NEW YORK APPELLATE DIGEST, LLC

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An Organized Compilation of Summaries of Selected Decisions Released July – September 2021 by the Second Department and Posted on the New York Appellate Digest Website that Quarter. 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 Quarterly.

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ASSOCIATIONS, HOMEOWNERS' ASSOCIATIONS, AUTHORTTY TO ORDER REMOVAL OF FENCE.

THE HOMEOWNERS' ASSOCIATION ACTED WITHIN ITS AUTHORITY WHEN IT REQUIRED A HOMEOWNER TO TAKE DOWN A FENCE; HOWEVER THE AUTHORITY FOR THE HEAVY FINE (OVER $35,000) WAS NOT VALID PURSUANT TO THE REAL PROPERTY LAW (SECOND DEPT).

The Second Department, reversing (modifying} Supreme Court, determined that the homeowners' association board (Fieldpoint) had the authority to require a homeowner to take down a fence and to fine the homeowner. However, the rule in effect at the time the fence was erected allowed only a one-time fine of $50.00. Supreme Court had awarded the homeowners' association over $35,000. The amendment to the by-laws which provided for heavier fines was not incorporated in a recorded amended declaration as required by Real Property Law 339-u:

"'In reviewing the actions of a homeowners' association, a court should apply the business judgment rule and should limit its inquiry to whether the action was authorized and whether it was taken in good faith and in furtherance of the legitimate interests of the association'" … . Accordingly, a court should defer to the actions of a homeowners' association board so long as the board acts for the purposes of the homeowners' association, within the scope of its authority, and in good faith … .

… Fieldpoint established … that its actions in denying approval for the fence were protected by the business judgment rule … . In opposition to Fieldpoint's prima facie showing, the plaintiffs failed to raise a triable issue of fact by submitting evidence that Fieldpoint acted "(1) outside the scope of its authority, (2) in a way that did not legitimately further the [interests of the association] or (3) in bad faith" … . Accordingly, the Supreme Court properly determined that Fieldpoint's actions in denying approval for the fence were within the scope of its authority and taken in good faith. However, the court should have issued declarations to that effect rather than dismissing the causes of action seeking declarations to the contrary … . Ives v Fieldpoint Community Assn., Inc., 2021 NY Slip Op 05028, Second Dept 9-22-21

ATTORNEYS, FEES, QUANTUM MERUIT, CONTRACT LAW.

PLAINTIFF ATTORNEY'S QUANTUM MERUIT ACTION FOR ATTORNEY'S FEES SHOULD NOT HAVE BEEN DISMISSED ON THE GROUND THAT IT WAS PRECLUDED BY A WRITTEN CONTRACT (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court determined plaintiff-attorney's quantum meruit action for legal services should not have been dismissed. The evidence did not demonstrate the existence of a written contract (which would preclude the quantum meruit action):

"In order to succeed on a cause of action to recover in quantum meruit, the plaintiff must prove (1) the performance of services in good faith, (2) the acceptance of the services by the person to whom they were rendered, (3) an expectation of compensation therefor, and (4) the reasonable value of the services" … . Recovery under the theory of quantum meruit is not appropriate where an express contract governs the subject matter involved … .

"[A] written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms" … . "[A]n unsigned contract may be enforceable, provided there is objective evidence establishing that the parties intended to be bound" … . "In determining whether the parties entered into a contractual agreement and what were its terms, it is necessary to look . . . to the objective manifestations of the intent of the parties as gathered by their expressed words and deeds" … . Gould v Decolator, Cohen & DiPrisco, LLP, 2021 NY Slip Op 05026, Second Dept 9-22-21

CIVIL PROCEDURE, COLLATERAL ESTOPPEL, LABOR LAW-CONSTRUCTION LAW, WORKERS' COMPENSATION.

THE LABOR-LAW CONSTRUCTION-ACCIDENT ACTION WAS PRECLUDED BY THE RESULT OF THE PRIOR WORKERS' COMPENSATION HEARING UNDER THE DOCTRINE OF COLLATERAL ESTOPPEL; THE MOTION TO AMEND THE ANSWER TO ADD THE COLLATERAL ESTOPPEL DEFENSE WAS PROPERLY GRANTED, EVEN THOUGH THE MOTION WAS MADE AFTER THE NOTE OF ISSUE WAS FILED (SECOND DEPT).

The Second Department, in a full-fledged opinion by Justice Dillon, determined the Labor Law 240(1), 241(6) and 200 action was precluded by the doctrine of collateral estoppel based upon the result of a Workers' Compensation hearing. Plaintiff alleged a hoist at a construction site malfunctioned causing knee injuries. Plaintiff was represented by an attorney at the Workers' Compensation hearing and witnesses were cross-examined. The Administrative Law Judge (ALJ) concluded that the incident (hoist malfunction) never occurred. In addition, the Second Department held that the motion to amend the answer to add the collateral estoppel defense, made after the note of issue was filed, was properly granted. Plaintiff could not have been surprised by the defense and suffered no prejudice from the late amendment:

Determinations rendered by quasi-judicial administrative agencies may qualify for collateral estoppel effect so long as the requirements of the doctrine [identity of issues and a full and fair opportunity to contest the controlling decision] are satisfied. Determinations of the Workers' Compensation Board are potentially within the scope of the doctrine … . * * *

… [T]he defendants met their burden of establishing, prima facie, their entitlement to judgment as a matter of law on the ground that the plaintiff's action was barred by the doctrine of collateral estoppel. The ALJ's findings, as affirmed by the Workers' Compensation Board, established as a matter of fact that the accident claimed by the plaintiff did not occur, or did not occur in the described manner as would cause injury. That finding is material and, in fact, pivotal, to the core viability of any personal injury action that the plaintiff could pursue in a court at law regarding

the same incident … . Lennon v 56th & Park(NY) Owner, LLC, 2021 NY Slip Op 04972, Second Dept 9-15-21

CIVIL PROCEDURE, FAILURE TO PROSECUTE.

A DISMISSAL OF A COMPLAINT FOR FAILURE TO PROSECUTE (CPLR 3215) IS NOT ON THE MERITS AND THEREFORE IS NOT "WITH PREJUDICE" (SECOND DEPT).

The Second Department noted that a dismissal of a complaint for failure to prosecute pursuant to CPLR 3215 (c) is not on the merits and therefore should not be "with prejudice:"

… [T]he court should not have directed dismissal of the complaint with prejudice, as "a dismissal under CPLR 3215(c) is a dismissal for a failure to prosecute and consequently [is] not a dismissal on the merits or with prejudice" … . Deutsche Bank Natl. Trust Co. v Brathwaite, 2021 NY Slip Op 04659, Second Dept 8-11-21

CIVIL PROCEDURE, JOHN DOES, STATUTES OF LIMITATIONS.

PLAINTIFF DID NOT SHOW DUE DILIGENCE IN ASCERTAINING THE NAME OF THE PARTY REFERRED TO AS "JOHN DOE" IN THE COMPLIANT RENDERING THE ACTION TIME-BARRED; ALTHOUGH THE COURT PROPERLY DEEMED PROOF OF SERVICE OF THE COMPLAINT AGAINST THE NAMED PARTY TIMELY FILED NUNC PRO TUNC, THE DEFAULT JUDGMENT AGAINST THE NAMED PARTY SHOULD NOT HAVE BEEN GRANTED RETROACTIVELY ONCE THE DEFECT WAS CURED (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court in this foreclosure action, determined plaintiff should not have been allowed to substitute the party's name (here Esther Shaskos) for the "John Doe" named in the complaint because the plaintiff did not demonstrate it exercised due diligence to timely ascertain Esther's identity. Therefore the complaint as against Esther was time-barred. As for the

complaint against Elliot Shaskos, who was named in the complaint, the proof of service was never filed. Although the filing failure is not a jurisdictional defect and therefore did not preclude ruling the proof of service timely filed nunc pro tunc, the default judgment against Elliot should not have been granted retroactively when the defect was cured. Elliot was given the opportunity to answer the complaint:

Supreme Court should not have granted that branch of the plaintiff's motion which was for leave to amend the caption to substitute Esther for the defendant "John Doe." The court erred in applying the "John Doe" designation authorized by CPLR 1024 and the relation-back doctrine of CPLR 203(c) to bar application of the statute of limitations, because the plaintiff failed to establish that it "made diligent efforts to ascertain the unknown party's identity prior to the expiration of the statute of limitations" … . …

The failure to file proof of service is a procedural irregularity, not a jurisdictional defect, that may be cured by motion, or sua sponte by the court in its discretion pursuant to CPLR 2004 … . … Supreme Court properly granted that branch of the plaintiff's motion which was to deem proof of service to have been timely filed nunc pro tunc. In granting this relief, however, the court must do so upon such terms as may be just, and only where a substantial right of a party is not prejudiced (see CPLR 2001 …). The court may not make such relief retroactive, to the prejudice of a defendant, by placing the defendant in default as of a date prior to the orde … . Accordingly, the court should have granted that branch of the Shashos' cross motion which was for leave to serve and file an answer, and denied that branch of the plaintiff's motion which was for leave to enter a default judgment against Elliot (see CPLR 320[a]). Wilmington Trust, N.A. v Shasho, 2021 NY Slip Op 04632, Second Dept 8-4-21

CIVIL PROCEDURE, JUDGMENT AS A MATTER OF LAW, MUNICIPAL LAW.

THE MOTION FOR A JUDGMENT AS A MATTER OF LAW (CPLR 4401) FINDING THE NYC HOUSING AUTHORITY LIABLE FOR A BEDBUG INFESTATION SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the motion for a judgment as a matter law (CPLR 4401), finding the NYC Housing Authority (NYCHA) liable for a bedbug infestation of plaintiffs' apartments, should not have been granted:

A motion pursuant to CPLR 4401 should not be granted unless, affording the party opposing the motion every inference which may properly be drawn from the facts presented, and viewing the evidence in the light most favorable to the nonmovant, there is no rational process by which the jury could find for the nonmovant against the moving party … . A court considering a motion for a directed verdict "must not 'engage in a weighing of the evidence,' nor may it direct a verdict where 'the facts are in dispute, or where different inferences may be drawn or the credibility of witnesses is in question'" … .

… [T]he evidence adduced at trial, viewed in the light most favorable to NYCHA, did not establish that there is no rational process by which the jury could find in favor of NYCHA … . The evidence included the plaintiffs' testimony, as well as the parties' competing expert testimony regarding the appropriate protocols for the treatment of a bedbug infestation and competing conclusions by the expert witnesses as to whether NYCHA's bedbug eradication efforts were appropriate. Although a landlord's violation of a municipal ordinance, including, as relevant here, Administrative Code of the City of New York §§ 27-2017 and 27-2018, may constitute some evidence of negligence for the jury to take into account, it does not constitute negligence per se … . Aponte v New York City Hous. Auth., 2021 NY Slip Op 05114, Second Dept 9-29-21

CIVIL PROCEDURE, MOTION TO RENEW.

COURTS HAVE THE DISCRETION TO GRANT A MOTION TO RENEW EVEN IF BASED ON INFORMATION KNOWN AT THE TIME OF THE ORIGINAL MOTION; HERE THE MOTION TO RENEW ADDRESSED AN OMISSION IN THE ORIGINAL MOTION PAPERS WHICH THE JUDGE HAD RAISED SUA SPONTE AS THE GROUND FOR DENYING THE MOTION (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff's motion to renew in this foreclosure action should have been granted. The judge denied plaintiff's motion for summary judgment on a ground not raised by the parties—plaintiff's failure to submit a power of attorney authorizing a party to act as a loan servicer. The motion to renew addressed that omission, which had been raised by the judge sua sponte:

"Generally, 'a motion for leave to renew is intended to bring to the court's attention new or additional facts which were in existence at the time the original motion was made, but were unknown to the movant'" … . "However, the requirement that a motion for leave to renew be based upon new or additional facts unknown to the movant at the time of the original motion is a flexible one and the court, in its discretion, may also grant renewal, in the interest of justice, upon facts which were known to the movant at the time the original motion was made"… .

Under the circumstances presented, the Supreme Court improvidently exercised its discretion in denying the plaintiff's motion for leave to renew based upon the submission of the limited power of attorney, since the plaintiff's initial failure to submit the power of attorney was raised sua sponte by the court … . NP162, LLC v Harding, 2021 NY Slip Op 04612, Second Dept 8-4-21

CIVIL PROCEDURE, MOTION TO RESETTLE ORDER.

THE MOTION TO RESETTLE REQUESTED A SUBSTANTIVE CHANGE IN THE PARTIES' RIGHTS WHICH CANNOT BE ADDRESSED BY RESETTLING AN ORDER; A MOTION TO RESETTLE IS MEANT TO ADDRESS CLERICAL ERRORS (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff's motion to resettle the court's order requested a substantive change in the parties' rights which can not be addressed by resettling an order:

… [T]he court … granted that branch of the plaintiff's motion which was to resettle the order … and thereupon deleted the provision directing that the defendant shall receive $284,069.66 of the proceeds from the sale of the subject property before the remainder is split equally between the plaintiff and the defendant. * * *

"Resettlement is generally intended to remedy clerical errors or clear mistakes in an order or judgment when there is no dispute about the substance of what that order or judgment should contain" … . "It may be used where the order improperly reflects the decision or fails to include necessary recitals, but [it] cannot be used to obtain a ruling not adjudicated on the original motion or to modify the decision which has been made" … . …

The court's determination … to reform the parties' open court stipulation upon its finding that the parties did not intend to agree to the monetary award effectuated a substantive change in the parties' rights, rather than the correction of a clerical error. Renaud v Renaud, 2021 NY Slip Op 04624, Second Dept 8-4-21

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

CIVIL PROCEDURE, POST-JUDGMENT INTEREST, ADVISORY DECISIONS.

SUPREME COURT HAD THE AUTHORITY UNDER CPLR 3001 TO ISSUE A DECLARATORY JUDGMENT ON THE PROPER RATE FOR POST-JUDGMENT INTEREST; ANOTHER COURT'S PRIOR DISCUSSION OF THE PROPER INTEREST RATE WAS MERELY ADVISORY (I.E., NOT ON THE MERITS) AND THEREFORE WAS NOT SUBJECT TO THE DOCTRINES OF RES JUDICATA, COLLATERAL ESTOPPEL OR LAW OF THE CASE (SECOND DEPT).

The Second Department, in a full-fledged opinion by Justice Dillon, over an extensive dissent, determined (1) Supreme Court had the power to issue a declaratory judgment in this hybrid proceeding seeking a declaratory judgment on the rate of post-judgment interest; and (2) Supreme Court correctly found that dicta in a prior ruling about the proper post-judgment interest rate (i.e., that the rate should be 9% per year under the CPLR, not 2% per month under the Insurance Law) was merely "advisory" and therefore was not controlling under the doctrines of collateral estoppel, res judicata, or law of the case. Supreme Court's finding that the Insurance Law interest rate applied was affirmed. Using that rate the original 2001 judgment of $8,842.49 had apparently grown to $229,981.66 as of 2015:

CPLR 3001 uniquely vests the Supreme Court with authority to render declaratory judgments to the exclusion of other courts of the state. … [T]o the extent [respondent] wished to obtain a declaratory judgment governing the rate of interest on its judgment, … with appellate remedies correctly foreclosed, the Supreme Court was the only court where it could seek redress on that issue. * * *

… [T]he Appellate Term's expression in its decision and order dated August 18, 2017, regarding the applicable rate of interest was not determined on the merits, but was instead merely advisory. * * *

… [Appellant] was unable to establish that there was a determination on the merits in any prior proceeding about the proper rate of interest applicable to the judgment, as to preclude the Supreme Court from considering the issue de novo … . Matter of

B.Z. Chiropractic, P.C. v Allstate Ins. Co., 2021 NY Slip Op 04484, Second Dept 7-21-21

CIVIL PROCEDURE, REPLY PAPERS.

SUPREME COURT SHOULD NOT HAVE CONSIDERED DEFENDANT'S ARGUMENT RAISED FOR THE FIRST TIME IN REPLY PAPERS; DEFENDANT ORIGINALLY MOVED FOR SUMMARY JUDGMENT AND THEN ARGUED IN REPLY PAPERS IT HAD INTENDED TO MAKE A MOTION TO DISMISS (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the defendant P & C Merrick's motion to dismiss the complaint, asserted for the first time in reply papers, should not have been considered by the court. P & C Merrick had initially moved for summary judgment:

The Supreme Court erred in considering P & C Merrick's contention, raised for the first time in reply, that it intended to move pursuant to CPLR 3211(a) to dismiss the complaint insofar as asserted against it rather than moving for summary judgment dismissing the complaint insofar as asserted against it. There is no indication in the record that the plaintiff had an opportunity to respond to P & C Merrick's reply and to submit papers in surreply … . Thus, the court should not have addressed the arguments raised by P & C Merrick for the first time in its reply papers … . As these new legal arguments were the basis for directing dismissal of the causes of action alleging specific performance and breach of contract, the plaintiff was prejudiced, and the Supreme Court erred in directing dismissal of those causes of action. Grocery Leasing Corp. v P&C Merrick Realty Co., LLC, 2021 NY Slip Op 04701, Second Dept 8-18-21

CIVIL PROCEDURE, STAY TRIGGERED BY SUSPENSION OF ATTORNEY.

STAY OF THE FORECLOSURE PROCEEDINGS WAS TRIGGERED BY THE SUSPENSION OF DEFENDANT'S ATTORNEY; BUT THE APPEARANCE OF NEW COUNSEL FOR THE DEFENDANT TO OPPOSE PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT WAIVED THE PROTECTION OF THE STAY (SECOND DEPT).

The Second Department, in a full-fledged opinion by Justice Dillon,, determined the defendant in this foreclosure action waived any stay of proceedings under CPLR 321(c) triggered by her attorney's suspension:

CPLR 321(c) … provides any adversary party with a mechanism for lifting a stay—by serving a notice upon the nonrepresented party to obtain a new attorney. Thus there are … two ways in which a CPLR 321(c) stay may be lifted. One way is if the party that lost its counsel retains new counsel at its own initiative, or otherwise communicates an intention to proceed pro se … . The second way is by means of the above-described notice procedure … . …

… [T]he plaintiff moved … for summary judgment … and for an order of reference … at a time when no event allowing for the lifting of the CPLR 321(c) stay had yet occurred. No new attorney had yet appeared on behalf of the defendant, and there is no indication that the defendant had elected to proceed pro se … . Moreover, the plaintiff moved for summary judgment without having served a CPLR 321(c) notice demanding the appointment of new counsel and without abiding by the statutorily mandated 30-day waiting period that follows the notice.

Nevertheless, the defendant's new counsel formally appeared in the action six days after the plaintiff's summary judgment motion was filed, submitted papers in opposition to that motion, and cross-moved to dismiss the complaint insofar as asserted against the defendant, all within the original or adjusted briefing schedule. … The appearance and activities of the defendant's new counsel operated, in effect, as a waiver of the protections otherwise afforded to the defendant by CPLR 321(c)

CONTRACT LAW, NURSING HOME ADMISSION AGREEMENTS, THIRD-PARTY LIABILITY.

PLAINTIFF NURSING HOME ALLEGED DEFENDANT "THIRD-PARTY" BREACHED OBLIGATIONS IMPOSED BY THE NURSING HOME ADMISSION AGREEMENT CONCERNING PAYMENT OF THE COSTS INCURRED BY THE RESIDENT; THE NURSING HOME'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, in a full-fledged opinion by Justice Miller, determined plaintiff nursing home's motion for summary judgment in this breach of contract action should not have been granted and defendant's motion for summary judgment dismissing the action for "breach of a contractual duty to cooperate" should have been granted. The contract at issue is the nursing home's admission agreement, which includes obligations imposed upon defendant "third-party" in connection with paying for the costs incurred by the resident of the nursing home. The opinion is fact-specific and analyzes the breach of contract allegations as they relate to specific provisions in the admission agreement. The analysis is too detailed to fairly summarize here. The court described the salient issues as follows:

Under state and federal law, a nursing facility is prohibited from requiring a third party to guarantee the payment of a resident as a condition of the resident's admission to the facility. As this case illustrates, however, a nursing facility is permitted to require a third party to undertake other kinds of contractual obligations, and a nursing facility may recover damages that were proximately caused by a failure of the third party to fulfil those obligations. Where it is alleged that a variety of different contractual obligations have been breached, each such theory of liability must be proved, defended, and analyzed independently. Where an admissions agreement containing pages of third-party obligations is both a requirement for admission and aggressively enforced, the fine legal distinctions between an unlawful

third party guarantee and a lawful agreement laden with additional affirmative obligations may have little practical significance for the third party. This is especially true where, as here, the nursing facility's litigation is directed solely at the third party, and recovery is not sought from the estate of the actual resident of the nursing facility. Wedgewood Care Ctr., Inc. v Kravitz, 2021 NY Slip Op 04731, Second Dept 8-18-21

CONTRACT LAW, PREVAILING PARTY, ATTORNEY'S FEES.

NEITHER PARTY WAS THE "PREVAILING PARTY" IN THIS DISPUTE OVER THE CARE OF THE PARTIES' INCAPACITATED FATHER; THEREFORE NEITHER PARTY WAS ENTITLED TO ATTORNEY'S FEES PURSUANT TO THE SETTLEMENT AGREEMENT (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined neither party in this dispute over care for an incapacitated person (the parties' father) was a "prevailing party" and therefore neither of the two sons, Michael and Stephen, was entitled to an award of attorney's fees:

Following an evidentiary hearing, … the Supreme Court denied Michael's request to remove Stephen as Milton's [father's] attorney-in-fact and health care agent. However, the court determined that Stephen breached the settlement agreement by refusing to mediate. The court also granted that branch of Michael's motion which was for an award of attorney's fees pursuant to the settlement agreement's fee shifting provision. …

"Under the general rule, attorney's fees are incidents of litigation and a prevailing party may not collect them from the loser unless an award is authorized by agreement between the parties, statute or court rule" … . "'[O]nly a prevailing party is entitled to recover an attorney's fee' and '[t]o be considered a prevailing party, a party must be successful with respect to the central relief sought'" … . "Such a determination requires an initial consideration of the true scope of the dispute litigated, followed by a comparison of what was achieved within that scope" … . Matter of Milton R., 2021 NY Slip Op 04975, Second Dept 9-15-21

CONTRACT LAW, TORTIOUS INTERFERENCE WITH CONTRACT.

DEFENDANT TORTIOUSLY INTERFERED WITH PLAINTIFF'S CONTRACT BUT DID NOT TORTIOUSLY INTERFERE WITH PLAINTIFF'S BUSINESS RELATIONS OR ENGAGE IN UNFAIR COMPETITION; THE ELEMENTS OF THE THREE CAUSES OF ACTION EXPLAINED (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined defendant was properly found to have tortiously interfered with plaintiff's contract but should not have been found to have tortiously interfered with plaintiff's business relations or to have engaged in unfair competition. The elements of each cause of action are clearly explained in the decision. With respect to tortious interference with business relations, the court wrote:

"While a cause of action for interference with prospective contract or business relationship is closely akin to one for tortious interference with contract, the former requires proof of more culpable conduct on the part of defendant" … . "This standard is met where the interference with prospective business relations was accomplished by wrongful means or where the offending party acted for the sole purpose of harming the other party" … . "Wrongful means" has been defined to include "physical violence, fraud or misrepresentation, civil suits and criminal prosecutions, and some degrees of economic pressure" … . "[A]s a general rule, the defendant's conduct must amount to a crime or an independent tort. Conduct that is not criminal or tortious will generally be 'lawful' and thus insufficiently 'culpable' to create liability for interference with prospective contracts or other nonbinding economic relations" … . In addition, conduct which is motivated by economic self-interest cannot be characterized as solely malicious … . Stuart's, LLC v Edelman, 2021 NY Slip Op 04569, Second Dept 7-29-21

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, APPEALS, ATTORNEYS, CORAM NOBIS.

APPELLATE COUNSEL SHOULD HAVE ARGUED THAT COUNTY COURT FAILED TO CONSIDER A YOUTHFUL OFFENDER ADJUDICATION; WRIT OF ERROR CORAM NOBIS GRANTED AND MATTER REMITTED (SECOND DEPT).

The Second Department granted the writ of error coram nobis and remitted the matter. Appellate counsel should have raised the argument that County Court failed to consider whether defendant should be adjudicated a youthful offender:

… [W]e grant the defendant's application for a writ of error coram nobis, based on former appellate counsel's failure to contend on appeal that the County Court failed to determine whether the defendant should be afforded youthful offender status. As held by the Court of Appeals in People v Rudolph (21 NY3d 497), CPL 720.20(1) requires "that there be a youthful offender determination in every case where the defendant is eligible, even where the defendant fails to request it, or agrees to forgo it as part of a plea bargain"… . Here, the record does not demonstrate that the court considered whether to adjudicate the defendant a youthful offender, even though the defendant was eligible … . Although we acknowledge that the Court of Appeals decided Rudolph only shortly before former appellate counsel filed the brief on the appeal, because the holding in Rudolph compels vacatur of the sentence, the standard of meaningful representation required former appellate counsel to argue that, pursuant to Rudolph, the sentence must be vacated and the matter remitted for determination of the defendant's youthful offender status … . People v Slide, 2021 NY Slip Op 04982, Second Dept 9-15-21

CRIMINAL LAW, APPEALS, SEALING CONVICTION.

THE DENIAL OF A MOTION TO SEAL A CRIMINAL CONVICTION IS CIVIL IN NATURE AND IS THEREFORE APPEALABLE, NOT WITHSTANDING THE ABSENCE OF A CRIMINAL-PROCEDURE STATUTE EXPRESSLY AUTHORIZING APPEAL (SECOND DEPT).

The Second Department, in a full-fledged opinion by Justice Brathwaite Nelson, determined the denial of a motion to seal a criminal conviction pursuant to Criminal Procedure Law 160.59 is appealable. Appeals in criminal matters must be authorized by statute. The court deemed the motion to seal to be civil in nature ant therefore not subject to the strict restrictions on criminal appeals:

Where, as here, the court issuing the order being appealed from possesses both civil and criminal jurisdiction, appellate courts look to "the true nature of the proceeding and to the relief sought in order to determine whether the proceeding was criminal or civil" … . Where the relief sought is "quintessentially, of a criminal nature"… , or an integral part of an ongoing criminal investigation, the proceeding falls within the court's criminal jurisdiction and an appeal may not be taken from an order issued therein in the absence of express statutory authority … . * * *

By contrast, even when an order is issued pursuant to a criminal investigation or relates to a collateral aspect of a criminal proceeding, if the nature of the relief sought is civil in nature and the order can be said to be final and does not affect the criminal judgment itself, courts have found the matter to be civil and appeals from such orders are not constrained by the rule controlling appeals from orders in criminal proceedings … . People v Coulibaly, 2021 NY Slip Op 04616, Second Dept 8-4-21

CRIMINAL LAW, APPEALS, SEALING OF CONVICTIONS.

THE DENIAL OF A MOTION TO SEAL A CRIMINAL CONVICTION IS CIVIL IN NATURE AND CAN BE APPEALED AS A MATTER OF RIGHT; HERE THE DEFENDANT'S MOTION SHOULD NOT HAVE BEEN DENIED WITHOUT A HEARING (SECOND DEPT).

The Second Department, reversing County Court, determined defendant could appeal the denial of his motion to seal his conviction record because the sealing procedure is civil in nature. In addition, the Second Department held defendant was entitled to a hearing on the motion:

Although a motion pursuant to CPL 160.59 relates to a criminal matter, "it does not affect the criminal judgment itself, but only a collateral aspect of it—namely, the sealing of the court record," and, therefore, is civil in nature … . As such, the defendant is entitled to appeal as of right from the subject order denying the 2020 motion, which was made upon notice to the People (see CPLR 5701[a][2][v] …). * * *

By using the word "shall," the Legislature clearly and unambiguously provided that when the motion is not subject to mandatory denial under CPL 160.59(3) and the district attorney opposes the motion, the motion court does not have the discretion to dispense with the hearing requirement, even where, as here, the court had held a hearing on the defendant's prior CPL 160.59 motion ,,, , Further, CPL 160.59 is a remedial statute, and remedial statutes should be interpreted broadly to accomplish their goals … . People v Bugge, 2021 NY Slip Op 04718, Second Dept 8-18-21

CRIMINAL LAW, ATTORNEYS, WAIVER OF RIGHT TO COUNSEL.

EVEN THOUGH DEFENDANT WAS A DISBARRED ATTORNEY, THE TRIAL JUDGE SHOULD HAVE CONDUCTED AN INQUIRY TO MAKE SURE THE DEFENDANT UNDERSTOOD THE RISKS OF REPRESENTING HIMSELF; CONVICTIONS REVERSED (SECOND DEPT).

The Second Department, reversing defendant's conviction, determined the judge should have ensured defendant knew the risks of conducting the trial pro se before allowing defendant, a disbarred attorney, to represent himself:

A court must determine that the defendant's waiver of the right to counsel is made competently, intelligently, and voluntarily before allowing that defendant to represent himself or herself … . In order to make that evaluation, the court "must undertake a 'searching inquiry' designed to 'insur[e] that the defendant [is] aware of the dangers and disadvantages of proceeding without counsel'" … . The court's inquiry "must accomplish the goals of adequately warning a defendant of the risks inherent in proceeding pro se, and apprising a defendant of the singular importance of the lawyer in the adversarial system of adjudication" … . Nonetheless, no specific litany is required and a reviewing court may look to the whole record, not simply to the questions asked and answers given during a waiver colloquy, in order to determine whether a defendant actually understood the dangers of self-representation … . Subsequent warnings, however, cannot cure a trial court's earlier error in not directing the defendant's attention to the dangers and disadvantages of self-representation … .

Here, although the record demonstrates that the Supreme Court was aware of the defendant's pedigree information, including his status as a disbarred attorney, the court failed to ascertain that the defendant was aware of the risks inherent in proceeding without a trial attorney and the benefits of having counsel represent him at trial … . Contrary to the People's contention, there is nothing in the record that demonstrates that the dangers and disadvantages of self-representation were known by the defendant … , as the court neither "tested defendant's understanding of

choosing self-representation nor provided a reliable basis for appellate review" … . People v Crispino, 2021 NY Slip Op 04918, Second Dept 9-1-21

CRIMINAL LAW, DEADLY FORCE JUSTIFICATION DEFENSE.

ALTHOUGH THE COMPLAINANT WAS USING ONLY HIS FISTS FIGHTING THE MUCH SMALLER DEFENDANT, THE DEFENDANT WAS ENTITLED TO THE DEADLY-FORCE-JUSTIFICATION-DEFENSE JURY INSTRUCTION (SECOND DEPT).

The Second Department, over a strong dissent, reversing defendant's conviction, determined defendant's request for a deadly-force-justification-defense jury instruction should have been granted. The person with whom defendant was fighting, Gibson, was five inches taller and 66 pounds heavier than defendant. Gibson testified the defendant struck him with a hammer and a meat cleaver. Although Gibson was using only his fists during the fight, he eventually rendered defendant unconscious with a single punch. The medical evidence did not support Gibson's claim he had been struck with a hammer and a meat cleaver:

The jury acquitted the defendant of attempted murder in the second degree and criminal possession of a weapon in the third degree, and convicted him of assault in the second degree. …

… [B]ased on the differences in size and strength between Gibson and the defendant … , the complainant's own testimony that he held the defendant down and punched him in the face, the significant injuries suffered by the defendant, including a fractured ankle, Hall's [a roommate's] statement during the 911 call that "they're killing each other," and the significant factual questions presented regarding what weapons were used and by whom, a rational jury could have found that the defendant reasonably believed that deadly physical force was necessary to defend himself … against the use or imminent use of deadly physical force by Gibson … . … [B]ased on the evidence viewed in the light most favorable to the defendant, a rational jury could have determined that Gibson, not the defendant, was the first person to use or threaten the imminent use of deadly physical force … . Under these circumstances, the failure to charge the defense constituted reversible error … . * * *

… Supreme Court failed to view the evidence in the light most favorable to the defendant. The court credited Gibson's testimony despite evidence which … significantly called into question the credibility of Gibson's story. … A criminal defendant has no burden to present evidence at trial to prove his innocence, including by showing that his conduct was justified and therefore lawful … . Instead, the burden to disprove justification falls on the People. People v Singh, 2021 NY Slip Op 05134, Second Dept 9-29-21

CRIMINAL LAW, GRAND JURY TESTIMONY, UNAVAILABLE WITNESS.

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, GUILTY PLEAS, APPEALS.

DEFENDANT SHOULD HAVE BEEN ALLOWED TO WITHDRAW HIS GUILITY PLEA; THE WAIVER OF APPEAL DID NOT PRECLUDE AN APPEAL ALLEGING THE GUILTY PLEA WAS INVALID (SECOND DEPT).

The Second Department, reversing County Court, over a dissent, determined defendant should have been allowed to withdraw his guilty plea. The court noted that the defendant's waiver of appeal did not preclude an appeal alleging the guilty plea was not valid:

… [T]he defendant secured new counsel and made a written motion to withdraw his plea a little more than four months after he pleaded guilty. The County Court denied the defendant's motion, without a hearing or any further inquiry into the defendant's claims. At the subsequent sentencing proceeding, the defendant again asserted his innocence and again asked the court to permit him to withdraw his plea based on his attorneys' failure to provide meaningful representation. The defendant's application to withdraw his plea at the sentencing proceeding was based on his statements to the court and his prior evidentiary submissions, which tended to substantiate his contention that he had not understood the concept of constructive possession or the nature of the People's evidence at the time that he pleaded guilty. These submissions were sufficient to cast doubt on his guilt and the validity of his plea … . The People did not allege any prejudice that would have resulted had the court permitted the defendant to withdraw his plea of guilty at that time … . People v Gerald, 2021 NY Slip Op 05130, Second Dept 9-29-21

CRIMINAL LAW, GUILTY PLEAS, APPEALS.

THE MAJORITY DETERMINED DEFENDANT'S ARGUMENT HIS GUILTY PLEA WAS NOT VOLUNTARILY ENTERED WAS NOT PRESERVED; THE DISSENT ARGUED DEFENDANT WAS NOT ADEQUATELY INFORMED OF HIS BOYKIN RIGHTS AND THE CONVICTION SHOULD BE REVERSED IN THE INTEREST OF JUSTICE (THIRD DEPT).

The Third Department, over a dissent, determined defendant's argument that his guilty plea was not knowingly, voluntarily and intelligently entered was rejected by the majority as unpreserved. The dissent agreed the issue was not preserved but argued the judge's failure to adequately inform defendant of the Boykin rights warranted reversal in the interest of justice:

From the Dissent:

Mindful that County Court was not required "to specifically enumerate all the rights to which . . . defendant was entitled".. , as defendant notes, the court nonetheless failed to explain, let alone refer to, any of the constitutional trial-related rights that he would forfeit by pleading guilty … . Rather, at the plea proceeding, the court focused almost exclusively on defendant's waiver of an intoxication defense, as well as any other potential defenses, and whether defendant understood the benefits and risks of going forward with a trial. The record also fails to disclose that the court "obtain[ed] any assurance that defendant had discussed with counsel the trial-related rights that are automatically forfeited by pleading guilty or the constitutional implications of a guilty plea" … . People v Simpson, 2021 NY Slip Op 04579, Third Dept 7-28-21

CRIMINAL LAW, INAUDIBLE RECORDING.

IT WAS REVERSIBLE ERROR TO ADMIT AN INAUDIBLE RECORDING AND TO PROVIDE THE JURY WITH A PURPORTED TRANSCRIPT OF THE RECORDING (SECOND DEPT).

The Second Department, reversing defendant's conviction, determined it was reversible error to admit in evidence an inaudible tape recording and to provide the jury with a purported transcript of the recording:

Whether a tape recording should be admitted into evidence is within the discretion of the trial court after weighing the probative value of the evidence against the potential for prejudice" … . "An audiotape recording should be excluded from evidence if it is so inaudible and indistinct that a jury must speculate as to its contents" … . "Even where tape recordings are inaudible in part, so long as the conversations can be generally understood by the jury, such infirmities go to the weight of the evidence and not to its admissibility" … . "[I]n order to constitute competent proof, a tape should be at least sufficiently audible so that independent third parties can listen to it and produce a reasonable transcript" … .

… Supreme Court improvidently exercised its discretion in admitting the subject recording into evidence … . The first approximately 25 minutes of the conversation between the defendant and the complainant on the subject recording is almost completely inaudible, as all that can be heard are the background noises of a restaurant … . Further, some of the remaining portions of the subject recording were "so inaudible and indistinct" … that the jury would have had to speculate as to their contents … . The error was compounded when the jury was given what purported to be a transcript of portions of the largely inaudible recording … . People v Melendez, 2021 NY Slip Op 04497, Second Dept 7-21-21

CRIMINAL LAW, INCLUSORY CONCURRENT COUNTS.

MURDER SECOND COUNTS WERE INCLUSORY CONCURRENT COUNTS OF MURDER FIRST AND SHOULD HAVE BEEN DISMISSED; FORMER APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THE ISSUE (SECOND DEPT).

The Second Department, reversing (modifying) County Court, determined the second degree murder counts should have been dismissed as inclusory concurrent counts of first degree murder, and the former appellate counsel was ineffective in failing to raise that issue:

… [F]ormer appellate counsel was ineffective for failing to contend on appeal that … the defendant's convictions of murder in the second degree, and the sentences imposed thereon, must be vacated, and those counts of the indictment dismissed, because those charges are inclusory concurrent counts of the conviction of murder in the first degree … . People v Davis, 2021 NY Slip Op 04720, Second Dept 8-18-21

CRIMINAL LAW, JUDGES, RECUSAL.

THE JUDGE'S LAW CLERK WAS A DA WHO HAD WORKED ON DEFENDANT'S CASE; THE JUDGE SHOULD HAVE RECUSED HIMSELF FROM THE SENTENCING (SECOND DEPT).

The Second Department, vacating defendant's sentence, determined the judge should have recused himself from the sentencing because his law clerk was a former DA who had worked on the case. The issue was not preserved but was considered in the interest of justice:

The defendant's contention that the trial justice should have recused himself from presiding over the sentencing proceeding, on the ground that the justice's law clerk was a former Queens County Assistant District Attorney who, in that capacity, had

worked on the early stages of this case, is unpreserved for appellate review. We nevertheless reach this contention in the exercise of our interest of justice jurisdiction (see CPL 470.05[2]). For the reasons discussed in our decision and order on an appeal by the defendant's codefendant (People v Hymes, 193 AD3d 975), the trial justice should have recused himself from presiding over the sentencing proceeding (see People v Suazo, 120 AD3d 1270).

Accordingly, we vacate the sentence imposed, and remit the matter to the Supreme Court, Queens County, for resentencing before a different Justice. People v McPhee, 2021 NY Slip Op 04723, Second Dept 8-18-21

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, MOTION TO WITHDRAW GUILITY PLEA.

DEFENDANT DID NOT DEMONSTRATE HE DID NOT ENTER HIS GUILTY PLEA VOLUNTARILY, KNOWINGLY AND INTELLIGENTLY; HIS MOTION TO WITHDRAW HIS PLEA WAS PROPERLY DENIED; STRONG DISSENT ARGUED DEFENDANT DEMONSTRATED AN INADQUATE OPPORTUNITY TO CONSULT WITH DEFENSE COUNSEL (SECOND DEPT).

The Second Department, over an extensive dissent, determined defendant entered his guilty plea voluntarily, knowingly and intelligently. Therefore, defendant's motion to withdraw his plea was properly denied. The dissent argued defendant demonstrated he did not have an adequate opportunity to consult with defense counsel:

The defendant … contended in his motion that he had inadequate opportunity to speak with his counsel regarding the case and any defenses. However, … when the plea court endeavored to inquire further as to an equivocal statement by the defendant that he was able to discuss "some" of the facts of the case with his counsel, the defendant terminated that inquiry, and confirmed that he had sufficient time to speak with his attorney. The defendant also does not dispute the People's assertion that, while the defendant was out on bail, he and defense counsel met with the prosecutor to view surveillance video allegedly depicting the explosives and reckless endangerment crimes. * * *

… [T]he record here demonstrates that the defendant was feeling pressure to decide whether to plead guilty and be remanded or face greater charges if the People presented the matter to the grand jury. Indeed, the defendant's precise words were:

"I am forced to plead because they don't—they will put me in the Grand Jury." However, as this Court has observed: "When offered benefits for pleading guilty and confronted with the risk of more severe punishment if a plea offer is refused, a defendant will certainly feel pressure to plead guilty. But such pressure does not render a guilty plea involuntary because 'the imposition of these difficult choices [is] an inevitable—and permissible—attribute of any legitimate system which tolerates and encourages the negotiation of pleas'" … . People v Hollman, 2021 NY Slip Op 04617, Second Dept 8-4-21

CRIMINAL LAW, PROSECUTORIAL MISCONDUCT, APPEALS.

ALTHOUGH NO OBJECTIONS WERE MADE TO THE PROSECUTOR'S NUMEROUS INAPPROPRIATE REMARKS, THE APPEAL WAS CONSIDERED IN THE INTEREST OF JUSTICE AND A NEW TRIAL WAS ORDERED (SECOND DEPT).

The Second Department, reversing defendant's conviction, determined prosecutorial misconduct deprived defendant of a fair trial. The errors were not preserved by objections, but the appeal was considered in the interest of justice. The prosecutor's remarks are detailed in the decision and are too numerous to include here:

The prosecutor denigrated any possible defense, invoked the jury's sympathy for the complainants based upon irrelevant evidence, vouched for the credibility of the People's witnesses, and misstated the law on circumstantial evidence … . People v Beck, 2021 NY Slip Op 04556, Second Dept 7-28-21

CRIMINAL LAW, PROSECUTORIAL MISCONDUCT.

THE PROSECUTOR'S REMARKS REQUIRED REVERSAL AND A NEW TRIAL ON ONE COUNT (SECOND DEPT).

The Second Department reversed defendant's conviction on one count (attempted assault), in the interest of justice (i.e. the issue was not preserved), based upon prosecutorial misconduct:

The prosecutor made a number of improper comments during her summation by improperly vouching for the credibility of the People's witnesses, interjecting sympathy, improperly advising the jurors on the law, and making herself an unsworn witness … .For example, when discussing the charge of attempted assault in the first degree, the prosecutor attempted to explain why no shell casings were recovered by informing the jurors that "unfortunately [the Evidence Crime Team] confine[d] themselves to where the crime scene tape was," although no such evidence exists in the record. … [T]he prosecutor referred to testimony that had been stricken … when she told the jury that … the defendant could have shot one of the witnesses. The prosecutor also informed the jury that the voice of that same witness could be heard screaming on an audio recording of a call to the 911 emergency number. The prosecutor also twice erroneously advised the jury that its credibility determination should be based on, among other things, "what [the jurors] felt" … , and, when discussing the credibility of the prosecution's witnesses, instructed the jury that the criminal history of one of the prosecution's witnesses was not relevant to the question of that witness's credibility. People v Veeney, 2021 NY Slip Op 04673, Second Dept 8-11-21

CRIMINAL LAW, RESENTENCING.

IN THIS RESENTENCING PROCEEDING, THE JUDGE SHOULD HAVE CONSIDERED DEFENDANT'S CONDUCT SINCE THE ORIGINAL SENTENCE WAS IMPOSED IN 1998-99 AND SHOULD HAVE ORDERED AN UPDATED PRESENTENCE REPORT WHICH INCLUDED AN INTERVIEW WITH DEFENDANT (SECOND DEPT).

The Second Department, reversing Supreme Court in this resentencing proceeding, determined the sentencing judge could consider defendant's conduct after the original sentence was imposed and should have ordered an updated presentence report, including an interview with the defendant. Defendant had been sentenced in 1998 and 1999 to 125 years of imprisonment. In 2019 defendant moved to set aside his sentence on the ground that is was vindictive and the People consented to setting the sentence aside:

The Supreme Court erred in determining that it had no discretion to consider the defendant's conduct after the original sentence was imposed. In People v Kuey (83 NY2d 278, 282), the Court of Appeals noted that when a defendant comes before the court for resentencing, "the proper focus of the inquiry is on the defendant's record prior to the commission of the crime." However, the Court of Appeals did not purport to limit the sentencing court's discretion. Indeed, in Kuey, the Court of Appeals further noted that the defendant was "afforded the opportunity to supply information about his subsequent conduct," and that the court had discretion to order an updated presentence report regarding the defendant's subsequent conduct, if it determined that such was necessary … .

Critically, unlike the resentencing proceeding in Kuey, the resentencing proceeding here was held because the original sentence was claimed to be vindictive, which is not merely a technical defect in the original sentence … , but implicates the original sentencing court's failure to have observed sentencing principles before imposing sentence. Given the context under which the resentence was directed, the resentencing court must exercise discretion and give due consideration "to, among other things, the crime charged, the particular circumstances of the individual before the [resentencing] court and the purpose of a penal sanction, i.e., societal protection,

rehabilitation and deterrence" … . People v Garcia, 2021 NY Slip Op 04558, Second Dept 7-28-21

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, SECOND VIOLENT FELONY OFFENDER, FOREIGN CONVICTIONS.

BECAUSE SOME OF THE ACTS CRIMINALIZED IN THE FLORIDA STATUTE CONSTITUTE NEW YORK VIOLENT FELONIES AND SOME DO NOT, THE FLORIDA ACCUSATORY INSTRUMENT MUST BE CONSULTED TO DETERMINE THE PRECISE ACTS INVOLVED; THE SECOND VIOLENT FELONY OFFENDER ADJUDICATION WAS VACATED AND THE MATTER WAS SENT BACK FOR A HEARING (SECOND DEPT).

The Second Department sent the matter back to County Court for a hearing to determine whether a Florida conviction supported sentencing defendant as a second violent felony offender:

The Florida robbery statute under which the defendant was convicted … criminalizes several different acts, some of which, if committed in New York, would constitute a violent felony pursuant to Penal Law § 160.15 or § 160.10, and some of which would not. Further, the Florida statute under which the defendant was convicted of possession of a weapon by a felon … does not set forth elements that are equivalent to a violent felony in New York (see Penal Law § 70.02[1]). Under such circumstances, resort to the Florida accusatory instrument, among other things, would be needed to ascertain the particular act or acts underlying the defendant's convictions for robbery and possession of a weapon by a felon in Florida to determine whether the underlying acts were equivalent to a violent felony in New York … . People v Jamison, 2021 NY Slip Op 04668, Second Dept 8-11-21

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA).

DEFENDANT WAS ENTITLED TO A DOWNWARD DEPARTURE FROM LEVEL TWO TO LEVEL ONE IN THIS STATUTORY RAPE CASE; ALTHOUGH NOT PRESERVED BY A REQUEST FOR A DOWNWARD DEPARTURE, THE APPEAL WAS CONSIDERED IN THE INTEREST OF JUSTICE (SECOND DEPT).

The Second Department, reversing County Court, determined defendant was entitled to a downward departure in this statutory-rape SORA risk level proceeding. The issue was not preserved because defendant did not request a downward departure but the appeal was considered in the interest of justice:

"In cases of statutory rape, the Board has long recognized that strict application of the Guidelines may in some instances result in overassessment of the offender's risk to public safety" … . The Guidelines provide that a downward departure may be appropriate where "(i) the victim's lack of consent is due only to inability to consent by virtue of age and (ii) scoring 25 points [for risk factor 2, sexual contact with the victim,] results in an over-assessment of the offender's risk to public safety" … .

Since the defendant did not request a downward departure from his presumptive risk level in the County Court, his contentions on appeal regarding a downward departure are unpreserved for appellate review … . However, under the circumstances of this case, we address those contentions in the interest of justice … .

Considering all of the circumstances presented here, including that the subject offense is the only sex-related crime in the defendant's history, and that the defendant accepted responsibility for his crime, the assessment of 25 points under risk factor 2 resulted in an overassessment of the defendant's risk to public safety … . Accordingly, a downward departure is warranted, and the defendant should be designated a level one sex offender. People v Maldonado-Escobar, 2021 NY Slip Op 04502, Second Dept 7-2-21

CRIMINAL LAW, SPEEDY TRIAL, DISCOVERY, CERTIFICATE OF COMPLIANCE, 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, SURCHARGES AND FEES.

STATUTORY AMENDMENTS REPEALING MANDATORY SURCHARGES AND CRIME VICTIM ASSISTANCE FEES FOR YOUTHFUL OFFENDERS WERE REMEDIAL IN NATURE AND THEREFORE SHOULD BE APPLIED RETROACTIVELY (SECOND DEPT).

The Second Department, modifying Supreme Court, determined the statutory amendments which went into effect while the appeal was pending were remedial and therefore should be applied retroactively. The amendments repealed the imposition of mandatory surcharges and crime victim assistance fees for youthful offenders:

Permitting juveniles whose direct appeals were pending when the amendments were enacted to benefit from them would further the legislative purpose of removing unreasonable financial burdens placed on juveniles and enhancing their chances for successful rehabilitation and reintegration. … [P]rospective application would undermine the legislative goals by continuing the recognized inequity created by imposition of the surcharges and fees and leaving youth at risk for future "devastating" consequences should they be unable to pay. Indeed, the Legislature conveyed "a sense of urgency" in correcting these problems by providing that the amendments would take effect immediately … .

… [R]etroactive application of the amendments would not result in unfairness or impair substantive rights … . The subject surcharges and fees, which are "nonpunitive," were enacted strictly as a revenue raising measure … . People v Dyshawn B., 2021 NY Slip Op 04487, Second Dept 7-21-21

CRIMINAL LAW, TRAFFIC STOPS, SEARCH AND SEIZURE.

ALTHOUGH THE WARRANTLESS SEARCH OF THE INTERIOR OF THE CAR FOR MARIJUANA WAS JUSTIFIED, THE FORGED CREDIT CARDS SHOULD NOT HAVE BEEN EXAMINED AND SIEZED; THERE WAS NOTHING ABOUT THE CARDS WHICH INDICATED THEY WERE CONTRABAND UNDER THE "PLAIN VIEW" DOCTRINE; THE COMPREHENSIVE DISCUSSION OF THE CRITERIA FOR WARRANTLESS SEARCHES UNDER THE NYS CONSTITUTION IS WORTH CONSULTING (SECOND DEPT).

The Second Department, reversing Supreme Court, in a comprehensive decision addressing the criteria for warrantless searches under the NYS Constitution, determined the credit cards seized in a legitimate warrantless automobile search for marijuana should have been suppressed. Although it turned out the credit cards were forged, there was nothing about their appearance which justified ascertaining the names on the cards under the "plain view" doctrine:

The record here established that Officer Zaleski had probable cause to search the center console of the vehicle—and the small zippered wallet that was contained within it—for the presence of marihuana … . * * *

Although Officer Zaleski lawfully encountered the three credit cards when he opened the zippered wallet to see whether there was marihuana inside it, the facts available to Officer Zaleski at the time he opened the zippered wallet would not "warrant a [person] of reasonable caution in the belief that [the credit cards] may be contraband" … . Indeed, at the time Officer Zaleski opened the zippered wallet, there was no evidence connecting the defendant to any burglary, or any other reason to believe that the three credit cards in the zippered wallet were stolen, forged, or otherwise illicit … . * * *

On this record, Officer Zaleski's discovery of three credit cards stacked inside a small zippered wallet was insufficient, without more, to justify an additional search that went beyond the search for marihuana. People v Mosquito, 2021 NY Slip Op 04620, Second Dept 8-4-21

CRIMINAL LAW, TRAFFIC STOPS, SEARCHES AND SEIZURES.

IN A COMPREHENSIVE OPINION WITH DETAILED DISCUSSIONS OF THE FELLOW OFFICER RULE, THE STOP OF A VEHICLE BASED ON AN OBSERVED TRAFFIC VIOLATION, THE AUTOMOBILE EXCEPTION TO THE WARRANT REQUIREMENT, AND THE VALIDITY OF AN INVENTORY SEARCH, COUNTY COURT'S DENIAL OF THE MOTION TO SUPPRESS THE COCAINE FOUND IN THE VEHICLE IS REVERSED OVER TWO CONCURRENCES AND A TWO-JUSTICE DISSENT (SECOND DEPT).

The Second Department, in an extensive, comprehensive opinion by Justice Miller, over two concurrences and a two-justice dissent, reversing defendant's conviction, determined the warrantless search of the vehicle in which cocaine was found was not demonstrated to be valid under the fellow officer rule, was not demonstrated to be valid pursuant to the automobile exception, and was not demonstrated to be based on a valid inventory search. In a nutshell, the claimed exceptions to the warrant requirement were rejected because they were not supported by the evidence at the suppression hearing. The detailed factual and legal analyses cannot be fairly summarized here. The opinion should be consulted on the issues addressed, including the propriety of the stop of the vehicle, because of the extraordinary depth of the discussions. County Court's denial of suppression was based on the following findings. All except the reason for the stop (an observed traffic violation) were rejected on appeal:

The [county] court first concluded that the State Troopers had probable cause to stop the vehicle by virtue of "the fellow-officer rule." … [T]he court cited to testimony that law enforcement officials had intercepted approximately 89,000 communications, and that some of these communications indicated that there would be a quantity of narcotics in the vehicle on the night in question.

… [T]he [county] court credited the testimony of one of the State Troopers who testified that he observed the subject vehicle exceed the maximum speed limit and fail to maintain its lane.

…[T]he [county] court concluded that the intercepted communications and the application of the fellow officer rule provided a lawful basis for the search of the vehicle at the outset of the traffic stop.

The [county court] concluded that the State Troopers were authorized to search the subject vehicle under the "automobile exception" to the Fourth Amendment. In this regard, the court noted that one of the State Troopers had reportedly detected the odor of marihuana when he initially approached the vehicle after it was pulled over.

Finally, the County Court determined, as a third alternative ground, that the cocaine was properly recovered pursuant to a valid inventory search. People v Mortel, 2021 NY Slip Op 04498, Second Dept 7-21-21

FAMILY LAW, ABUSE, NEGLECT, EVIDENCE.

THE 2ND DEPARTMENT, MAKING ITS OWN CREDIBILITY ASSESSMENTS, DETERMINED THE EVIDENCE SUFFICIENTLY DEMONSTRATED ABUSE; A FINDING OF NEGLECT BASED UPON EXCESSIVE CORPORAL PUNISHMENT WAS NOT SUPPORTED (SECOND DEPT).

The Second Department, reversing Family Court, making its own credibility assessments, determined there was sufficient evidence Amir abused Shyla. In addition, the Second Department determined the evidence did not demonstrate that mother neglected Amir by inflicting excessive corporal punishment:

Shyla described in detail at the fact-finding hearing the incidents of abuse by Bryan, which testimony sufficiently corroborated her out-of-court descriptions of the abuse … . Inconsistencies in Shyla's testimony as to peripheral details, such as timing and the presence of other individuals in the home at the time of the abuse, did not detract from Shyla's consistent and credible description of the core conduct constituting the abuse, particularly considering the child's age at the time of these events … . Further, Shyla's previous, out-of-court recantation of her allegations was sufficiently explained by the indirect threats she received from her own family members … . …

While the use of excessive corporal punishment constitutes neglect, "[p]arents have a right to use reasonable physical force against a child in order to maintain discipline or to promote the child's welfare" … . Here, ACS [Administration for Children's Services] offered evidence of a single instance in which the mother hit Amir's arm with a belt to discipline him after he was caught shoplifting, and failed to sufficiently demonstrate that marks observed on Amir were the result of being hit with the belt by the mother. Under the circumstances, ACS failed to establish that the mother's conduct rose to the level of neglect or that she exhibited a pattern of inflicting excessive corporal punishment on Amir … . Matter of Tarahji N. (Bryan N.–Divequa C.), 2021 NY Slip Op 05125, Second Dept 9-29-21

FAMILY LAW, CRIMINAL LAW, JUVENILE DELINQUENCY, MIRANDA.

THE JUVENILE DELINQUENCY ADJUDICATION WAS AFFIRMED; TWO DISSENTERS ARGUED THE PROOF THE JUVENILE KNOWINGLY, VOLUNTARILY AND INTELLIGENTLY WAIVED HIS MIRANDA RIGHTS WAS INSUFFICIENT (SECOND DEPT).

Although the Second Department affirmed the juvenile delinquency adjudication, two dissenters argued the presentment agency did not prove the juvenile was capable of knowingly, voluntarily and intelligently waiving his Miranda rights. The juvenile's expert provided evidence of the juvenile's limited intellectual functioning:

From the dissent:

The expert's uncontradicted opinion was that the appellant had "fundamental problems" in understanding and comprehending Miranda rights. Specifically, the appellant believed that he had to waive his right to remain silent in order to find out what the detectives were questioning him about. The appellant did not understand what it meant for a statement to be "used against him." Further, he did not understand the role of an attorney in the context of an interrogation.

Given the appellant's young age, low IQ scores, and limited intellectual functioning, there are serious doubts about the appellant's ability to knowingly and intelligently

waive his Miranda rights under the circumstances … . Notably, the Presentment Agency did not introduce any expert testimony contradicting the conclusions reached by the appellant's expert forensic psychologist … . The conclusions of the appellant's expert were confirmed by the appellant's educational records showing that he had been selected for an individualized education plan (hereinafter IEP) and had consistently been evaluated as having intellectual disabilities, including a low IQ with reading, listening, and comprehension difficulties. Matter of Tyler L., 2021 NY Slip Op 04713, Second Dept 8-18-21

FAMILY LAW, DIVORCE, ATTORNEYSS, RIGHT TO COUNSEL.

SUPREME COURT SHOULD HAVE CONDUCTED AN INQUIRY TO ENSURE DEFENDANT INTELLIGENTLY WAIVED HIS RIGHT TO COUNSEL AFTER HIS ATTORNEY WAS PERMITTED TO WITHDRAW; NEW TRIAL ORDERED (SECOND DEPT).

The Second Department, reversing Supreme Court in this divorce action, determined the court did not make sure defendant intelligently waived his right to counsel after his attorney was permitted to withdraw:

A divorce litigant has a statutory right to counsel for the custody portion of the litigation (see Family Ct Act § 262[a][iii], [v]; Judiciary Law § 35[8]). Here, the defendant's attorney was permitted to withdraw during the trial, and the defendant proceeded pro se. However, the Supreme Court did not determine whether the defendant was unequivocally, voluntarily, and intelligently waiving his right to counsel … and failed to inquire whether the defendant understood the risks and disadvantages of appearing pro se. … [W]e … remit the matter … for a new trial … . At that time, the court should conduct a more detailed inquiry to determine whether the defendant is eligible for assigned counsel. Brandel v Brandel, 2021 NY Slip Op 05116, Second Dept 9-29-21

FAMILY LAW, DIVORCE, MAINTENANCE, BUSINESS VALUATION.

IN THIS DIVORCE ACTION SUPREME COURT ABUSED ITS DISCRETION IN IMPUTING TOO MUCH INCOME TO AND AWARDING TOO LITTLE MAINTENANCE TO PLAINTIFF WIFE; IN ADDITION DEFENDANT SHOULD NOT HAVE BEEN AWARDED 50% OF THE VALUE OF PLAINTIFF'S BUSINESS AND THE COURT SHOULD NOT HAVE ORDERED A POSTTRIAL VALUATION OF THE BUSINESS (SECOND DEPT).

The Second Department, reversing Supreme Court in this divorce action, determined the imputation of income to plaintiff, the amount of maintenance awarded to plaintiff were not supported by the evidence. In addition the award of 50% of plaintiff's business to defendant and the ordering of a posttrial valuation of the business were deemed improper:

… [T]he Supreme Court improvidently exercised its discretion by imputing an annual income of $80,000 to the plaintiff when calculating her maintenance award. During this 28-year marriage, notwithstanding her college degree and various certifications, the plaintiff, who was 55 years old at the time of trial, had been a stay at home mother and homemaker for almost 10 years and had never earned more than $19 per hour from employment upon returning to work outside the home, while the defendant was the primary wage earner for the family and earned a substantial income. Moreover, the plaintiff's business was not a financial success. …

"In cases such as this one, commenced prior to January 23, 2016 …, factors to be considered are, among others, the standard of living of the parties, the income and property of the parties, the distribution of property, the duration of the marriage, the health of the parties, the present and future earning capacity of the parties, the ability of the party seeking maintenance to become self-supporting, the reduced or lost earning capacity of the party seeking maintenance, and the presence of children of the marriage in the respective homes of the parties" … . Weiss v Nelson, 2021 NY Slip Op 04573, Second Dept 7-28-21

FAMILY LAW, REFEREE'S AUTHORITY.

THE REFEREE DID NOT HAVE THE AUTHORITY TO PRECLUDE DEFENDANT FROM PRESENTING EVIDENCE AS AN APPARENT SANCTION FOR DEFENDANT'S FAILURE TO APPEAR; THE REFEREE'S REPORT SHOULD NOT HAVE BEEN CONFIRMED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the referee's report in this matrimonial matter should not have been confirmed because the referee exceeded her authority by ruling the defendant could not present any evidence, an apparent sanction for defendant's failure to appear:

"A referee derives his or her authority from an order of reference by the court, and the scope of the authority is defined by the order of reference" (… see CPLR 4311). "A referee who attempts to determine matters not referred to him or her by the order of reference acts beyond and in excess of his or her jurisdiction" … . Where, as here, the parties did not consent to the determination of any issues by the referee, and the order of reference directed the referee to hear and report (see CPLR 4317 [a]), "the referee had the power only to hear and report his [or her] findings"… .

Here, the Referee exceeded her authority to hear and report her findings based upon the evidence presented at trial by making a determination to preclude the defendant from presenting a case … . Pursuant to CPLR 4201, a referee assigned to hear and report "shall have the power to issue subpoenas, to administer oaths and to direct the parties to engage in and permit such disclosure proceedings as will expedite the disposition of the issues." However, neither CPLR 4201 nor any other provision confers the authority on a referee assigned to hear and report to impose a penalty on a party for failing to appear, such as precluding that party from presenting any evidence. Pulver v Pulver, 2021 NY Slip Op 04727, Second Dept 8-18-21

FAMILY LAW, REVOCATION OF SUSPENSION OF ORDER OF COMMITMENT.

BECAUSE A LIBERTY INTEREST IS AT STAKE, RESPONDENT SHOULD HAVE BEEN AFFORDED AN OPPORTUNITY TO BE HEARD IN OPPOSITION TO THE REVOCATION OF THE SUSPENSION OF THE ORDER OF COMMITMENT (SECOND DEPT).

The Second Department, reversing Family Court, reversing the revocation of the suspension of the order of commitment, determined respondent was entitled to an opportunity to be heard because a liberty interest is at stake:

"The court may suspend an order of commitment upon reasonable conditions and is also authorized to revoke such suspension at any time for good cause shown" … . However, given the liberty interest at stake, the Family Court, before revoking a suspension of an order of commitment, must provide to a respondent an opportunity to be heard and to present witnesses on the issue of whether good cause exists to revoke the suspension … . Here, because the father was deprived of this opportunity, we must reverse the order of commitment appealed from and remit the matter to the Family Court … for a hearing and a determination thereafter of whether good cause exists to revoke the suspension. Matter of Gast v Faria, 2021 NY Slip Op 04549, Second Dept 7-28-21

FAMILY LAW, SEPARATION AGREEMENTS, HEALTH DECISIONS, INOCULATIONS.

THE SEPARATION AGREEMENT PROVIDED THAT THE PARTIES "SHALL" CONSULT EACH OTHER ON HEALTH DECISIONS FOR THE CHILD BUT FATHER HAD THE CHILD INOCULATED WITHOUT CONSULTING MOTHER; BECAUSE THE PARTIES AGREED THE CHILD WOULD ATTEND PUBLIC SCHOOL, AND INOCULATION IS REQUIRED BY THE PUBLIC HEALTH LAW, MOTHER DID NOT DEMONSTRATE SHE WAS PREJUDICED BY THE BREACH OF THE SEPARATION AGREEMENT; THEREFORE MOTHER'S MOTION TO HOLD HUSBAND IN CONTEMPT WAS PROPERLY DENIED (SECOND DEPT).

The Second Department determined Supreme Court properly denied defendant-mother's motion to hold plaintiff-father in contempt for having the child inoculated for common childhood diseases. The separation agreement required that the parties consult each other on health decisions for the child. Father did not consult with mother before having the child inoculated. The separation agreement did not unequivocally prohibit plaintiff from having the child inoculated and the parties agreed the child would attend public school, for which inoculation is required. Therefore defendant was unable to demonstrate a violation of the separation agreement which prejudiced her:

The separation agreement provided that "[t]he parties shall continue to cooperate and consult with one another to arrive at decisions which they believe are in the best interest of the [c]hild with respect to health." Despite this language, on two occasions, the plaintiff, without first consulting with the defendant, took the child, who had not received any vaccinations since the age of two, to get vaccinated.

However, the parties' separation agreement did not unequivocally prohibit the plaintiff from having the child inoculated. Moreover, in light of the parties' express intention to maintain the child's enrollment in public education, and New York State's then newly enacted public school vaccine mandate requiring such inoculations in order for the child to continue to attend public school (see Public

Health Law § 2164; C.F. v New York City Dept. of Health & Mental Hygiene, 191 AD3d 52, 70), the defendant cannot demonstrate that she was prejudiced by the failure of the plaintiff to consult with her prior to having the child inoculated. Heffer v Krebs, 2021 NY Slip Op 04542, Second Dept 7-29-21

FAMILY LAW, SOLEMNIZED MARRIAGE.

IN NEW YORK A MARRIAGE WHICH HAS BEEN SOLEMNIZED IS VALID IN THE ABSENCE OF A MARRIAGE LICENSE (SECOND DEPT).

The Second Department noted that a marriage which has been solemnized is valid in the absence of a marriage license:

There is a strong presumption favoring the validity of marriages … . While the Domestic Relations Law deems it necessary for all persons intending to be married to obtain a marriage license … , a marriage is not void for the failure to obtain a marriage license if the marriage is solemnized … . A marriage is solemnized where the parties "solemnly declare in the presence of a clergyman or magistrate and the attending witness or witnesses that they take each other as husband and wife"… . Thus, under New York law, the marriage between parties will be valid, even without a marriage license, in instances where it is solemnized … . Pursuant to Domestic Relations Law § 12, "[n]o particular form or ceremony is required when a marriage is solemnized as herein provided by a clergyman or magistrate, but the parties must solemnly declare in the presence of a clergyman or magistrate and the attending witness or witnesses that they take each other as husband and wife. In every case, at least one witness beside the clergyman or magistrate must be present at the ceremony." … . Yusupov v Baraev, 2021 NY Slip Op 04634, Second Dept 8-4-21

FAMILY LAW, STIPULATION OF SETTLEMENT, CHILD SUPPORT.

THE APPLICABILITY OF THE CHILD SUPPORT STANDARDS ACT (CSSA) WAS NOT ADEQUATELY WAIVED IN THE STIPULATION OF SETTLEMENT; THE CHILD SUPPORT PROVISIONS OF THE STIPULATION SHOULD HAVE BEEN VACATED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the child support provisions of the stipulation of settlement should have been vacated because the applicability of Child Support Standards Act (CSSA) was not waived:

Parties to a separation agreement are free to "opt out" of the provisions of the Child Support Standards Act (Domestic Relations Law § 240[1-b] [hereinafter the CSSA]) "so long as their decision is made knowingly"… . To ensure that waivers of the statutory provisions of the CSSA are truly knowingly made, Domestic Relations Law § 240(1-b)(h) requires that stipulations of settlement include provisions: "(1) stating that the parties have been advised of the provisions of the CSSA; (2) stating that the basic child support provisions of the CSSA would presumptively result in the determination of the correct amount of child support to be awarded; (3) stating what the amount of basic child support would have been if calculated pursuant to the CSSA, if the parties' stipulation or agreement deviates from the basic child support obligation; and (4) setting forth the parties' reason or reasons for deviating from the CSSA calculation, if they have chosen to deviate" … . "The policy reasons underlying the requirement that waivers must be knowingly made are so strong that agreements that do not comply with the strictures of the CSSA are invalid and unenforceable, at least to the extent of the child support provisions set forth therein" … .

Here, the child support provisions in the parties' stipulation of settlement did not include any of the foregoing recitals, including a calculation of basic child support pursuant to the CSSA. Haik v Haik, 2021 NY Slip Op 04599, Second Dept 8-4-21

FORECLOSURE, ABUSE OF PROCESS, MALICIOUS PROSECUTION.

IN THIS FORECLOSURE ACTION, DEFENDANT'S COUNTERCLAIMS FOR ABUSE OF PROCESS AND MALICIOUS PROSECUTION SHOULD HAVE BEEN DISMISSED (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court in this foreclosure action, determined defendant's (Yeshiva's) counterclaims for abuse of process and malicious prosecution should have been dismissed:

Supreme Court should have granted those branches of Maspeth's [the bank's] motion which were to dismiss Yeshiva's second and third counterclaims, sounding in abuse of process and malicious prosecution, respectively. To state a cause of action to recover damages for abuse of process, a party must allege the existence of (1) regularly issued process, (2) an intent to do harm without excuse or justification, and (3) the use of process in a perverted manner to obtain a collateral objective … . Here, Yeshiva failed to allege any actual misuse of the process to obtain an end outside its proper scope … . Moreover, "[t]he elements of the tort of malicious prosecution of a civil action are (1) prosecution of a civil action against the plaintiff, (2) by or at the instance of the defendant, (3) without probable cause, (4) with malice, (5) which terminated in favor of the plaintiff, and (6) causing special injury" … . Here, Yeshiva failed to adequately allege malice on the part of Maspeth in commencing the action, a termination of the action in favor of Yeshiva, or the requisite special injury. Maspeth Fed. Sav. & Loan Assn. v Elizer, 2021 NY Slip Op 05030, Second Dept 9-22-21

FORECLOSURE, BUSINESS RECORDS.

THE BUSINESS RECORDS REFERRED TO IN THE SUPPORTING AFFIDAVIT WERE NOT ATTACHED; THE BANK'S MOTION FOR A DEFAULT JUDGMENT IN THIS FORECLOSURE ACTION SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the bank's motion for a default judgment in this foreclosure action should not have been granted. The business records referred in the affidavit of the banks servicing agent were not attached:

Where, as here, a foreclosure complaint is not verified, CPLR 3215(f) states, among other things, that upon any application for a judgment by default, proof of the facts constituting the claim, the default, and the amount due are to be set forth in an affidavit made by the party'" … . Here, in support of its motion, the plaintiff submitted an affidavit of merit executed by a "Document Execution Specialist" who was employed by the plaintiff's servicing agent … . The affiant asserted that she had personal knowledge of the merits of the plaintiff's cause of action based upon her review of various business records. However, as the defendants correctly contend, since the plaintiff failed to attach the business records upon which the affiant relied in her affidavit, her factual assertions based upon those records constituted inadmissible hearsay, and her affidavit was insufficient to demonstrate "proof of the facts constituting the claim" … . Deutsche Bank Natl. Trust Co. v Hossain, 2021 NY Slip Op 04480, Second Dept 7-21-21

FORECLOSURE, BUSINESS RECORDS.

THE LOAN SERVICER'S AFFIDAVIT IN THIS FORECLOSURE ACTION LAID A PROPER FOUNDATION FOR THE BUSINESS RECORDS DESCRIBED IN IT, BUT THE RECORDS THEMSELVES WERE NOT ATTACHED, RENDERING THE AFFIDAVIT INADMISSIBLE HEARSAY (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff's representative in this foreclosure action demonstrated in her affidavit that she was familiar with the relevant business records, but did not attach the records. Therefor the affidavit was hearsay:

… [T]he plaintiff submitted … the affidavit of Denise Dickman, … the plaintiff's loan servicer, who averred that she was familiar with the business records maintained … for the purpose of servicing mortgage loans for the plaintiff and that she had personal knowledge of the manner in which those business records were created. Dickman further averred that the satisfaction of mortgage was intended to be recorded against the second mortgage, under which the defendant had defaulted and which [the bank] had "charged off as uncollectable." However, "[d]ue to a clerical error, a loan number was not included with the processing request for the charge off," and, consequently, a satisfaction of mortgage was "prepared, executed and filed in error" … .

Since Dickman attested that she was familiar with [the bank's] record-keeping practices and procedures, her affidavit laid a proper foundation for the admission of the business records on which she relied in asserting that the satisfaction of mortgage was erroneously filed due to a clerical error … . However, Dickman's assertions as to the contents of those records were inadmissible since the records themselves were not submitted with her affidavit … . U.S. Bank N.A. v Kandra, 2021 NY Slip Op 04679, Second Dept 8-11-21

FORECLOSURE, CIVIL PROCEDURE, DEATH OF MORTGAGOR.

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

FORECLOSURE, CIVIL PROCEDURE, FAILURE TO APPEAR, REFEREE'S REPORT.

A DEFENDANT IN A FORECLOSURE ACTION WHICH HAS "FAILED TO APPEAR" IS NOT ENTITLED TO NOTICE OF A MOTION TO CONFIRM A REFEREE'S REPORT, NOTWITHSTANDING DICTA IN PRIOR 2ND DEPARTMENT RULINGS; A DETAILED AND COMPREHENSIVE DISCUSSION OF THE NOTICE REQUIREMENTS WHERE A DEFENDANT IN A FORECLOSURE ACTION HAS DEFAULTED (SECOND DEPT).

The Second Department, in a comprehensive discussion of the requirements for seeking a default judgment, including the meaning of "failure to appear," determined the party which failed to appear in this foreclosure action was not entitled to notice of a motion to confirm a referee's report. The extensive and detailed explanation of the applicable law was deemed necessary to clear up dicta in Second Department decisions which indicated such notice was required:

CPLR 3215(g)(1) applies "whenever application is made to the court or to the clerk." By its plain language, it merely requires the plaintiff to provide "notice of the time and place of the application" for a default judgment … , which application must be held in a location authorized by CPLR 3215(e), and supported by, among other things, "proof of . . . the amount due" … . … [T]he purpose of the notice is to provide a defaulted defendant with the "opportunity to challenge the amount of damages sought by the plaintiffs" … . Contrary to [defendant's] contention, CPLR 3215(g)(1) does not, once triggered, require a plaintiff to provide five days' notice of every subsequent motion or application in the action … .

The 2017 motion was not an "application" for a default judgment within the meaning of CPLR 3215(b). Rather, the 2017 motion sought confirmation of the referee's report and entry of a judgment of foreclosure and sale, relief predicated on CPLR 4403 … . Since the 2017 motion was not an "application" within the meaning of CPLR 3215(b), the notice specified in CPLR 3215(g)(1) was inapplicable to the 2017 motion, and notice of that motion was instead governed by the general notice provisions applicable to all motions (see CPLR 2103[e]). As already observed, that

section merely requires that notice be served on "every other party who has appeared" … . Since, at the time of the 2017 motion, [defendant's predecessor] still had not made any appearance in the action, it was not, without more, entitled to notice of that motion … . 21st Mtge. Corp. v Raghu, 2021 NY Slip Op 05016, Second Dept 9-22-21

FORECLOSURE, CIVIL PROCEDURE, 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, CIVIL PROCEDURE, REVOCATION OF 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, DEBTOR-CREDITOR, MUNICIPAL LAW.

THE BANK IN THIS FORECLOSURE ACTION WAS NOT REQUIRED TO DEMONSTRATE IT WAS A LICENSED DEBT COLLECTION AGENCY PURSUANT TO THE NYC ADMINISTRATIVE CODE; THE BANK DID NOT ATTACH THE BUSINESS RECORDS NECESSARY TO DEMONSTRATE DEFENDANT'S DEFAULT (SECOND DEPT).

The Second Department, in a full-fledged opinion by Justice Iannacci, determined: (1) the bank in this foreclosure action did not have to allege it was a licensed "debt collection agency" pursuant to the NYC Administrative Code (20-490); (2) the proof of defendant's default was inadmissible hearsay:

A judicial foreclosure action such as the one at bar does not constitute the sort of tactics "shocking to the conscience of ordinary people"—like phone calls at unreasonable hours and other threatening behavior—that the subject Administrative Code provisions were enacted to address. Furthermore, the particular requirements and prohibitions placed upon debt collectors under the Administrative Code are concerned with ensuring that consumers can verify that payment on a debt is actually due, learn the correct amount of the debt, and meaningfully communicate with the debt collection agency about the debt … . In the context of judicial foreclosure, the state statutory scheme operates to protect homeowners and ensure fairness in the process, in a far more comprehensive manner and in ways that might not be entirely consistent with the Administrative Code provisions. * * *

… [T]he plaintiff failed to sustain its initial burden of demonstrating that the defendants defaulted in the repayment of the subject note. To establish such default, the plaintiff relied upon an affidavit of a representative of its loan servicer, whose averment regarding the defendants' default was based upon her review of unidentified business records. Inasmuch as no business records were attached to, or otherwise incorporated into, the affidavit, this averment constituted inadmissible hearsay lacking in probative value … . Citibank, N.A. v Yanling Wu, 2021 NY Slip Op 04902, Second Dept 9-1-21

FORECLOSURE, DEFAULT, CONTEST AMOUNT, REFEREE'S REPORT, BUSINESS RECORDS.

ALTHOUGH DEFENDANT WAS IN DEFAULT IN THIS FORECLOSURE ACTION, SHE STILL CAN CONTEST THE AMOUNT OWED; THE REFEREE'S REPORT HERE WAS REJECTED BECAUSE IT WAS BASED IN PART ON UNPRODUCED BUSINESS RECORDS AND THE MATTER WAS REMITTED FOR RECALCULATION (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the referee's report in this foreclosure action should have been rejected because it was based in part on business records which were not produced. Although defendant was in default, she still could contest the amount owed:

The fact that the defendant defaulted in appearing did not mean that she was precluded from contesting the amount owed … . The Supreme Court should not have confirmed the referee's report because the referee's recommendation that the plaintiff be awarded tax and hazard insurance disbursements was premised upon unproduced business records … . Consequently, the referee's findings with respect to the total amount due upon the mortgage were not substantially supported by the record … . Accordingly, we reject the referee's report and remit the matter to the Supreme Court, Kings County, for a new report computing the amount due to the plaintiff, followed by further proceedings in accordance with CPLR 4403 and the entry of an appropriate amended judgment thereafter. Wells Fargo Bank, N.A. v Campbell, 2021 NY Slip Op 04574, Second Dept 7-28-21

FORECLOSURE, DEFAULT, EXCUSE.

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, DEFAULT.

DEFENDANTS' DEFAULT IN MAKING MORTGAGE PAYMENTS WAS NOT SUPPORTED BY THE SUBMISSION OF THE RELEVANT BUSINESS RECORDS; THEREFORE PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT IN THIS FORECLOSURE ACTION SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the proof of defendants' default in mortgage payments was based upon business records which were not produced:

… [T]he plaintiff failed to establish, prima facie, the defendants' default in payment by submitting the affidavit of Haley Pope, the Foreclosure Manager for its loan servicer. Pope did not specifically state that she had personal knowledge of the defendants' default in payment. To the extent Pope relied on her review of business records, she did not identify which records she relied on to assert a default in payment, or attach any business records to her affidavit to substantiate the alleged default in payment. Thus, the plaintiff failed to meet its prima facie burden by relying on Pope's conclusory assertion that the defendants defaulted in payment, which was not supported by a factual basis … . Wilmington Sav. Fund Socy., FSB v McLaughlin, 2021 NY Slip Op 04576, Second Dept 7-28-21

FORECLOSURE, FAILURE TO TIMELY TAKE DEFAULT JUDGMENT.

PLAINTIFF BANK DID NOT PROVIDE AN ADEQUATE EXCUSE FOR FAILING TO TAKE A TIMELY DEFAULT JUDGMENT; THE FORECLOSURE ACTION WAS ABANDONED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the foreclosure action should have been dismissed because plaintiff's excuse for failing to take a timely default judgment was inadequate:

To avoid dismissal of a complaint pursuant to CPLR 3215(c) as abandoned, a plaintiff must demonstrate both that there is a reasonable excuse for the delay and that the action is meritorious … . "Although the determination of what constitutes a reasonable excuse lies within the sound discretion of the Supreme Court, reversal is warranted if that discretion is improvidently exercised" … .

Here, contrary to the Supreme Court's determination, the excuse for the plaintiff's failure to take proceedings for the entry of a judgment within one year after the action was released from the foreclosure settlement conference part was not reasonable … . Throughout the course of this litigation, there were unexplained gaps of time where months of inactivity passed. Neither the need to move for the appointment of a successor guardian nor the plaintiff's change of attorney which change occurred after the statutory one-year period had expired constitutes a reasonable excuse for the plaintiff's failure to timely prosecute this action … . HSBC Bank USA, N.A. v Whaley, 2021 NY Slip Op 05027, Second Dept 9-22-21

FORECLOSURE, NOTICE.

THE BANK IN THIS FORECLOSURE ACTION WAS NOT REQUIRED TO MEET THE 90-DAY-NOTICE REQUIREMENT OF RPAPL 1304 BECAUSE THE DEFENDANT HAD MOVED FROM THE RESIDENCE; HOWEVER THE BANK WAS STILL REQUIRED BY RPAPL 1304 TO PROVIDE NOTICE OF THE FORECLOSURE TO THE DEFENDANT; THE PROOF THAT NOTICE WAS MAILED WAS INSUFFICIENT (SECOND DEPT).

The Second Department determined the loan in question in this foreclosure proceeding was a "home loan" within the meaning of RPAPL 1304 and therefore the notice requirements of RPAPL 13O4 applied. The bank argued the loan was not a "home loan" because the defendant no longer lived on the property. The Second Department held that, because the defendant had moved, the 90-day-notice required by RPAPL 1304 did not apply, but the bank was still obligated to notify the defendants of the foreclosure action. Because the bank did not submit sufficient proof of compliance with the notice provisions of RPAPL 1304, the bank's motion for summary judgment was properly denied:

… [W]hile finding, pursuant to RPAPL 1304(3), that "[g]iven that Defendant no longer occupies the residence as his principal dwelling place, the ninety-day period specified in the notice is inapplicable," the Supreme Court properly concluded that "Defendant's loan qualified as a 'home loan' under RPAPL § 1304(5) due to the fact that the home was Defendant's primary residence from the time of the loan until he was transferred to California in 2011," and that, "[t]herefore, Plaintiff needed to serve statutory notice pursuant to RPAPL § 1304 on Defendant by first class mail and certified mail." …

To establish its compliance with the notice requirements of RPAPL 1304, the plaintiff submitted the affidavit of its employee, Takesha Brown, a document execution specialist. Although Brown stated in her affidavit that the RPAPL 1304 notices were mailed by certified and regular first-class mail, she did not attest to having personal knowledge of the mailing, and the plaintiff failed to attach, as exhibits to the motion, any documents to prove that the notices were actually mailed to the defendant … . In addition, the plaintiff failed to provide "proof of a standard office mailing procedure designed to ensure that items are properly addressed and mailed, sworn to by someone with personal knowledge of the procedure" … . Nationstar Mtge., LLC v Jong Sim, 2021 NY Slip Op 04979, Second Dept 9-15-21

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

THE AFFIDAVITS SUBMITTED TO DEMONSTRATE THE FAIR MARKET VALUE OF THE FORECLOSED PROPERTY IN THIS ACTION SEEKING A DEFICIENCY JUDGMENT PURSUANT TO RPAPL 1371 (2) WERE DEFECIENT; SUPREME COURT PROPERLY ORDERED A HEARING TO ESTABLISH THE FAIR MARKET VALUE (SECOND DEPT).

The Second Department in this foreclosure proceeding seeking a deficiency judgment determined Supreme Court properly ordered a hearing to establish the fair market value of the property. The submitted affidavits were not sufficient:

"RPAPL 1371(2) permits the mortgagee in a mortgage foreclosure action to recover a deficiency judgment for the difference between the amount of indebtedness on the mortgage and either the auction price at the foreclosure sale or the fair market value of the property, whichever is higher" … When a lender moves to secure a deficiency judgment against a borrower, "the court . . . shall determine, upon affidavit or otherwise as it shall direct, the fair and reasonable market value of the mortgaged premises as of the date such premises were bid in at auction or such nearest earlier date as there shall have been any market value thereof" … . "It is the lender who bears the initial burden of demonstrating, prima facie, the property's fair market value as of the date of the auction sale"… . "RPAPL 1371 does not require the court to hold an evidentiary hearing; however, where 'a triable issue as to the reasonable market value is presented, that issue should not be decided upon affidavits, but by the court or a referee, so that the witnesses may be subject to observation and cross-examination'" … . …

The appraisal … was not certified, nor was it accompanied by an affidavit of the appraiser. Moreover, the appraisal stated that the value indicated by the income approach was in the amount of $450,000, while the value indicated by the sales comparison approach was in the amount of $480,000. There was no explanation as to why the Supreme Court should accept the value based on the income approach as opposed to the sales comparison approach. U.S. Bank, N.A. v 199-02 Linden Blvd. Realty, LLC, 2021 NY Slip Op 04991, Second Dept 8-15-21

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

PROOF OF MAILING OF THE RPAPL 1304 NOTICE TO THE CORRECT ADDRESS WAS NOT INCLUDED IN THE INITIAL MOTION PAPERS AND THEREFORE WAS NOT PART OF PLAINTIFF'S ATTEMPT TO MAKE OUT A PRIMA FACIE CASE; IN ADDTIION, THE PROOF OF MAILING OF THE RPAPL 1304 NOTICE WAS DEFICIENT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the defendant failed to demonstrate compliance with the RPAPL 1304 notice requirements in this

foreclosure action. The proof of mailing to the correct address was first provided in reply papers for the motion to confirm the referee's report and was not part of plaintiff's initial summary judgment motion. And the proof of mailing was not supported by proof of the affiant's knowledge of the mailing practices and procedures of the party which actually mailed the documents:

Although Cantu [plaintiff's default servicing officer] stated in his affidavit that the RPAPL 1304 notices were mailed by certified and first-class mail to the defendants at the property, and he attached copies of 90-day notices with corresponding certified and first-class envelopes, Cantu did not attach the 90-day notices and envelopes addressed to the property where the defendants resided or any United States Post Office documentation showing that the purported mailings to the property actually occurred … . To the extent the plaintiff relies on copies of the 90-day notices with corresponding certified and first-class envelopes addressed to the property which were submitted for the first time in its reply papers on its subsequent motion … to confirm the referee's report, those documents were insufficient to satisfy the plaintiff's prima facie burden on its initial motion … for summary judgment … . "A party seeking summary judgment should anticipate having to lay bare its proof and should not expect that it will readily be granted a second or third chance" … . Further, while Cantu asserted that he had personal knowledge of the plaintiff's procedures for creating and maintaining its business records, he did not attest that he was familiar with the mailing practices and procedures of Walz, the third-party entity that he acknowledged sent the notices … . Thus, the plaintiff failed to establish proof of standard office practices and procedures designed to ensure the notices were properly addressed and mailed … . Caliber Home Loans, Inc. v Weinstein, 2021 NY Slip Op 05021, Second Dept 9-22-21

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

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, REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL), NOTICE, DEFAULT.

THE BANK'S EVIDENCE OF DEFENDANT'S DEFAULT AND COMPLIANCE WITH THE NOTICE REQUIREMENTS OF RPAPL 1304 AND THE MORTGAGE WAS INSUFFICIENT (SECOND DEPT).

The Second Department, reversing Supreme Court in this foreclosure action, determined plaintiff bank did not present sufficient evidence of defendant's default or the bank's compliance the the notice requirements of the mortgage and RPAPL 1304:

… [Plaintiff's representative] did not attest that he was personally familiar with the record-keeping practices and procedures of the plaintiff or those of the plaintiff's predecessor in interest, or that the records generated by the plaintiff's predecessor in interest were incorporated into the plaintiff's own records or routinely relied upon in its business (see CPLR 4518[a] …), and failed to attach any business records of the plaintiff or its predecessor in interest to his affidavit ,,, . Moreover, to the extent that the …. employee's purported knowledge of [defendant's] default was based upon his review of unidentified business records … , his affidavit constituted inadmissible hearsay and lacked probative value … . …

The plaintiff failed to submit an affidavit of service or any proof of mailing by the post office demonstrating that it properly served [defendant] pursuant to the terms of RPAPL 1304 … . The … employee's affidavit was insufficient to establish that the notice was sent to [defendant] in the manner required by RPAPL 1304, as the employee did not provide evidence of the actual mailing … . Bank of N.Y. Mellon v DeLoney, 2021 NY Slip Op 04655, Second Dept 8-11-21

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

SENDING THE 90-DAY FORECLOSURE NOTICE TO TWO BORROWERS IN THE SAME ENVELOPE DOES NOT COMPLY WITH THE REQUIREMENTS OF RPAPL 1304, WHICH IS A CONDITION PRECEDENT TO A FORECLOSURE ACTION; BECAUSE THE NOTICE WAS NOT SENT TO EACH BORROWER IN A SEPARATE ENVELOPE THE FORECLOSURE ACTION WAS PROPERLY DISMISSED (SECOND DEPT).

The Second Department, in a full-fledged opinion by Justice Wooten, over a strong dissent, determined RPAPL 1304 requires that the 90-day notice of foreclosure proceedings be sent to each borrower in separate envelopes. Here a single envelope with the RPAPL 1304 notice addressed to both borrowers did not comply with the statute and the foreclosure action was properly dismissed by Supreme Court:

… [W]hile 30-day notices of default were separately mailed to each of the defendants, the 90-day notice, which was sent via certified and first-class mail, was jointly addressed to the defendants. While the record reflects that "F. Yapkowitz" signed for and accepted delivery of the 90-day notice sent via certified mail, receipt of the notice is inconsequential. Even assuming, arguendo, that both of the defendants had signed for and accepted delivery of the 90-day notice, the plaintiff would not have demonstrated strict compliance with the requirements of RPAPL 1304 by mailing a notice jointly addressed to both of the borrowers in the same envelope. Since it is undisputed that the 90-day notice to each of the borrowers was sent in the same envelope, the plaintiff failed to establish its compliance with RPAPL 1304, a condition precedent to the commencement of the action. Wells Fargo Bank, N.A. v Yapkowitz, 2021 NY Slip Op 05139, Second Dept 9-29-21

FORECLOSURE, REFEREE'S REPORT, BUSINESS RECORDS.

THE REFEREE'S REPORT WAS BASED UPON INFORMATION IN BUSINESS RECORDS WHICH WERE NOT ATTACHED TO THE AFFIDAVIT IN WHICH THE RECORDS WERE DESCRIBED; THE INFORMATION IN THE AFFIDAVIT WAS THEREFORE INADMISSIBLE HEARSAY (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the referee in this foreclosure action relied on information in business records which were not provided along with the affidavit describing them:

The defendant argues … that the Supreme Court erred in confirming the referee's report because the referee's computation was premised upon unproduced business records. "The report of a referee should be confirmed whenever the findings are substantially supported by the record, and the referee has clearly defined the issues and resolved matters of credibility" … . Here, the affidavit executed by an employee of the plaintiff submitted for the purpose of establishing the amount due and owing under the subject mortgage loan constituted inadmissible hearsay and lacked probative value because the affiant did not produce any of the business records she purportedly relied upon in making her calculations … . Consequently, the referee's findings with respect to the total amount due under the mortgage were not substantially supported by the record … . Wells Fargo Bank, NA v Clerge, 2021 NY Slip Op 05038, Second Dept 9-22-21

FORECLOSURE, USURY DEFENSE.

DEFENDANT IN THIS FORECLOSURE ACTION UNSUCCESSFULLY RAISED USURY AS AN AFFIRMATIVE DEFENSE; DEFENDANT ARGUED THE BROKER'S COMMISSION, TITLE INSURANCE COST AND ATTORNEY'S FEE CONSTITUTED A COVER FOR USURY (SECOND DEPT).

The Second Department determined the broker's commission, title insurance and attorney's in connection with defendant's (Chandler's) mortgage were not a cover for usury. Chandler had raised usury as an affirmative defense to foreclosure:

General Obligations Law § 5-501(2) provides that "[n]o person or corporation shall, directly or indirectly, charge, take or receive any money, goods or things in action as interest on the loan or forbearance of any money, goods or things in action at a rate exceeding the [maximum permissible interest rate]." In New York, the civil usury statute provides that "[t]he maximum interest rate permissible on a loan is 16% per annum, and any interest rate in excess of that amount is usurious" … . "A usurious contract is void and relieves the borrower of the obligation to repay principal and interest thereon" … . There is a strong presumption against a finding of usury, which must be established by clear and convincing evidence … . …

Chandler claimed that three charges, a $14,000 mortgage broker's commission, a title insurance charge of $7,212.50, and a $1,000 fee paid to her attorney at the closing, were a cover for usury. "[W]hether a commission is a cover for usury is a factual issue which must be demonstrated by clear and convincing evidence" … . If itemized in writing to the borrower, reasonable fees, charges and costs for, among other things, title insurance and legal services are not considered interest on a loan secured by a one- or two-family owner-occupied residence Notably, "[a]n imprecise … . disclosure . . . constitutes a bona fide error of fact which is insufficient to establish the requisite usurious intent" … . Zanfini v Chandler, 2021 NY Slip Op 04681, Second Dept 8-11-21

INSURANCE LAW, BROKER LIABILITY.

ALTHOUGH THE BROKER MAY HAVE REQUESTED THAT PLAINTIFF BE ADDED TO THE INSURANCE POLICY, THE BROKER ALLEGEDLY DID NOT VERIFY THE COVERAGE WAS IN PLACE BEFORE ERRONEOUSLY REPRESENTING TO THE PLAINTIFF THAT IT WAS INSURED; THERE WAS A QUESTION OF FACT WHETHER THE BROKER BREACHED A COMMON-LAW OR CONTRACTUAL DUTY OWED TO PLAINTIFF (SECOND DEPT).

The Second Department determined there were triable issues of fact concerning whether defendant Ovation breached its common-law or contractual duty to procure insurance for plaintiff Concrete. Allegedly, Ovation had represented to Concrete that the insurance had been procured but did not verify that the coverage, to be provided by the insurer, was in place:

In general, "insurance brokers have a common-law duty to obtain requested coverage for their clients within a reasonable time or inform the client of the inability to do so" … . A claim of liability for a violation of this duty may sound in either contract or tort … . To state a claim based upon violation of the insurance broker's common-law duty, the client must demonstrate that the broker failed to discharge its duty either by breaching the agreement with the client by failing to obtain the requested coverage or by failing to exercise due care in obtaining insurance on the client's behalf … .

Here, the Ovation defendants failed to establish … that Ovation did not breach its common-law or contractual duty to Concrete. Even assuming [there was a request] that Concrete be added to the existing policy … the deposition testimony submitted by the Ovation defendants … demonstrated that Ovation agreed to obtain insurance for Concrete and then represented that it had done so without verifying this fact. … [T]he Ovation defendants failed to establish, … the absence of a triable issue of fact as to whether Ovation undertook a duty to Concrete which it then failed to discharge. Alpha/Omega Concrete Corp. v Ovation Risk Planners, Inc., 2021 NY Slip Op 05113, Second Dept 9-29-21

JUDGMENT BY CONFESSION, VACATION.

GENERALLY, TO VACATE A JUDGMENT BY CONFESSION, A PLENARY ACTION, NOT A MOTION TO VACATE, MUST BE BROUGHT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that, in order to vacate a judgment by confession, a plenary action must be commenced. Here the motion to vacate was not the proper vehicle:

"Generally, a person seeking to vacate a judgment entered upon the filing of an affidavit of confession of judgment must commence a separate plenary action for that relief" … . Here, the grounds for vacatur relied upon by the defendant do not fall within an exception to that general rule … . Accordingly, the Supreme Court should have denied the defendant's motion without prejudice to his right to commence a plenary action to vacate the judgment by confession. Funding Metrics, LLC v D & V Hospitality, Inc., 2021 NY Slip Op 04964, Second Dept 9-15-21

LABOR LAW-CONSTRUCTION LAW, CIVIL PROCEDURE, AMENDMENT OF BILL OF PARTICULARS.

SUPREME COURT PROPERLY ALLOWED THE AMENDMENT OF THE BILL OF PARTICULARS AFTER THE NOTE OF ISSUE HAD BEEN FILED; THE AMENDMENT ALLEGED ADDITIONAL VIOLATIONS OF THE INDUSTRIAL CODE IN THIS LABOR LAW 241(6) ACTION (SECOND DEPT).

The Second Department determined Supreme Court properly allowed the amendment of the bill of particulars after the note of issue had been filed in this Labor Law 231(6). The amendment alleged additional violations of the Industrial Code:

"[L]eave to amend the pleadings to identify a specific, applicable Industrial Code provision may properly be granted, even after the note of issue has been filed, where the plaintiff makes a showing of merit, and the amendment involves no new factual allegations, raises no new theories of liability, and causes no prejudice to the defendant"… . Here, the Supreme Court providently exercised its discretion in granting that branch of the plaintiff's cross motion which was to amend the bill of particulars to allege violations of additional Industrial Code sections. The plaintiff's amendment did not prejudice the defendants and did not involve new factual allegations or raise new theories of liability … . Palaguachi v Idlewild 228th St., LLC, 2021 NY Slip Op 05127, Second Dept 9-29-21

LABOR LAW-CONSTRUCTION LAW.

THE INSTALLATION OF LARGE INDVIDUAL LETTERS FOR A SIGN ON THE FRONT SOFFIT OF A BUILDING CONSTITUTED "ALTERING" THE BUILDING TO WHICH LABOR LAW 240(1) AND 241(6) APPLY; BECAUSE THE DEFENDANT DID NOT DEMONSTRATE IT DID NOT HAVE ACTUAL NOTICE OF THE DANGEROUS CONDITION OF THE SOFFIT (WHICH COLLAPSED), THE LABOR LAW 200 CAUSE OF ACTION SHOULD NOT HAVE BEEN DISMISSED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined Labor Law 240 (1), 241 (6) and 200 causes of action should not have been dismissed. Plaintiff was hired to install a sign made up of large individual letters on the front soffit of a business. Plaintiff used a ladder to climb inside the soffit through an access door to attach washers and nuts to bolts holding the letter which were passed through drilled holes by a co-worker. The floor of the soffit gave way and plaintiff fell 15 feet to the concrete below. Installing the sign constituted "altering" the building such that Labor Law 240 (1) and 241(6) applied. Also the Labor Law 200 cause of action should have survived because defendant did not demonstrate it lacked actual notice of the condition of the soffit:

… "[A]ltering," within the meaning of Labor Law § 240(1) [and 241 (6)] , involves "making a significant physical change to the configuration or composition of the building or structure" … . Here, the evidence … failed to establish … that the injured

plaintiff was not engaged in "altering" the building at the time of the accident … . …

… "[W]here a plaintiff's injuries stem … from a dangerous condition on the premises, a landowner may be liable under Labor Law § 200 if it 'either created the dangerous condition that caused the accident or had actual or constructive notice of the dangerous condition'" … . …

… [Defendant] failed to establish … that it lacked actual notice of the allegedly defective condition in the soffit … . Alberici v Gold Medal Gymnastics, 2021 NY Slip Op 04651, Second Dept 8-11-21

LABOR LAW-CONSTRUCTION LAW, SUBCONTRACTOR LIABILITY.

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

LABOR LAW-CONSTRUCTION LAW, HOMEOWNER LIABILITY.

ALTHOUGH THE HOMEOWNER HIRED CONTRACTORS TO REPAIR HER HOME AND VISITED THE PROPERTY AS THE WORK WAS BEING DONE SHE DID NOT DIRECT OR SUPERVISE THE WORK AND THEREFORE WAS ENTITLED TO SUMMARY JUDGMENT DISMISSING THE LABOR LAW 240(1), 241(6) AND 200 CAUSES OF ACTION (SECOND DEPT).

The Second Department determined defendant homeowner's (Hanson's) motion for summary judgment in this Labor Law 240(1), 241(6) and 200 action was properly granted, in part because the homeowner's exemption from Labor Law liability applied. The facts that the homeowner hired several contractors to repair her home and visited the property while work was being done did not subject her to liability:

Hannon established … that she was the owner of a single-family home and that she did not direct or control the work performed by the plaintiff or his employer… . While Hannon testified at her deposition that she visited the property several times per week to "[p]ick up the mail, check on progress, say hello," her deposition testimony, along with that of the plaintiff, established that she never directed the work … . …[T]he fact that Hannon hired separate contractors to perform different aspects of the work on her property does not render her "a general contractor, responsible for supervising the entire construction project and enforcing safety standards" … .

… Supreme Court properly granted that branch of Hannon's motion which was for summary judgment dismissing the Labor Law § 200 and common-law negligence causes of action insofar as asserted against her. Hannon established, prima facie, that she did not have the authority to supervise or control the method or manner in which

the plaintiff's work was performed … . Navarra v Hannon, 2021 NY Slip Op 04611, Second Dept 8-4-21

LABOR LAW-CONSTRUCTION LAW, ROUTINE MAINTENANCE.

PLAINTIFF'S FALL FROM A LADDER OCCURRED DURING ROUTINE MAINTENANCE AND THEREFORE WAS NOT ACTIONABLE PURSUANT TO LABOR LAW 240 (1) (SECOND DEPT).

The Second Department determined plaintiff's Labor Law 240 (1) cause of action was properly dismissed because plaintiff was engaged in routine maintenance at the time of his fall from a ladder:

"Generally, courts have held that work constitutes routine maintenance where the work involves 'replacing components that require replacement in the course of normal wear and tear'" … .

… [T]he defendants established … that the replacement of the condenser fan motor, which, according to the deposition testimony of the injured plaintiff's employer, weighed approximately 1½ pounds and was the kind of part that required replacement "all the time," constituted routine maintenance and not repairing, or any of the other enumerated activities under Labor Law § 240(1) … . "The work here involved replacing [a] component[ ] that require[s] replacement in the course of normal wear and tear" … . Stockton v H&E Biffer Enters. No. 2, LLC, 2021 NY Slip Op 04568, Second Dept 7-28-21

LABOR LAW-CONSTRUCTION LAW, SCAFFOLDS.

THE SCAFFOLD ON WHICH PLAINTIFF WAS STANDING FELL OVER WHEN HE ATTEMPTED TO MOVE IT WHILE STANDING ON IT; PLAINTIFF WAS ENTITLED TO SUMMARY JUDGMENT ON HIS LABOR LAW 240(1) AND 241(6) CAUSES OF ACTION (SECOND DEPT).

The Second Department determined plaintiff was entitled to summary judgment in this Labor Law 240(1) and 241(6) action. The scaffold fell over when plaintiff attempted to move it while standing on it. There was evidence one of the wheels, which was attached with wire, became detached:

… [T]he plaintiff demonstrated that he was directed to work on a Baker scaffold in order to perform his task of installing tracks on the ceiling, that the scaffold he was using was the only scaffold available to him, that as he was working without assistance, he tried to move the scaffold while he was standing on it, and that after the scaffold toppled over he observed that one of its wheels was detached. The plaintiff also submitted the affidavit of his foreman … who averred … that there were no nuts and bolts securing the wheels to the scaffold, and that the wheels were kept in place with the use of wire. Shortly after the accident, [the foreman] also observed that one of the wheels of the scaffold had become detached from its frame.

… [The] defendants failed to present a plausible view of the evidence—enough to raise a fact question—that there was no statutory violation and that the plaintiff's own acts or omissions were the sole cause of the accident … . Masmalaj v New York City Economic Dev. Corp., 2021 NY Slip Op 05119, Second Dept 9-29-21

NEGLIGENCE, EDUCATION-SCHOOL LAW, EMPLOYMENT LAW.

THE FACT THAT A CONTRACT DESCRIBES A PARTY AS AN INDEPENDENT CONTRACTOR IS NOT NECESSARILY DISPOSITIVE; DESPITE THE WORDING OF THE CONTRACT, THE COMPLAINT HERE STATED A CAUSE OF ACTION BASED UPON AN EMPLOYER-EMPLOYEE RELATIONSHIP (SECOND DEPT).

The Second Department determined the complaint stated a cause of action against the school district as the employer of a therapist, Silecchia, who allegedly injured plaintiff-student in therapy session. Although the contract between the school district and Silecchia's employer, PBS, stated PBS was responsible for the conduct of PBS's employees, evidence suggested some control over PBS by the district:

Although the agreement provided that all employees of the service provider, which was defined as PBS, shall be deemed as employees of the service provider for all purposes and that the service provider alone would be responsible for their work, personal conduct, direction, and compensation, "[t]he fact that a contract exists designating a person as an independent contractor is to be considered, but is not dispositive" … . Other provisions in the agreement, including the scope of services provision, which provided, … that parent training services shall be in coordination with the students' classroom teachers and/or at the direction of the District's Committee on Special Education, provided some indication that the District may have maintained control over the method and means by which PBS, and therefore, Silecchia, were to perform the work … . D. S. v Positive Behavior Support Consulting & Psychological Resources, P.C., 2021 NY Slip Op 04626, Second Dept 8-4-21

NEGLIGENCE, ESPINAL, LAUNCH AN INSTRUMENT OF HARM.

QUESTION OF FACT WHETHER A CONTRACTOR WAS LIABLE TO A SUBCONTRACTOR FOR LAUNCHING AN INSTRUMENT OF HARM; THE SUBCONTRACTOR WAS INJURED ATTEMPTING TO FIX THE PROBLEM ALLEGEDLY CREATED BY THE CONTRACTOR (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined there was a question of fact whether a contractor, Home Crafts, launched an instrument of harm such that the contractor was liable to a subcontractor, Catalano, who fell from a ladder when attempting to fix the problem. Home Craft had ordered that sheet metal be placed over a chimney during the installation of gas fireplace inserts. The sheet metal caused smoke to back up when the fireplace was tested. Catalano fell when taking the sheet metal off the chimney:

… "[A] contractor may be said to have assumed a duty of care and, thus, be potentially liable in tort, to third persons when the contracting party, in failing to exercise reasonable care in the performance of its duties, launches a force or instrument of harm" … .

Here, Home Crafts failed to establish, prima facie, that it did not launch a force or instrument of harm by directing Catalano to seal the chimney, without alerting the other contractors that the fireplace at issue was rendered inoperable due to the inability to ventilate smoke … . Santibanez v North Shore Land Alliance, Inc., 2021 NY Slip Op 04921, Second Dept 9-1-21

NEGLIGENCE, 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

NEGLIGENCE, MEDICAL MALPRACTICE.

PLAINTIFF'S EXPERT'S AFFIDAVIT IN THIS MEDICAL MALPRACTICE ACTION WAS NOT CONCLUSORY OR SPECULATIVE; THE AFFIDAVIT DEMONSTRATED THE EXPERT WAS QUALIFIED TO RENDER AN OPINION ON PROPER WOUND CARE; DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff's expert's affidavit should not have been rejected on the ground the expert was not qualified to give an opinion on proper wound care, or on the ground the affidavit was conclusory:

… [T]he plaintiff raised a triable issue of fact through the expert affirmation of Craig A. Nachbauer, a thoracic surgeon and Medical Director of the University of Vermont Health Network-CVPH Wound Center, who opined within a reasonable degree of medical certainty that the respondents departed from the accepted standard of care and that such departure resulted in decubitus ulcers and the disfigurement of the plaintiff's knees … . … [T]he plaintiff's expert raised a triable issue of fact as to whether the respondents failed to take appropriate measures to prevent the decubitus ulcers … , including allowing him to remain prone without turning or repositioning him for over 90 hours, without the use of pillows, foam, and gel pads to protect his hips or knees … .

… [T]he plaintiff's expert established that his qualifications were sufficient to render an opinion as to the propriety of the wound care provided to the plaintiff in 2008 … . … [T]he plaintiff's expert averred … that he had practiced surgery and wound care for approximately 30 years and that by virtue of his training and experience, he was fully familiar with the standards of accepted practice in the field of wound care, and with the responsibilities of hospital staff and physicians in the prevention and treatment of pressure/decubitus ulcers, as they existed in 2008. Cerrone v North Shore-Long Is. Jewish Health Sys., Inc., 2021 NY Slip Op 04593, Second Dept 8-4-21

NEGLIGENCE, MUNICIPAL LAW, POLICE LIABILITY, SPECIAL RELATIONSHIP.

QUESTIONS OF FACT PRECLUDED SUMMARY JUDGMENT IN THIS ACTION AGAINST THE TOWN; TOWN POLICE HAD CONFISCATED PLAINTIFF'S DECEDENT'S HUSBAND'S GUN AFTER SHE TOLD THE POLICE HE HAD ASSAULTED HER; THE TOWN SUBSEQUENTLY RETURNED THE GUN TO HER HUSBAND AFTER LEARNING HE WAS A RETIRED POLICE OFFICER; HER HUSBAND THEN SHOT AND KILLED PLAINTIFF'S DECEDENT AND TOOK HIS OWN LIFE (SECOND DEPT).

The Second Department determined the town's motion for summary judgment was properly denied. Plaintiff's decedent had called the town police and told them her husband had assaulted her and that she feared for her life. The town police confiscated her husband's gun. The town returned the gun upon learning the husband was a retired police officer, even though he was not licensed to possess a gun in New York. He shot and killed plaintiff's decedent and then took his own life:

Government action, if discretionary, may not be a basis for liability, while ministerial actions may be, but only if they violate a special duty owed to the plaintiff, apart from any duty to the public in general … . Here … the return of the firearm … was not a discretionary function. [Decedent's husband] did not, … produce a license to possess the gun in the State of New York, and did not produce the proper identification under the Law Enforcement Officers Safety Act … . * * *

… [T]he evidence demonstrated the existence of triable issues of fact as to whether the Town, through its police officers, voluntarily assumed a duty on behalf of the decedent when they confiscated [the] gun in response to the decedent's alleged report that [her husband] had physically assaulted her.

… The Town was not entitled to summary judgment … on the ground that [decedent"s husband's] shooting of the decedent was an intervening act that severed the causal connection between the Town's alleged negligence … and the injuries and death to the decedent … . An intervening act may not serve as a superseding

cause, and relieve an actor of responsibility, where the risk of the intervening act occurring is the very same risk which renders the actor negligent … . Santaiti v Town of Ramapo, 2021 NY Slip Op 04986, Second Dept 9-15-21

NEGLIGENCE, MUNICIPAL LAW, UNJUST ENRICHMENT.

THE CITY ORDERED PLAINTIFF TO REPAIR A WATER LEAK ON PLAINTIFF'S PROPERTY WHICH THE CITY CLAIMED CAUSED A SINK HOLE IN THE ABUTTING ROAD; PLAINTIFF PAID FOR EXCAVATING THE AREA AND FIXING THE ROAD; PLAINTIFF SUED THE CITY ALLEGING THERE WAS NO WATER LEAK AND THE CITY NEGLIGENTLY ORDERED HER TO REPAIR THE ROAD; THE NEGLIGENCE CAUSE OF ACTION WAS PROPERLY DISMISSED (NO SPECIAL RELATIONSHIP WITH PLAINTIFF), BUT THE UNJUST ENRICHMENT CAUSE OF ACTION BASED ON PLAINTFF'S PAYING FOR THE REPAIR OF THE PUBLIC ROAD SHOULD NOT HAVE BEEN DISMISSED (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined the negligence cause of action against the city was properly dismissed, but the unjust enrichment cause of action should not have been dismissed. A sink hole developed in front of plaintiff's proper. The city concluded there was a leak in the water connection to plaintiff's property and issued a violation requiring repair. Plaintiff had the area excavated and repaired the sink hole but allegedly discovered no leak. Plaintiff sued the city for the related expenses. The negligence cause of action did not fly because the city was exercising a governmental function and there was no special relationship between the city and plaintiff. However the unjust enrichment cause of action should not have been dismissed:

An unjust enrichment claim is rooted in the equitable principle that a person shall not be allowed to enrich himself unjustly at the expense of another" … . "To adequately plead such a cause of action, a plaintiff must allege that '(1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered'" … .

… [W]e find [the complaint] sufficiently alleged that the City was unjustly enriched, at the plaintiff's expense, by the plaintiff's excavation and repair of the public road where the sinkhole was located, and that it would be against equity and good conscience to permit the City to retain what is sought to be recovered—i.e., the repaired road—without paying for those repairs … . The City had a duty to keep its public road in a reasonably safe condition … , and it could be unjustly enriched by being spared the expense of repairing the sinkhole in the road … . Moreover, the complaint alleges that the plaintiff only incurred fees in repairing the road because the City's agent negligently informed her that she had to excavate the road to fix an alleged leak. This alleged benefit conferred on the City through its allegedly tortious conduct sufficiently pleads that it is against equity and good conscience to permit the defendant to retain the benefit … . Trenholm-Owens v City of Yonkers, 2021 NY Slip Op 04627, Second Dept 8-4-21

NEGLIGENCE, RAILING GAVE WAY, LIABILITY OF LLC AS OWNER.

THE SOLE MEMBER OF THE LLC WHICH OWNED THE PROPERTY COULD NOT BE HELD LIABLE FOR THE DANGEROUS CONDITION SOLELY BY VIRTUE OF HIS MEMBER STATUS; HOWEVER THERE WAS A QUESTION OF FACT WHETHER THE LLC COULD BE LIABLE (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court in this premises liability case, determined the sole member of the LLC (Romanoff) which owned the premises was not liable, but there was a question of fact whether the LLC had constructive knowledge of the defective railing which collapsed when plaintiff leaned on it:

… [T]he plaintiff failed to raise a triable issue of fact. Romanoff, as a member of the LLC, cannot be held liable for the company's obligations by virtue of that status alone … , and the plaintiff failed to adduce evidence as to the existence of circumstances that would entitle him to pierce the corporate veil to impose personal liability on Romanoff … .

… [T]he Romanoff defendants failed to establish, prima facie, that the LLC did not have constructive notice of the alleged hazardous condition … . In support of their motion, the Romanoff defendants submitted … evidence that the porch railing that collapsed had not been physically inspected in the eight months following the purchase of the premises. They also failed to demonstrate that the alleged dangerous condition of the porch railing was latent and not discoverable upon a reasonable inspection. … [T]he Romanoff defendants relied upon the plaintiff's deposition testimony that, as he leaned onto the railing to shake dust out of a blanket, he felt the railing move as soon as he made contact with it, and it did not appear to be attached to anything. Hayden v 334 Dune Rd., LLC, 2021 NY Slip Op 04481, Second Dept 7-21-21

NEGLIGENCE, CONTRACT LAW, RELEASES, LANGUAGE BARRIER.

THE RELEASE WAS VALID EVEN THOUGH PLAINTIFF DID NOT UNDERSTAND ENGLISH; CPLR 2101, WHICH REQUIRES DOCUMENTS IN A FOREIGN LANGUAGE WHICH ARE FILED OR SERVED BE ACCOMPANIED BY AN ENGLISH TRANSLATION, DOES NOT APPLY BECAUSE THE RELEASE WAS IN ENGLISH (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the release executed by plaintiff with respect to defendant M & I was valid, despite the fact that plaintiff did not understand English:

A person who does not understand the English language is not automatically excused from complying with the terms of a signed agreement, since such person must make a reasonable effort to have the agreement made clear to him or her … . Here, the deposition testimony of the injured plaintiff … demonstrates that the terms of the release were explained to the injured plaintiff before he executed the document … . Furthermore, contrary to the plaintiffs' contention, the Supreme Court erred in determining that CPLR 2101(b) precluded consideration of the release. That statute provides that papers to be "served or filed shall be in the English language" and "[w]here an affidavit or exhibit annexed to a paper served or filed is in a foreign language, it shall be accompanied by an English translation and an affidavit by the translator stating his qualifications and that the translation is accurate" (CPLR

2101[b]). Here, the release was written in English. Ivasyuk v Raglan, 2021 NY Slip Op 04706, Second Dept 8-18-21

NEGLIGENCE, SLIP AND FALL, BUSINESS RECORDS.

THE CLIMATOLOGICAL DATA SUBMITTED BY DEFENDANT IN THIS ICE AND SNOW SLIP AND FALL CASE WAS NOT AUTHENTICATED; BECAUSE DEFENDANT DID NOT DEMONSTRATE THERE WAS A STORM IN PROGRESS AT THE TIME OF THE FALL, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant's motion for summary judgment in this ice and snow slip and fall case should not have been granted. The climatological data presented to show there was a storm in progress at the time of the fall was not authenticated, related to a different county, and conflicted with plaintiff's testimony at the 50-h hearing:

… [T]he defendant failed to meet its initial burden as the movant. Contrary to the defendant's contention, the three pages of climatological data that it submitted in support of its motion should have been authenticated because these pages themselves did not indicate that the data contained therein was "taken under the direction of the United States weather bureau" (CPLR 4528). In any event, the climatological data was gathered from a neighboring county, and it was inconsistent with the plaintiff's testimony at a General Municipal Law § 50-h hearing that light snow fell about [*2]six hours prior to the accident. Under the circumstances, the defendant failed to establish, prima facie, that a storm was in progress at the time of the accident or that it did not have a reasonable opportunity after the cessation of the storm to remedy the alleged slippery condition … . Beaton v City of New York, 2021 NY Slip Op 04477, Second Dept 7-21-21

NEGLIGENCE, SLIP AND FALL, BUSINESS RECORDS.

THE CLIMATOLOGICAL RECORDS WERE NOT CERTIFIED AS BUSINESS RECORDS AND THEREFORE COULD NOT BE RELIED UPON TO SHOW A STORM IN PROGRESS AT THE TIME OF THE SLIP AND FALL; PROOF OF A GENERAL INSPECTION ROUTINE COULD NOT BE RELIED UPON TO SHOW THE ABSENCE OF CONSTRUCTIVE NOTICE OF THE BLACK ICE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant's motion for summary judgment in this black-ice slip and fall case should not have been granted. The climatological records submitted to demonstrate there was a storm in progress at the time of the fall were not certified as business records and were otherwise insufficient. The evidence of a routine inspection practices was not sufficient to demonstrate a lack of constructive notice:

… [T]he defendant relied upon, among other things, climatological data for Poughkeepsie Airport and Danbury Municipal Airport in Connecticut, as well as spotter reports of snowfall accumulation in neighboring towns. However, because these records were not certified as business records, they were inadmissible (see CPLR 4518[a] …). In any event, the climatological data and spotter reports gathered from nearby areas were insufficient to demonstrate, prima facie, that the storm in progress rule applied … . Moreover, the climatological data was inconsistent and contradicted the parties' deposition testimony, transcripts of which the defendant also submitted in support of its motion, as to whether precipitation was falling at or near the time of the plaintiff's accident … . * * *

… "[M]ere reference to general cleaning practices, with no evidence regarding any specific cleaning or inspection of the area in question, is insufficient to establish a lack of constructive notice" … . Here, the testimony of the defendant's witness, at best, established the defendant's general inspection practices with respect to snow and ice on the defendant's property … . Thus, absent specific evidence that this area was inspected prior to the plaintiff's fall, the defendant cannot rely on this testimony in meeting its prima facie burden … . Johnson v Pawling Cent. Sch. Dist., 2021 NY Slip Op 04543, Second Dept 7-28-21

NEGLIGENCE, SLIP AND FALL, COOPERATIVES, CONTRACT LAW.

BY THE TERMS OF THE MANAGING AGENT'S CONTRACT WITH THE COOPERATIVE, THE MANAGING AGENT DID NOT FULLY ASSUME THE DUTY TO MAINTAIN THE COOPERATIVE PREMISES SUCH THAT THE AGENT WOULD BE LIABLE FOR PLAINTIFF'S SLIP AND FALL ON THE PREMISES; THE MANAGING AGENT'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court in this slip and fall case, determined the defendant managing agent was not liable based on the terms of managing agent's contract with the cooperative where plaintiff fell:

Where … a managing agent is accused of nonfeasance which causes injury to a third party, it is subject to liability only where it has complete and exclusive control of the management and operation of the property in question … . A managing agent is not in complete and exclusive control of the premises where the owner has reserved to itself a certain amount of control in the written agreement … . …

… [T]he terms of the management agreement … established (1) that the resident manager, who was an employee of the cooperative, was responsible for supervising all personnel, including the maintenance staff, (2) that all personnel were employees of the cooperative, and (3) that all maintenance, repairs, and inspections were performed by the resident manger or members of the maintenance staff. Cacciuottolo v Brown Harris Stevens Mgt., 2021 NY Slip Op 04656, Second Dept 8-11-21

NEGLIGENCE, SLIP AND FALL, DOCUMENTARY EVIDENCE.

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, ESPINAL.

THE "BUILDING" DEFENDANTS AND THE COMPANY WHICH INSTALLED AND MAINTAINED THE AIR CONDITIONING UNIT WHICH ALLEGEDLY LEAKED WATER ON THE FLOOR WERE NOT ENTITLED TO SUMMARY JUDGMENT IN THIS SLIP AND FALL CASE; THE LANDLORD DID NOT DEMONSTRATE IT WAS AN OUT-OF-POSSESSION LANDLORD; THE "BUILDING" DEFENDANTS DID NOT DEMONSTRATE THEY DID NOT HAVE ACTUAL OR CONSTRUCTIVE KNOWLEDGE OF THE CONDITION; AND THE COMPANY WHICH INSTALLED AND MAINTAINED THE AIR CONDITIONER DID NOT SHOW IT DID NOT LAUNCH AND INSTRUMENT OF HARM.

The Second Department, reversing Supreme Court, determined the summary judgment motions by several defendants in this slip and fall case should not have been granted in this slip and fall case. Plaintiff alleged she slipped on water dripping from and air conditioning unit in the break room. The landlord did not demonstrate it was an out-of-possession landlord. The defendants failed to show they did not have actual of constructive notice of the condition. Superior, the company which installed the air conditioner (HVAC system], did not show that it did not launch an instrument of harm:

An out-of-possession landlord and its agent may be liable for injuries occurring on its premises if it has "retained control over the premises and has a duty imposed by statute or assumed by contract or a course of conduct" to perform maintenance and repairs … . … [The defendants] failed to establish … that they were out-of-possession landlords, that they did not assume a duty by course of conduct to maintain the area of the building at issue, including the HVAC system, and that they relinquished control over the premises to such a degree so as to extinguish their duty to maintain the premises … . * * *

… Superior's submissions demonstrated that it entered into a contract with the … defendants' general contractor to install the HVAC system, that the installation was completed approximately eight months before the plaintiff's alleged slip and fall, and that, subsequently, it entered into a contract … to service and maintain at least

a part of that HVAC system, and this contract was in effect at the time of the accident. Superior failed to establish … that the source of the leak at issue was not the HVAC system. Superior also failed to eliminate all triable issues of fact as to whether it launched an instrument of harm by creating the alleged recurring condition through its negligent installation or maintenance of the HVAC system … . Taliana v Hines REIT Three Huntington Quadrangle, LLC, 2021 NY Slip Op 05138, Second Dept 9-29-21

NEGLIGENCE, SLIP AND FALL, FIREFIGHTERS, MUNICIPAL LAW.

PLAINTIFF FIREFIGHTER ALLEGED DEBRIS ON STAIRS IN DEFENDANT'S HOME CAUSED HIM TO FALL WHILE FIGHTING A FIRE; THE DEBRIS DID NOT VIOLATE THE NYC ADMINISTRATIVE CODE SO THE GENERAL MUNICIPAL LAW 205-A CAUSE OF ACTION WAS PROPERLY DISMISSED; HOWEVER THE COMMON LAW NEGLIGENCE CAUSE OF ACTION SHOULD NOT HAVE BEEN DISMISSED (SECOND DEPT).

The Second Department, modifying Supreme Court, determined the plaintiff firefighter's General Municipal Law 205-a action was properly dismissed, but the common law negligence action against the owner of the home where plaintiff fell while fighting a fire should not have been dismissed. Plaintiff alleged debris on a stairway caused the fall. The General Municipal Law 205-a cause of action was dismissed because the debris was not a structural defect and did not therefore violate the NYC Administrative Code:

… Supreme Court properly granted that branch of the defendant's motion which was for summary judgment dismissing so much of the cause of action pursuant to General Municipal Law § 205-a as was predicated on violations of Administrative Code of the City of New York §§ 28-301.1 and 29-107.5 i… . The defendant demonstrated, prima facie, that the dangerous condition which allegedly caused the plaintiff's injuries "did not constitute a specific structural or design defect giving rise to liability under the Administrative Code" … . …

… Supreme Court should not have granted that branch of the defendant's motion which was for summary judgment dismissing the cause of action alleging common-law negligence insofar as asserted against him. Contrary to the defendant's contention, the firefighter's rule does not bar this cause of action under the circumstances of this case … . The defendant failed to establish that he lacked constructive notice of the debris on the stairway, including a box, which allegedly caused the plaintiff to fall … . Pomilla v Bangiyev, 2021 NY Slip Op 04984, Second Dept 9-15-21

NEGLIGENCE, SLIP AND FALL, MUNICIPAL LAW, NOTICE.

IN A SIDEWALK SLIP AND FALL CASE, WHERE THE VILLAGE CODE REQUIRES WRITTEN NOTICE OF THE DEFECT BE GIVEN TO THE VILLAGE CLERK AS A CONDITION PRECEDENT TO LIABILITY, PROOF THAT WRITTEN NOTICE WAS GIVEN TO SOME OTHER VILLAGE OFFICER OR ENTITY WILL NOT DEFEAT THE VILLAGE'S MOTION FOR SUMMARY JUDGMENT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the village's motion for summary judgment in this sidewalk slip and fall case should have been granted. The village code provided the village would not be liable unless written notice of the condition had been given to the village clerk. Here the notice was apparently given to another village officer or body:

Village Code § 59-l provides that "[n]o civil actions shall be maintained against the Village for damages or injuries to persons or property sustained" from a defect in Village property "unless written notice" of the defect "was actually given to the Village Clerk and there was a failure or neglect within a reasonable time after the receipt of such written notice to repair or remove the defect." Where, as here, a municipality has enacted a prior written notice law, it may not be subjected to liability for injuries caused by a dangerous condition which comes within the ambit of the law unless it has received prior written notice of the alleged defect or dangerous condition pursuant to the terms of the prior written notice law, or an exception to the prior written notice requirement applies … .

Here, the Village established its prima facie entitlement to judgment as a matter of law by submitting, inter alia, an affidavit from the Village Clerk, who averred that she had conducted a search of the records contained in the Office of the Village Clerk and that there was no prior written notice of the alleged defective condition that caused the injured plaintiff's accident.

In opposition, the plaintiffs failed to raised a triable issue of fact as to whether the Village Clerk had received prior written notice of the alleged defective condition. Evidence that written notice may have been provided to another Village officer or body did not give rise to a triable issue of fact, since Village Code § 59-l requires that written notice be actually given to the Village Clerk … . Hiller v Village of Warwick, 21 NY Slip Op 04704, Second Dept 8-18-21

NEGLIGENCE, SLIP AND FALL, NOTICE.

AN INSPECTION OF THE BLACKTOP FIVE TO SEVEN WEEKS BEFORE PLAINTIFF ALLEGEDLY STEPPED IN A HOLE AND FELL DID NOT DEMONSTRATE DEFENDANT DID NOT HAVE CONSTRUCTIVE NOTICE OF THE CONDITION (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant in this slip and fall case did not demonstrate it did not have constructive notice of the hole in the blacktop where plaintiff allegedly fell:

"To meet its initial burden on the issue of lack of constructive notice, [a] defendant must offer some evidence as to when the area in question was last cleaned or inspected relative to the time when the plaintiff fell" … .

Here, the defendants submitted evidence that a paving contractor inspected the parking lot prior to the plaintiff's accident, and found no defective conditions in the area of the plaintiff's accident. However, that inspection occurred approximately five to seven weeks prior to the plaintiff's accident … . Moreover, although the defendants' property manager submitted an affidavit in which she attested that she did not find any potholes or pothole-type conditions during her inspection of the area a few days after the plaintiff's accident, her contemporaneous notes and her

deposition testimony acknowledged that she found, and had repaired, three "tiny holes" or "small spots by each curb curve" in the subject parking lot. Hughes v Tower Crestwood 2015, LLC, 2021 NY Slip Op 04705, Second Dept 8-18-21

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, TRAFFIC ACCIDENT, BICYCLISTS, VEHICLE AND TRAFFIC LAW.

THE JURY SHOULD HAVE BEEN INSTRUCTED ON THE VEHICLE AND TRAFFIC LAW PROVISION WHICH REQUIRES SIGNALING FOR 100 FEET BEFORE MAKING A TURN, EVEN THOUGH THE TRUCK WHICH MADE THE TURN WAS STOPPED AT A TRAFFIC LIGHT; DEFENSE VERDICT IN THIS TRUCK-BICYCLE ACCIDENT CASE REVERSED (SECOND DEPT).

The Second Department, in a full-fledged opinion by Justice Barros, overruling a City Court decision, reversing the jury verdict in this truck-bicycle traffic accident case, determined the jury should have been instructed on the Vehicle and Traffic Law provision requiring that a turn signal be activated for 100 feet before turning. The truck was at a stop light and plaintiff testified the truck's turn signal was not on when she pulled up to the stop light next to the truck. When she started riding straight through the intersection, the truck allegedly made a right turn and ran over her. The driver (Murphy) testified he put his signal on and then made the turn. The trial court instructed the jury on the Vehicle and Traffic Law provision which applies to parked cars and which does not have the "100-foot" signaling requirement. The Second Department found that the truck was not "parked" within the meaning of that provision:

Vehicle and Traffic Law § 1163(b) provides that "[a] signal of intention to turn right or left when required shall be given continuously during not less than the last one hundred feet traveled by the vehicle before turning." Under Vehicle and Traffic §

1163(a), Murphy was required to signal his intention to turn right at the subject intersection. Thus, since a signal of intention to turn was required, the clear and unambiguous words used in Vehicle and Traffic Law § 1163(b) also required Murphy to give such signal "continuously during not less than the last one hundred feet" that he traveled before making the turn. The provision makes no exception for vehicles that are stopped at a red traffic light … .

… Vehicle and Traffic Law § 1163(d), which applies … to vehicles moving from a parked position, and which does not require a vehicle to signal its turn 100 feet before making it, is inapplicable. Murphy's truck was not parked within the meaning of "park or parking" under Vehicle and Traffic Law § 129. Rather, it was stopped at a red light … . To the extent that People v Brandt (60 Misc 3d 956, 961 [Poughkeepsie City Ct]) holds otherwise, we overrule it.

The precise and specific duty established in Vehicle and Traffic Law § 1163(b) bore directly on the facts to which the parties testified, and, therefore, the Supreme Court erred in refusing to give that charge … . The statute establishes a standard of care, the unexcused violation of which is negligence per se … . Moore v City of New York, 2021 NY Slip Op 04483, Second Dept 7-21-21

NEGLIGENCE, TRAFFIC ACCIDENTS, CROSSING GUARDS, PEDESTRIANS.

PLAINTIFF WAS STRUCK AFTER DEFENDANT CROSSING GUARD MOTIONED FOR HIM TO CROSS; THE CROSSING GUARD'S MOTION FOR SUMMARY JUDGMENT PROPERLY GRANTED; THE DISSENT WOULD HAVE DENIED THE MOTION (SECOND DEPT).

The Second Department, over a dissent, affirmed the grant of the crossing guard's (Gandolfo's) and the county's motion for summary judgment in this pedestrian-vehicle accident case. Defendant Gandolfo had assumed her position in the crosswalk and motioned for infant plaintiff to cross the road when plaintiff was struck by a car driven by Upton. The dissent argued there was some evidence that Gandolfo may have been negligent:

Vehicle and Traffic Law § 1102 provides that "[n]o person shall fail or refuse to comply with any lawful order or direction of any police officer or flagperson or other person duly empowered to regulate traffic." Here, the County defendants … [submitted] transcripts of the deposition testimony of Gandolfo, Upton, and an eyewitness to the accident, which demonstrated that Upton's actions were the sole proximate cause of the accident. Gandolfo testified that, upon seeing the infant at the southern corner of the intersection from her post on the northern corner, she entered the crosswalk, and, upon reaching the middle, raised her stop sign toward traffic traveling east on Montauk Highway, and her gloved hand toward traffic traveling west, checked in both directions two times for approaching vehicles, and seeing none, nodded to the infant to enter the crosswalk. Gandolfo further testified that she heard Upton's vehicle, which was traveling east on Montauk Highway, before she saw it, and that, despite Gandolfo's presence in the crosswalk, Upton failed to stop her vehicle, and struck the infant as he had almost reached the middle of the crosswalk. The eyewitness testified that, after dropping her child off at the high school, she was waiting for the infant to walk through the crosswalk before making a right turn onto Montauk Highway, and the crossing guard, dressed in a crossing guard uniform, was in the middle of the crosswalk holding a stop sign, when the infant was struck as he approached the middle of the crosswalk. During her deposition, Upton, who frequently traveled the route where the accident occurred, testified that, prior to striking the infant, she saw Gandolfo in the road, holding up her stop sign, but did not see the infant until after her vehicle struck him. Christopher W. v County of Suffolk, 2021 NY Slip Op 04922, Second Dept 9-1-21

NEGLIGENCE, TRAFFIC ACCIDENTS, EMPLOYMENT LAW, WORKERS' COMPENSATION.

DEFENDANT DID NOT DEMONSTRATE PLAINTIFF IN THIS TRAFFIC ACCIDENT CASE WAS A SPECIAL EMPLOYEE OR A CO-EMPLOYEE OF DEFENDANT AT THE TIME OF THE ACCIDENT; THEREFORE DEFENDANT'S WORKERS' COMPENSATION AFFIRMATIVE DEFENSE SHOULD HAVE BEEN DISMISSED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant's "Workers'-Compensation-exclusive-recovery" defense should have been dismissed. Plaintiff was involved in a traffic accident driving defendant's van, which plaintiff alleged was not properly maintained. Defendant unsuccessfully argued plaintiff was a special employee or a co-employee of defendant and therefore plaintiff's only remedy was Workers' Compensation:

"Generally, workers' compensation benefits are the sole and exclusive remedy of an employee against an employer or co-employee for injuries sustained in the course of employment (see Workers' Compensation Law §§ 11, 29[6] …). "For purposes of the Workers' Compensation Law, a person may be deemed to have more than one employer—a general employer and a special employer … . "A special employee is 'one who is transferred for a limited time of whatever duration to the service of another,' and limited liability inures to the benefit of both the general and special employer" … . Many factors are weighed in deciding whether a special employment relationship exists, and generally no single one is decisive. Principal factors include who has the right to control the employee's work, who is responsible for the payment of wages and the furnishing of equipment, who has the right to discharge the employee, and whether the work being performed was in furtherance of the special employer's or the general employer's business. The most significant factor is who controls and directs the manner, details, and ultimate result of the employee's work" … . * * *

… [T]he evidence did not support a conclusion that a special employment relationship existed between the plaintiff and the defendant … at the time of the accident. Furthermore, the evidence indicated that the defendant was not a co-

employee of the plaintiff at … the time of the accident. The defendant testified that prior to [the accident], he … began working for another car service company, and that, at the time of the accident, he was in Texas training for another employment opportunity. Chiloyan v Chiloyan, 2021 NY Slip Op 04696, Second Dept 8-18-21

NEGLIGENCE, TRAFFIC ACCIDENTS, MUNICIPAL LAW.

THE CITY DID NOT DEMONSTRATE THE ABSENCE OF A LEFT TURN TRAFFIC SIGNAL WAS BASED ON A STUDY FINDING THE SIGNAL WAS NOT WARRANTED; THEREFORE THE CITY DID NOT DEMONSTRATE IT WAS ENTITLED TO IMMUNITY IN THIS HIGHWAY-PLANNING ACTION BY A PEDESTRIAN WHO WAS STRUCK BY A VEHICLE MAKING A LEFT TURN (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the city's motion for summary judgment in this pedestrian-vehicle accident case should not have been granted. Plaintiff was crossing the street in the crosswalk with the pedestrian light in her favor when she was struck by a car making a left turn. There was a left turn lane but no left turn traffic signal. The city did not demonstrate the design of the traffic light was based upon a study which considered whether a left turn signal was warranted:

… [I]n the field of traffic design engineering, the State is accorded a qualified immunity from liability arising out of a highway planning decision" … . Under the doctrine of qualified immunity, a governmental entity may not be held liable for a highway safety planning decision unless its study of a traffic condition is plainly inadequate, or there is no reasonable basis for its traffic plan … . Immunity will apply only "where a duly authorized public planning body has entertained and passed on the very same question of risk as would ordinarily go to the jury" … .

Here, the City failed to establish that the design of the subject traffic signal, including the determination that no left-turn signal was warranted, was based on a study which entertained and passed on the very same question of risk that the plaintiff would put to a jury … . Rosado v City of New Rochelle, 2021 NY Slip Op 04675, Second Dept 8-11-21

REAL PROPERTY LAW, DEEDS, TRUSTS AND ESTATES.

THE GRANTOR WAS NOT THE SOLE HEIR OF THE TITLE HOLDER; THEREFORE THE DEED PURPORTING TO TRANSFER A 100% INTEREST IN THE PROPERTY WAS VOID AB INITIO (SECOND DEPT).

The Second Department determined a deed was null and void because the grantor was not the sole heir of the title holder:

By a deed dated July 25, 2012, Colie Gallman, Jr., alleged to be the sole heir of Lillian Hudson, purportedly transferred his 100% interest in certain real property owned by Hudson to the defendant. In January 2015, the plaintiff commenced this action against the defendant seeking a judgment declaring that the July 25, 2012 deed is null and void. * * *

A misrepresentation in a deed that the seller of the property is the sole heir of the holder of the title to the property renders the conveyance void ab initio … . Here, the evidence and affidavits submitted by the plaintiff to the Supreme Court during the course of motion practice in this action established that Colie Gallman, Jr., was not the sole heir of Hudson as of the date of the subject deed, and thus, the deed purporting to convey all of the interest in the subject property is void ab initio … . In opposition, the defendant failed to raise a triable issue of fact. 23A Vernon, LLC v Oneal, 2021 NY Slip Op 05017, Second Dept 9-22-21

TRUSTS AND ESTATES, WILLS, NATURE AND EXTENT OF PROPERTY.

THE PROPONENT OF THE WILL DID NOT DEMONSTRATE DECEDENT KNEW THE NATURE AND EXTENT OF THE PROPERTY HE WAS DISPOSING AT THE TIME THE WILL WAS EXECUTED (SECOND DEPT).

The Second Department, over a strong dissent, determined that Alice, the decedent's sister, did not prove the decedent knew the nature and extent of the property he was disposing at the time the will was executed:

Alice testified that the decedent told her his total assets amounted to $200,000. The decedent then told the attorney who prepared the will that his total assets amounted to $1.5 million, when in fact, with the annuity, his assets, including nonprobate property consisting of an IRA in the amount of $258,299, are valued at more than $2.6 million. This amount does not include the CDs the decedent claimed were held in trust for his grandchildren, which are not listed on the inventory of assets filed with the Surrogate's Court. * * *

On the day he executed the will [December 15], the 83-year-old decedent, who had stage IV prostate cancer, had been a patient at WPH for two weeks, since December 1, 2014. He was admitted with a fever, generalized weakness, pneumonia, bilateral pleural effusion, and a 30-to-40-pound weight loss over the prior three to four months. During those two weeks, he had a choking incident on December 4, which caused respiratory and cardiac arrest and resulted in intubation and transfer to the ICU, and a second incident on December 13, two days prior to executing the will, during which he developed respiratory arrest, was transferred to the CCU, and was sedated with morphine. At times, during the day before he executed the will, as well as on the morning of the day of the execution, the decedent exhibited an inability to follow instructions, disorientation, confusion, inability to benefit from education, impulsive behavior, and a potential to injure himself. On both the day prior to the execution of the will and the day the will was executed, the decedent was intubated and on a ventilator and unable to speak. The decedent was also sedated with

lorazepam the day before the execution of the will. Matter of Falkowsky, 2021 NY Slip Op 05122, Second Dept 9-29-21

ZONING, LAND USE, ADMINISTRATIVE LAW.

THE ZONING BOARD OF APPEALS' (ZBA'S) DENIAL OF A LOT-SIZE VARIANCE CONFLICTED WITH A PRIOR RULING BASED ON SIMILAR FACTS; THEREFORE THE ZBA WAS REQUIRED TO PROVIDE A FACTUAL BASIS FOR ITS DECISION; THE DECISION, WHICH WAS SUPPORTED ONLY BY COMMUNITY OPPOSITION, WAS ARBITRARY AND CAPRICIOUS (SECOND DEPT).

The Second Department affirmed Supreme Court's ruling that the zoning board of appeals (ZBA's) denial of a lot-size variance was arbitrary and capricious:

"A decision of an administrative agency which neither adheres to its own prior precedent nor indicates its reason for reaching a different result on essentially the same facts is arbitrary and capricious," and thus, "[w]here an agency reaches contrary results on substantially similar facts, it must provide an explanation" … .

Here, the ZBA failed to set forth any factual basis in the determination to establish why it was reaching a different result on essentially the same facts as a prior application that had been granted … . Further, in response to the petitioner's submission of expert testimony, the ZBA's findings were merely supported by generalized community opposition and were not corroborated by any empirical data or expert testimony … . Matter of O'Connor & Son's Home Improvement, LLC v Acevedo, 2021 NY Slip Op 04915, Second Dept 9-1-21