NEW YORK APPELLATE DIGEST, LLC

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With Practice Points
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APPEALS.

ALTHOUGH THE ISSUES ON APPEAL COULD HAVE BEEN RAISED IN AN APPEAL WHICH WAS DISMISSED FOR FAILURE TO PROSECUTE, THE COURT EXERCISED ITS JURISDICTION TO CONSIDER THE INSTANT APPEAL; THE MOTION FOR A JUDGMENT AS A MATTER OF LAW WAS BROUGHT BEFORE PLAINTIFF CLOSED HER CASE AND THEREFORE SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing the defense judgment as a matter of law in this medical malpractice case, determined: (1) although the issues could have been raised in the appeal of the original judgment which was dismissed for failure to prosecute, the Second Department exercised its jurisdiction to consider the issues in this appeal from the denial of the motion to reargue; (2) the motion for a judgment as a matter of law was premature (made before plaintiff closed her case) and therefore should not have been granted:

… [A]s a general rule we do not consider any issue raised on a subsequent appeal that was raised, or could have been raised, in an earlier appeal that was dismissed for lack of prosecution, we have the inherent jurisdiction to do so … . Here, the plaintiff appealed from the March 29, 2018 judgment entered in favor of the defendants, and that appeal was dismissed for lack of prosecution. Nevertheless, under the circumstances, including that the appeal from the judgment was still pending at the time the notice of appeal was filed from the subject order made upon reargument, we exercise our jurisdiction to review the issues properly raised on the appeal from the order … . …

"A motion for judgment as a matter of law is to be made at the close of an opposing party's case or at any time on the basis of admissions (see CPLR 4401), and the grant of such a motion prior to the close of the opposing party's case generally will be reversed as premature even if the ultimate success of the opposing party in the action is improbable" … . Here, the defendants' motions for judgment as a matter of law dismissing the complaint were made before the close of the plaintiff's case, and were not based upon admissions by the plaintiff. Fuchs v Long Beach Med. Ctr., 2021 NY Slip Op 06153, Second Dept 11-10-21

Practice Point: As a rule, issues which could have been raised in a prior appeal will not be considered in a subsequent appeal. Here the court made an exception to that rule based upon the unique facts.

CIVIL PROCEDURE, ATTORNEYS.

THE EMAIL EXCHANGE BETWEEN THE ATTORNEYS IN THIS PERSONAL INJURY ACTION CONSTITUTED AN ENFORCEABLE SETTLEMENT WHICH WAS UNAFFECTED BY THE SUBSEQUENT GRANTING OF DEFENDANTS' SUMMARY JUDGMENT MOTION (SECOND DEPT).

The First Department, reversing Supreme Court, determined the email exchange between attorneys constituted an enforceable settlement of the personal injury action which was unaffected by the subsequent granting of summary judgment to the defendants:

The settlement agreement was stated in an email communication in which plaintiffs' counsel stated, "This is to confirm settlement in the sum of $275,000. Please send release language and parties to be released." Later that day, plaintiffs' counsel sent a follow-up email, stating, "Please confirm we are settled." Sea Crest's counsel responded, "Confirmed. I'll have release information to you ASAP." …

The emails, which reduced the settlement to a writing in accordance with CPLR 2104, were "subscribed" within the meaning of the statute, as the sender was identifiable and there was no contention that Sea Crest's counsel did not send any of the emails intentionally … . Rawald v Dormitory Auth. of the State of N.Y., 2021 NY Slip Op 06109, First Dept 11-9-21

Practice Point: Emails no longer need to be "signed" to create a valid settlement agreement. Here the email exchange constituted an agreement to settle which was not affected by the subsequent grant of defendants' motion for summary judgment.

CIVIL PROCEDURE, JURISDICTION.

THE JUDGE SHOULD NOT HAVE DISMISSED THE COMPLAINT SUA SPONTE; ALTHOUGH DEFENDANT WAS NOT SERVED, DEFENDANT'S APPEARANCE PRO SE WAIVED ANY LACK-OF-JURISDICTION ARGUMENT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the judge should not have, sua sponte, dismissed the complaint and noted that a party (Taddeo) who has not been served, but who appears in the action pro se, has waived a lack-of-jurisdiction argument:

"A court's power to dismiss a complaint, sua sponte, is to be used sparingly and only when extraordinary circumstances exist to warrant dismissal" … . Moreover, a ministerial dismissal, made without notice and without benefit of further judicial review, is erroneous … . Under such circumstances, the court should direct the parties to show cause why the complaint should not be dismissed, and enter a formal order of dismissal on notice to the parties… .

Here, the Supreme Court never ordered the plaintiff to show cause why its failure to serve [defendant] should not result in the dismissal of the complaint. The court had only directed the plaintiff to provide certain information, and the plaintiff did so.

The Supreme Court also erred in concluding that the failure to serve [defendant] constituted a jurisdictional defect. "An appearance by a defendant in an action is deemed to be the equivalent of personal service of a summons upon him [or her], and therefore confers personal jurisdiction over him [or her], unless he [or she] asserts an objection to jurisdiction either by way of motion or in his [or her] answer" . Here, by filing a pro se answer that did not include an objection to jurisdiction, Taddeo waived any argument that the court lacked personal jurisdiction over him … . Bayview Loan Servicing, LLC v Taddeo, 2021 NY Slip Op 06147, Second Dept 11-10-21

Practice Point: The argument that the court does not have jurisdiction over a party who was not served is waived by that party's appearance and failure to object to jurisdiction.

CRIMINAL LAW, APPEALS, JUDGES.

THE JUDGE DID NOT ENSURE THAT DEFENDANT'S WAIVER OF A JURY TRIAL WAS KNOWING, INTELLIGENT AND VOLUNTARY (SECOND DEPT).

The Second Department, reversing defendant's manslaughter and criminal possession of a weapon convictions, determined the judge did not make an adequate inquiry to ensure defendant's waiver of a jury trial was knowing, intelligent and voluntary. Although the issue was not preserved, the appeal was considered in the interest of justice:

A defendant's waiver of the right to a jury trial is governed by CPL 320.10, which provides, in relevant part, that a defendant "may at any time before trial waive a jury trial and consent to a trial without a jury in the superior court in which the indictment is pending. . . . Such waiver must be in writing and must be signed by the defendant in person in open court in the presence of the court, and with the approval of the court" … . In addition, the record as a whole must also reflect that "[t]he circumstances surrounding the waiver . . . support the conclusion that it was knowing, intelligent and voluntary" … . While the trial judge eliciting the defendant's "full understanding of the importance of the right being waived" … is considered good practice, "no particular catechism is required to establish the validity of a jury trial waiver" … .

… [A]t the time of the purported jury waiver, the 76-year-old defendant—who had no prior contact with the criminal justice system other than a disorderly conduct violation dating back to 1980—had a recent history of paranoid delusional thinking and possible early dementia and was being treated with anti-psychotic medication. The defendant had been examined several times pursuant to CPL article 730 and had repeatedly been found unfit to proceed in the two years immediately following his arrest. … [D]uring the very terse oral colloquy that preceded the signing of the

written waiver, the Supreme Court did not ask the defendant, for instance, if he was compliant with his anti-psychotic medication and was able to understand the proceedings. Indeed, the court failed to ask the defendant a single question relating to the waiver. People v Black, 2021 NY Slip Op 06183, Second Dept 11-10-21

Practice Point: Although there is no standard catechism for an oral jury-trial-waiver colloquy, here the judge failed to ask a single question about the waiver. The defendant's signing a written waiver was not sufficient.

CRIMINAL LAW, APPEALS, MIRANDA.

DEFENDANT'S WAIVER OF APPEAL WAS INVALID; UNWARNED STATEMENTS MADE DURING CUSTODIAL INTERROGATION SHOULD HAVE BEEN SUPPRESSED; GUILTY PLEA VACATED (FOURTH DEPT).

The Fourth Department, vacating defendant's guilty plea, determined defendant's waiver of appeal was invalid and unwarned statements made by the defendant under custodial interrogation should have been suppressed. Defendant was interrogated about two missing college students. As the questioning proceeded it became apparent defendant was involved in the matter in some way, and eventually she revealed where the students were:

Defendant orally waived her right to appeal and executed a written waiver of the right to appeal. The language in the written waiver is inaccurate and misleading insofar as it purports to impose "an absolute bar to the taking of a direct appeal" and purports to deprive defendant of her "attendant rights to counsel and poor person relief, [as well as] all postconviction relief separate from the direct appeal" … . … A "waiver[] cannot be upheld . . . on the theory that the offending language can be ignored and that [it is] enforceable based on the court's few correctly spoken terms" … . …

… [D]efendant was placed in a conference room and was questioned by an investigator from approximately 3:15 p.m. until 5:00 p.m. At 5:00 p.m., another investigator accompanied defendant to the bathroom, and the investigator continued

questioning defendant. During that conversation, defendant made admissions demonstrating that she was more involved in the case than she had initially revealed, that she knew who was holding the students, and that one of the students had been shot. … At no time was she ever given Miranda warnings. People v Hughes, 2021 NY Slip Op 06231, Fourth Dept 11-12-21

CRIMINAL LAW, CREDIBILITY OF POLICE OFFICERS.

THE SUPPRESSION COURT PROPERLY FOUND THE POLICE OFFICERS' TESTIMONY ABOUT THE REASON FOR THE TRAFFIC STOP CREDIBLE; TWO DISSENTERS DISAGREED (FOURTH DEPT).

The Fourth Department, over a two-justice dissent, determined the suppression court properly deemed the police officers' testimony about the reasons for the traffic stop credible. After a car chase and a foot chase, a weapon was seized from the vehicle and defendant was charged with criminal possession of a weapon second. The dissenters argued that the testimony of the police officers was not credible and therefore the People did not meet their burden to show the traffic stop was lawful:

… [W]e reject defendant's … contention and the dissent's assertion that the officers' suppression hearing testimony should be discredited, and thus that the traffic stop should be deemed unlawful, because the officers failed to disclose that they… had a pretextual reason for stopping the vehicle based on information from a confidential informant conveyed to them by another officer in an earlier phone call. The officers acknowledged when the suppression hearing was reopened that they had failed to disclose in their reports or during their prior testimony that they had a pretextual reason for stopping the vehicle based on information from a confidential informant that a firearm may have been in the vehicle. Nonetheless, one of the officers offered a credible explanation for that initial nondisclosure and the other explained that, consistent with their prior testimony, the officers had not received a "call for service," i.e., a citizen complaint via 911, prior to the traffic stop but, rather, had received a phone call from another officer. We conclude on this record that the officers' testimony "was not so inherently incredible or improbable as to warrant disturbing the . . . court's determination of credibility" after it was presented with

the initial omissions and subsequent explanations … . People v Addison, 2021 NY Slip Op 06225, Fourth Dept 11-12-21

CRIMINAL LAW, EVIDENCE, JUDGES.

THE COURT SHOULD NOT HAVE CONDITIONED ITS SANDOVAL RULING ON WHETHER DEFENSE COUNSEL CROSS-EXAMINES THE PEOPLE'S WITNESSES ABOUT THEIR CRIMINAL HISTORIES (SECOND DEPT).

The Second Department, reversing defendant's convictions and ordering a new trial, determined the judge's ruling that defendant can be cross-examined about prior convictions if the defense cross-examines the People's witnesses on their criminal histories was improper:

A trial court may "make an advance ruling as to the use by the prosecutor of prior convictions or proof of the prior commission of specific criminal, vicious or immoral acts for the purpose of impeaching a defendant's credibility" … . "[A] balance must here be struck between the probative worth of evidence of prior specific criminal, vicious or immoral acts on the issue of the defendant's credibility on the one hand, and on the other the risk of unfair prejudice to the defendant, measured both by the impact of such evidence if it is admitted after his testimony and by the effect its probable introduction may have in discouraging him [or her] from taking the stand on his [or her] own behalf" and thereby denying the jury significant material evidence … . These considerations "simply do not apply to a witness who is not a defendant, and cross-examination of such a witness should therefore be permitted with respect to any immoral, vicious or criminal act committed by him [or her] which may reflect upon his [or her] character and show him [or her] to be unworthy of belief" … .

… Supreme Court failed to engage in the appropriate balancing between the probative worth of the convictions on the issue of the defendant's credibility against the possible prejudice to the defendant … , and, instead, improperly conditioned its Sandoval ruling on whether defense counsel would impeach the People's witnesses with their criminal histories. … Whether the defendant impeaches the credibility of

the People's witnesses during cross-examination based upon those witnesses' criminal histories, or whether the People's witnesses testify, are not relevant factors to consider in making a Sandoval ruling … . People v Brannon, 2021 NY Slip Op 06184, Second Dept 11-10-21

Practice Point: A Sandoval ruling re: prior crimes about which the defendant may be cross-examined can not be conditioned on whether defense counsel cross-examines the People's witnesses about their criminal history.

CRIMINAL LAW, INCLUSORY CONCURRENT COUNTS.

THE DWI COUNTS WERE INCLUSORY CONCURRENT COUNTS OF VEHICULAR MANSLAUGHTER WHICH MUST BE DISMISSED AS A MATTER OF LAW (FOURTH DEPT).

The Fourth Department noted that DWI is an inclusory concurrent count of vehicular manslaughter:

… [T]he DWI counts of which defendant was convicted are inclusory concurrent counts of vehicular manslaughter in the second degree , reconsideration . Thus, those DWI counts must be dismissed as a matter of law … . People v Conklin, 2021 NY Slip Op 06246, Fourth Dept 11-12-21

Practice Point: DWI is an inclusory concurrent count of vehicular manslaughter which must be dismissed upon conviction of the greater offense.

CRIMINAL LAW, JURISDICTION.

THE CUSTODIAL INTERFERENCE OFFENSES DID NOT TAKE PLACE IN ONTARIO COUNTY AND DID NOT HAVE A PARTICULAR EFFECT ON ONTARIO COUNTY; THEREFORE THE COURT DID NOT HAVE JURISDICTION OVER THEM (FOURTH DEPT).

The Fourth Department determined the custodial interference offenses did not have a "particular effect" in Ontario County, therefore the court did not have jurisdiction over them:

… [I]t is undisputed that all elements of the crime of custodial interference in the first degree were committed outside of Ontario County, the People contend that Ontario County Court could exercise jurisdiction under the " 'injured forum' " provisions of CPL 20.40 (2) (c) … . That statute provides, in pertinent part, that "[a] person may be convicted in an appropriate criminal court of a particular county, of an offense of which the criminal courts of this state have jurisdiction pursuant to section 20.20, . . . when: . . . [e]ven though none of the conduct constituting such offense may have occurred within such county: . . . [s]uch conduct had, or was likely to have, a particular effect upon such county or a political subdivision or part thereof, and was performed with intent that it would, or with knowledge that it was likely to, have such particular effect therein" … . * * *

… [T]he conduct alleged in the counts of the indictment charging defendant with custodial interference in the first degree occurred outside Ontario County and did not have a materially harmful impact on the governmental processes or community welfare of Ontario County. That conduct impacted three people: the children and their mother, none of whom resided in Ontario County, and did not impact the community as a whole … . People v Roth, 2021 NY Slip Op 06257, Fourth Dept 11-12-21

Practice Point: If a crime is prosecuted in one county but was committed in another the court does not have jurisdiction over the prosecution unless the offense had "particular effect" on the prosecuting county. The "particular effect" must impact the county as a whole.

CRIMINAL LAW, JURORS.

SUPREME COURT SHOULD HAVE CONDUCTED A HEARING ON THE MOTION TO SET ASIDE THE VERDICT ALLEGING RACIAL BIAS AMONG JURORS (FOURTH DEPT).

The Fourth Department, remitting the matter, determined defendant's motion to set aside the verdict based upon juror misconduct should not have been denied without a hearing:

… [S]etting aside the verdict "is warranted where a juror had an undisclosed preexisting prejudice that would have resulted in his or her disqualification if it had been revealed during voir dire, such as an undisclosed, pretrial opinion of guilt against the defendant"… .

… [T]he court erred in denying defendant's motion without a hearing because the sworn allegations in support of the motion, including the affidavits of two jurors, indicated that certain other jurors may have had undisclosed preexisting prejudices against people of defendant's race that may have affected defendant's substantial right to an impartial jury and fair trial … . … [A]s early as the evening following the verdict, the two jurors alleged in emails sent directly to the court that, during deliberations, certain other jurors directed racist comments at the defendants and that racial bias had played a role in the verdict. … [T]he detailed affidavits of the two jurors recounting specific instances of racist comments by certain other jurors did, in fact, allege that the verdict was influenced by racial bias against the defendants … . People v Woodard, 2021 NY Slip Op 06256, Fourth Dept 11-12-21

Practice Point: If a motion to set aside the verdict in a criminal case is supported by detailed affidavits from jurors attesting to the racial bias of other jurors, expressed during deliberations, a hearing is warranted.

CRIMINAL LAW, LESSER INCLUDED OFFENSES.

CRIMINAL SEXUAL ACT FIRST DEGREE IS NOT A LESSER INCLUDED OFFENSE OF PREDATORY ASSAULT AGAINST A CHILD; THE PROSECUTOR IMPROPERLY INJECTED THE INTEGRITY OF THE DISTRICT ATTORNEY'S OFFICE INTO THE CASE (FOURTH DEPT).

The Fourth Department, dismissing one count without prejudice, determined criminal sexual act first degree is not a lesser included offense of predatory sexual assault against a child. Therefore the jury should not have been so instructed. The court noted that the prosecutor improperly injected the integrity of the District Attorney's office into the trial by telling the jury he was at a significant advantage because he had been working on the case for more than a year:

As alleged in count one of the indictment, defendant committed predatory sexual assault against a child because, during a certain period of time, and while "being [18] years old or more, [he] engaged in two or more acts of sexual conduct, which included at least one act of sexual intercourse, oral sexual conduct, anal sexual conduct or aggravated sexual contact, with a female . . . , who was less than [13] years old." Thus, by its explicit language, the count of predatory sexual assault against a child was predicated on defendant's alleged commission of the class B felony of course of sexual conduct against a child in the first degree (see Penal Law § 130.75 [1] [b]) and, as a result, the People could not establish that the offense of criminal sexual act in the first degree, a different class B felony, was a lesser included offense of predatory sexual assault against a child within the meaning of CPL 1.20 (37). Stated another way, it is not impossible to commit predatory sexual assault against a child, as the offense was charged in the indictment in this case, without concomitantly, by the same conduct, committing criminal sexual act in the first degree. Indeed, as the offense was charged in the indictment here, a defendant could commit predatory sexual assault against a child by engaging in sexual intercourse or aggravated sexual contact with the victim (see Penal Law §§ 130.96, 130.75 [1] [b]), without concomitantly, by the same conduct, committing criminal sexual act in the first degree (see § 130.50 [3]). People v Getman, 2021 NY Slip Op 06224, Fourth Dept 11-12-21

Practice Point: Criminal sexual act first degree is not a lesser included offense of predatory sexual assault against a child.

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA).

THE LEVEL-THREE RISK ASSESSMENT WAS NOT MANDATORY AND THE EVIDENCE IN SUPPORT OF A DOWNWARD DEPARTURE SHOULD HAVE BEEN CONSIDERED; ON REMAND WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW ARE REQUIRED (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined the SORA court should not have considered the level three risk assessment mandatory and should have considered the evidence submitted in support of a downward department. On remand, the SORA court was directed to make findings of fact and conclusions of law in writing:

Where a "defendant's prior felony conviction of a sex crime raised his [or her] presumptive risk level from level two to level three . . . , the [SORA] court is not mandated to apply the override but may, in appropriate circumstances, impose a lower risk level"… .

… Supreme Court, in its oral decision, incorrectly treated defendant's presumptive level three classification as mandatory, and the court therefore never ruled on his downward departure application. We reject the People's assertion that the court corrected that error in its subsequent written decision. … [T]he written decision explicitly "incorporates . . . [the] oral decision" and again failed to rule on defendant's downward departure application. … [T]he "compelling evidence" line in the written decision merely summarized the findings of the Board of Examiners of Sex Offenders and was not … an independent holding or ruling by the court. People v Douglas, 2021 NY Slip Op 06229, Fourth Dept 11-12-21

Practice Point: The level three risk level assessment was not mandatory. Therefore the court should have considered the defense evidence offered in support of a

downward modification. The court is required to make written findings of fact and conclusions of law.

CRIMINAL LAW, SUPPRESSION, HEARSAY, ATTORNEYS.

DEFENDANT WAS DENIED HIS RIGHT TO CONFRONT THE WITNESSES AGAINST HIM BY A DETECTIVE'S TESTIM0NY ABOUT THE SUBSTANCE OF A STATEMENT ALLEGEDLY MADE BY A NONTESTYING ACCOMPLICE; THE ERROR WAS PRESERVED FOR APPEAL BY THE DEFENDANT HIMSELF, NOT DEFENSE COUNSEL, CITING CRAWFORD V WASHINGTON (SECOND DEPT),

The Second Department, reversing the murder conviction and ordering a new trial, in a full-fledged opinion by Justice Chambers, determined a detective's testimony about what a nontestifying accomplice (Andy Dabydeen) said violated defendant's right to confront the witnesses against him. Although defense counsel did not object to the detective's testimony, the defendant himself objected after the fact, citing Crawford v Washington, 541 US 51, which preserved the issue for appeal:

After the defendant continued to deny any involvement in the murder, the detective confronted him by saying that "Andy had told us what had happened." The detective further testified that, shortly thereafter, upon returning from the bathroom, the defendant reacted to that information by stating that he could not believe that Dabydeen had "snitched" on him. …

… [W]e find that the defendant's objection—albeit made after the detective had finished testifying and the People had rested—was sufficiently specific to draw the Supreme Court's attention to the Sixth Amendment Confrontation Clause problems attendant to the People's use, as part of their case-in-chief, of Dabydeen's out-of-court testimonial statement directly implicating the defendant in the murder. …

This is not to suggest that the People are precluded from giving some context to the defendant's statement that Dabydeen had "snitched" on him. We merely emphasize that the People could have done so without disclosing the substance of Dabydeen's

incriminating statement … . People v Lockley, 2021 NY Slip Op 06192, Second Dept 11-10-21

Practice Point: Here the defendant, not defense counsel, preserved the error for appeal by objecting to a detective's hearsay testimony describing what an non-testifying accomplice said. The murder conviction was reversed.

CRIMINAL LAW, VEHICLE AND TRAFFIC LAW.

THE $1000 FINE FOR THE DWI COUNT WAS HARSH AND EXCESSIVE; THE FAILURE TO IMPOSE A FINE FOR AGGRAVATED UNLICENSED OPERATION WAS ILLEGAL; REFUSING TO SUBMIT TO A BREATH TEST IS NOT A COGNIZABLE OFFENSE (FOURTH DEPT).

The Fourth Department determined: (1) the $1000 fine imposed for the driving while intoxicated count (in addition to a period of incarceration) was harsh and excessive; (2) the sentence for aggravated unlicensed operation was illegal; and (3) refusing to submit to a breath test is not a crime:

… [T]he sentence imposed on count two of the indictment is illegal because a fine of between $500 and $5,000 is mandatory upon a conviction of aggravated unlicensed operation of a motor vehicle in the first degree, even where, as here, the court also imposes a sentence of incarceration (see Vehicle and Traffic Law § 511 [3] [b] …). …

… [W]e note that the Appellate Term, Second Department, has repeatedly stated that a defendant's "refusal to submit to a breath test did not establish a 'cognizable offense' " … . We agree, and we therefore further modify the judgment by reversing that part convicting defendant of count four of the indictment, vacating the plea with respect to that count of the indictment and dismissing that count. People v Bembry, 2021 NY Slip Op 06235, Fourth Dept 11-21-21

Practice Point: Refusing to submit to a breath test is not a cognizable offense.

CRIMINAL LAW, YOUTHFUL OFFENDERS.

ALTHOUGH DEFENDANT PLED GUILTY TO AN ARMED FELONY, HE WAS AN "ELIGIBLE YOUTH" ENTITLED TO CONSIDERATION WHETHER MITIGATING CIRCUMSTANCES JUSTIFIED AFFORDING HIM YOUTHFUL OFFENDER STATUS (SECOND DEPT).

The Second Department, vacating defendant's sentence, determined Supreme Court should have found defendant to be an "eligible youth" and then considered whether mitigating circumstances warranted youthful offender status:

While the ultimate determination as to whether an "eligible youth" (CPL 720.20[1]) should be afforded youthful offender status must be made "[a]fter receipt of a written report of the investigation and at the time of pronouncing sentence" … , there is no such requirement with respect to the initial determination as to whether the defendant is an "eligible youth" … .

… Supreme Court improvidently exercised its discretion in finding that the defendant was ineligible for youthful offender status. Pursuant to CPL 720.10(3), although the defendant entered a plea of guilty to an armed felony offense in which he was the sole participant, he could be eligible for youthful offender status if there were "mitigating circumstances that bear directly upon the manner in which the crime was committed" … . Such mitigating circumstances include "'a lack of injury to others or evidence that the defendant did not display a weapon during the crime'" … . Here, there is no indication in the record that the defendant displayed the firearm which was recovered from his backpack, that the defendant caused or threatened any injury to another individual, or that the defendant intended to use the firearm against another individual. Consequently, the court should have determined that the defendant is an "eligible youth," and thus, proceeded to determine whether the defendant is entitled to youthful offender status pursuant to CPL 720.20(1) … . People v Morris, 2021 NY Slip Op 06195, Second Dept 11-10-21

Practice Point: A defendant who pleads guilty to an armed felony may still be eligible for youthful offender status based upon mitigating circumstances.

CRIMINAL LAW.

DEFENDANT'S UNLAWFUL IMPRISONMENT CONVICTION MERGED WITH OFFENSES OF WHICH DEFENDANT WAS ACQUITTED; ALTHOUGH THE ISSUE WAS NOT PRESERVED FOR APPEAL, THE CONVICTION WAS VACATED IN THE INTEREST OF JUSTICE (SECOND DEPT).

The Second Department, applying the merger doctrine and considering the unpreserved issue in the interest of justice, determined the unlawful imprisonment conviction must be vacated:

[Defendant was convicted] of coercion in the first degree, unlawful imprisonment in the first degree, criminal obstruction of breathing or blood circulation, menacing in the second degree, reckless endangerment in the second degree, unlawful fleeing a police officer in a motor vehicle in the third degree, and reckless driving … . * * *

… [U]pon exercising our interest of justice jurisdiction, we conclude that the merger doctrine precludes the defendant's conviction of unlawful imprisonment in the first degree because the confinement of the complaining witness in the defendant's car was only the incidental means to the accomplishment of the conduct underlying the counts of which the defendant was acquitted … . Thus, the conviction of unlawful imprisonment in the first degree must be vacated and that count of the indictment dismissed. The defendant's unpreserved contention that the merger doctrine applies to other offenses for which he was convicted is without merit … . People v Sims, 2021 NY Slip Op 06200, Second Dept 11-10-21

Practice Point: Convictions of offenses which merge with offenses of which defendant was acquitted must be vacated.

CRIMINAL LAW, SECOND FELONY OFFENDER.

THE FEDERAL DRUG CONVICTION WAS NOT THE EQUIVALENT OF A VIOLATION OF PENAL LAW 220.39 FOR SECOND-FELONY-OFFENDER PURPOSES; IT IS NOT CLEAR WHETHER THIS DECISION OVERRULED FIRST DEPARTMENT PRECEDENT, OR WHETHER A REVIEW OF THE FEDERAL ACCUSATORY INSTRUMENT WOULD HAVE DEMONSTRATED THE TWO OFFENSES WERE EQUIVALENT (FIRST DEPT).

The First Department, reversing Supreme Court, determined the federal drug conviction was not the equivalent of a violation of Penal Law 220.39, Therefore the federal conviction could not be the basis for second felony offender status. It is not clear whether this decision overruled other First Department decisions to the contrary, or whether a review of the federal accusatory instrument would demonstrate an equivalency:

Defendant was adjudicated a second felony offender based on a federal conviction for distribution and possession with intent to distribute cocaine under 21 USC § 841(a)(1). That provision is not equivalent to Penal Law § 220.39 because the federal crime has a broader knowledge element, requiring only that the defendant "knowingly or intentionally . . . possess with intent to . . . distribute . . . a controlled substance," as opposed to having particular knowledge of the drug type actually possessed … . The cases in which this Court has upheld 21 USC § 841(a)(1) as the equivalent of a New York felony did not address this discrepancy in the breadth of the knowledge element; other equivalency issues were raised in those cases … . People v Campanioni, 2021 NY Slip Op 06105, First Dept 11-9-21

Practice Point: The First Department held 21 USC 841 (a)(1) is not the equivalent of Penal Law 220.39 for second felony offender purposes, overruling prior First Department rulings. Whether an examination of the federal and state accusatory instruments would reveal the two offenses were equivalent was not addressed on this appeal.

ENVIRONMENTAL LAW, UTILITIES, MUNICIPAL LAW.

THE STATE PROPERLY APPROVED THE CONSTRUCTION OF ELECTICITY-GENERATING WIND TURBINES IN WESTERN NEW YORK (FOURTH DEPT).

The Fourth Department, affirming the approval of the construction of wind turbines for generating electricity by the NYS Board on Electric Generation Siting and the Environment (Board), determined: (1) the correct local wind-turbine law for the Town of Freedom was considered by the Board; (2) the Board correctly refused to consider a local wind-turbine law for the Town of Farmersville enacted after the evidentiary phase of the project was complete; (3) the Board properly considered the climate-change effects of the project and the effects on wild life and the land; and (4) the coalition contesting the Board ruling did not have standing to represent the First Amendment rights of the Amish community:

… [T]he Board must determine … whether a proposed electric generating facility "is a beneficial addition to or substitution for the electric generation capacity of the state" and whether "the adverse environmental effects of the construction and operation of the facility will be minimized or avoided to the maximum extent practicable" (Public Service Law § 168 [3] [a], [c]), and the Board must consider … "the impact on community character" and any additional "social, economic, visual or other aesthetic, environmental and other conditions" deemed pertinent by the Board … . "[T]he Board was created to provide for an expeditious review process and 'to balance, in a single proceeding, the people's need for electricity and their environmental concerns' " … . Furthermore, it is settled that "[t]his [C]ourt's scope of review is limited to whether the decision and opinion of the [B]oard, inter alia, are . . . supported by substantial evidence in the record and matters of judicial notice properly considered and applied in the opinion . . . , are made in accordance with proper procedure . . . and are not arbitrary, capricious or an abuse of discretion" … . "The task of weighing conflicting evidence . . . is properly left to the . . . Board" … . Matter of Coalition of Concerned Citizens v New York State Bd. On Elec. Generation Siting & The Envt. & Alle-Catt Wind Energy, LLC, 2021 NY Slip Op 06221, Fourth Dept 11-12-21

Practice Point: Local Laws which were not enacted at the time of the evidentiary phase of the process for approving the construction of electricity-generating wind turbines will not be considered by the NYS Board on Electric Generation Siting and the Environment.

FAMILY LAW, ATTORNEYS.

THE JUDGE DID NOT MAKE THE REQUIRED INQUIRY RE: DEFENDANT'S WAIVER OF THE RIGHT TO COUNSEL IN THIS CUSTODY PROCEEDING BEFORE ALLOWING DEFENDANT TO PROCEED WITHOUT AN ATTORNEY; NEW HEARING ORDERED (SECOND DEPT).

The Second Department, reversing Supreme Court and ordering a new custody hearing, determined the judge did not make the required inquiry before allowing defendant to waiver her right to counsel:

The parent of any child seeking custody or contesting the substantial infringement of his or her right to custody of such child must be advised "before proceeding that he or she has the right to be represented by counsel of his or her own choosing, of the right to have an adjournment to confer with counsel, and of the right to have counsel assigned by the court in any case where he or she is financially unable to obtain the same" (Family Ct Act § 262[a][v]; see Judiciary Law § 35[8] …). A party may waive the right to counsel, provided he or she makes a knowing, voluntary, and intelligent waiver of that right … . Here, the Supreme Court failed to conduct the requisite inquiry before allowing the defendant to proceed pro se with regard to the hearing and determination of the defendant's motions to modify and/or vacate the custody order … . Wondemagegehu v Edem, 2021 NY Slip Op 06213, Second Dept 11-10-21

Practice Point: Parents have a right to counsel in custody matters. Any waiver of that right must be based upon an adequate inquiry by the judge.

FAMILY LAW, CHILD SUPPORT, APPEALS.

THE ISSUE WHETHER THE STATUTORY REQUIREMENT THAT OBJECTIONS TO CHILD SUPPORT ORDERS BE RULED ON WITHIN 15 DAYS WAS CONSIDERED ON APPEAL AS AN EXCEPTION TO THE MOOTNESS DOCTRINE; THE 15-DAY RULE IS MANDATORY AND MUST BE ENFORCED; THE MOTHER WAS ENTITLED TO ATTORNEY'S FEES UNDER THE EQUAL ACCESS TO JUSTICE ACT BECAUSE HER ACTION WAS THE CATALYST FOR THIS DECISION (FIRST DEPT).

The First Department, reversing Family Court, in a full-fledged opinion by Justice Mazzarelli, determined: (1) the issue whether objections to child support rulings must be ruled on within 15 days (Family Court Act 439(a)) will be considered on appeal as an exception to the mootness doctrine; (2) under the Equal Access to Justice Act (EAJA) (CPLR 8600, et seq) mother-petitioner was entitled to attorney's fees because her action served as a catalyst to this decision enforcing the 15-day rule:

The mother has established that this is not the first time in this case that the issue has arisen. Further, the issue is not likely to be resolved without application of the exception, because the Family Court can so easily obviate it by issuing a decision on the objections, albeit after the expiration of the 15 days. Courts have applied the exception under similar circumstances … . * * *

The statute is mandatory insofar as it plainly states that the court "shall," within 15 days of an objection to a support award being fully submitted, issue a ruling on it … . * * *

Because the CAJ [Chief Administrative Judge, NYC Family Court] responded to the mother's petition by assigning a Family Court judge to rule on her objections, and because the CAJ offers no substantial justification for not having enforced Family Court Act § 439(e) before the petition was filed, the matter should be remanded for an assessment of the mother's attorneys' fees under the State EAJA. Matter of Liu v Ruiz, 2021 NY Slip Op 06089, First Dept 11-9-21

Practice Point: The statutory requirement that objections to child support orders be ruled on within 15 days is mandatory.

Practice Point: Because the issue is likely to recur, the court considered the appeal as an exception to the mootness doctrine.

FAMILY LAW, CUSTODY.

AWARDING A PARENT DECISION-MAKING AUTHORITY FOR ANY MAJOR CHILD-RELATED ISSUE IS TANTAMOUNT TO MODIFYING A CUSTODY ARRANGEMENT TO AWARD SOLE CUSTODY TO THE DECISION-MAKING PARENT; SUPREME COURT SHOULD HAVE HELD A HEARING (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the custody arrangement should not have been modified in the absence of a hearing. The court noted that the award of decision-making authority for any major child-related issue on which the parties cannot agree is tantamount to the award of sole custody:

The Supreme Court erred by, in effect, granting, without a hearing, that branch of the defendant's motion which was to modify the parties' stipulation of settlement and judgment of divorce so as to award her sole legal custody of the child to the extent of awarding her final decision-making authority as to any major child-related issue about which the parties could not agree, and denying that branch of the plaintiff's cross motion which was to modify the stipulation of settlement and judgment of divorce so as to award him sole legal custody. "'[A] court may grant relief that is warranted by the facts plainly appearing on the papers on both sides, if the relief granted is not too dramatically unlike the relief sought, the proof offered supports it, and there is no prejudice to any party'" … . … There can be no question that the award of final decision-making authority is not "dramatically unlike" the relief requested, as decision making is part and parcel to legal custody. … [T]he court erred in granting this award without a hearing. The court's determination that "neither party has established change in circumstances warranting an award of sole custody to either parent" is incongruous with the court's determination to award the defendant final decision-making authority. Since it appears that the court believed

that the parties made an evidentiary showing of a change in circumstances demonstrating a need for a change of decision-making authority to ensure the child's best interests, a hearing on that issue was required … . Trazzera v Trazzera, 2021 NY Slip Op 06208, Second Dept 11-10-21

Practice Point: Awarding a party decision-making authority over any child-related issue on which the parties cannot agree is tantamount to awarding the decision-making parent sole custody of the child.

FAMILY LAW, RELIGION.

THE INSTRUCTION THAT MOTHER NOT "EXPOSE" THE CHILD TO ACTIVITIES NOT IN KEEPING WITH THE CHILD'S FAITH, WHICH IMPLICITLY REQUIRED THAT THE CHILD NOT BE "EXPOSED" TO MOTHER'S LGBTQ IDENTITY, IS NOT ENFORCEABLE (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined the instruction that mother not "expose" the child to activities not in keeping with religious requirements during periods of her parental access was unenforceable. Mother identified as a member of the LGBTQ community, and considered herself an Orthodox Jew:

… [A] court oversteps constitutional limitations when it purports to compel a parent to adopt a particular religious lifestyle. "… '[I]t is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise'" … . A religious upbringing provision "should not, and cannot, be enforced to the extent that it violates a parent's legitimate due process right to express oneself and live freely" … . Thus, where the effect of a religious upbringing provision is to compel a parent to himself or herself practice a religion, rather than merely directing the parent to provide the child with a religious upbringing, the provision must be stricken … .

… [T]he challenged restriction does not expressly require the plaintiff to herself comply with the rules of the child's Orthodox Jewish Chasidic faith during periods

of parental access. … [T]he provision in forbidding her to "expose" the child to any activities which violate the child's Orthodox Jewish Chasidic faith has the same effect … . The only way for the plaintiff to ensure her compliance with the restriction is for her to comply with all religious requirements of the child's faith during her periods of parental access, lest she "expose" the child to activities not in keeping with those religious requirements. … The defendant [father] was especially concerned that the child would be exposed to people involved in a "gay lifestyle" … . Such restrictions on a parent's ability to "express oneself and live freely" go beyond requiring a noncustodial parent to support and enable the child's religious practices, and impermissibly infringe on the noncustodial parent's rights … . Weichman v Weichman, 2021 NY Slip Op 06211, Second Dept 11-10-21

Practice Point: A divorce court cannot restrict a parent's ability to "express him or herself and live freely" in order to support a child's religious practices. Here the instruction that mother not "expose" the child to her LBGTQ lifestyle on the ground that it was not in keeping with religious requirements was struck down.

FAMILY LAW, SURRENDER FOR ADOPTION.

MOTHER TIMELY REVOKED HER EXTRA-JUDICIAL SURRENDER OF HER CHILD FOR ADOPTION; FAMILY COURT SHOULD NOT HAE DENIED MOTHER'S MOTION TO DEEM THE SURRENDER A NULLITY AND SHOULD NOT HAVE CONDUCTED A BEST INTERESTS HEARING (FOURTH DEPT).

The Fourth Department, reversing Family Court, determined mother properly revoked her extra-judicial surrender of the child for adoption and Family Court should not have denied mother's motion to deem the surrender a nullity and should not have conducted a best interests hearing:

… [T]he plain language of Social Services Law § 383-c (6) (a) mandates that a timely revocation shall render the extra-judicial surrender a nullity and that the child shall be returned to the care and custody of the authorized agency, and the statute contains no language providing for a best interests hearing in the event of such a timely revocation … . * * *

… [T]he court here had no statutory basis for refusing to deem the surrender a nullity, denying the birth mother's motion, and instead conducting a best interests hearing. Matter of Tony S.H. (Katrina F.), 2021 NY Slip Op 06238, Fourth Dept 11-12-21

Practice Point: Mother timely revoked her extra-judicial surrender of her child for adoption. In that circumstance the surrender was a nullity, and the court did not have the authority to hold a best interests hearing.

FAMILY LAW, TEMPORARY REMOVAL OF CHILD.

FAMILY COURT SHOULD NOT HAVE RETURNED THE CHILD TO THE PARENTS' CUSTODY AFTER THE CHILD HAD BEEN TEMPORARILY REMOVED BECAUSE OF APPARENT ABUSE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the parents' application for the return of their child after a temporary removal pursuant to Family Court Act article 10 should not have been granted:

"An application pursuant to Family Court Act § 1028(a) for the return of a child who has been temporarily removed shall be granted unless the court finds that 'the return presents an imminent risk to the child's life or health'" … . * * *

The petitioner established a prima facie case of child abuse against the parents by presenting evidence that injuries Ezara sustained would not ordinarily occur absent an act or omission of the caregiver, and that the parents were the caregivers of Ezara during the relevant time period … . Specifically, the petitioner's expert in child abuse pediatrics testified that the then two-month-old Ezara had multiple rib fractures, which appeared to have been sustained at different times, as well as fractures in his legs and a laceration of his spleen, and further testified within a reasonable degree of medical certainty that these injuries were caused by non-accidental trauma. The parents failed to rebut the presumption of culpability with a reasonable and adequate explanation for Ezara's injuries … . Further, the petitioner established that the parents demonstrated such an impaired level of parental judgment with respect to

Ezara so as to create a substantial risk of harm to any child in their care … . Matter of Chase P. (Maureen Q.), 2021 NY Slip Op 06173, Second Dept 11-10-21

FORECLOSURE, REAL PROPERTY ACTIONS AND PROCEEDIGS LAW (RPAPL).

FAILURE TO COMPLY WITH THE NOTICE REQUIREMENTS OF RPAPL 1304 CAN BE RAISED AT ANY TIME; HERE IT WAS RAISED IN OPPOSITION TO THE MOTION TO CONFIRM THE REFEREE'S REPORT; THE PROOF OF COMPLIANCE WAS INSUFFICIENT (SECOND DEPT).

The Second Department, reversing Supreme Court's grant of summary judgment to the bank in this foreclosure action, noted that the failure to comply with the notice requirements of Real Property Actions and Proceedings Law (RPAPL) 1304 can be raised at any time. Here it was raised in opposition to the bank's motion to confirm the referee's report:

… [T]he plaintiff failed to establish that it complied with the requirements of RPAPL 1304. The affidavits of Armenia L. Harrell and La'Shana Farrow, both of whom are officers of Wells Fargo Bank, N.A. (hereinafter Wells Fargo), the servicing agent of the plaintiff, were insufficient to establish that the plaintiff complied with RPAPL 1304. Both Harrell and Farrow attested that they were familiar with Wells Fargo's records and record-keeping practices. Farrow averred, inter alia, that the plaintiff complied with RPAPL 1304 by mailing the required notices. The record indicates that the 90-day notices appear to have been mailed by ASC (America's Servicing Company). However, neither Harrell or Farrow attest that they personally mailed the notices or that they were familiar with the mailing practices and procedures of ASC. Therefore, they failed establish proof of standard office practice and procedures designed to ensure that items are properly addressed and mailed … . Moreover, the plaintiff failed to send individually addressed notices to each borrower; rather, the 90-day notices were jointly addressed to the [defendants]. U.S. Bank N.A. v Krakoff, 2021 NY Slip Op 06209, Second Dept 11-10-21

Practice Point: The failure to comply with the notice requirements of RPAPL 1304 can be raised at any time in a foreclosure action. Here the issue was properly raised in opposition to a motion to confirm the referee's report.

FRAUD, JUDICIARY LAW, NOERR-PENNINGTON DOCTRINE.

THE AIDING AND ABETTING FRAUD AND JUDICIARY LAW CAUSES OF ACTION WERE PRECLUDED BY THE NOERR-PENNINGTON DOCTRINE; THE FRAUDULENT INDUCEMENT CAUSE OF ACTION DID NOT ALLEGE RELIANCE (SECOND DEPT).

The Second Department determined the aiding and abetting fraud and Judiciary Law 487 causes of action were barred by the Noerr-Pennington doctrine (see Mine Workers v Pennington, 381 US 657; Eastern Railroad Presidents Conference v Noerr Motor Freight, Inc., 365 US 127), and the complaint did not state a cause of action for fraudulent inducement:

"The Noerr-Pennington doctrine protects the right under the First Amendment to the United States Constitution to petition the government for governmental action, including through litigation and activity incidental to litigation" … . …

… Supreme Court properly concluded that the causes of action alleging that the defendants aided and abetted fraud and violated Judiciary Law § 487 were barred by the Noerr-Pennington doctrine. The Noerr-Pennington doctrine applied to these causes of action insofar as they were based upon litigation and activities that were incidental to litigation, and the pertinent allegations did not fit within either the "sham" or the "corruption" exceptions to the Noerr-Pennington doctrine … . …

Where a cause of action is based upon misrepresentation or fraud, "the circumstances constituting the wrong shall be stated in detail" (CPLR 3016[b]). Here, the allegations in the complaint failed to sufficiently allege justifiable reliance, and therefore failed to state a cause of action for fraudulent inducement … . Louie's Seafood Rest., LLC v Brown, 2021 NY Slip Op 06167, Second Dept 11-10-21

Practice Point: The Noerr-Pennington doctrine bars fraud-related and Judiciary Law causes of action which are based on allegations made during litigation and activities incidental to litigation.

LABOR LAW- CONSTRUCTION LAW, ELEVATION-RELATED EVENT.

PLAINTIFF INJURED HIS BACK LIFTING A HEAVY METAL STRUCTURE A FEW INCHES TO ALLOW ROOFING MATERIAL TO BE PUT DOWN UNDERNEATH IT; THE INJURY WAS NOT THE RESULT OF AN ELEVATION-RELATED HAZARD COVERED BY LABOR LAW 240 (1) (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined defendants' motion for summary judgment on plaintiff's Labor Law 240 (1) cause of action should have been granted. Plaintiff injured his back lifting a metal structure a few inches so roofing material could be applied underneath it. The injury was not related to the failure to provide a safety device to prevent an elevation-related injury:

… "[L]iability may . . . be imposed under [Labor Law § 240 (1)] only where the 'plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential' " … . The statute "was designed to prevent those types of accidents in which the scaffold, hoist, stay, ladder or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person" … . … [T]he protections of Labor Law § 240 (1) " 'do not encompass any and all perils that may be connected in some tangential way with the effects of gravity' " … .

… Although plaintiff's back injury was "tangentially related to the effects of gravity upon the [structure] he was lifting, it was not caused by the limited type of elevation-related hazards encompassed by Labor Law § 240 (1)" … . … [P]laintiff's injuries "resulted from a 'routine workplace risk[]' of a construction site and not a 'pronounced risk[] arising from construction work site elevation differentials' " … . Branch v 1908 W. Ridge Rd, LLC, 2021 NY Slip Op 06248, Fourth Dept 11-12-21

Practice Point: A back injury caused by lifting a heavy object a few inches was not the result of an elevation-related hazard within the meaning of Labor Law 240 (1), even though the heavy object was located on the roof of the building.

MUNICIPAL LAW, NOTICE OF CLAIM, CIVIL PROCEDURE.

A NOTICE OF CLAIM IS NOT A PLEADING AND THEREFORE NEED NOT BE ANNEXED TO A SUMMARY JUDGMENT MOTION; ALTHOUGH PLAINTIFF IN THIS LABOR LAW 240 (1) AND 241 (6) ACTION ESTABLISHED HE FELL FROM A SCAFFOLD, HE DID NOT ESTABLISH THE FALL WAS DUE TO INADEQUATE SAFETY EQUIPMENT; HIS MOTION FOR SUMMARY JUDGMENT WAS PROPERLY DENIED ON THAT GROUND (SECOND DEPT).

The Second Department determined plaintiff's motion for summary judgment in this Labor Law 240 (1) and 2411 (6) scaffold-fall case was properly denied on evidentiary grounds, but it was not properly denied because the notice of claim was not included with the motion papers. Although the pleadings must be annexed to a summary judgment motion, a notice of claim is not a pleading. The motion was properly denied on evidentiary grounds because it was not demonstrated the fall was the result of a failure to provide adequate safety equipment:

While the defendant correctly contends that CPLR 3212(b) requires that motions for summary judgment be supported by a copy of the pleadings, a notice of claim is not a pleading … . …

… [T]he plaintiff relies solely on his General Municipal Law § 50-h hearing testimony and his deposition testimony, which merely established that he fell from a scaffold. The plaintiff failed to address whether there were scaffold rails, possible tie off points for a harness, or some alternative fall protection. Without more, the plaintiff's testimony that he "moved [his] foot" to the left, causing him to step off of the scaffold and into an "empty space," and that "there was nothing there because [he] stepped on it and . . . thought it was something solid" are insufficient … . Torres v New York City Hous. Auth., 2021 NY Slip Op 06207, Second Dept 11-10-21

Practice Point: A notice of claim is not a pleading and therefore need not be attached to a motion for summary judgment.

NEGLIGENCE, ASSUMPTION OF THE RISK, GENERAL OBLIGATIONS LAW.

QUESTIONS OF FACT ABOUT THE APPLICABILITIY OF THE ASSUMPTION OF THE RISK DEFENSE AND THE VALIDITY OF THE RELEASE UNDER THE GENERAL OBLIGATIONS LAW PRECLUDED SUMMARY JUDGMENT IN FAVOR OF DEFENDANT FITNESS CENTER; ALLEGEDLY, PLAINTIFF WAS INJURED WHEN THE TRAINER INSTRUCTED HIM TO ATTEMPT A BALANCING EXERCISE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined there were question of fact about whether the defendant fitness center could assert the assumption of the risk defense, or whether the released executed by plaintiff was valid pursuant to the General Obligations Law:

The defendant failed to establish … the plaintiff assumed the risk of injury when he unsuccessfully attempted the balancing exercise. The deposition testimony … raises questions of fact as to whether the trainer exposed the plaintiff to an unassumed risk. Specifically, the trainer allegedly encouraged the plaintiff to attempt the exercise after he expressed that he could not perform it, by allegedly offering verbal reassurances such as "I'm right here," which the plaintiff mistakenly believed meant that the trainer would catch him or stabilize him if he began to fall … .

The defendant also failed to establish … the plaintiff's claims are barred by the release the plaintiff executed. The defendant failed to demonstrate the inapplicability of General Obligations Law § 5-326, which would render the release void, as the defendant's evidence did not establish as a matter of law that its facility was not a "gymnasium" within the meaning of that statute … . Haggerty v Northern Dutchess Hosp., 2021 NY Slip Op 06162, Second Dept 11-10-21

Practice Point: Plaintiff was injured at a fitness center while being instructed by a trainer. Questions of fact about whether plaintiff assumed the risk and whether the release violated the General Obligations Law precluded summary judgment.

REAL PROPERTY TAX, FORECLOSURE, CIVIL PROCEDURE, TRUSTS AND ESTATES.

NOTING THE SPLIT OF AUTHORITY BETWEEN THE 2ND AND 4TH DEPARTMENTS, THE 3RD DEPARTMENT SIDED WITH THE 2ND AND HELD THAT, WHERE THE PROPERTY OWNER IS DECEASED, JURISDICTION OVER THE PERSONAL REPRESENTATIVE OF THE DECEDENT IS REQUIRED FOR AN IN REM TAX FORECLOSURE PROCEEDING (THIRD DEPT).

The Third Department, in a complex tax foreclosure case involving many other parties and many other issues, in a full-fledged opinion by Justice Lynch, over a dissent, determined the city could not proceed against property owned by a deceased party without jurisdiction over the personal representative of the decedent's estate. The court noted a split of authority between the Second and Fourth Departments. The Fourth Department held that a tax foreclosure is an in rem proceeding (against the property) and the death of the owner is therefore irrelevant. The Third Department sided with the contrary ruling by the Second Department(requiring jurisdiction over the personal representative). The two-justice dissent argued the Fourth Department's approach is the correct one:

Supreme Court properly granted Paul's motion to vacate the default judgment. Paul is the adult son of Paywantie Allicock (hereinafter decedent), who purchased the property at 82 James Street in the City of Schenectady, Schenectady County (hereinafter the property) in 2004 and resided there with her son until she passed away in May 2015. Paul continues to reside at the premises. At issue is whether petitioner duly acquired jurisdiction over the property for purposes of this RPTL article 11 in rem foreclosure proceeding, commenced in April 2019. Pertinent here, there is a split between the Second and Fourth Departments as to whether a tax foreclosure proceeding may include a parcel where the owner is deceased at the time the action is commenced (compare Matter of Foreclosure of Tax Liens, 165 AD3d

at 1116, with Hetelekides v County of Ontario, 193 AD3d 1414, 1419-1420 [2021]). We ascribe to the viewpoint expressed by the Second Department that such a proceeding may not be commenced until such time as the petitioner first acquires jurisdiction over the personal representative of the decedent's estate … . Matter of City of Schenectady, 2021 NY Slip Op 06120, Third Dept 11-10-21

Practice Point: There is a split of authority on whether tax foreclosures must be brought against a representative of the estate of a deceased property owner. The Fourth Department held the in rem proceedings are against the property, not the property owner, and no representative need be named. The Second and Third Departments disagree.

UNEMPLOYMENT INSURANCE.

CLAIMANT, A MEMBER OF THE CITY BOARD OF ASSESSMENT AND REVIEW (BAR) HIRED TO REVIEW THE FAIRNESS OF PROPERTY TAX ASSESSMENTS, WAS NOT AN EMPLOYEE OF THE CITY AND THEREFORE WAS NOT ELIBIBLE FOR UNEMPLOYMENT INSURANCE BENEFITS (THIRD DEPT).

The Third Department, reversing the Unemployment Insurance Appeal Board, determined claimant, a City Board of Assessment and Review (BAR) member, was not an employee of the city and therefore was not entitled to unemployment insurance benefits. BAR members determine the fairness of property tax assessments:

… [C]laimant acknowledged … that neither the City Assessor nor any other City entity has control over BAR's review and determination of grievances or the means by which such determinations are reached (see RPTL 523, 525, 526). Rather, the City Assessor merely provides BAR with the necessary property information, and once BAR reaches its determination, the role of the City Assessor is limited to adjusting the tentative assessment roll — as necessary — before the assessment roll is finalized (see RPTL 526 [5]). Notably, although the City Assessor could return a determination to BAR to correct "technical" errors, the City Assessor could not alter or modify the determination reached by BAR (see RPTL 526 [5]). Finally, the record

reflects that the City Assessor could neither sanction nor terminate a member of BAR.

Based upon the foregoing, the Board's finding of an employment relationship is not supported by substantial evidence. Matter of McLaughlin (City of Albany–Commissioner of Labor), 2021 NY Slip Op 06119, Third Dept 11-10-21

ZONING, VARIANCES, JUDGES, ADMINISTRATIVE LAW.

THE ADMINISTRATIVE RECORD SUPPORTED THE GRANT OF THE ARIA VARIANCE BY THE ZONING BOARD OF APPEALS; SUPREME COURT SHOULD NOT HAVE SUBSTITUTED ITS JUDGMENT FOR THE BOARD'S (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined the zoning board of appeals (ZBA) properly granted an area variance and Supreme Court should not have substituted its judgment for the board's:

The administrative record and the ZBA's formal return in the CPLR article 78 proceeding establish that the ZBA considered the five statutory factors, including whether the alleged difficulty was self-created … . Thus, we conclude that the ZBA "rendered its determination after considering the appropriate factors and properly weighing the benefit to the [applicants] against the detriment to the health, safety and welfare of the neighborhood or community" if the variance was granted … . We further conclude that the record establishes that the ZBA's determination had the requisite rational basis … . It was therefore error for the court to substitute its judgment for that of the ZBA, "even if such a contrary determination is itself supported by the record" … . Matter of Gasparino v Town of Brighton Zoning Bd. of Appeals, 2021 NY Slip Op 06239, Fourth Dept 11-12-21

Practice Point: As long as the ruling of a zoning board of appeals has a rationale basis, the judge in a subsequent Article 78 proceeding does not have the authority to substitute his or her judgment for the board's.