NEW YORK APPELLATE DIGEST, LLC

First Department Quarterly "Mostly Reversals" Report
January – March 2022

An Organized Compilation of Selected Decisions and Opinions, Mostly Reversals, Released by the First Department January – March 2022. 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 "Mostly Reversals" Report.

Contents

Table of Contents

Table of Contents

Table of Contents

Table of Contents

Table of Contents

Table of Contents

Table of Contents

AGENCY, CONTRACT LAW.

THE CONTRACTOR COULD NOT ESCAPE LIABILITY FOR PAYMENT OF THE SUBCONTRACTOR; THE PAY-WHEN-PAID CLAUSE IN THE CONTRACT IS INVALID; NOTHING IN THE CONTRACT INDICATED THE CONTRACTOR WAS ACTING SOLELY AS AN AGENT FOR THE OWNER (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Moulton, determined defendant Sweet was not an agent such that it could avoid responsibility for paying a subcontractor, Arenson, for the construction work done by Arenson. The First Department further held General Business Law 756-a did not invalidate the

precedent prohibiting pay-when-paid clauses like the one in the contract between Sweet and Arenson:

The scope letter, which is on Sweet's letterhead, contains the following clause: "Subcontractor understands that Contractor is acting as an agent for the Owner, and agrees to look only to funds actually received by the Contractor (from the Owner) as payment for the work performed under this Subcontract." [This is the prohibited pay-when-paid clause.] * * *

… Sweet was not an agent for a disclosed principal. The clearest indicator of Sweet's role, its signature, supports this conclusion. The signature line for "Sweet Construction Approval" and the signature do not indicate that Sweet signed the contract as agent on behalf of a disclosed principal or reflect any limitations … . …

In characterizing itself as "only a facilitator of payment" and "merely a conduit" Sweet ignores that the subcontract provides that the work is to be performed pursuant to the "SCC General Requirements." Those requirements, which also appear in the scope letter, provide that Arenson will … indemnify and hold Sweet harmless with respect to Arenson's work; obtain liability insurance in Sweet's favor; and recognize Sweet's authority to issue safety violations and correct unsafe conditions. These general requirements, on their face, apply to Sweet in its own capacity, and not in its capacity as an agent. Bank of Am., N.A. v ASD Gem Realty LLC, 2022 NY Slip Op 01379, First Dept 3-3-22

APPEALS, FUGITIVE DISENTITLEMENT DOCTRINE.

ALTHOUGH THE APPELLANT WAS IN JAPAN, THE 1ST DEPARTMENT REFUSED TO DISMISS THE APPEAL PURSUANT TO THE FUGITIVE DISENTITLEMENT DOCTRINE IN THIS FAMILY COURT CIVIL-CONTEMPT MATTER; APPELLANT HAD APPEARED VIRTUALLY IN COURT PROCEEDINGS AND STATED HE WOULD RETURN TO NEW YORK TO COMPLY WITH ANY COURT ORDER (FIRST DEPT).

The First Department refused to dismiss the appeal of this Family Court civil contempt matter pursuant to the fugitive disentitlement doctrine (which authorizes

the dismissal of an appeal if the appellant has left the jurisdiction). Here father was in Japan:

Although the father is in Japan, we decline to dismiss the appeal pursuant to the fugitive disentitlement doctrine. There is no "nexus" connecting the father's fugitive status and these proceedings … . The father has continued to appear virtually in court, communicate with his counsel, and consent to relief sought by the mother. He has complied with the terms of his probation and submitted an affidavit stating that he will return to New York to comply with any court order. Under these circumstances, we find that the father has not "flout[ed] the judicial process," frustrated the operation of the courts, or prejudiced the mother's rights by leaving the jurisdiction to warrant dismissal of the appeal … .Matter of Hilary C. v Michael K., 2022 NY Slip Op 01512, First Dept 3-10-22

Practice Point: If an appellant leaves the court's jurisdiction (here father went to Japan), the appeal may be dismissed pursuant to the fugitive disentitlement doctrine. The doctrine was not applied in this Family Court civil contempt case because father participated in court proceedings virtually and stated he would return to New York to comply with any court order.

ARBITRATION, AWARDING RELIEF NOT REQUESTED.

THE ARBITRATOR EXCEEDED HER POWERS BY AWARDING RELIEF WHICH WAS NOT REQUESTED BY ALL THE PARTIES OR AUTHORIZED BY LAW; PUNITIVE DAMAGES, SANCTIONS AND ATTORNEY'S FEES AWARDS VACATED (FIRST DEPT).

The First Department vacated the arbitrator's award of punitive damages, sanctions and attorney's fees because that relief was not requested by the parties, therefore the arbitrator exceeded her power:

Although the American Arbitration Association (AAA) preprinted form petitioner used allows a claimant to seek other relief, including attorneys' fees, interest, arbitration costs and punitive/exemplary damages, the only boxes that petitioner checked off were for interest and arbitration costs. It did not check the punitive

damages box or attorneys' fees box, nor indicate anywhere on its demand that it was seeking such relief. Petitioner never amended its demand for arbitration. Nor did it include a prayer for such relief in its subsequently filed post-arbitration memorandum. By granting unrequested relief, the arbitrator exceeded the expressly enumerated limits on her authority by deciding matters that were not before her … .

Although AAA commercial rule 47(d) empowers an arbitrator to award attorneys' fees, this is only "if all parties have requested such an award or it is authorized by law or their arbitration agreement." Here, neither party requested such an award and it is not authorized by law. Matter of 544 Bloomrest, LLC v Harding, 2022 NY Slip Op 00936, First Dept 2-10-22

ATTORNEYS, CIVIL RIGHTS LAW, DEFAMATION, PRIVILEGE.

THE PRIVILEGE AFFORDED ATTORNEYS UNDER THE CIVIL RIGHTS LAW RE: ALLEGEDLY DEFAMATORY CLAIMS INCLUDED IN A COMPLAINT (WITH ONE EXCEPTION NOT APPLICABLE HERE) IS ABSOLUTE, EVEN IN THE FACE OF ALLEGATIONS OF MALICE AND BAD FAITH (FIRST DEPT).

The First Department determined the allegedly defamatory claims included in a complaint against plaintiff were absolutely privileged with respect to the attorneys who drafted the complaint.

… [T]here is no evidence to support a claim that defendant attorneys acted with malice against plaintiff, either in the commencement of this case or in the preparation of the papers as well as any dissemination of the papers, which are for public consumption to a reporter. … [T]here are no … issues of fact as to whether defendant attorneys instituted and sought to publicize a "sham" action containing defamatory allegations against plaintiff for the sole or primary purpose of disseminating those defamatory allegations while cloaking them in the privilege that attends certain statements made in connection with proceedings before a court (see Williams v Williams, 23 NY2d 592, 599 [1969]). …

In the absence of alleged facts supporting the Williams exception, the privilege under Civil Rights Law § 74 is absolute and applies even where the plaintiff alleges malice or bad faith … . Weeden v Lukezic, 2022 NY Slip Op 00026, First Dept 1-4-22

ATTORNEYS, JUDGES, SANCTIONS.

THE JUDGE DID NOT FOLLOW PROPER PROCEDURE FOR IMPOSING SANCTIONS, I.E., PLAINTIFF'S COUNSEL WAS ORDERED TO PAY $10,000 IN COUNSEL FEES TO DEFENDANT'S COUNSEL (FIRST DEPT).

The First Department, reversing Supreme Court, determined the judge did not follow the procedural requirements for imposing sanctions, i.e., $10,000 in attorney's fees to defendant's counsel, to be paid by plaintiff's counsel:

The motion court's sua sponte award of sanctions against plaintiff's counsel did not satisfy the procedural requirements of the Rules of the Chief Administrator of the Court (22 NYCRR) § 130-1. That section provides that a court may award costs or impose sanctions "upon the court's own initiative, after a reasonable opportunity to be heard" … and "only upon a written decision setting forth the conduct on which the award or imposition is based, the reasons why the court found the conduct to be frivolous, and the reasons why the court found the amount awarded or imposed to be appropriate" … . DeSouza v Manhattan RX LLC, 2022 NY Slip Op 01875, First Dept 3-17-22

Practice Point: Before a judge can impose sanctions, here ordering plaintiff's attorney to pay counsel fees in the amount of $10,000 to defendant's attorney, the relevant rules in 22 NYCRR 130-1 must be complied with, i.e., affording an opportunity to be heard and issuing a written decision explaining the conduct, why it was found frivolous and the reasons for the amount awarded or imposed.

CIVIL PROCEDURE, CHILD VICTIMS ACT, SUE ANONYMOUSLY.

THE PLAINTIFFS' REQUEST TO PROCEED ANONYMOUSLY IN THIS CHILD VICTIMS ACT CASE WAS NOT SUPPORTED BY SUFFICIENT EVIDENCE OF ANY HARM WHICH WOULD RESULT FROM USING PLAINTIFFS' LEGAL NAMES IN THE CAPTION (FIRST DEPT).

The First Department, reversing Supreme Court, determined the plaintiffs in this Child Victims Act action should not have been allowed to proceed anonymously. The request was not supported by sufficient evidence of harm which would result from using plaintiff's legal names in the caption:

Several New York courts "have addressed the legislature's intent in enacting the CVA [Child Victims Act] with respect to the use of pseudonyms and concluded that the legislature 'left it up to each alleged victim to determine whether to seek anonymity' . . . [and] 'left it to the courts to assess each individual case'" … . This Court has held that permission to use a pseudonym will not be granted automatically and has noted that the motion court "should exercise its discretion to limit the public nature of judicial proceedings sparingly and then, only when unusual circumstances necessitate it" … . In determining whether to grant a plaintiff's request to proceed anonymously, the motion court must "'use its discretion in balancing plaintiff's privacy interest against the presumption in favor of open trials and against any potential prejudice to defendant'"… . A plaintiff seeking permission to proceed anonymously by employing a pseudonym must provide facts specific to the plaintiff that will allow the motion court to exercise its discretion in an informed manner … .

Here, plaintiffs' motion to allow 33 unnamed plaintiffs to proceed anonymously should have been denied because plaintiffs failed to submit sufficient evidence to support the relief requested. Plaintiffs only submitted a short attorney affirmation, which merely repeated the relief requested in the order to show cause and made a single vague statement that plaintiffs might suffer further mental harm should their identities be revealed. Plaintiffs failed to provide any specific evidence as to why each unnamed plaintiff should be entitled to proceed anonymously … . Twersky v Yeshiva Univ., 2022 NY Slip Op 00366, First Dept 1-20-22

CIVIL PROCEDURE, DEBTOR-CREDITOR, ENFORCEMENT OF CHINESE JUDGMENT.

SUPREME COURT SHOULD NOT HAVE DISMISSED AN ACTION TO ENFORCE A MONEY JUDGMENT OBTAINED IN THE PEOPLE'S REPUBLIC OF CHINA (PRC) ON THE IMPLICIT GROUND THE DEFENDANTS WERE NOT AFFORDED DUE PROCESS IN THE PRC; THE US STATE DEPARTMENT DOCUMENTS UPON WHICH SUPREME COURT'S RULING WAS BASED DO NOT CONSTITUTE DOCUMENTARY EVIDENCE; THE COMPLAINT SUFFICIENTLY ALLEGED DEFENDANTS HAD AN OPPORTUNITY TO BE HEARD, WERE REPRESENTED BY COUNSEL AND HAD THE OPPORTUNITY TO APPEAL IN THE PRC ACTION (FIRST DEPT).

The First Department, reversing Supreme Court, determined the complaint sufficiently alleged that the money judgment obtained by plaintiff in the People's Republic of China (PRC) comported with the principles of due process. The complaint alleged the defendants had an opportunity to be heard, were represented by counsel, and had a right to appeal the underlying proceeding in the PRC. Plaintiff's action to enforce the foreign judgment should not have been dismissed based upon US State Department reports alleging a lack of judicial independence in the PRC:

The court should not have dismissed the action on the ground that the U.S. State Department's 2018 and 2019 Country Reports on Human Rights Practices (Country Reports) conclusively refuted plaintiff's allegation that the PRC judgment was rendered under a system that comported with the requirements of due process. The Country Reports do not constitute "documentary evidence" under CPLR 3211(a)(1) … . In any event, the reports, which primarily discuss the lack of judicial independence in proceedings involving politically sensitive matters, do not utterly refute plaintiff's allegation that the civil law system governing this breach of contract business dispute was fair. Shanghai Yongrun Inv. Mgt. Co., Ltd v Maodong Xu, 2022 NY Slip Op 01523, First Dept 3-10-22

CIVIL PROCEDURE, PRE-JOINDER MOTION.

A PRE-JOINDER MOTION FOR SUMMARY JUDGMENT MUST BE DENIED (FIRST DEPT).

The First Department, reversing Supreme Court, noted that a pre-joinder motion for summary judgment must be denied:

The Court of Appeals has noted that the rule barring a pre-joinder motion for summary judgment is strictly applied (City of Rochester v Chiarella, 65 NY2d 92, 101 [1985]). While CPLR 3211(c) permits the court, on notice to the parties, to treat a motion to dismiss as a motion for summary judgment before issue is joined, that is not the case here, where [plaintiff] moved directly for summary judgment; thus, a motion for summary judgment brought before a defendant has answered the complaint is premature and must be denied … . SHG Resources, LLC v SYTR Real Estate Holdings LLC, 2022 NY Slip Op 00525, First Dept 1-27-22

CIVIL PROCEDURE, STATUTE OF LIMITATIONS DEFENSE.

ALTHOUGH THE MOTION TO DISMISS ON STATUTE OF LIMITATIONS GROUNDS WAS NOT TIMELY, THE ASSERTION OF THE DEFENSE IN THE REPLY TO THE COUNTERCLAIM WAS TIMELY; THE DEFENSE CAN BE RAISED IN A SUBSEQUENT SUMMARY JUDGMENT MOTION (FIRST DEPT).

The First Department noted that the statute of limitations affirmative defense was timely served in a reply to a counterclaim

[Defendant] NYCTA did not waive its affirmative defense under CPLR 3211(a)(5) because a defense based upon the statute of limitations is waived only if it is neither asserted in a responsive pleading or in a timely motion … . Here the affirmative defense was timely asserted in NYCTA's reply to the counterclaim. The motion to dismiss under CPLR 3211(a)(5), however, was not timely made, as required under CPLR 3211(e) … . … We note that NYCTA may pursue relief on its statute of limitations defense by way of a summary judgment motion in the

normal course of the litigation … . Han v New York City Tr. Auth., 2022 NY Slip Op 01737, First Dept 3-15-22

Practice Point: Even if it is too late to move to dismiss on statute-of-limitations grounds, if the defense has been timely asserted, it can be the basis of a subsequent summary judgment motion.

CIVIL PROCEDURE, STAY PENDING RESULT IN RELATED FOREIGN ACTION.

PLAINTIFF STARTED AN ACTION AGAINST DEFENDANT IN NEW YORK; THEN DEFENDANT STARTED AN ACTION AGAINST PLAINTIFF IN ROMANIA; THE RESULTS OF THE ROMANIAN ACTION MAY BE DISPOSITIVE IN THE NEW YORK ACTION; THE NEW YORK ACTION SHOULD HAVE BEEN STAYED PENDING THE OUTCOME OF THE ROMANIAN ACTION, EVEN THOUGH THE NEW YORK ACTION WAS COMMENCED FIRST (FIRST DEPT).

The First Department, reversing Supreme Count, stayed the New York action pending the resolution of a related action brought by the defendant in Romania. the fact that the New York action was commenced first didn't matter:

In March 2021, plaintiff brought this action to recover on a personal guaranty executed by defendant as consideration for a loan by plaintiff to two Romanian companies partly owned by defendant. Two months later, defendant brought suit against the instant plaintiff in Romania, seeking a declaration that the companies' payment obligations under the underlying loan agreements were not enforceable.

… [T]he issues to be decided in the Romanian action are potentially dispositive of this action … . …

Although this action was filed first, chronology is not dispositive, "particularly where both actions are at the earliest stages of litigation" … . "[T]he practice of determining priorities between pending actions on the basis of dates of filing is a general rule, not to be applied in a mechanical way, regardless of other considerations" … . Here, both actions are in the early stages and were commenced

reasonably close in time and the later-filed action is more "comprehensive" and involves more parties … . E D & F Man Sugar Ltd. v Gellert, 2022 NY Slip Op 00813, first Dept 2-8-22

CIVIL PROCEDURE, CIVIL RIGHTS LAW, ANTI-SLAPP LAW, DEFAMATION.

THE 2020 AMENDMENTS TO CIVIL RIGHTS LAW 70, THE ANTI-SLAPP LAW, DO NOT APPLY RETROACTIVELY TO THE PLAINTIFF'S PENDING DEFAMATION ACTION AGAINST DEFENDANT (FIRST DEPT).

The First Department, reversing Supreme Court, determined the 2020 amendments to the anti-strategic lawsuit against public participation (anti-SLAPP) law (Civil Rights Law section 70) should not be applied retroactively to cover plaintiff's defamation claims against defendant. Therefore defendant's motion for a ruling that the anti-SLAPP amendments applied retroactively should not have been granted:

… [T]here is insufficient evidence supporting the conclusion that the legislature intended its 2020 amendments to the anti-strategic lawsuit against public participation (anti-SLAPP) law (see Civil Rights Law § 70 et seq.) to apply retroactively to pending claims such as the defamation claims asserted by plaintiffs in this action.

The Court of Appeals has stated, in general terms, that "ameliorative or remedial legislation" should be given "retroactive effect in order to effectuate its beneficial purpose" … . * * * … "[C]lassifying a statute as remedial does not automatically overcome the strong presumption of prospectivity since the term may broadly encompass any attempt to supply some defect or abridge some superfluity in the former law" … . …

In light of …. the factual evidence that the amendments to New York's anti-SLAPP law were intended to better advance the purposes of the legislation by correcting the narrow scope of the prior anti-SLAPP law, we find that the presumption of prospective application of the amendments has not been defeated. The legislature acted to broaden the scope of the law almost 30 years after the law

was originally enacted, purportedly to advance an underlying remedial purpose that was not adequately addressed in the original legislative language. The legislature did not specify that the new legislation was to be applied retroactively. The fact that the amended statute is remedial, and that the legislature provided that the amendments shall take effect immediately, does not support the conclusion that the legislature intended retroactive application of the amendments. Gottwald v Sebert, 2022 NY Slip Op 01515, First Dept 3-10-22

Practice Point: The fact that a statute is deemed "remedial" in nature does not necessarily support a retroactive application of the statute. Here the 2020 amendments to the anti-SLAPP law, although "remedial," were not applied retroactively to cover plaintiff's pending defamation action against the defendant. The defendant's motion for a ruling applying the amendments retroactively should not have been granted.

CIVIL PROCEDURE, CORPORATION LAW, FOREIGN CORPORATIONS, PROPER FORUM.

ALTHOUGH THIS SHAREHOLDERS' DERIVATIVE ACTION AGAINST A SWISS CORPORATION REQUIRES THE APPLICATION OF SWISS LAW, NEW YORK IS THE PROPER FORUM; MOST ON THE BOARD OF DIRECTORS ARE RESIDENTS OF NEW YORK AND THE ALLEGATIONS IN THE COMPLAINT REFLECT A SUBSTANTIAL NEXUS TO NEW YORK (FIRST DEPT).

The First Department, reversing Supreme Court, determined New York, not Switzerland, was the proper forum for this shareholders' derivative action against a Swiss corporation, despite the need to apply Swiss law:

Defendants did not establish that in the interest of substantial justice, this action should be heard in another forum, namely, Switzerland (see generally CPLR 327[a] …). Adjudication of plaintiffs' claims, which are undisputedly governed by Swiss law, will not place an undue burden on New York courts … . New York courts are frequently called on to apply the laws of foreign jurisdictions and in this case, there is no indication that the relevant law, which is from only one foreign jurisdiction, is in dispute or is distinctly abstruse … . That plaintiffs seek certain

nonmonetary relief that may not be available or enforceable in Switzerland does not cut in favor of dismissal because defendants can seek to limit the damages sought and plaintiffs are now willing to withdraw their requests for nonmonetary relief as against [defendant corporation].

Defendants do not claim that litigation in New York will cause them any hardship and although this matter could be litigated in Switzerland, Swiss courts do not permit trial by jury, which could pose some hardship to plaintiffs … . Moreover, most of defendant-board members are residents of New York and none are residents of Switzerland … . The allegations in the complaint make clear that this action has a substantial nexus to New York and at this point, it appears that the majority of the witnesses and evidence will be located in the United States, principally New York … . Wormwood Capital LLC v Mulleady, 2022 NY Slip Op 01526, First Dept 3-10-22

Practice Point: Although this shareholders' derivative action is against a Swiss corporation and requires the application of Swiss law, New York is the proper forum. Most of the directors live in New York, most of the witnesses are in the US and New York, most of the evidence is located in New York, and allegations in the complaint demonstrate a substantial nexus to New York. Defendants did not show they will suffer any prejudice if the suit is heard here.

CIVIL PROCEDURE, DEBTOR-CREDITOR.

IN AN ACTION SEEKING TO ENFORCE A JUDGMENT AGAINST NON-DEBTORS PURSUANT TO CPLR ARTICLE 52, THE PETITIONERS ARE NOT ENTITLED TO A JURY TRIAL; THE ACTION IS EQUITABLE IN NATURE, DESPITE THE DEMAND FOR MONETARY DAMAGES (FIRST DEPT).

The First Department determined petitioner's request for a jury trial in this action seeking to compel non-debtors to make assets accessible for execution should have been stricken. Even though money damages were demanded, the essence of the action is equitable:

Petitioners commenced a "turnover" special proceeding under CPLR article 52 and sought a judgment among other things, "seeking . . 'turnover' of [defendant] NYGFI assets to satisfy [p]etitioners' judgment . . . compelling the non-debtor [r]espondents to disclose, bring within the jurisdiction, and make accessible for execution . . . all cash, income, distributions and funds . . . including all membership interests in limited lability companies . . . and shares in corporations and interests in partnerships . . . and granting the appointment of a CPLR [a]rticle 52 receiver."

… "[A] [p]laintiff is not entitled to a jury trial . . . [when] he seeks to enforce a judgment against a party other than the judgment debtor, which is an equitable claim" … .

… "[T]he rule is fundamental that where a plaintiff seeks legal and equitable relief in respect of the same wrong, his right to trial by jury is lost" … . Moreover, "[i]nclusion of a demand for money damages in the [pleading] does not, in and of itself, guarantee entitlement to a jury trial. Rather, it must be determined whether the main thrust of the action is for legal damages or for equitable relief" … . Matter of Uni-Rty Corp. v New York Guangdong Fin., 2022 NY Slip Op 01525, First Dept 3-10-22

Practice Point: An action pursuant to CPLR Article 52 to enforce a judgment against non-debtors is equitable in nature. A jury trial is therefore not available. The demand for money damages (legal relief) did not alter the fact that petitioners are primarily seeking equitable relief.

CIVIL PROCEDURE, FRAUDULENT CONVEYANCE, PLEADING INADEQUATE.

COMPLAINT ALLEGATIONS OF A FRAUDULENT CONVEYANCE MADE "UPON INFORMATION AND BELIEF" DO NOT STATE A CAUSE OF ACTION (FIRST DEPT).

The First Department, reversing Supreme Court, determined "upon information and belief" complaint allegations of a fraudulent conveyance did not state a cause of action:

The complaint fails to state a cause of action for constructive fraudulent conveyance under former Debtor and Creditor Law §§ 273 and 274 … . Defendants are members of S. Land Development LLC (S. Land), which previously held title to real property and against which plaintiff obtained a money judgment in 2019 in a related action. Plaintiff alleges that defendants transferred or otherwise encumbered S. Land's assets, rendering it insolvent and precluding plaintiff from being able to collect on the judgment. However, since the allegations are made "upon information and belief," the complaint does not sufficiently allege that any transfers were made without fair consideration or rendered S. Land insolvent … . L&M 353 Franklyn Ave. LLC v Steinman, 2022 NY Slip Op 00724, First Dept 2-3-22

CIVIL PROCEDURE, MISSING EVIDNCE, ADVERSE INFERENCE JURY INSTRUCTION.

THE TRIAL JUDGE SHOULD HAVE GIVEN THE ADVERSE INFERENCE CHARGE WHICH HAD BEEN ORDERED AS A DISCOVERY SANCTION RE: A MISSING SURVEILLANCE TAPE; JURY VERDICT SET ASIDE (FIRST DEPT).

The First Department, reversing Supreme Court and setting aside the verdict, determined the trial judge should have given the adverse inference charge with respect to a missing video surveillance tape:

… [T]he court erred in declining to give an adverse inference charge with respect to a missing video surveillance tape. An order stating that plaintiff was entitled to such a charge had been issued during discovery upon plaintiff's motion for sanctions pursuant to CPLR 3126. Thus, the adverse inference charge was a discovery sanction, not a prospective evidentiary ruling … . While the verdict is supported by sufficient evidence, that error was not harmless. Hegbeli v TJX Cos., Inc., 2022 NY Slip Op 00502, First Dept 1-27-22

CIVIL PROCEDURE, MOTION TO RENEW.

PLAINTIFFS' MOTION TO RENEW ON THE GROUND THE DEFENDANTS' WINNING ARGUMENT WAS RAISED FOR THE FIRST TIME IN REPLY PAPERS SHOULD HAVE BEEN GRANTED (FIRST DEPT).

The First Department, reversing Supreme Court, determined plaintiffs' motion to renew should have been granted. Defendants' motion to dismiss was improperly granted based upon an argument first raised in reply papers:

The court granted defendants' motion to dismiss … based on defendants' argument raised for the first time in their reply to their motion to dismiss, that [the] operating agreement contained a provision wherein plaintiffs purportedly waived any past, present, and future conflicts of interest. Plaintiffs moved for leave to renew and reargue, claiming that the issue of the waiver provision was improperly raised for the first time in reply, and in substance was contradicted by another section of the operating agreement that provides, among other things, that no one other than the members can enforce any provision of the operating agreement against any member.

The motion to renew should have been granted. Plaintiffs' claim that the waiver issue was improperly raised in defendants' reply provides a reasonable justification for granting the renewal motion … . Upon renewal, defendants' motion should be denied with respect to plaintiffs' breach of fiduciary duty claim … . Dismissal is warranted only where documentary evidence "conclusively establishes a defense to

the asserted claims as a matter of law" … . Mehra v Morrison Cohen LLP, 2022 NY Slip Op 01396, First Sept 3-3-22

CIVIL PROCEDURE, APPEALS, NO APPEAL FROM REFUSAL TO SIGN ORDER TO SHOW CAUSE.

IN THIS ARTICLE 78 PROCEEDING, NO APPEAL LIES FROM A JUDGE'S DECLINING TO SIGN AN ORDER TO SHOW CAUSE; THE ONLY REMEDY IS A MOTION TO VACATE THE FINAL JUDGMENT (FIRST DEPT).

The First Department, in this Article 78 proceeding, noted that no appeal lies from a judge's declining to sign an order to show cause. The only remedy is a motion to vacate the final judgment:

No appeal lies from an order declining to sign an order to show cause, since it is an ex parte order that does not decide a motion made on notice (see CPLR 5701[a][2] …).

No party requests that we consider relief under CPLR 5704(a). In any event, we note that Supreme Court providently exercised its discretion in declining to sign plaintiffs' proposed order to show cause … . Plaintiffs sought to bring on a motion to renew an order that denied the petition and dismissed the proceeding, thus terminating the special proceeding. Renewal is not available under such circumstances … . Instead, an application to vacate a final judgment must be brought pursuant to CPLR 5015 … . This principle applies specifically in the context of a challenge to "a judgment dismissing a CPLR article 78 petition" … . Matter of Alliance to End Chickens as Kaporos v New York City Police Dept., 2022 NY Slip Op 00041, First Dept 1-6-22

CIVIL PROCEDURE, PRELIMINARY INJUNCTION, DEBTOR-CREDITOR, FRAUD.

IF PLAINTIFFS IN A FRAUDULENT-CONVEYANCE AND ENFORCEMENT-OF-MONEY JUDGMENT PROCEEDING CAN BE FULLY COMPENSATED BY MONEY DAMAGES, IT IS ERROR TO ISSUE A PRELIMINARY INJUNCTION (FIRST DEPT),

The Frist Department, reversing Supreme Court, determined plaintiffs in this fraudulent conveyance action can be fully compensated by money damages. Therefore the preliminary injunction was not available relief:

In this action to set aside alleged fraudulent conveyances and other relief in aid of enforcement of money judgments, plaintiffs can be fully compensated by a monetary award, and thus an injunction will not issue because no irreparable harm will be sustained in the absence of such relief … . Medallion Fin. Corp. v Tsitiridis, 2022 NY Slip Op 02090, First Dept 3-29-22

Practice Point: If a plaintiff can be fully compensated by money damages, an injunction is not an available remedy.

CONTRACT LAW, DOUBLE RECOVERY.

DEFENDANT HAD WITHHELD PAYMENT ON THE CONTRACT AS AN OFFSET FOR THE LIQUIDATED DAMAGES PROVISION OF THE CONTRACT; THE AWARD OF LIQUIDATED DAMAGES TO THE DEFENDANT THEREFORE CONSTITUTED A DOUBLE RECOVERY (FIRST DEPT).

The First Department, reversing Supreme Court, determined defendant should not have been awarded summary judgment on the liquidated damages counterclaim because defendant had withheld payment on the contract as an offset to the liquidated damages:

Supreme Court should have denied summary judgment in defendant's favor on the liquidated damages counterclaim. To be sure, the liquidated damages provision of the contract, providing for damages of $100 for each day that plaintiff failed to timely respond to a request for repairs or to complete repairs already begun and $100 for failing to timely provide a written estimate, was not an unenforceable penalty … . However, to the extent defendant has withheld payment from plaintiff for work performed to offset liquidated damages, the award of liquidated damages constitutes a double recovery. Summit Rest. Repairs & Sales, Inc. v New York City Dept. of Educ., 2022 NY Slip Op 00526, First Dept 1-27-22

CONTRACT LAW, REMOVAL OF POSTED VIDEOS, VACCINATIONS.

DEFENDANT VIDEO-HOSTING SERVICE, VIMEO, DID NOT BREACH ITS CONTRACT WITH PLAINTIFF BY REMOVING FIVE VIDEOS POSTED BY PLAINTIFF CLAIMING CHILDHOOD VACCINATION LEADS TO AUTISM; THE COMMUNICATIONS DECENCY ACT AUTHORIZES INTERNET PROVIDERS TO REMOVE "OBJECTIONABLE" MATERIAL (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Singh, determined defendant video-hosting service, Vimeo, did not breach its contract with plaintiff by removing five videos posted by plaintiff which Vimeo concluded made false or misleading claims about vaccine safety. The videos claimed that childhood vaccines lead to autism:

This appeal concerns whether a video-hosting service may be held liable for its decision to remove videos that it determines violate its terms of service. Defendant Vimeo, Inc. prohibits users from posting videos that make false or misleading claims about vaccine safety. It removed five videos, posted by a commercial user, because the videos claimed that childhood vaccination leads to autism. The user sued, claiming that Vimeo had breached the parties' contract. The motion court held that liability was precluded by section 230 of the Communications Decency Act. We agree. Section 230 prevents lawsuits against Internet service providers for their good-faith decisions to remove content that they consider objectionable. If service providers had to justify those decisions in court, or if plaintiffs could circumvent immunity through unsupported accusations of bad faith, section 230

would be a dead letter. This is as true for commercial users as for any other plaintiff. Therefore, we affirm dismissal of the complaint.

… [S]ection 230(c)(2) prohibits holding an interactive computer service provider liable for "any action voluntarily taken in good faith to restrict access to or availability of material that the provider . . . considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable" (47 USC § 230[c][2][A]). Word of God Fellowship, Inc. v Vimeo, Inc., 2022 NY Slip Op 01978, First Dept 3-22-22

Practice Point: The Communications Decency Act allows Internet providers to take down posted material the providers deem "objectionable." Here a video-hosting service, Vimeo, took down five videos posted by plaintiff which claimed childhood vaccination leads to autism. Plaintiff's breach of contract action was dismissed.

CONTRACT LAW, STATUTE OF LIMITATIONS.

BECAUSE PLAINTIFF ALLEGED THE ORAL CONTRACT WAS ENFORCEABLE EVEN IF THE TRIGGERING EVENT OCCURRED AFTER A YEAR, THE CONTRACT WAS WITHIN THE STATUTE OF FRAUDS AND THEREFORE MUST IN BE WRITING (FIRST DEPT).

The First Department determined the oral contract was within the statute of frauds because it was not susceptible of performance within one year. Plaintiff alleged he was entitled to 50% of the placement fee received by defendant for job candidates he referred to defendant, even if placement was made after a year:

The alleged oral agreement upon which plaintiff sues is within the statute of frauds, since plaintiff contends that when he refers a job candidate to defendant, he is entitled to 50% of the fee defendants receive for placing the candidate, even when the candidate is placed more than a year after plaintiff's referral (General Obligations Law § 5-701[a][1] …). As a result, because plaintiff has fully executed the contract while defendant's obligation continues past a one-year period, the contract is not, by its terms, susceptible of performance within one year, and therefore must be in writing to be enforceable … . Although oral agreements

that violate the statute of frauds are enforceable where the party to be charged admits having entered into the contract, defendant never admitted that it agreed to pay plaintiff a fee on placements occurring more than a year after a referral … . Birnbaum v Goldenberg Consulting Group, Inc., 2022 NY Slip Op 00042, First Dept 1-6-22

CONTRACT LAW, FRAUD.

THE COMPLAINT DID NOT STATE A CAUSE OF ACTION FOR FRAUD IN THE INDUCEMENT, AS OPPOSED TO AN INSINCERE PROMISE OF FUTURE PERFORMANCE; ALTHOUGH THE ISSUE WAS RAISED IN REPLY AND WAS NOT RAISED BELOW, IT WAS CONSIDERED ON APPEAL BECAUSE IT WAS DETERMINATIVE, DID NOT ALLEGE NEW FACTS, AND COULD NOT HAVE BEEN AVOIDED IF RAISED BELOW (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, determined the complaint did not support a cause of action for fraud in the inducement. Plaintiff ordered an artistic silk floral display but rejected it when delivered on the ground the display did not match what plaintiff ordered. Defendants refused to refund the money. Although the inadequacy of the fraud in the inducement allegations was first raised in reply, the First Department considered it because it was determinative, did not allege new facts and could not have been avoided if raised below:

As for the fraud in the inducement claim, defendants challenged this claim in their reply brief in Supreme Court. While, normally, arguments set forth for the first time in reply should not be considered … , this Court will consider this argument as it is determinative, does not allege new facts, and is a legal argument on the face of the record that would not have been avoidable if raised in defendants' moving brief below, and because the record is sufficient to resolve the issue … . Here, plaintiff merely alleged that defendants "grossly misrepresented the quality and nature of the Decorations" to induce plaintiff into retaining them and compensating them, and the representations were false when made. This simply alleges "an insincere promise of future performance under the contract, which is insufficient to

plead fraud" … . As such, the fraud in the inducement claim is dismissed. Newport E. Inc. v Sviba Floral Decorators, Inc., 2022 NY Slip Op 00819, First Dept 2-8-22

CONTRACT LAW, RELEASES.

SUPREME COURT, IN THE CONTEXT OF A MOTION TO DISMISS, SHOULD NOT HAVE DETERMINED AS A MATTER OF LAW THAT THE DEFENDANTS WERE NOT "AFFILIATES" WITHIN THE MEANING OF THE LANGUAGE OF A RELEASE (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, determined Supreme Courts should have simply denied the motion to dismiss instead of deciding what parties were included in the term "affiliates" in the release at issue:

Supreme Court erred in finding, as a matter of law, that the word "affiliates" in the release entered into between plaintiffs and Siddiqui could not be read to include defendants Cernich and Huan Tseng … . The word "affiliates" may apply to individuals, and is "not commonly understood to apply only to entities" … . Furthermore, the arbitrator's conclusion, in an earlier arbitration against different parties, that the release did not apply to nonparty Ming Dang does not serve as a conclusive basis for finding that the release did not apply to defendants. Accordingly, the scope of the release language with respect to Cernich and Tseng was ambiguous, and Supreme Court should have simply denied the motion to dismiss without determining the meaning of the release language as a matter of law. Apollo Mgt., Inc. v Cernich, 2022 NY Slip Op 00964, First Dept 2-15-22

CONTRACT LAW.

THE BREACH OF IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING CAUSE OF ACTION SHOULD HAVE BEEN DISMISSED AS DUPLICATIVE OF THE BREACH OF CONTRACT CAUSE OF ACTION; THE APPEAL FROM AN ORDER WHICH WAS NOT THE PRODUCT OF A MOTION ON NOTICE MUST BE DISMISSED (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Higgitt which is too comprehensive and detailed to fairly summarize here. determined: (1) the cause of action for breach of implied covenant of good faith and fair dealing was duplicative of the breach of contract cause of action; and (2) an appeal from a supplemental order which was not the product of a motion on notice must be dismissed:

The implied covenant of good faith and fair dealing "embraces a pledge that neither party shall do anything that will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract" … , and is breached when a party acts in a manner that deprives the other party of the benefits of the contract (id.). Generally, a breach of the covenant of good faith and fair dealing is a breach of the contract itself … . Therefore, a separate cause of action for breach of the covenant cannot be maintained where, as here, "it is premised on the same conduct that underlies the breach of contract cause of action and is intrinsically tied to the damages allegedly resulting from a breach of the contract" … . Because a breach of the covenant of good faith and fair dealing is a breach of the contract itself, plaintiffs may press their theory that defendants acted in derogation of the covenant in conjunction with their cause of action for breach of the license agreements … . We note that to the extent defendants were entitled to exercise discretion in the manner in which they performed their obligations … , they were, under the covenant (and, by natural extension, under the license agreement itself) prohibited from acting arbitrarily, irrationally, or in bad faith … . …

Defendants' appeal from the supplemental order is dismissed because that order was not the product of a motion on notice (see CPLR 2214); rather, the supplemental order was issued in response to an inquiry from counsel seeking clarity regarding the court's decision and order determining the summary judgment

motions (see CPLR 5701[a][2] …). Parlux Fragrances, LLC v S. Carter Enters., LLC, 2022 NY Slip Op 01250, First Dept 2-24-22

COOPERATIVES, CIVIL PROCEDURE, ATTORNEYS, SANCTIONS.

THE DEPOSITION OF THE NONPARTY MAJORITY SHAREHOLDER IN THE COOPERATIVE REGARDING LEAKS IN THE UNITS WAS PROPER AND SHOULD NOT HAVE BEEN STOPPED AND SUPPRESSED BY THE JUDGE; SANCTIONS AGAINST PLAINTIFF'S ATTORNEY FOR FRIVOLOUS AND UNPROFESSIONAL CONDUCT WERE WARRANTED (FIRST DEPT).

The First Department, reversing Supreme Court, determined the deposition of a witness, Ruth Miller, was proper and the judge should not have ordered the deposition to cease and should not have suppressed the portion of the deposition which had already been taken. Miller was a nonparty majority shareholder in the cooperative and the action concerned leaks in the units. The First Department further determined that sanctions against plaintiff's counsel were warranted:

It was an improvident exercise of discretion for the court to issue a protective order under CPLR 3103(a) barring a continuation of the deposition of nonparty Ruth Miller. Miller is the majority shareholder of the Coop, and therefore is a key figure in the events surrounding plaintiffs' negligence and breach of contract claims regarding leaks in plaintiffs' units. Moreover, Miller was a member of the Board during a period of time when decisions were made about building maintenance, which is a relevant issue in plaintiffs' action. Thus, her testimony is "material and necessary" (CPLR 3101[a] …). …

… [i]t was error for the court to sua sponte issue a suppression order of the testimony previously taken (see CPLR 3103[c]). Defendants made no showing that evidence was improperly or irregularly obtained during the deposition, or that prejudice to a substantial right had accrued through discovery of improperly obtained evidence … . …

… [C]ounsel's behavior at the deposition was frivolous and unprofessional. Among other things, counsel called the witness "a liar" and told her on the record

that she had done "plenty wrong" and had "plenty to worry about in this case," despite the fact that she is not even a party to the action. Sanctions against counsel are therefore warranted (22 NYCRR 130-1.1 …). Gendell v 42 W. 17th St. Hous. Corp., 2022 NY Slip Op 00272, First Dept 1-18-22

CORPORATION LAW, PRE-DISSOLUTION CLAIMS.

PLAINTIFF, A DISSOLVED CORPORATION, PROPERLY PURSUED CLAIMS AND LIABILITIES WHICH AROSE PRIOR TO DISSOLUTION (FIRST DEPT).

The First Department, reversing Supreme Court, determined plaintiff-dissolved-corporation properly pursued claims and liabilities which arose prior to dissolution:

A dissolved corporation is permitted to pursue claims and liabilities that arose prior to dissolution as part of the winding up process (Business Corporation Law §§ 1005[a][1]; 1006[a][4]; [b] …). Plaintiff's commencement of this litigation, as well as the settlement of other predissolution claims against defendant, and its use of settlement funds to satisfy its outstanding liabilities in the wage violations case, are expressly contemplated and authorized by Business Corporation Law § 1006(a)(4). Thus, it was error to find that plaintiff's dissolution resulted in it lacking capacity to maintain this action against defendant for work performed before plaintiff was dissolved … .

Contrary to defendant's contention, plaintiff's winding up period has not been so extended as to be considered unreasonable … . TADCO Constr. Corp. v Dormitory Auth. of the State of N.Y., 2022 NY Slip Op 00990, First Dept 2-15-22

CRIMINAL LAW, INCLUSORY CONCURRENT COUNTS.

THE SECOND DEGREE MURDER COUNTS SHOULD HAVE BEEN DISMISSED AS INCLUSORY CONCURRENT COUNTS OF THE FIRST DEGREE MURDER COUNTS (FIRST DEPT).

The First Department noted that the second-degree murder counts must be dismissed as inclusory concurrent counts of the first-degree murder counts:

As the People concede, the second-degree murder counts should be dismissed as inclusory concurrent counts of the first-degree murder counts (see CPL 300.40[3][b]). People v Ortega, 2022 NY Slip Op 00828, First Dept 2-8-22

CRIMINAL LAW, JUROR MISCONDUCT.

THE JUROR'S SIMULATION OF THE STABBING IN THE JURY ROOM DID NOT CONSTITUTE JUROR MISCONDUCT (FIRST DEPT).

The First Department determined a juror's use of a piece of cardboard to simulate a stabbing motion with a knife (during deliberations) did not constitute juror misconduct:

… [T]he juror … used a piece of cardboard to simulate a knife and briefly made a stabbing motion in an effort to demonstrate or reenact the crime at issue. Based on the evidence adduced at the hearing, this conduct likewise did not constitute "improper conduct" within the meaning of CPL 330.30(2). "It is well recognized that jurors may conduct a jury room crime reenactment or demonstration provided it involves no more that the jurors' application of everyday experiences, perceptions and common sense to the evidence" … . In light of the trial evidence and the nature of the demonstration, the juror did not become an unsworn witness, or introduce new facts into the deliberations … . Given the location, simplicity, and brief duration of the demonstration … , as well as the hearing testimony of the jurors who testified that the demonstration had no effect on their deliberations … , the demonstration did not prejudice a substantial right of defendant …. **People v Hubbard, 2022 NY Slip Op 00017, First Dept 1-4-22**

CRIMINAL LAW, LESSER INCLUDED OFFENSES.

THIRD-DEGREE POSSESSION OF A CONTROLLED SUBSTANCE (PENAL LAW 220.16 (12)) IS NOT A LESSER INCLUDED OFFENSE OF THIRD-DEGREE POSSESSION OF A CONTROLLED SUBSTANCE (PENAL LAW 220.16 (1)); GUILTY PLEA VACACTED (FIRST DEPT).

The First Department, reversing Supreme Court and vacating defendant's guilty plea, determined defendant pled to an offense which was not a lesser included offense of any offense in the indictment:

… [W]here the indictment charges two or more offenses in separate counts, a defendant may enter a plea of guilty to one or more of the offenses charged and/or lesser included offenses thereof" … . "For plea purposes only, lesser included offenses include not only those qualifying as such under the general statutory definition of lesser included crimes (CPL 1.20[37]), but also the specifically enumerated extensions of the lesser included offense concept, set forth in CPL 220.20(1)(a)-(k)" … .

Third-degree possession of a controlled substance in violation of Penal Law § 220.16(12) is not a lesser included offense of third-degree possession in violation of Penal Law § 220.16(1). The former subsection was not charged in the indictment, does not qualify as a lesser included offense under the general statutory definition, and is not included in the class of crimes that are deemed lesser included offenses of criminal possession of a controlled substance pursuant to CPL 220.20(1)(i) … . People v Acosta, 2022 NY Slip Op 00509, First Dept 1-27-22

CRIMINAL LAW, RIGHT TO REPRESENT ONESELF.

DEFENDANT'S REPEATED REQUESTS TO REPRESENT HIMSELF WERE NOT ADEQUATELY ADDRESSED BY THE THREE JUDGES TO WHOM THE REQUESTS WERE MADE; CONVICTION REVERSED AND NEW TRIAL ORDERED (FIRST DEPT).

The First Department, reversing defendant's conviction and ordering a new trial, determined defendant's repeated requests to represent himself had not been properly addressed by the three calendar judges to whom the requests were made:

"The denial of defendant's repeated requests to proceed pro se deprived defendant of his right to represent himself and requires reversal of his conviction" … . Although defendant made repeated unequivocal requests to proceed pro se, the calendar courts hearing these applications repeatedly deferred making a ruling. To the extent that these courts can be viewed as having denied the applications on the ground that defendant was disruptive, this was inappropriate because defendant's only outbursts were the product of his frustration at not receiving a ruling on his rightful applications … . Furthermore, defendant was clearly fit to proceed to trial and fit to waive counsel … . The fact that defendant's request to proceed pro se was based in part on his disagreements with counsel did not, standing alone, justify the denial of his request … . Defendant expressly stated that he wanted to represent himself, whether or not the court assigned new counsel. People v Goodwin, 2022 NY Slip Op 00281, First Dept 1-18-22

CRIMINAL LAW, SPEEDY TRIAL.

THE SIX-YEAR DELAY, DURING WHICH DEFENDANT WAS INCARCERATED, DEPRIVED DEFENDANT OF HIS RIGHT TO A SPEEDY TRIAL; THE MURDER AND ASSAULT CONVICTIONS AFTER TRIAL REVERSED (FIRST DEPT).

The First Department, reversing defendant's murder and assault convictions after trial, determined defendant have been deprived of his right to a speedy. It was presumed that the delay of six years, during which defendant was incarcerated,

prejudiced the defense. The prosecution failed to demonstrate good cause for the delay:

"Where there has been extended delay, it is the People's burden to establish good cause" … . Following defendant's January 2011 arraignment, this case was reassigned to successive Assistant District Attorneys. After the case was assigned to the third and final prosecutor in mid-2014, he waited about one year before seeking to obtain a DNA sample from defendant to be compared with DNA recovered from a plastic cup found outside the garage in which the shootings occurred during a party. That motion was denied because there was no nexus between the cup and the shootings, and because defendant's admitted attendance at the party was undisputed. The People argue that their delay was justified by the reluctance of a retired detective to testify; they cite a note from the detective's doctor stating that he was medically unfit to be cross-examined and argue that the detective was a necessary witness because he conducted the lineup in which the surviving victim identified defendant as the assailant. However, this detective ultimately did not testify at the suppression hearing or trial, and the suppression court credited the hearing testimony of the surviving victim, who knew defendant, and denied the motion to suppress the identification based on that testimony. Moreover, it is undisputed that the retired detective was not needed to introduce defendant's statements, which were introduced through another detective at trial. People v McDonald, 2022 NY Slip Op 02099, First Dept 3-29-22

Practice Point: Here the defendant's murder and assault convictions after trial were reversed because defendant was deprived of his right to a speedy trial. Defendant was incarcerated during the six-year delay, which raised the presumption the defense was prejudiced by the delay. In addition the People were not able to show a good cause for the delay. The People claimed a detective's poor health precluded him from testifying, but the detective's testimony was not necessary.

CRIMINAL LAW, APPEALS.

AN APPELLATE COURT CANNOT DETERMINE A SUPPRESSION MOTION BASED ON TRIAL EVIDENCE; THE TRIAL EVIDENCE REVEALED THE SEARCH OF DEFENDANT'S APARTMENT MAY HAVE BEEN UNLAWFUL; BASED UPON THE LIMITED INFORMATION AVAILABLE TO DEFENDANT WHEN THE SUPPRESSION MOTION WAS MADE, THE ALLEGATION THE POLICE DID NOT HAVE PERMISSION TO ENTER WAS ENOUGH TO WARRANT A PROBABLE CAUSE HEARING; MATTER REMITTED (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Pitt, reversing Supreme Court's denial of a probable cause hearing, determined the evidence revealed for the first time at trial called into serious question whether the search of defendant's apartment was unlawful. Prior to trial the information provided to defendant gave the impression the apartment was entered and searched pursuant to a warrant. At trial the police testified they entered the apartment two hours before the search warrant was issued. The defendant was convicted of drug possession. The suppression motion stated the police entered the apartment without defendant's permission. Given the limited and misleading information available to the defendant at the time the suppression motion was made, the allegations in the motion were sufficient to warrant a probable cause hearing. The appeal was held in abeyance and the matter was sent back for the hearing:

… [T]he Appellate Division "may not make its own finding of an independent source based upon trial testimony" … . Thus, we cannot hold that the denial of the Mapp/Dunaway hearing was proper, and the claim unpreserved, due to legal arguments pertaining to the lawfulness of the search and based on evidence adduced at trial, well after the lower court ruled on the motion to suppress.

… [H]ere, the trial testimony is being used solely to determine the context of defendant's motion, the extent of her lack of access to information …, and the extent of information withheld from the motion court prior to making its decision to summarily deny defendant's motion. … [W]e find that defendant's motion should not have been summarily denied pursuant to CPL 710.60, and a hearing

should have been conducted to make the necessary findings of fact. People v Esperanza, 2022 NY Slip Op 00383, First Dept 1-25-22

CRIMINAL LAW, APPEALS, BENCH TRIAL, REVERSAL ON EVIDENTIARY ERRORS.

IN A RARE REVERSAL OF A BENCH TRIAL ON EVIDENTIARY GROUNDS, THE 1ST DEPT DETERMINED FOUR OUT-OF-COURT STATEMENTS ALLEGEDLY MADE BY THE VICTIM IN THIS SEXUAL-OFFENSE CASE SHOULD NOT HAVE BEEN ADMITTED UNDER THE "EXCITED UTTERANCE" OR "PROMPT OUTCRY" THEORIES; THE COURT NOTED THAT ONLY THE FACT OF THE COMPLAINT, NOT THE ACCOMPANYING DETAILS, ARE ADMISSIBLE AS A "PROMPT OUTCRY" (FIRST DEPT).

The First Department, reversing defendant's conviction after a nonjury trial, determined four out-of-court statements made by the alleged victim in this sexual-offense case should not have been admitted a "excited utterances." Although two of the statements were "prompt outcries," under that theory only the fact of a complaint, not the details (as provided here) are admissible:

… [T]he trial court admitted four statements made by the alleged victim following the incident, reasoning that they were admissible both as excited utterances and prompt outcries. This was error. The alleged victim's out-of-court statements did not qualify as excited utterances and should not have been admitted for their substance under that hearsay exception … . Although two of the four statements were correctly admitted under the alternative theory that they constituted prompt outcries, under this exception, "only the fact of a complaint, not its accompanying details" is admissible … . It is clear from the record that the trial court considered all four hearsay statements for their substance, and thus, there can be no presumption that the court, as the finder of fact, considered only competent evidence … .. Given the People's strong reliance on the hearsay statements to prove its case, and the court's indication that it intended to review the written statement that was in evidence during deliberation, we cannot say that "the proof of the defendant's guilt, without reference to the error, is overwhelming" and that

the error was therefore harmless … . People v Gideon, 2022 NY Slip Op 01746, First Dept 3-15-22

Practice Point: In this nonjury sexual-offense prosecution the court erred by admitting out-of-court statements by the alleged victim under the "prompt outcry" theory. Only the fact of the complaint is admissible, not the accompanying details.

CRIMINAL LAW, BURLARY.

THE HOSPITAL FROM WHICH LAPTOPS WERE STOLEN WAS NOT A "DWELLING" WITHIN THE MEANING OF THE BURGLARY STATUTE (FIRST DEPT).

The First Department, reversing two of defendant's burglary convictions, determined the hospital from which laptops were stolen was not a "dwelling" as that term is used in the burglary statutes:

Defendant's convictions under counts three and four of the indictment, regarding the 2017 thefts of laptop computers from the Physicians & Surgeons Building at Columbia University Medical Center, were not supported by legally sufficient evidence of the "dwelling" element of burglary in the second degree (see Penal Law § 140.00[3]). There was no evidence that patients stayed overnight in this building. The People's reliance on Penal Law § 140.00(2) is unavailing, because no "unit" within the building is a dwelling. Although the building was part of a large campus covering several blocks, there was insufficient evidence that this building provided defendant with ready access via connecting elevators, stairwells, or corridors to other buildings, where hospital patients stayed overnight and which was, in any event, at a considerable distance … . People v Brown, 2022 NY Slip Op 02205, First Dept 3-31-22

Practice Point: Here a hospital from which laptops had been stolen was not a "dwelling" as that term is used in the burglary statutes.

CRIMINAL LAW, DEPRAVED INDIFFERENCE MURDER, TRAFFIC ACCIDENTS.

DEPRAVED INDIFFERENCE MURDER CONVICTION AFFIRMED; DURING A POLICE CHASE, DEFENDANT DROVE THE WRONG WAY ON A HIGHWAY AND CRASHED HEAD-ON INTO AN ONCOMING CAR (FIRST DEPT).

The First Department determined the evidence supported defendant's depraved indifference murder conviction stemming from his driving the wrong way on a highway and crashing into an oncoming car during a police chase:

While fleeing from the police, defendant drove 14 blocks against oncoming traffic on the West Side Highway, a major roadway, despite openings in the median between the north and southbound lanes, while running several red lights and driving onto the curb and sidewalk. Additionally, defendant did not avail himself of parking lots and driveways on the west side of the Highway, where he could have pulled off to avoid any collision with an oncoming vehicle. Heading north, the Highway merges into, and becomes, the Henry Hudson Parkway at the intersection of 57th Street. Instead of utilizing the last available opportunity to turn into the north bound lanes, defendant made the decision to continue driving in the wrong direction and entered onto the Parkway. It is unrefuted that the Parkway had no breaks in the median through which he could return to the northbound lanes and that oncoming cars were going even faster there than on the Highway because the speed limit increased from 35 mph to 50 mph. After he got on the Parkway, defendant remained in the lane immediately to the left of the concrete barrier separating the northbound and southbound lanes, made no effort to change lanes or to swerve to avoid oncoming vehicles and made no effort to stop or slow down, despite the fact that he was now on a parkway. He continued driving this way on the Parkway for seven blocks at which time he collided, head-on, with a vehicle driving in the proper direction in the southbound lane. People v Herrera, 2022 NY Slip Op 00949, First Dept 2-10-22

CRIMINAL LAW, ERRONEOUS AMENDMENT OF INDICTMENT DURING TRIAL.

THE INDICTMENT CHARGED DEFENDANT WITH ASSAULT SECOND AND ATTEMPTED ASSAULT SECOND BUT DID NOT ALLEGE THE USE OF A DEADLY WEAPON OR A DANGEROUS INSTRUMENT; THE PEOPLE'S THEORY AT TRIAL WAS DEFENDANT USED A PVC PIPE AS A DEADLY WEAPON OR A DANGEROUS INSTRUMENT; BUT, TO CORRECT THE FLAWED INDICTMENT, THE JUDGE, A DAY BEFORE THE END OF THE TRIAL, AMENDED THE INDICTMENT TO CHARGE ASSAULT THIRD AND ATTEMPTED ASSUALT THIRD; THE AMENDMENT PREJUDICED THE DEFENDANT (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Oing, vacating defendant's conviction with leave to resubmit, determined the indictment should not have been amended at the end of the trial to charge defendant with assault third and attempted assault third, instead of assault second and attempted assault second as originally charged in the indictment. The indictment did not allege the use of a deadly weapon or dangerous instrument. The last minute amendment was an effort to correct that charging flaw. However the People's theory, before the grand jury and at trial, was defendant used a PVC pipe as a deadly weapon or a dangerous instrument. But, because of the amendment, the jury was not asked to consider the deadly weapon or dangerous instrument element:

An indictment may be amended to correct "matters of form, time, place, names of persons and the like" (CPL 200.70[1]). An amendment must not "change the theory or theories of the prosecution as reflected in the evidence before the grand jury . . . or otherwise tend to prejudice the defendant on the merits" (CPL 200.70[1]). …

… [N]otice could not have been given, because the indictment's deficiency was not discovered until one day before the trial concluded. This unorthodox correction is not the kind of procedure sanctioned under CPL 200.70 or 300.50. The amendment was therefore not a mere correction of a "misnomer" of the offense in the accusatory clauses of the indictment … . …

… [D]efendant was prejudiced by the amendment. The People's theory before the grand jury was that Bari's injuries were caused by the use of a dangerous instrument, i.e., the bike rental sign. The prosecutor in her opening statement made references to the bike rental sign. She did so in her summation even after the court deleted the original second-degree hate crimes and replaced them with third-degree hate crimes. Further, on the People's case, the prosecutor elicited testimony from Bari to support this theory. Thus, the People tried the case from inception to conclusion, and defendant mounted a defense, on the theory that a deadly weapon or a dangerous instrument was used in the commission of the hate crimes. On the last day of the trial, however, the court amended the indictment and charged the jury with variations of third-degree assault, which do not require proof of the existence of a deadly weapon or a dangerous instrument. Thus, after hearing evidence of a dangerous instrument throughout the trial, the jury received instructions that did not require it to find that the People had proven the existence of a dangerous instrument beyond a reasonable doubt to convict defendant of the third-degree hate crimes or the third-degree assault. This result was an impermissible change in the theory of the prosecution. People v Winston, 2022 NY Slip Op 02080, First Dept 3-24-22

Practice Point: Here the indictment was flawed because it charged assault second but did not allege use of a deadly weapon or a dangerous instrument. The People's theory at trial was that defendant used a PVC pipe as a deadly weapon or a dangerous instrument. A day before the end of the trial, the judge amended the indictment to charge assault third. The amendment was improper and prejudiced the defendant.

CRIMINAL LAW, EVIDENCE, UNTIMELY DISCLOSURE.

GIVEN THE INITIAL LACK OF DISCLOSURE BY THE PEOPLE AND DEFENDANT'S RESPONSES ONCE THE PEOPLE DISCLOSED THE TRANSMISSION WHICH LED TO HIS ARREST, DEFENDANT ALLEGED SUFFICIENT FACTS TO WARRANT A MAPP/DUNAWAY HEARING (FIRST DEPT).

The First Department, reversing Supreme Court, determined defendant had alleged sufficient facts to warrant a hearing on whether the police had probable cause to arrest him:

… [D]efendant's motion challenged the constitutional adequacy of "any transmitted description on which the seizing officers relied in detaining and arresting the defendant."

Defendant's access to information was limited, because … the People … did not disclose "by either voluntary discovery or otherwise, . . . the description radioed by the purchasing officer to the arresting officer" … . Indeed, … the People did not even specifically aver that such a communication occurred. … [T]he absence of factual allegations regarding the content of a transmission from the undercover to the arresting officer did not render defendant's motion deficient. …

[D]efendant made allegations of facts within his knowledge that … were pertinent to defendant's argument that probable cause to arrest him was lacking. … [D]efendant described his own appearance at the time of arrest to the extent of stating that he was a 44-year-old black man, and that there was nothing "particularly distinctive about his appearance" that would tend to "preclude the possibility of misidentification." This description allowed for a comparison between defendant's self-description and the transmitted description, once that description was disclosed. People v Fleming, 2022 NY Slip Op 00360, First Dept 1-20-22

CRIMINAL LAW, GOOD FAITH EFFORT TO COMPLY WITH PLEA AGREEMENT.

DEFENDANT MADE GOOD FAITH EFFORTS TO COMPLY WITH THE TERMS OF HER PLEA AGREEMENT; SENTENCE REDUCED AND CONVICTION MODIFIED IN THE INTEREST OF JUSTICE (FIRST DEPT).

The First Department, reducing defendant's sentence and modifying her conviction in the interest of justice, determined defendant had made good faith efforts to complete the anger-management program that was part of her plea agreement:

… [D]efendant entered into a plea agreement whereby she would plead guilty to second-degree assault, third-degree assault and endangering the welfare of a child, and the case would be adjourned for one year to allow her to complete a 12-week anger management program. If defendant completed the program, complied with an order of protection and had no new arrests, the People would allow her to withdraw her guilty plea to second-degree assault, and she would be sentenced to conditional discharges on the two misdemeanor convictions. Despite defendant's diligent, repeated efforts to complete an anger management program, legitimate issues such as her inability to arrange childcare for her two young children after her 75-year-old grandmother, who had been caring for the children while defendant attended the sessions, broke her hip, prevented her from attending all the sessions. She enrolled in the program three times, each time beginning from the start, but could not complete the 12 weeks. At the time of sentencing, she had found, enrolled in and almost completed a different program close to her home with a schedule that allowed her to work and pick up her children after school. Although she did not complete the anger management program, defendant satisfied the remaining terms of the plea agreement. Under these circumstances, in the interests of justice we accordingly reduce the conviction and modify the sentence … . People v Perez, 2022 NY Slip Op 01104, Second Dept 2-17-22

CRIMINAL LAW, INEFFECTIVE ASSISTANCE, RISK OF DEPORATION.

DEFENDANT DID NOT RECEIVE EFFECTIVE ASSISTANCE OF COUNSEL; COUNSEL SAID A GUILTY PLEA MAY RESULT IN DEPORTATION WHEN DEPORTATION WAS MANDATORY (FIRST DEPT).

The First Department determined defendant did not receive effective assistance of counsel because he was told pleading guilty may result in deportation when deportation was mandatory:

The existing record sufficiently demonstrates that defendant was deprived of effective assistance of counsel (see Padilla v Kentucky, 559 US 356, 369, 374 [2010]) when his attorney failed to advise him that his guilty plea to a drug-related felony would result in mandatory deportation, and merely stated that "this may and probably will affect his immigration status" … . The appeal is held in abeyance to afford defendant the opportunity to move to vacate his plea upon a showing that there is a reasonable probability that he would not have pleaded guilty had he been made aware of the deportation consequences of his plea. People v Acosta, 2022 NY Slip Op 00737, First Dept 2-3-22

CRIMINAL LAW, NO NOTICE OF CHARGE GIVEN TO THE JURY.

THE PEOPLE FOCUSED THEIR PROOF ON THE SEXUAL MOTIVATION FOR THE BURGLARY; ALTHOUGH BURGLARY SECOND IS A LESSER INCLUDED OFFENSE OF BURGLARY SECOND AS A SEXUALLY MOTIVATED OFFENSE, THE JURY SHOULD NOT HAVE BEEN CHARGED ON THE LESSER OFFENSE BECAUSE THE DEFENDANT HAD NO PRIOR NOTICE OF THAT POSSIBILITY (FIRST DEPT).

The First Department, dismissing the burglary second count, determined the People's request to instruct the jury on burglary second as a lesser included offense of burglary second as a sexually motivated offense should not have been granted. Although burglary second is a lesser included offense of burglary second as a sexually motivated offense, the People's case focused only on the sexual

motivation. Defendant therefore did not have notice the jury would consider burglary second:

… [T]he court improperly charged the lesser-included offense because the People, through the way they presented their case, deprived defendant of notice of the possibility that the jury would be asked to consider a lesser-included. In People v Barnes (50 NY2d 375 [1980]), the Court of Appeals observed that, where the People in a burglary case limit to a particular crime the act that the defendant intended to commit while unlawfully in a building, "the court is obliged to hold the prosecution to this narrower theory alone" … . * * *

In opposing defendant's pretrial motion to sever certain charges in the indictment from the others, the People focused exclusively on defendant's sexual harassment of the complainant, and on his grabbing the arm and pulling the shirt of another woman he encountered in the dorm. In making an application for the admission of certain Molineux evidence, the prosecutor focused only on the theory that defendant entered the dorm to satisfy his own sexual urges. And, in his opening statement, the prosecutor stated that defendant "knowingly and unlawfully entered the private area of a dorm to do exactly what he had been doing minutes prior — to grab, to grope and to harass the young women who lived there." Further, the prosecutor downplayed the behavior defendant displayed towards some men he saw in the lobby of the dorm, stating that "the evidence will show that he was substantially motivated by his desire to abuse women when he passed that turnstile and unlawfully entered the private area of the dorm." People v Seignious, 2022 NY Slip Op 00948, First Dept 2-10-22

CRIMINAL LAW, VOIR DIRE.

THE JUDGE SHOULD HAVE INQUIRED FURTHER WHEN A PROSPECTIVE JUROR SAID TRAVEL PLANS PROHIBITED HER FROM SERVING BEYOND THE PROJECTED LAST DAY OF THE TRIAL, CONVICTION REVERSED (FIRST DEPT).

The First Department, reversing defendant's conviction, determined the judge should have inquired further when a prospective juror said travel plans prohibited her from serving beyond the projected last day of the trial:

During jury selection, the court advised the panel that the trial could last until April 17, 2018. The panelist at issue stated that she "absolutely" could not serve on April 18, because she had irrevocable travel plans for that day. When defense counsel said that "we are starting to get closer to the 16th, 17th," and asked whether she "may not be able to give [her] best attention" if "we started moving in that direction," the panelist said, "Yes." Counsel challenged this panelist for cause because of the concern that she would have difficulty focusing on the trial due to her travel constraints. In the alternative, counsel sought to question this panelist further. The court denied the challenge because it believed that the trial "should never even get that close." Defendant was compelled to exercise his final peremptory challenge against this panelist. The court should have granted defendant's request for further inquiry to determine her ability to serve … . Given that her travel plans precluded her from serving a single day beyond the court's estimated outer limit for the trial, the panelist gave the impression that she would have difficulty focusing on the trial, as she stated, and that, if selected, she might have been biased in favor of reaching a verdict quickly … . People v Bowman, 2022 NY Slip Op 02208, First Dept 3-31-22

Practice Point: Here a prospective juror had firm travel plans and therefore could not serve beyond the projected last day of the trial. The judge should have inquired further when defense counsel suggested she may have difficulty focusing on the trial. The juror may have been biased in favor of a quick verdict. Defense counsel used a peremptory challenge; new trial ordered.

EMPLOYMENT LAW, EDUCATION-SCHOOL LAW, CONTRACT LAW.

THE TERM "ECONOMIC SECURITY" IN THE NYU FACULTY HANDBOOK DID NOT PROHIBIT A POLICY (THE "REF" POLICY) TYING A TENURED FACULTY MEMBERS' SALARY-REDUCTION TO THE AMOUNT OF GRANTS PROCURED IN A GIVEN YEAR; THE REF POLICY WAS NOT A DISCIPLINARY PROCEDURE; A SPECIFIC SALARY FIGURE IN A TENURED FACULTY MEMBER'S CONTRACT, HOWEVER, COULD NOT BE REDUCED PURSUANT TO THE REF POLICY (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice OIng, modifying Supreme Court, determined: (1) the term "economic security" in the faculty handbook was prefatory language that did not prohibit the university (NYU) from tying salary reductions for tenured faculty to the amount of grant-money procured by a faculty member (the REF policy); (2) the salary reductions were not part of disciplinary procedure; and (3) the provision in the contract with one of the faculty members, Samuels, setting his salary at a specific amount prohibited the salary reductions tied to grants as to him:

Assuming that the term "economic security" gives rise to contractual rights, we reject the argument advanced by the Professors and amici curiae that "economic security" is an ambiguous term of art and that custom and usage in academia define it as prohibiting retroactive salary reductions pursuant to such policies as the REF Policy. * * *

A faculty member's failure to comply with the REF Policy is simply not conduct that is subject to discipline. * * *

We find that NYU breached the terms of the "2001 Contract" when it reduced Professor Samuels's salary pursuant to the REF Policy and that he is entitled to summary judgment on this claim. Monaco v New York Univ., 2022 NY Slip Op 01125, First Dept 2-22-22

EMPLOYMENT LAW, BREACH OF FIDUCIARY DUTY, FRAUD.

EACH TIME PLAINTIFF'S MARKETING DIRECTOR ENTERED A CONTRACT WITH A COMPANY IN WHICH THE DIRECTOR HAD AN OWNERSHIP INTEREST CONSTITUTED A SEPARATE WRONG UNDER THE CONTINUING WRONG DOCTRINE; THE COMPLAINT STATED CAUSES OF ACTION FOR FRAUD AND BREACH OF FIDUCIARY DUTY (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, determined the continuing wrong doctrine applied to each time defendant hired Exit for video editing services within six years of filing the complaint. In addition, the complaint stated a cause of action for breach of a fiduciary duty:

This action arises from the conduct of plaintiff's former director of marketing, Taufiq, in repeatedly contracting with Exit Editorial, Inc. (Exit), owned by Tristan Kneschke (together with Exit, the Exit defendants), for video editing services. Plaintiff claims that Taufiq falsely represented to it that he negotiated with Exit at arms length and that Exit's prices were reasonable, when in fact its prices were well above market rate, he had an ownership interest in Exit, and he received a cash finder's fee for each contract with Exit.

Plaintiff's allegations and supporting affidavits were sufficient to permit an inference that a separate exercise of judgment, and thus a separate wrong, was committed each time Exit was hired, thereby enabling application of the continuing wrong doctrine … . * * *

The breach of fiduciary duty claim against Taufiq should be reinstated, as an agent has a duty to make full disclosure to its principal of any conflicts of interest and there is no requirement of justifiable reliance for such a claim … .Manipal Educ. Ams., LLC v Taufiq, 2022 NY Slip Op 02200, First Dept 3-31-22

Practice Point: An allegation that an employee entered contracts on behalf of his employer with a company of which the employee was a part-owner, without so informing his employer, supports causes of action for fraud and breach of fiduciary duty. Each contract constituted a separate wrong pursuant to the continuing wrong doctrine

EMPLOYMENT LAW, EMPLOYER LIABILITY, ASSAULT BY EMPLOYEE.

ALTHOUGH THE PERSON WHO ALLEGEDLY ASSAULTED PLAINTIFF AT JFK AIRPORT WAS AN EMPLOYEE OF AMERICAN AIRLINES, HE WAS NOT ON DUTY AT THE TIME OF THE INCIDENT; THE DEFENDANTS MOTION FOR SUMMARY JUDGMENT ON THE VICARIOUS LIABILITY AND NEGLIGENCE CAUSES OF ACTION SHOULD HAVE BEEN GRANTED (FIRST DEPT).

The First Department, reversing Supreme Court, determined defendants' motion for summary judgment in this vicarious liability, negligent hiring and supervision and premises liability action should have been granted. Plaintiff was allegedly assaulted by Miles, who worked for American Airlines, at JFK airport (owned by defendant Port Authority). Plaintiff sued under respondeat superior and negligence theories. Miles testified he was not on duty at the time of the incident:

Under the doctrine of respondeat superior, an employer may be held vicariously liable for intentional torts committed by employees acting within the scope of their employment, as long as those acts were "generally foreseeable and a natural incident of the employment" … . Where the material facts are not in dispute, the question whether respondeat superior liability attaches is one of law and can be determined on a motion for summary judgment … . Here the threshold question is whether Miles was even working, or under the direction of American, at the time of the incident. … [D]efendants attached the deposition transcript of Miles, who testified that he was not working at the time of the incident. This was sufficient to at least satisfy defendants' prima facie burden … .

Because the testimony of Miles, who, notably, is not a party to this action, was that he was not on duty when the altercation occurred, defendants shifted the burden on the issue of respondeat superior. Moreover, Miles's testimony about his job responsibilities — escorting planes in and out, and loading and unloading luggage — established prima facie that the foreseeability element of respondeat superior liability was not present. The alleged assault bore no connection to plaintiff's work duties, and thus was not "in furtherance of any employer-related goal whatsoever" Summors v Port Auth. of N.Y. & N.J., 2022 NY Slip Op 01891, First Dept 3-17-22

Practice Point: An American Airlines employee allegedly assaulted plaintiff at JFK airport. The defendants demonstrated the American Airlines employee was not on duty at the time of the incident, which was deemed fatal to respondeat superior (vicarious) liability.

EMPLOYMENT LAW, HOMEOWNER LIABILITY FOR INJURED CONTRACTOR.

PLAINTIFF WAS AN EMPLOYEE OF THE CONTRACTOR DEFENDANT HOMEOWNER HIRED TO BUILD A NEW STAIRCASE; PLAINTIFF WAS INJURED BY A PROTRUDING SCREW ON THE NEW STAIRCASE; DEFENDANT WAS NOT LIABLE; THE HOMEOWNER DID NOT CREATE THE CONDITION, DID NOT SUPERVISE THE CONTRACTOR'S WORK, AND DID NOT HAVE NOTICE OF THE CONDITION (FIRST DEPT).

The First Department, reversing Supreme Court, determined defendant homeowner was not liable to plaintiff, an employee of the contractor defendant hired to replace a staircase. Plaintiff was injured by a protruding screw attached to the new staircase:

… [D]efendant established prima facie that he did not create the allegedly unsafe condition in the unfinished staircase … . Although defendant testified that he tried to repair the old staircase before hiring the contractor, the uncontradicted evidence showed that the contractor removed the old staircase and that plaintiff was injured on a screw attached to the new staircase. The new staircase was built entirely by the contractor.

… [P]laintiff's testimony that defendant gave the contractor instructions on where to place the staircase and general instructions on how he wanted the construction to proceed does not, without more, raise a triable issue of fact as to whether defendant created the condition. On the contrary, the mere retention of general supervisory powers over an independent contractor, as opposed to the giving of specific directions on how to do the work, cannot form a basis for the imposition of liability against the principal …

There is … no evidence in the record that defendant had actual or constructive notice of the condition in the unfinished staircase, as the protruding screw was not visible and apparent, nor is there any evidence showing that it existed for a sufficient length of time before the accident to permit defendant to discover and remedy it … . Lara v Kadir, 2022 NY Slip Op 00504, First Dept 1-27-22

EMPLOYMENT LAW, HUMAN RIGHTS LAW, DISCRIMINANTION.

PLAINTIFF'S EMPLOYMENT DISCRIMINATION ACTION SHOULD NOT HAVE BEEN DISMISSED (FIRST DEPT).

The First Department, reversing Supreme Court, determined there were triable issues of fact in this employment discrimination case:

Plaintiff, an African American female, raises triable issues of fact whether her October 2017 termination (adverse employment action) was in retaliation for her verbal complaints (protected activity) concerning racist comments defendant Annie Liu allegedly uttered at work … . A question of fact exists as to whether plaintiff complained in July or August 2017. If plaintiff's testimony is credited, the time frame between the discriminatory comments, plaintiff's complaints, and her firing is evidence of a causal connection between the protected activity and her termination two months later … . Contrary to defendants' argument, it is unclear from the record whether an intervening event occurred to dispel an inference of a causal relationship. Moreover, issues of fact also exist as to whether defendants' proffered explanation for terminating plaintiff's employment was pretextual … . Cancel v Global Fertility & Genetics, Inc., 2022 NY Slip Op 00811, First Dept 2-8-22

EMPLOYMENT LAW, HUMAN RIGHTS LAW.

PLAINTIFF SUFFICIENTLY ALLEGED CAUSES OF ACTION FOR EMPLOYMENT DISMCRIMINATION BASED ON NATIONAL ORIGIN (YEMENI), HOSTILE WORK ENVIRONMENT, AND RETALIATION (FIRST DEPT).

The First Department, reversing Supreme Court, determined plaintiff stated claims for (1) employment discrimination on the basis of national origin)Yemeni), (2) hostile work environment, and (3) retaliation:

[Plaintiff's] assertion that he was denied a promotion to sergeant on at least two occasions adequately supports … his claim [for discrimination on the basis of national origin] … . … [H]is allegations that a coworker made derogatory remarks about Yemenis in the presence of his supervisors, that such remarks were ignored or condoned, and that non-Yemeni campus peace officers, who were less qualified than he, were promoted to the sergeant position, supports the fourth element of his claim, i.e. that the adverse action occurred under circumstances giving rise to an inference of discrimination … . …

Plaintiff has also stated a cause of action for hostile work environment, as his coworker's multiple derogatory remarks about Yemenis, sometimes made in the presence of plaintiff's supervisors, along with the allegedly unfounded write-ups, unfavorable assignments, and denial of a promotion, were sufficiently severe and pervasive to support that cause of action … . Plaintiff also alleges that defendants knew about the comments and failed to take appropriate action … .

Plaintiff has sufficiently alleged retaliation by showing that: (1) he engaged in protected activity in December 2016 when he filed a complaint stating that his supervisor was discriminating against him, (2) defendants were aware that he participated in such activity, (3) he was denied a promotion in February and May 2017, and (4) there is a causal connection between the protected activity and the adverse action … . Alshami v City Univ. of N.Y., 2022 NY Slip Op 02053, First Dept 3-24-22

Practice Point: This decision describes the allegations of employment discrimination (Human Rights Law) for (1) discrimination on the basis of national

origin (Yemeni), (2) hostile work environment, and (3) retaliation which are sufficient to survive a motion to dismiss.

EMPLOYMENT LAW, MUNICIPAL LAW, CIVIL SERVICE LAW, RETALIATION.

CIVIL SERVICE LAW 75-B SERVES THE SAME PURPOSE AS THE EMPLOYMENT ANTI-RETALIATION STATUTES IN THE NEW YORK STATE AND NEW YORK CITY HUMAN RIGHTS LAW; EVEN THOUGH PLAINTIFF HAD RESIGNED AT TIME OF THE SUIT, HIS RETALIATION CAUSE OF ACTION SHOULD NOT HAVE BEEN DISMISSED (FIRST DEPT).

The First Department, reversing Supreme Court, determined plaintiff's retaliation claim pursuant to Civil Service Law 75-b should not have been dismissed. Plaintiff, an employee of the NYC Department of Buildings (DOB), alleged he was denied a job because of a poor reference allegedly made in retaliation for his reporting a conflict of interest to the City's Department of Investigation. At the time plaintiff brought this action he had retired, but his retirement did not preclude his Civil Service Law cause of action:

… [W]e reject the motion's court determination that Civil Service Law § 75-b does not apply to actions taken by a public employer after an employee has resigned. Civil Service Law § 75-b prohibits a public employer from dismissing or taking any "other disciplinary or other adverse personnel action against a public employee regarding the employee's employment" because the employee discloses information of either (1) a violation of rule or law, which presents a substantial and specific danger to public health and safety, or (2) improper governmental action … . Section 75-b serves a purpose similar to that of other anti-retaliation statutes, including the New York State Human Rights Law (Executive Law § 296) and the New York City Human Rights Law (Administrative Code of City of NY § 8-107), in that they "'remediat[e] adverse employment actions which, if allowed, would undermine important public policy'" … . Thus, an analogous reading of the term "employee" under Civil Service Law § 75-b to include former employees alleging post-employment retaliation for reports made in the course of their prior employment, is appropriate … . Moreover, blacklisting and providing negative references to an individual's prospective employers in retaliation for prior reports

of government misconduct may constitute adverse personnel action under the statute, in the same way that the State Human Rights Law has been found to cover such acts … . DaCosta v New York City Dept. of Bldgs., 2022 NY Slip Op 01963, First Dept 3-22-22

Practice Point: Civil Service Law 75-b serves the same purpose as the employment anti-retaliation statutes in the New York State and New York City Human Rights Law. The NYC employee's Civil Service Law 75-b cause of action, alleging he was given a poor reference in retaliation for reporting a conflict of interest, should not have been dismissed, even though he had resigned at the time the suit was filed.

FALSE IMPRISONMENT, STATUTE OF LIMITATIONS.

THE FALSE IMPRISONMENT CAUSE OF ACTION WAS UNTIMELY BECAUSE IT ACCRUED WHEN DEFENDANT WAS RELEASED UPON ARRAIGNMENT, NOT WHEN HE WAS RELEASED UPON COMPLETION OF HIS SENTENCE (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, determined that the false imprisonment cause of action was untimely because it accrued when plaintiff was released upon arraignment, not when he was released after completing his sentence:

Contrary to the motion court's finding, the statute of limitations began to run not on the date on which plaintiff was released from incarceration, having completed his sentence, but on the date of his arraignment, when he was released on his own recognizance … . False imprisonment consists of detention without legal process and ends once the accused is held pursuant to legal process, such as arraignment … . Plaintiff's incarceration following his conviction is not part of his false imprisonment claim and thus is not relevant to determining the date of expiration of the limitations period for the claim. Butler v City of New York, 2022 NY Slip Op 00810, First Dept 2-8-22

FAMILY LAW, JURISDICTION TO AMEND SEPARATION AGREEMENT.

FAMILY COURT DID NOT HAVE JURISDICTION TO MODIFY A SEPARATION AGREEMENT WHICH WAS INCORPORATED BUT NOT MERGED INTO THE JUDGMENT OF DIVORCE; A PLENARY ACTION IS REQUIRED (FIRST DEPT).

The First Department, reversing (modifying) Family Court, determined Family Court did not have jurisdiction to modify the separation agreement by putting a cap on the child-support/spousal-support credit father was entitled to for his payment of the mortgage and apartment expenses:

A stipulation of settlement which is incorporated but not merged into the parties' judgment of divorce may be reformed only in a plenary action … . Family Court does not have jurisdiction to modify a separation agreement … . Under the terms of the parties' stipulation of settlement, the father is entitled to pay his $2,100 in monthly child support directly to the mortgagee of the parties' former marital apartment. However, the Family Court erred in capping the father's credit against support arrears at $25,200 per year based on this provision. Although Family Court found that there was no similar provision with respect to spousal support, in fact the parties' stipulation permits the father to also deduct the payment of apartment expenses, including the mortgage, from his spousal support. Accordingly, Family Court improperly amended the stipulation by imposing an annual maximum credit to which the father is entitled based solely on his child support obligation. Matter of Deborah K. v Richard K., 2022 NY Slip Op 01391, First Dept 3-3-22

FAMILY LAW, NEGLECT, MOTHER'S MENTAL ILLNESS.

EVIDENCE OF MOTHER'S MENTAL ILLNESS AND HER FAILURE TO PROPERLY TREAT IT WAS SUFFICIENT TO SUPPORT A FINDING OF NEGLECT, EVEN IN THE ABSENCE OF PROOF OF A SPECIFIC INSTANCE OF CHILD NEGLECT (SECOND DEPT).

The Second Department, reversing Family Court, determined the Administration for Children's Services (ACS) presented sufficient proof to support a finding of

neglect based upon mother's mental illness (schizophrenia) which mother failed to properly treat. Evidence of an actual instance of child neglect is not necessary:

"Even though evidence of a parent's mental illness, alone, is insufficient to support a finding of neglect of a child, such evidence may be part of a neglect determination when the proof further demonstrates that the parent's condition creates an imminent risk of physical, mental, or emotional harm to the child" … . "Indeed, even when a child has not been actually impaired, a finding of neglect is appropriate to prevent imminent impairment, which is an independent and separate ground on which a neglect finding may be based" … . In such cases, the court is not required to wait until a child has already been harmed before it enters a neglect finding … . Proof of a parent's "ongoing mental illness and the failure to follow through with aftercare medication is a sufficient basis for a finding of neglect where such failure results in a parent's inability to care for [his or] her child in the foreseeable future" … . Matter of Khaleef M. S.-P. (Khaleeda M. S.), 2022 NY Slip Op 02124, Second Dept 3-30-22

Practice Point: Here the Second Department determined proof of mother's mental illness and her failure to properly treat it was sufficient to support a finding of child neglect, even the absence of a specific instance of child neglect.

FAMILY LAW, NEGLECT, PERSON LEGALLY RESPONSIBLE.

DESPITE THE ORDER OF PROTECTION EXCLUDING RESPONDENT FROM THE HOME, THE PETITIONER PRESENTED SUFFICIENT EVIDENCE RESPONDENT WAS A PERSON LEGALLY RESPONSIBLE FOR THE CHILD; PEITIONER DEMONSTRATED RESPONDENT HAD NEGLECTED THE CHILD BY COMMITTING DOMESTIC VIOLENCE IN THE CHILD'S PRESENCE (FIRST DEPT).

The First Department, reversing Family Court, determined the evidence demonstrated respondent was a person legally responsible (PLR) for the child and respondent neglected the child by committing domestic violence in the child's presence:

Petitioner demonstrated by a preponderance of the evidence that respondent was a person legally responsible (PLR) for the subject child, as well as for the child's three older siblings. Respondent and the children's mother were in a romantic relationship and lived together before the child was born, and they both represented to caseworkers that respondent was the child's biological father. There is evidence that, although he was excluded from the home because of an order of protection against him, respondent maintained communication with the mother and slept at the home at least on occasion, sharing the mother's bed. Respondent failed to appear or testify to dispute the evidence that he was the child's biological father or a PLR for him … . The fact that respondent was excluded from the household before the child's birth as a result of having committed acts of excessive corporal punishment against the child's eldest sibling does not outweigh the evidence that demonstrates that he is a PLR for the child … . The finding that respondent is a PLR for the child is further supported by his failure to appear in court, "allowing the court to draw a negative inference against him" … . Matter of Tristian B. (Winston B.), 2022 NY Slip Op 00498, First Dept 1-27-22

FAMILY LAW, DIVORCE, DEFAULT JUDGMENT.

SUPREME COURT SHOULD NOT HAVE ENTERED A DEFAULT JUDGMENT OF DIVORCE AGAINST THE HUSBAND, WHO WAS REPRESENTING HIMSELF, WHEN HE DID NOT APPEAR AT THE INQUEST; BOTH THE COURT AND THE WIFE WERE AWARE THE HUSBAND HAD BEEN DIAGNOSED WITH A SIGNIFICANT MENTAL HEALTH CONDITION (FIRST DEPT).

The First Department, reversing Supreme Court, determined the judgment of divorce should not have been entered after the husband, who was representing himself, failed to appear at an inquest. Both the court and his wife were aware he had been diagnosed with a mental health condition, resulting in episodes when he could not care for himself or protect his interests:

… [A]t the conclusion of the inquest, the court explicitly acknowledged that the husband's absence was likely attributable to his mental health. Thus, before entering judgment upon the husband's default, there should have been an inquiry

into whether a guardian ad litem was necessary (see CPLR 1201, 1203 …). Because there was no inquiry, the judgment must be vacated and the matter remanded for further proceedings, including, if necessary, an inquiry into the husband's current capacity … . Richard v Buck, 2022 NY Slip Op 02101, First Dept 3-29-22

Practice Point: Here both the court and the wife were aware the husband, who was representing himself and did not appear at the inquest, suffered from a significant mental health condition. The default judgment of divorce should not have been entered. The judgment was vacated. If necessary, Supreme Court should hold a hearing to determine the husband's capacity.

FAMILY LAW, SEXUAL ABUSE, DISCOVERY OF CHILD'S MENTAL HEALTH RECORDS.

IN THIS SEXUAL ABUSE CASE, THE CHILD'S MENTAL HEALTH RECORDS SHOULD BE REVIEWED BY THE JUDGE IN CAMERA TO DETERMINE WHETHER ANY RECORDS ARE RELEVANT TO THE RESPONDENT'S CLAIM THE CHILD FABRICATED THE SEXUAL ABUSE ALLEGATIONS; FAMILY COURT PROPERLY DENIED RESPONDENT'S REQUEST FOR DISCOVERY OF THE RECORDS (FIRST DEPT).

The First Department, reversing (modifying) Family Court, held the judge properly denied discovery of the child's mental health records in this sexual abuse proceeding, but the judge should review the records in camera to determine if any records support respondent's position that the child fabricated the sexual abuse allegations:

Confidential mental health records may only be disclosed upon a finding by a court that "the interests of justice significantly outweigh the need for confidentiality" (Mental Hygiene Law § 33.13[c][1]). Pursuant to Family Court Act § 1038(d), the court must conduct a balancing test to weigh "the need of the [moving] party for the discovery to assist in the preparation of the case" against "any potential harm to the child [arising] from the discovery" … .

… [G]iven respondent's need to prepare his defense, his right to impeach the child's credibility as she is likely to be a witness, and the child's diminished interest in the confidentiality of older records from an institution that is not currently providing services to her, we find that an in camera review of the … records is warranted … . …

… [W]e find that the Family Court properly denied his request for those records … . Were a court to grant such a request on the sparse showing in this case, virtually every child's therapy records would be subject to exposure. Matter of Briany T. (Justino G.), 2022 NY Slip Op 00629, First Dept 2-1-22

FORECLOSURE, ACCRUAL OF INTEREST.

IN THIS FORECLOSURE ACTION, THE ACCRUAL OF INTEREST SHOULD HAVE BEEN TOLLED DURING THE BANK'S UNEXPLAINED DELAYS IN PROCURING AND ENTERING AN ORDER OF REFERENCE (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined the accrual of interest should have been tolled during the bank's unexplained delays in procuring and entering an order or reference:

Supreme Court properly found that the nearly 17-month delay in the plaintiff's service of the notice of entry of the order of reference entered April 30, 2014, was excessive … . However, it improvidently exercised its discretion in tolling the accrual of interest for only one year, as it should have been tolled for the entire period from April 30, 2014, through September 9, 2015. In addition, the court should have also tolled the accrual of interest for the time periods in which the plaintiff made two motions for an order of reference after its initial motion for an order of reference was denied for administrative reasons … . The tolling of the accrual of interest during these time periods is not … penalizing the plaintiff for losing its motions, but is instead a response to the plaintiff's unexplained delay in prosecuting the action by failing to promptly move for relief after the denial of its first and second motions. … [A]fter the plaintiff's first motion for an order of reference was denied in August 2011, it failed to move again until February 2013. After the second motion was denied in September 2013, the plaintiff did not make

its third motion until February 2014. Deutsche Bank Natl. Trust Co. v Ould-Khattri, 2022 NY Slip Op 00167, Second Dept 1-12-22

FREEDOM OF INFORMATION LAW (FOIL), TAXI LICENSES, CRMINAL CONVICTIONS.

PETITIONER SOUGHT RECORDS FROM THE NYC TAXI AND LIMOUSINE COMMISSION (TLC) TO DETERMINE HOW THE COMMISSION WAS HANDLING LICENSE APPLICANTS WITH CRIMINAL CONVICTIONS; THE REQUEST SHOULD NOT HAVE BEEN DENIED; MATTER REMITTED FOR IN CAMERA REVIEW (FIRST DEPT).

The First Department, reversing Supreme Court, determined petitioner's request for records from the NYC Taxi and Limousine Commission (TLC), including fitness interview decisions (FID"s) should not have been denied. The matter was remitted to Supreme Court for an in camera review of the records:

The Driver's Privacy Protection Act (DPPA) (18 USC § 2721 et seq.) does not impose a blanket prohibition on disclosure of all motor vehicle records. Instead, the law restricts disclosure of "personal information," which includes personal identifiers of the type that petitioner agrees should be redacted. Moreover, even as to such personal information, the DPPA still expressly provides for disclosure in various circumstances, such as for research purposes, where the personal information will not be further disclosed … . Motor vehicle records under the DPPA are thus not the kind of records as to which production is absolutely prohibited, as long as they are redacted … .

The record is not clear as to what extent it is possible to anonymize production of the TLC fitness interview decisions (FIDs), which petitioner seeks in order to assess whether the TLC has been applying fair standards in its decision making on licensing determinations with respect to people with one or more criminal convictions … . Matter of Brooklyn Legal Servs. v New York City Taxi & Limousine Commn., 2022 NY Slip Op 00809, First Dept 2-8-22

HUMAN RIGHTS LAW, MUNICIPAL LAW, BUILDING ACCESS FOR DISABLED PERSONS.

THE FACT THAT THE CITY BUILDING CODE DID NOT REQUIRE DISABLED-ACCESS TO THE THIRD FLOOR OF DEFENDANT RESTAURANT DID NOT CONFLICT WITH THE FACT THAT THE HUMAN RIGHTS LAW MAY REQUIRE SUCH ACCESS (FIRST DEPT).

The First Department, reversing Supreme Court, determined plaintiff, a disabled wheelchair user, had standing to bring a discrimination action against defendant restaurant alleging the third floor of the restaurant was not accessible. The fact that the NYC Building Code did not require disabled-access to the third floor based on the square-footage did not conflict with the Human Rights Law which may require access:

The Building Code and disability discrimination laws serve different purposes and can easily be enforced and harmonized. The Building Code serves foremost to ensure safety in construction and maintenance of structures. The accessibility provision at issue simply states that no disabled access is required for building areas which measure less than 2,500 square feet. The provision does not prohibit building owners from providing such access — it simply provides that, for purposes of the Building Code, no such access is required.

The disability discrimination laws are designed, as pertinent here, to ensure that disabled persons have reasonable access to public accommodations. While the Building Code might not require disabled access under the circumstances present here, this does not mean that more may not be required under the State and City Human Rights Laws' (HRLs) disability discrimination provisions. In this, there is no conflict. To the extent there is any tension between the Building Code's provisions and the HRLs, such tension may be remedied by the rule of reasonableness which is an integral component of the HRLs' requirement that disabled persons be reasonably accommodated (see Executive Law § 296[c][i]; Administrative Code of City of NY § 8-107[15][b]). Jones v McDonald's Corp., 2022 NY Slip Op 00814, First Dept 2-8-22

INSURANCE LAW, NO-FAULT, INDEPENDENT MEDICAL EXAM.

TO BE ENTITLED TO SUMMARY JUDGMENT BASED ON A PATIENT'S FAILURE TO SHOW UP FOR AN INDEPENDENT MEDICAL EXAMINATION (IME), THE NO-FAULT INSURER MUST SHOW BOTH THAT THE PATIENT DID NOT SHOW UP AND THE REQUEST FOR THE IME AND THE SCHEDULING OF THE IME COMPLIED WITH THE REQUIRED TIME-FRAMES (FIRST DEPT).

The First Department, reversing Supreme Court, determined plaintiff-insurer's motion for summary judgment in this no-fault insurance action should not have been granted. Although an insurer need not pay no-fault claims if the patient did not appear for an independent medical examination (IME), in order to warrant an award of summary judgment the insurer must demonstrate compliance with the required time frames for requesting and scheduling the IME:

The failure to appear for a properly scheduled independent medical examination (IME) requested by the insurer "when, and as often as, it may reasonably require is a breach of a condition precedent to coverage under the no-fault policy" and vitiates coverage ab initio … . However, to meet its prima facie burden for summary judgment where it has denied a claim for no-fault benefits based on a patient's failure to appear for an IME, the insurer must establish that it requested IMEs in accordance with the procedures and time frames set forth in the no-fault implementing regulations and that the patient did not appear … . Because it is impossible to discern from the record in each case here whether plaintiff complied with the requisite time frames requiring it to request IMEs within 15 days of receiving appellants' claims and scheduling the IMEs for within 30 days of receiving their claims (11 NYCRR 65-3.5[b],[d]), plaintiff failed to establish its prima facie entitlement to summary judgment … . American Tr. Ins. Co. v Martinez, 2022 NY Slip Op 00963, First Dept 2-15-22

INSURANCE LAW, MUNICIPAL LAW, SOCIAL SERVICES LAW, BASIC ECONOMIC LOSS.

THE NYC HUMAN RESOURCES ADMINISTRATION (HRA) WAS NOT ENTITLED TO ANY OF THE PROCEEDS OF PLAINTIFF'S CAR-ACCIDENT SETTLEMENT BECAUSE THE SETTLEMENT DID NOT INCLUDE MEDICAL EXPENSES; PLAINTIFF WAS BARRED FROM RECOVERY OF MEDICAL COSTS BECAUSE HER BASIC ECONOMIC LOSS WAS LESS THAN $50,000 (INS LAW 5102) (FIRST DEPT).

The First Department, reversing Supreme Court, determined no part of plaintiff's automobile accident settlement was available to satisfy a medical lien held by the NYC Human Resources Administration (HRA) because the settlement did not include medical expenses:

HRA asserted a lien on the proceeds of plaintiff's settlement of an action arising out of an automobile accident in an amount representing the total amount of the medical bills it paid in connection with the treatment of the injuries plaintiff sustained in the accident (see Social Services Law § 104-b). However, plaintiff was barred from suing for medical expenses, because her basic economic losses were less than $50,000 (see Insurance Law § 5102[a]). Moreover, in light of the particular record before us, no portion of the proceeds of the settlement represents medical expenses, and HRA may not recover any portion of the proceeds for its medical costs … . Marmol v Mutino, 2022 NY Slip Op 00970, First Dept 2-15-22

INSURANCE LAW, NO-FAULT, INDEPENDENT MEDICAL EXAM.

IN THIS NO-FAULT INSURANCE MATTER, PLAINTIFF INSURER DID NOT DEMONSTRATE COMPLIANCE WITH THE NYCRR SUCH THAT IT WAS ENTITLED TO SUMMARY JUDGMENT BASED UPON THE INSURED'S FAILURE TO APPEAR FOR AN INDEPENDENT MEDICAL EXAMINATION (FIRST DEPT).

The First Department, reversing Supreme Court, determined plaintiff insurer did not demonstrate it was entitled to summary judgment based upon the insured's failure to appear for an independent medical examination (IME):

[Plaintiff insurer's] its motion papers did not demonstrate that it sustained its burden of showing that it complied with New York State no-fault regulations (11 NYCRR § 65-3.5[b], [d]) governing the timeframes for scheduling IMEs … .. Specifically, plaintiff did not establish that it timely requested the IMEs under the applicable no-fault regulations, since plaintiff's motion papers did not establish the dates of the verification forms that it received from the medical provider defendants; therefore, it is not possible to determine whether plaintiff sent the appropriate notices within 15 business days or 30 calendar days of receiving the forms, as required under (11 NYCRR) § 65-3.5(b) and (d) … American Tr. Ins. Co. v Alcantara, 2022 NY Slip Op 01871, First Dept 3-17-22

Practice Point: An insurer must show compliance with the regulatory timeframes for scheduling an independent medical examination (IME) before it will be entitled to summary judgment based on an insured's failure to appear at an IME.

INSURANCE LAW, SECURITIES, FIDELITY BONDS.

DEFENDANT COMMODITY FUTURES BROKER IS ENTITLED TO COVERAGE UNDER FIDELITY BONDS FOR LOSSES INCURRED BY THE CRIMINAL ACTIONS OF A BROKER AMOUNTING TO $141 MILLION (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, in a full-fledged opinion by Justice Kapnick, determined defendant MF Global was entitled to coverage under fidelity bonds for losses incurred by the criminal actions of a broker, Dooley, for which Dooley was ordered to pay restitution to MF Global in the amount of $141 million:

This 2009 declaratory judgment action involves a $141 million insurance coverage dispute between plaintiffs New Hampshire Insurance Company, Liberty Mutual Insurance Company, and Axis Reinsurance Company (Insurers) and defendant, commodity futures broker MF Global Finance USA, Inc. (MF Global). New Hampshire issued the primary bond insurance policy to MF Global's predecessor and Liberty Mutual and Axis Reinsurance each issued excess financial institution bonds, covering the same policy period and incorporating the provisions and terms of the primary bond. Defendant MF Global seeks coverage under those bonds for a trading loss incurred in February 2008 by Evan Brent Dooley, a broker for MF Global, who in 2012 pleaded guilty to exceeding speculative position limits in violation of 7 USC §§ 6a and 13(a)(5). Dooley was sentenced to five years' imprisonment and one year of supervised release and was ordered to pay restitution of over $141 million to MF Global upon release from prison.

… [W]e hold that defendant is covered under the fidelity bonds for its loss and is entitled to summary judgment in its favor…. . New Hampshire Ins. Co. v MF Global Fin. USA Inc., 2022 NY Slip Op 01880, First Dept 3-17-22

LABOR LAW-CONSTRUCTION LAW, DEFICIENT EXPERT AFFIDAVIT.

DEFENDANT'S EXPERT'S AFFIDAVIT ITSELF RAISED QUESTIONS OF FACT AND WAS OTHERWISE DEFICIENT IN THIS LABOR LAW 240(1) LADDER FALL CASE; DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (FIRST DEPT).

The First Department, reversing Supreme Court, determined plaintiff's Labor Law 240(1) cause of action should not have been dismissed. Plaintiff alleged he fell off a ladder while cleaning glass with an extension pole. The court noted that the defendant's expert affidavit was deficient and itself raised questions of fact precluding summary judgment in favor of the defendant:

Summary dismissal of the Labor Law § 240(1) claim is precluded by issues of fact as to whether plaintiff was exposed to an elevation-related risk "attendant to his work [of washing windows] as it was intended to be performed" … . Plaintiff testified that he performed the work using an extension pole with a squeegee attached to one end, while both of his feet were on the rung one or two steps below the top of a 12-foot ladder. Plaintiff was unable to estimate the height of the glass except that it was more than 15 feet above the floor, but he stated that he could not have cleaned the glass while standing on the floor because he would not have been able to apply sufficient force to the glass. * * *

The [defendant's] expert's statements raised issues of fact as to his own credibility in opining that plaintiff could have cleaned all of the glass while standing on the floor and plaintiff's description of the supplies he needed to use and did use in performing the work. Durasno v 680 Fifth Ave. Assoc., L.P., 2022 NY Slip Op 01413, First Dept 3-8-22

Practice Point: Here the defendant's expert's affidavit failed to address all of the allegations made by plaintiff in this Labor Law 240(1) ladder-fall case and raised issues as to the expert's credibility. Defendant's motion for summary judgment should not have been granted.

LABOR LAW-CONSTRUCTION LAW, ELEVATION DIFFERENTIAL.

PLAINTIFF WAS WALKING UP AN EARTHEN RAMP WHEN HE WAS STRUCK BY AN EXCAVATOR AND ROLLED DOWN THE RAMP; THERE WAS NO "SIGNIFICANT ELEVATION DIFFERENTIAL" SUCH THAT LABOR LAW 24O (1) WOULD APPLY (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, determined the circumstances of plaintiff's injury did not fit the "elevation-related" element of a Labor Law 240(1) cause of action. Plaintiff was walking up an earthen ramp when he was struck by an excavator and rolled down the ramp:

Labor Law § 240(1) is inapplicable to this case because plaintiff's injuries were not "the direct consequence of a failure to provide adequate protection against a risk from a physically significant elevation differential" … . Plaintiff was struck by an excavator; the fact that at the time he was bringing debris up an earthen ramp, or that he rolled down the ramp after being struck, does not give rise to a cause of action pursuant to Labor Law § 240(1) … . Herrera v Kent Ave. Prop. III LLC, 2022 NY Slip Op 01738, First Dept 3-15-22

Practice Point: Plaintiff was walking up an earthen ramp when he was struck by an excavator and rolled down the ramp. There was no failure to provide equipment to protect against an elevation-related hazard such that Labor Law 240 (1) would apply.

LABOR LAW-CONSTRUCTION LAW, FALLING OBJECT.

THE WRENCH WHICH FELL AND STRUCK PLAINTIFF COULD HAVE BEEN TETHERED TO THE WORKER WHO DROPPED IT; PLAINTIFF WAS ENTITLED TO SUMMARY JUDGMENT ON HIS LABOR LAW 240(1) CAUSE OF ACTION; PLAINTIFF NEED NOT SUBMIT AN EXPERT AFFIDAVIT (FIRST DEPT).

The First Department, reversing Supreme Court, determined plaintiff's motion for summary judgment on the Labor Law 240(1) cause of action should have been granted. A wrench slipped out of a co-worker's hand and fell 10 or 15 feet striking plaintiff. Defendant's expert opinion that the wrench could not be tethered to a wall missed the point that the wrench could be tethered to the worker. Plaintiff was not required to submit an expert opinion:

Plaintiff is entitled to summary judgment on the Labor Law § 240(1) claim based on [defendant] NYCHA's failure to provide an adequate safety device to protect him from falling objects that were required to be secured … . Third-party defendant Vestar, Inc.'s expert opinion that the wrench "could not have been functionally employed if it was secured/tethered on the parapet wall" completely misses the point, since the wrench could have been tethered to the worker. … [T]he accident report … made the recommendation "to use tethering devices while working from heights," to prevent reoccurrence of such an accident … . Contrary to NYCHA's and Vestar's contention, plaintiff was not required to proffer an expert affidavit … . Rincon v New York City Hous. Auth., 2022 NY Slip Op 00639, First Dept 2-1-22

LABOR LAW-CONSTRUCTION LAW, GRAVITY-RELATED EVENT.

A STACK OF SHEETROCK BOARDS WHICH WERE LEANING AGAINST A WALL FELL ON PLAINTIFF; THERE WERE QUESTIONS OF FACT ABOUT WHETHER IT WAS A GRAVITY-RELATED EVENT AND WHETHER THE ELEVATION DIFFERENTIAL WAS DE MINIMUS (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, determined there was a question of fact whether plaintiff could recover for injuries under Labor Law 240(1). A stack of 25 to 30 sheetrock boards which had been leaning against a wall fell on him. The court noted that the Labor Law 241(6) cause of action was properly dismissed because the incident happened in an apartment, not a "passageway:"

… [T]he record presents issues of fact as to whether plaintiff's injuries flowed directly from the application of the force of gravity to the sheetrock, whether the elevation differential was de minimis, and whether the combined weight of the sheetrock panels could generate a significant amount of force as it fell … . Kuylen v KPP 107th St., LLC, 2022 NY Slip Op 01419, First Dept 3-8-22

Practice Point: A stack of sheetrock boards which had been leaning against a wall fell on plaintiff. There were questions of fact re: whether the accident was covered by Labor Law 240(1) as a gravity-related event where the elevation differential was not de minimus.

LABOR LAW-CONSTRUCTION LAW, INTEGRAL PART OF THE WORK.

THE DUCT ON THE FLOOR WAS AN INTEGRAL PART OF THE DEMOLITION WORK, THEREFORE LABOR LAW 241 (6) DID NOT APPLY; THE DEFENDANT DID NOT SUPERVISE OR CONTROL PLAINTIFF'S WORK, THEREFORE LABOR LAW 200 DID NOT APPLY (FIRST DEPT).

The First Department, reversing Supreme Court, determined the air duct which caused plaintiff's fall was part of the demolition work plaintiff's employer was

hired to perform. Therefore Labor Law 241(6) was not applicable. In addition, Labor Law 200 did not apply to the defendant who did not supervise or control plaintiff's work:

Plaintiff fell after trying to climb over an air duct that was left on the floor as part of the demolition work his employer was subcontracted to perform. Accordingly, the air duct constituted an integral part of the work, and 12 NYCRR 23-1.7(e)(2) as a predicate for the Labor Law § 241(6) claim is inapplicable … . Contrary to plaintiff's contention, defendant properly raised its "integral part" argument in its moving papers.

Defendant cannot be held liable under Labor Law § 200, because the presence of the air duct on the floor was a condition created by the means and methods of the work performed by plaintiff or his employer, and the record demonstrates that defendant had only general supervisory authority over the construction site and did not control plaintiff's work … . Plaintiff testified that he received instructions only from his employer's foremen … . Mateo v Iannelli Constr. Co. Inc., 2022 NY Slip Op 00010, First Dept 1-4-22

LABOR LAW-CONSTRUCTION LAW, NO EVIDENCE OF CAUSE OF LADDER-FALL.

THERE WAS NO DIRECT OR CIRCUMSTANTIAL EVIDENCE OF THE CAUSE OF PLAINTIFF'S-DECEDENT'S FALL FROM A LADDER; ONLY A DEFECTIVE OR UNSAFE LADDER GIVES RISE TO LABOR LAW 240(1) LIABILITY; THE TRIER OF FACT WOULD HAVE TO RESORT TO SPECULATION; THE ACTION SHOULD HAVE BEEN DISMISSED (FIRST DEPT).

The First Department, reversing Supreme Court, determined plaintiff-decedent's Labor Law 240(1) and 241(6) causes of action should have been dismissed. Plaintiff's decedent fell from a ladder, but there were no witnesses and no evidence of the cause of the fall. The trier of fact would have been forced to speculate about whether the ladder was defective in some way:

[Defendants] Casur and 124 Ridge established their prima facie entitlement to judgment as a matter of law by demonstrating that no one was in a position to establish the cause of the accident, as there was no direct or circumstantial evidence as to how the accident happened … . In opposition, plaintiff failed to raise a triable issue of fact. Since the accident may well have been caused by a misstep or loss of balance, rather than by a defective or improperly secured ladder, any determination by the trier of fact as to the cause of the accident would be based upon speculation … . The Noseworthy doctrine (see Noseworthy v City of New York, 298 NY 76, 80-81 [1948])is not applicable to this case, since Casur and 124 Ridge's knowledge as to the cause of the accident is no greater than plaintiff's … Public Adm'r of Queens County v 124 Ridge LLC, 2022 NY Slip Op 01522, First Dept 3-10-22

Practice Point: Falling from a ladder does not automatically trigger Labor Law 240(1) liability. There must be proof the ladder was defective or failed to protect the plaintiff in some way. Here there was no proof of the cause of plaintiff's decedent's fall so the action should have been dismissed.

LABOR LAW-CONSTRUCTION LAW, OPEN AND OBVIOUS.

THE SCAFFOLD BRACING BAR OVER WHICH PLAINTIFF TRIPPED WAS OPEN AND OBVIOUS AND NOT INHERENTLY DANGEROUS; LABOR LAW 200 AND COMMON LAW NEGLIGENCE CAUSES OF ACTION DISMISSED (FIRST DEPT).

The First Department, reversing Supreme Court, determined the scaffold-bracing bar over which plaintiff tripped was open and obvious and not inherently dangerous. Therefore the Labor Law 200 and common law negligence causes of action should have been dismissed:

… [T]he horizontal cross-bracing bar affixed to the scaffold, about 14 inches above the ground, which plaintiff tripped over while attempting to step over it, was open and obvious, and not inherently dangerous … . Plaintiff, a carpenter for 28 years, testified that the cross-bracing was readily observable, he was aware of its presence, having stepped over it without incident on four to six prior occasions,

and that the bar was stationary and secure and did not move or shift when his foot struck it.

Plaintiff's own imprudent act of attempting to climb over the cross-bracing bar, rather than use the available openings in the scaffold without bars, was the sole proximate cause of his injury … . Plaintiff was admittedly aware that a safer method was available to him, and instead chose not to use it … . Peranzo v WFP Tower D Co. L.P., 2022 NY Slip Op 00147, First Dept 1-11-22

LABOR LAW-CONSTRUCTION LAW, SCAFFOLD FALL.

IN THIS SCAFFOLD-FALL CASE, EVIDENCE PLAINTIFF WAS INSTRUCTED TO USE GUARD RAILS ON THE SCAFFOLD BUT DID NOT REQUIRED DENIAL OF PLAINTFF'S MOTION FOR SUMMARY JUDGMENT ON THE LABOR LAW 240 (1) CAUSE OF ACTION (FIRST DEPT).

The First Department determined Supreme Court properly denied plaintiff's motion for summary judgment in this scaffold-fall case. Defendants raised a question of fact with evidence plaintiff was instructed to use guard rails on the scaffold but did not:

… [T]hrough the testimony that plaintiff declined to use guardrails even though he was instructed to do so and even though guardrails were available, [defendants] raised an issue of fact as to whether plaintiff was the sole proximate of his accident, thus rendering summary judgment in his favor inappropriate … . Although the field supervisor did not witness the accident, he attested that he arrived on the scene as plaintiff was getting into the ambulance and proceeded straightaway to the worksite, where he found the Baker scaffold that plaintiff had been using to be in good condition, but the guardrails that plaintiff had been instructed to use leaning up against a nearby wall. Vargas v 1166 LLC, 2022 NY Slip Op 00528, 1-27-22

LABOR LAW-CONSTRUCTION LAW.

A STAIRWAY CAN BE A "PASSAGEWAY" WITHIN THE MEANING OF THE INDUSTRIAL CODE; THE LABOR LAW 241(6) CAUSE OF ACTION SHOULD NOT HAVE BEEN DISMISSED (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, determined that a stairway where plaintiff fell could be a "passageway" within the meaning of the Industrial Code. Therefore the Labor Law 241(6) cause of action should not have been dismissed:

For purposes of the applicability of Industrial Code (12 NYCRR) § 23-1.7(d), a staircase may constitute a passageway when that staircase is the sole access to the work site … . Here, plaintiff and his coworkers were required to use the loading dock entrance, where they would check in with security and go down to the basement level; from the basement, the workers proceeded to the floors where construction was ongoing. Although workers had the option of using a single-stop elevator to gain access to the basement, plaintiff's uncontradicted testimony showed that the workers used the staircase, not the elevator. At the time of plaintiff's accident, he was with several coworkers, all of whom had just checked in with the security guard and were using the staircase. CJS offered no evidence that any of the workers for any of the contracted trades used the single-stop elevator for purposes other than delivering construction material. Under these circumstances, where the staircase on which plaintiff fell the way in which the workers generally accessed the basement level, the staircase was a passageway for Labor Law § 241(6) purposes … . Tolk v 11 W. 42 Realty Invs., L.L.C., 2022 NY Slip Op 00150, First Dept 1-11-22

LABOR LAW-CONSTRUCTION LAW.

BECAUSE PLAINTIFF HAD TO STAND ON THE GUARDRAILS OF THE MANLIFT TO REACH WHAT HE WAS WORKING ON, THE MANLIFT WAS NOT APPROPRIATE EQUIPMENT; PLAINTIFFS WERE ENTITLED TO SUMMARY JUDGMENT ON THE LABOR LAW 240(1) CAUSE OF ACTION (FIRST DEPT).

The First Department, reversing Supreme Court, determined plaintiff was entitled to summary judgment on his Labor Law 240(1) cause of action. Plaintiff had to stand on the guardrails of a manlift to reach what he was working on. He received an electric shock and fell:

Plaintiffs should be granted summary judgment as to defendants' liability under the statute. The record demonstrates that plaintiff Matthew S. Healy (plaintiff) fell from the guardrails of a manlift after sustaining an electric shock. Plaintiff was required to stand on the manlift's guardrails because HVAC ductwork prevented him from raising the manlift to the area in which he needed to work. Thus, the manlift was "inappropriate for the task at hand in light of the configuration of the building" and failed to afford plaintiff adequate protection pursuant to the statute … .Healy v BOP One N. End LLC, 2022 NY Slip Op 01388, First Dept 3-3-22

LABOR LAW-CONSTRUCTION LAW.

NEITHER THE BUILDING OWNER NOR THE PROSPECTIVE BUILDING OWNER HAD SUPERVISORY CONTROL OVER THE PREMISES OR THE WORK, INCLUDING THE WORK OF PLAINTIFF AND HIS CO-WORKER WHO APPARENTLY MOPPED THE FLOOR WHERE PLAINTIFF SLIPPED AND FELL; THE LABOR LAW 200 AND COMMON LAW NEGLIGENCE CAUSES OF ACTION AGAINST THE OWNER AND PROSPECTIVE OWNER SHOULD HAVE BEEN DISMISSED (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, determined the Labor Law 200 and common law negligence causes of action against the building owner (Grand) and the prospective purchaser of the building (Empire) should have been dismissed. Plaintiff slipped and fell on a wet floor which apparently had just been mopped by a co-worker. Neither Grand nor Empire had general supervisory authority over the premises and did not supervise or control the work of plaintiff or the co-worker:

The building was owned by defendant Grand but was under a contract of sale to defendant Empire, with a closing date of February 1, 2017. Under the contract of sale, Empire was given access to the premises prior to closing to perform renovations and to stage and lease the apartments. Empire hired plaintiff's employer Infinity to act as general contractor for the renovations. According to the record, Empire did not have any employees at the premises on the date of the accident and did not supervise Infinity's work. Grand had no employees or agents at the premises full time, but an employee of a company related to Grand would occasionally visit the building to check that there were no problems and that everything was clean. The employee visited the building approximately four or five times, approximately twice in the four months prior to the accident, and once during construction. No one employed by Grand regularly supervised the construction ongoing at the premises. Arnold v Empire 326 Grand LLC, 2022 NY Slip Op 00965, First Dept 2-15-22

LABOR LAW-CONSTRUCTION LAW.

PLAINTIFF SLIPPED AND FELL ON A PLASTIC SHEET PLACED OVER AN ESCALATOR TO PROTECT IT FROM DRIPPING PAINT; PLAINTIFF'S LABOR LAW 241 (6) ACTION DISMISSED; THE PLASTIC COVER WAS NOT A FOREIGN SUBSTANCE; AND THE PLASTIC COVER WAS AN INTEGRAL PART OF THE WORK; TWO-JUSTICE DISSENT (FIRST DEPT).

The First Department, reversing Supreme Court, over an extensive two-justice dissent, determined two provisions of the Industrial Code did not apply to this slip and fall on a plastic covering used to protect an escalator from dripping paint. The code provision requiring areas to be kept free of slippery "foreign substances" did not apply. And both code provisions were inapplicable because the condition was an integral part of the work being performed:

Sensibly interpreted, the heavy-duty plastic covering is not similar in nature to the foreign substances listed in the regulation, i.e., ice, snow, water or grease … . …

… [T]he covering was part of the staging conditions of the area plaintiff was tasked with painting, making it integral to his work. Therefore, even if the regulation arguably contemplates plastic sheeting to be a slipping hazard, under the factual circumstances here, the integral to the work defense bars plaintiff's reliance on 12 NYCRR 23-1.7(d). …

… [T]he Supreme Court and the dissent incorrectly find liability pursuant to Industrial Code Section 23-1.7(e)(1). This section is inapplicable for the same reasons stated above with respect to Industrial Code Section 23-1.7 (d), namely that the plastic covering was an integral part of the work being performed … . Bazdaric v Almah Partners LLC, 2022 NY Slip Op 02189. First Dept 3-31-22

Practice Point: Plaintiff slipped and fell on a plastic sheet placed to protect an escalator from dripping paint. The Labor Law 241(6) action was dismissed because (1) the plastic sheet was not a slippery foreign substance within the meaning of the Industrial Code and (2) the plastic sheet was an integral part of the work performed to which the Industrial Code does not apply.

LABOR LAW-CONSTRUCTION LAW.

QUESTION OF FACT WHETHER PLAINTFF SLIPPED AND FELL ON ICE OR SNOW IN AN AREA WHICH HAD BEEN CLEARED SUCH THAT IT CONSTITUTED A "PASSAGEWAY" WITHIN THE MEANING OF THE INDUSTRIAL CODE RE: THIS LABOR LAW 241(6) ACTION (FIRST DEPT).

The First Department determined there was a question of fact in this Labor Law 241(6) action about whether the area where plaintiff slipped and fell on ice or snow was a "passageway" within the meaning of the Industrial Code:

This personal injury action stems from injuries sustained by plaintiff when he allegedly slipped and fell on snow or ice while walking from an area on a roof, where he was performing mason work, to its exit. …

"Although the regulations do not define the term 'passageway' . . . , courts have interpreted the term to mean a defined walkway or pathway used to traverse between discrete areas as opposed to an open area" … . …

The record contains competing evidence as to the location of the accident, whether a path had been cleared so that workers could safely walk between the stairway and the location on the roof where the work was being performed and whether it was necessary for plaintiff to traverse the area where he allegedly fell. …

If, as defendants claim, plaintiff's accident occurred outside of the passageway or pathway defendants claim existed, then issues of fact exist as to whether it was necessary for plaintiff to traverse that area as part of his work … . Venezia v LTS 711 11th Ave., 2022 NY Slip Op 00152, First Dept 1-11-22

LABOR LAW-CONSTRUCTION LAW.

THE SCAFFOLD ON WHICH PLAINTIFF WAS STANDING WAS INSECURE, WHICH IS A VIOLATION OF LABOR LAW 240(1); WHETHER THERE WAS SAFETY EQUIPMENT WHICH WAS NOT USED, EVEN IF PLAINTIFF WAS INSTRUCTED TO USE IT, IS IRRELEVANT (FIRST DEPT).

The First Department, reversing Supreme Court, determined plaintiff's motion for summary judgment on his Labor Law 240(1) cause of action should have been granted. There were no witnesses to plaintiff's scaffold-fall. Plaintiff testified the unsecured scaffold moved when he started using the chipping gun and the unsecured plywood on which he was standing caused him to lose his balance. The fact that there may have been scaffold railings available and the evidence plaintiff was instructed to use the railings did not defeat summary judgment because comparative negligence is not part of the analysis:

The purpose of Labor Law § 240 (1) "is to protect workers by placing ultimate responsibility for safety practices at building construction jobs where such responsibility actually belongs, on the owner and general contractor. . . instead of on workers, who are scarcely in a position to protect themselves from accident" … . Thus, the statute imposes a nondelegable duty on owners and contractors to provide "devices which shall be so constructed, placed and operated as to give proper protection to" those individuals performing the work … . "Under Labor Law § 240 (1) it is conceptually impossible for a statutory violation (which serves as a proximate cause for a plaintiff's injury) to occupy the same ground as a plaintiff's sole proximate cause for the injury" … . Therefore, if a violation of Labor Law § 240 (1) is a proximate cause of an injury, the plaintiff cannot be solely to blame for it … . * * * [E]ven if there were evidence that adequate safety devices were readily available at the work site and that plaintiff knew he was expected to use them, it would not render plaintiff the sole cause of the accident, because the unsecured scaffold with unlevel, uneven, and unsecured floor planks initially caused him to lose his balance and fall …". Quiroz v Memorial Hosp. for Cancer & Allied Diseases, 2022 NY Slip Op 01130, First Dept 2-22-22

LABOR LAW-CONSTRUCTION LAW.

THERE WERE QUESTIONS OF FACT WHETHER PLAINTIFF SLIPPED AND FELL ON ICE AND SNOW IN A "PASSAGEWAY" WITHIN THE MEANING OF THE INDUSTRIAL CODE; THEREFORE DEFENDANT WAS NOT ENTITLED TO SUMMARY JUDGMENT ON THE LABOR LAW 241(6) CAUSE OF ACTION (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, determined defendant's summary judgment on the Labor Law 241(6) should not have been granted. Plaintiff alleged he slipped and fell on ice and snow on a passageway which had not been cleared of ice and snow:

Labor Law § 241(6) imposes on owners, general contractors, and their agents a nondelegable duty to provide "reasonable and adequate protection" to workers engaged in construction, demolition, and excavation activities by complying with Industrial Code regulations that specify concrete safety directives, regardless whether they exercised supervision or control over the work … . Industrial Code § 23-1.7(d) provides that employers shall not allow any employee to use a "floor, passageway, walkway, scaffold, platform, or other elevated work surface which is in a slippery condition," and specifically enumerates ice and snow as foreign substances that must be removed, sanded, or covered. Plaintiff was allegedly injured at the construction site where he was working when he slipped and fell on snow and ice after he had passed through a perimeter gate, towards his employer's shanty nearby upon arriving for work one morning. Defendant construction manager … testified the shanty area "was commonly used as a roadway for egress" and an "egress path" for workers going from the office trailers on one side of the shanties to the building under construction. Although it is unclear on this record whether there was a defined path where plaintiff fell, it is also unclear whether he was within the "shanty area" that was used as a "roadway for egress" and an "egress path." Accordingly, issues of fact exist as to whether plaintiff was in a defined walkway within the meaning of Industrial Code § 23-1.7(d) … . Lapinsky v Extell Dev. Co., 2022 NY Slip Op 00815, First Dept 2-8-22

LANDLORD-TENANT, MITIGATION OF DAMAGES, APPLICATION OF SECURITY DEPOSIT.

RECENT CHANGES TO THE STATUTES: (1) REQUIRING A LANDLORD TO MITIGATE DAMAGES WHEN A TENANT ABANDONS A RESIDENTIAL APARTMENT BEFORE THE END OF THE LEASE; AND (2), APPLYNG A SECURITY DEPOSIT TO REPAIRS, INTERPRETED AND APPLIED (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Gische, interpreted recent changes to Real Property Law 227-e and General Obligations law 7-108 regarding the landlord's duty to mitigate damages (when a tenant abandons an apartment before the end of the lease), and the landlord's use of a security deposit to make repairs:

Real Property Law § 227-e now clearly holds that the duty to mitigate damages applies to all residential leases in New York State. It also clarifies that the doctrine of mitigation of damages is not an affirmative defense to be asserted by a tenant, but rather the burden is on landlord to establish it took reasonable and customary actions to "render the injury as light as possible" … . * * *

Under General Obligations Law § 7-103(1), it is black letter law that money deposited or advanced by a tenant on a lease agreement "shall continue" to be tenant's money and "shall" be held in trust for the benefit of tenant until the lease is terminated and it is repaid or applied. The deposit is meant to cover the costs of repairing damages to the apartment. …

General Obligations Law § 7-108 (1-a)(d) also newly added, provides a requirement that landlord provide tenant with written notice of a right to have and be present at an inspection of the premises upon moving out. * * *

The penalty of [a landlord's] forfeiture [of the security deposit] is only mandated when landlord fails to provide an itemized statement of the repairs that it claims are required and justify retention of part or all of the security deposit … . 14 E. 4th St. Unit 509 LLC v Toporek, 2022 NY Slip Op 00002, First Dept 1-4-22

LANDLORD-TENANT, STIPULATION OF SETTLEMENT.

THE STIPULATION OF SETTLEMENT IN THIS LANDLORD-TENANT ACTION WAS NOT INVALIDATED BY A CHANGE IN THE LAW BASED UPON A COURT OF APPEALS DECISION ISSUED A MONTH AFTER THE STIPULATION; A "MISTAKE OF LAW" DOES NOT INVALIDATE A STIPULATION OF SETTLEMENT (FIRST DEPT).

The First Department determined that a stipulation of settlement in open court was valid, despite a Court of Appeals decision which ruled the Housing Stability and Tenant Protection Act (HSTPA) cannot be applied retroactively. The retroactive application of the HSTPA (to the stipulation) was deemed a "mistake of law" which is not a ground for invalidating a stipulation:

On … the date of trial, the court facilitated settlement negotiations and the parties placed the material terms of their settlement on the record. "The in-court oral stipulation made here . . . evidences [defendant]'s unconditional agreement, through authorized counsel, to settle" for a sum certain of $7.5 million, provide leases at specific monthly rents for plaintiffs still living in the building, and enter into a confidentiality agreement … . "[W]hen the transcript . . . is read in its entirety, it is clear that what was spread upon the record was an oral stipulation and not simply an agreement to agree" … . "The fact that it is necessary for the parties to exchange general releases and execute a confidentiality agreement does not render the agreement invalid"… , nor does the parties' representation that they would "execute formal settlement papers" demonstrate that there was no agreement on material terms … . …

We reject defendant's contention that the decision of the Court of Appeals … , issued one month afterwards, requires that the settlement be vacated. While that decision held that the retroactive application of the [HSTPA] would violate due process …, previous interpretations to the contrary constituted "a mistake as to the law," which is insufficient grounds for vacating a stipulation … . Nieborak v W54-7 LLC, 2022 NY Slip Op 01397, First Dept 3-3-22

LANDLORD-TENANT, CLASS CERTIFICATION.

CLASS CERTIFICATION SHOULD NOT HAVE DENIED TENANTS IN THIS RENT-OVERCHARGE ACTION (FIRST DEPT).

The First Department, reversing Supreme Court, determined class certification in this rent overcharge action should not have been denied. The tenants alleged the landlord unlawfully deregulated apartments while receiving J-51 tax benefits:

Class certification was improperly denied. The determination of whether plaintiffs have a cause that may be asserted as a class action turns on the application of CPLR 901. That section provides that "[o]ne or more members of a class may sue or be sued as representative parties on behalf of all" where five factors — sometimes characterized "as numerosity, commonality, typicality, adequacy of representation and superiority" … . The party seeking class certification has the burden of establishing the prerequisites of CPLR 901(a) and thus establishing entitlement to certification … .

Here, plaintiffs met their burden of demonstrating the prerequisites for class action certification under CPLR 901 and 902. Contrary to the motion court's determination, plaintiffs established numerosity and typicality in their initial motion for class certification. The allegations in the amended complaint taken with the DOF tax bills showed that by June 2017, only 8 of 100 apartments were registered as rent-stabilized. … [T]his Court [has] held that similar bills were sufficient to establish numerosity, i.e., the number of deregulated units. As to typicality, the predominant legal question involves one that applies to the entire class—whether defendant unlawfully deregulated rent-stabilized apartments while receiving J-51 real estate tax abatement benefits. Cupka v Remik Holdings LLC, 2022 NY Slip Op 00812, First Dept 2-8-22

LANDLORD-TENANT, TENANT HARASSMENT.

PLAINTIFFS-TENANTS STATED CLAIMS FOR TENANT HARASSMENT, PRIVATE NUISANCE, INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS AND PUNITIVE DAMAGES FOR FAILURE TO PROVIDE ELECTRICITY, WATER, HEAT AND VENTILATION (FIRST DEPT).

The First Department, reversing Supreme Court, determined plaintiff-tenants stated claims for tenant (statutory) harassment, private nuisance, intentional infliction of emotional distress and punitive damages in connection with failure to provide electricity, water, heat and ventilation:

The complaint states a cause of action for harassment under Administrative Code of City of NY §§ 27-2005 (d) and 27-2115 (m) … . Namely, it sufficiently alleges that defendants failed to provide essential services, including electricity, water, heat, and ventilation, resulting in violations of the Housing Maintenance Code, and that that failure was calculated to and did cause plaintiffs to vacate their apartment … . …

Defendants do not oppose the reinstatement of the claims for private nuisance or intentional infliction of emotional distress, opting to litigate those claims on the merits. However, contrary to defendants' contention, punitive damages may be appropriate under both causes of action if the alleged acts are shown to be intentional or malicious … . Carlson v Chelsea Hotel Owner, LLC, 2022 NY Slip Op 01117, First Dept 2-22-22

LANDLORD-TENANT, TENANT HARASSMENT.

TENANTS' CAUSES OF ACTION FOR TENANT (STATUTORY) HARASSMENT, PRIVATE NUISANCE, ASSAULT, BREACH OF THE WARRANTY OF HABITABILITY, AS WELL AS THE CLAIM FOR PUNITIVE DAMAGES, REINSTATED (FIRST DEPT).

The First Department, reversing Supreme Court, reinstated plaintiffs-tenants' causes of action for statutory harassment, private nuisance, assault, breach of the warranty of habitability, as well as the demand for punitive damages, in this action by tenants against the landlord alleging both habitability-issues and the landlord's imminent threat to use force. With respect to the tenant (statutory) harassment cause of action, the court wrote:

Plaintiffs alleged … there were repeated interruptions of essential services such as heat, hot water, gas, and electricity, as well as disruptions in elevator service, phone, television, and internet service; large amounts of construction dust, including lead dust, in the public hallways; flooding and mold on the tenth floor; rat and vermin infestations; a lack of building security in the lobby and a lack of a fire safety system. * * *

The complaint states a cause of action for harassment under Administrative Code of City of NY §§ 27—2005(d) and 27—2115(m), as Supreme Court is "a court of competent jurisdiction" for the purposes of Administrative Code § 27—2115(m)(2) … . Contrary to the motion court's determination, the statute expressly provides that only claims arising [from conditions in the building, that is, under subparagraphs b, c, and g of Administrative Code § 27-2004(a)(48)(ii), require the existence of a predicate violation to state a claim for harassment. Here, plaintiffs assert their first cause of action under Administrative Code § 27-2004(a)(48)(ii)(a), based on allegations that defendant Chelsea Hotel Owner, LLC's principal, defendant Ira Drukier, was "making express or implied threats that force will be used" against plaintiffs, and therefore no predicate violation was required for this cause of action. …

On the third cause of action, for harassment arising from deprivation of services, plaintiffs state a claim under the statute by asserting that the alleged conditions were the subject of violations that, if established, would support a claim for

harassment (see Robinson v Day, 103 AD3d 584, 587 [1st Dept 2013] ["A complaint need only 'allege the misconduct complained of in sufficient detail to inform the defendants of the substance of the claims'"]). Evidence of the specific violations issued in connection with the alleged conditions may be obtained in discovery as contemplated by the statute (see Administrative Code § 27-2115[h][2][ii]). Berg v Chelsea Hotel Owner, LLC, 2022 NY Slip Op 01511. First Dept 3-10-22

Practice Point: The courts have recently been fleshing out the proof requirements for tenant (statutory) harassment under the NYC Administrative Code. Here, both the habitability issues and the landlord's assaultive behavior (imminent threat of force) fit into the criteria for a valid tenant (statutory) harassment cause of action.

LANDLORD-TENTANT, CIVIL PROCEDURE, SUMMARY PROCEEDINGS.

THE LANDLORD'S SUMMARY PROCEEDING WAS PROPERLY BROUGHT IN SUPREME COURT BECAUSE COVID EXECUTIVE ORDERS PROHIBITED BRINGING THE ACTION IN CIVIL COURT; ALTHOUGH SUA SPONTE ORDERS ARE NOT APPEALABLE, THE NOTICE OF APPEAL WAS DEEMED A MOTION FOR LEAVE TO APPEAL (FIRST DEPT).

The First Department, reversing Supreme Court, determined Supreme Court should not have dismissed the landlord's summary proceeding on the ground that it should have been brought in Civil Court, not Supreme Court. COVID-related Executive Orders prohibited actions for nonpayment of rent in Civil Court. The First Department noted that a sua sponte order is not appealable as of right, but deemed the notice of appeal to be a request for leave to appeal which was granted:

The motion court erred in sua sponte dismissing the complaint on the ground that this action was a landlord-tenant dispute that should have been brought as a summary proceeding in Civil Court. Supreme Court has unlimited general jurisdiction over all real property actions, including those commenced by a landlord against a tenant (NY Const, art VI, § 7[a] …). Supreme Court, however, has the discretion to decline to entertain such an action on the ground that a pending action in Civil Court was the proper forum … .

Here, Supreme Court was the appropriate forum for this action to recover rental arrears because the Executive Orders implemented in response to the pandemic precluded the landlord from commencing a nonpayment proceeding in Civil Court during the relevant period, compelling the landlord to commence this action. A&L 1664 LLC v Jaspar Hospitality LLC, 2022 NY Slip Op 00264, First Dept 1-18-22

LEGAL MALPRACTICE, REAL ESTATE.

PLAINTIFFS' LEGAL MALPRACTICE ACTION SHOULD NOT HAVE BEEN DISMISSED; PLAINTIFFS' 2010 BREACH OF A CONDOMINIUM-SALE CONTRACT ACTION WAS DISMISSED ON STATUTE OF FRAUDS GROUNDS; WHEN A WRITTEN CONTRACT SUBSEQUENTLY SURFACED, DEFENDANT ATTORNEYS DID NOT MOVE TO RENEW, VACATE OR APPEAL THE ORDER (FIRST DEPT).

The First Department, reversing Supreme Court, determined the legal malpractice action should not have been dismissed. Plaintiffs, apparently represented by defendant attorneys, brought a 2010 action for breach of a condominium-sale contract which was dismissed on statute of frauds grounds (no written contract). When the written contract for the condominium sale surfaced, the defendants did not move to renew, vacate or appeal the order:

Regardless of whether the dismissal on statute of frauds grounds was ultimately correct, defendants should have known that the condominium claims, which involved the sale of real property, would be subject to the statute of frauds and thus would require reference to a written contract (General Obligations Law § 5-703[2]); that the statute of frauds could be raised and adjudicated on a motion to dismiss under CPLR 3211(a)(5); and that a dismissal under the statute of frauds would be on the merits, thus precluding any future claim for damages on the sale of the condominium … . As a result, with respect to the condominium sale, it cannot be determined as a matter of law that plaintiffs failed to plead a claim for legal malpractice based upon defendants' actions in litigating the breach of contract claim. Komolov v Popik, 2022 NY Slip Op 01966, First Dept 3-22-22

Practice Point: The defendant attorneys apparently represented plaintiffs in their 2010 action for breach of a condominium-sale contract. The 2010 action was dismissed on statute of frauds grounds. Subsequently a written contract surfaced and defendant attorneys did not move to renew, vacate or appeal the order. Plaintiffs' legal malpractice complaint should not have been dismissed.

MEDICAL MALPRACTICE, AMENDMENT OF ANSWERS TO ALLEGE PLAINTIFF'S CULPABLE CONDUCT (SMOKING, WEIGHT).

DEFENDANTS' MOTIONS TO AMEND THEIR ANSWERS IN THIS MED MAL CASE TO ALLEGE PLAINTIFF'S CULPABLE CONDUCT AND COMPARATIVE NEGLIGENCE (RE: HER WEIGHT AND SMOKING) SHOULD HAVE BEEN GRANTED; THE DELAY IN MAKING THE MOTION CAUSED NO PREJUDICE; GOOD CAUSE FOR THE DELAY NEED NOT BE SHOWN; FAILURE TO INCLUDE THE AMENDED PLEADINGS WITH THE MOTION PAPERS AND DEFECTS IN VERIFICATIONS SHOULD HAVE BEEN OVERLOOKED (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, determined: (1) the defendants in this medical malpractice actions should have been allowed to amend their answers to allege culpable conduct and comparative negligence on the part of plaintiff, citing her weight and smoking habit: (2) the defendants failure to attach the proposed amended pleading to the motion papers was a technical defect which should have been overlooked; (3) the defendants did not need to submit a certificate of merit for the proposed amendments; and (4), the defects in the defendants' verifications should have been overlooked:

"While [defendants were] or should have been aware of the facts and theories asserted in the amended [answers] long before amendment was actually sought, delay alone is not a sufficient ground for denying leave to amend" … . Under the circumstances in this case, there was no unreasonable delay by defendants in seeking leave to amend, as plaintiff has not filed her note of issue nor has the case has been certified as trial-ready … . Further, because there was no extended delay

by defendants in moving to amend, they did not need to proffer a reasonable excuse for the delay … .

… "[O]n a motion for leave to amend, [the movant] need not establish the merit of its proposed new allegations, but simply show that the proffered amendment is not palpably insufficient or clearly devoid of merit" … Contrary also to plaintiff's argument, Golson v Addei [216 AD2d 268] does not stand for the proposition that a comparative negligence defense in a medical malpractice case based on a plaintiff's smoking history is per se meritless … . Johnson v Montefiore Med. Ctr., 2022 NY Slip Op 01418, First Dept 3-8-22

Practice Point: In a med mal case, plaintiff's weight and smoking habit maybe grounds for affirmative defenses.

Practice Point: There was no need to submit a certificate of merit with the motion to amend the answers.

Practice Point: Where there has been no prejudice to the plaintiff, the unexcused delay in seeking amendment of the answers here was not a sufficient ground for denying the amendment.

Practice Point: Failure to include the proposed amended answers with the motion for leave to amend, and defects in defendants' verifications, were technical defects which should have been overlooked.

MEDICAL MALPRACTICE, CATARACT SURGERY, LOSS OF SIGHT.

THE DEFENDANT OPHTHALMOLOGICAL SURGEON'S MOTION TO SET ASIDE THE PLAINTIFF'S VERDICT IN THIS MEDICAL MALPRACTICE ACTION WAS PROPERLY DENIED; CRITERIA EXPLAINED; PLAINTIFF LOST SIGHT IN HER RIGHT EYE AFTER CATARACT-REMOVAL SURGERY (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Mendez, determined the defendant's motion to set aside the plaintiff's verdict in this medical malpractice action was properly denied. Plaintiff lost sight in her right eye after cataract-

removal surgery. The opinion describes the surgeries and the theories presented by the experts in great detail:

In a medical malpractice action, the plaintiff is required to show that the defendant deviated from acceptable medical practice, and that the deviation is the proximate cause of her injuries. A defendant's negligence is the proximate cause when it is a substantial factor in the events that produced the injury … .. * * *

The jury, which is in the best position to assess the credibility of the witnesses, is entitled to assess his credibility and decide what weight it will give to his testimony … .. Great deference is accorded to the factfinders, who had the opportunity to see and hear the witnesses … . * * *

The documentary evidence and the testimony of all the experts created factual and credibility issues that were properly determined by the jury … . If the resolution of the case turns on the evaluation of conflicting testimony of expert witnesses, the resolution of such a conflict rests with the jury and not the court … . The conclusions reached by the jury should not be overturned as against the weight of the evidence unless "there is simply no valid line of reasoning, and permissible inferences which could possibly lead rational people to the conclusion reached by the jury" … . Rozon v Schottenstein, 2022 NY Slip Op 01278, First Dept 3-1-22

MEDICAL MALPRACTICE, EVIDENCE.

PLAINTIFFS' EXPERT DID NOT ADDRESS THE OPINION OF DEFENDANTS' EXPERT; DEFENDANTS' MOTION FOR SUMMARY JUDGMENT IN THIS MEDICAL MALPRACTICE CASE SHOULD HAVE BEEN GRANTED (FIRST DEPT).

The First Department, reversing Supreme Court and dismissing the complaint in this medical malpractice case, determined the defendants' motion for summary judgment should have been granted because plaintiffs' expert did not address the defendants' expert's opinion. The defense expert averred plaintiff's problems were caused by cancer. Plaintiffs' expert took the position plaintiff never had cancer, a position contradicted by the record:

Defendants made a prima facie showing of entitlement to summary judgment through their expert, who averred that defendants' treatment of plaintiff was within the standard of care and any difficulties with the treatment were caused by plaintiff's underlying cancer. Plaintiffs' expert failed to address that opinion, and thus failed to rebut defendants' showing of entitlement to summary judgment … . Instead, the expert took the position that plaintiff never had cancer, a fact contradicted by the record … .. While plaintiff's cancer had an unusual presentation, and pathologists initially disagreed as to whether she had an invasive jaw cancer, she was ultimately successfully treated by oncologists with surgery, radiation, and gene therapy. Plaintiffs' expert entirely ignored plaintiff's treatment from 2016 to 2017 for a rare variant of squamous cell carcinoma, as well as her 2018 treatment for a reoccurrence … . Given those omissions, plaintiffs did not rebut defendants' prima facie showing of entitlement to summary dismissal of the negligence and medical malpractice claims against them…. . Mulroe v New York-Presbyt. Hosp., 2022 NY Slip Op 02204, First Dept 3-31-22

MEDICAL MALPRACTICE, FAILURE TO DIAGNOSE, STATUTE OF LIMITATIONS.

PLANTIFF ALLEGED FAILURE TO DIAGNOSE CANCER IN 2014 IN THIS MEDICAL MALPRACTICE ACTION; DESPITE THE ENACTMENT OF LAVERN'S LAW (CPLR 214-A) IN 2018, WHICH EXTENDED THE STATUTE OF LIMITATIONS FOR FAILURE TO DIAGNOSE CANCER BY VIRTUE OF ITS RETROACTIVE-APPLICATION AND REVIVAL PROVISIONS, THE ACTION WAS TIME-BARRED (FIRST DEPT).

The First Department, reversing Supreme Court, determined plaintiff's med mal action alleging failure to diagnose lung cancer based upon a CT scan in 2014 was time barred pursuant to the retroactive-application and revival limitations in CPRL 214-a, enacted on January 31, 2018 (called Lavern's Law):

[Lavern's Law] "appl[ies] to acts, omissions, or failures occurring within 2 years and 6 months prior to the effective date of this act, and not before" … . Thus, by its terms, the discovery toll in Lavern's Law's applies retroactively to causes of action

that were not time-barred as of Lavern's Law's effective date, i.e., causes of action accruing on or after July 31, 2015. Plaintiff's causes of action, which accrued on May 16, 2014, predate the earliest date to which Lavern's Law's retroactive discovery toll applies.

Lavern's Law also provides for the revival of certain time-barred medical malpractice causes of action. Where a claim based on the negligent failure to diagnose cancer or a malignant tumor occurred and, "within ten months prior to the effective date of the act . . . became time-barred under any applicable limitations period then in effect, such action or claim may be commenced within six months of the effective date of the act . . . ." … . Therefore, a failure to diagnose cancer or malignant tumor cause of action that became time-barred between March 31, 2017 and January 31, 2018 may be revived if it is commenced no later than July 31, 2018 … . Because plaintiff's claims became time-barred on November 16, 2016, the limited revival provision of the new law (for certain claims that became time-barred after March 31, 2017) does not avail her … .Ford v Lee, 2022 NY Slip Op 01414, First Dept 3-8-22

MEDICAL MALPRACTICE.

PLAINTIFFS STATED A CAUSE OF ACTION FOR MEDICAL MALPRACTICE BY ALLEGING THE TREATMENT OF PLAINTIFF'S DECEDENT AGAINST THE WISHES OF DECEDENT AND DECEDENT'S HEALTH-CARE AGENTS PROLONGED DECEDENT'S PAIN AND SUFFERING; THE "WRONGFUL LIFE" LINE OF CASES DOES NOT APPLY (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Gesmer, reversing Supreme Court, determined plaintiff stated a cause of action sounding in medical malpractice by alleging the treatment of plaintiff's decedent against decedent's wishes and the wishes of his health-care agents prolonged his pain and suffering. This action was distinguished from the "wrongful life" line of case which held that being born alive with disabilities does not constitute an injury in New York [therefore a medical malpractice lawsuit alleging the parents should have been advised to terminate the pregnancy does not state a cause of action]. Supreme Court had based its dismissal of the complaint on a Second Department case

(Cronin) which followed the "wrongful life" line of reasoning. The First Department refused to follow the Second Department:

… [In] Cronin, it appears that plaintiff sought damages based on a claim "that the defendant wrongfully prolonged the decedent's life by resuscitating him against the express instructions of the decedent and his family" (Cronin, 60 AD3d at 804). In contrast, here, plaintiff seeks damages for decedent's pain and suffering, which the complaint alleges was the result of medical malpractice in that defendants breached the standard of care by administering treatments without consent and in direct contravention of decedent's wishes expressed in his advance directives as reaffirmed by his health care agents … .Greenberg v Montefiore New Rochelle Hosp., 2022 NY Slip Op 02194, First Dept 3-31-22

Practice Point: A decision in one appellate-division department does not bind another department. Here the "wrongful life" line of cases did not preclude a medical malpractice action alleging the treatment of plaintiff's decedent against decedent's wishes and against the wishes of decedent's health-care agents prolonged decedent's pain and suffering.

NEGLIGENCE, EVIDENCE, SUBWAY ACCIDENT.

PLAINTIFF'S VERDICT IN THIS SUBWAY ACCIDENT CASE SHOULD HAVE BEEN SET ASIDE; PLAINTIFF WAS STRUCK BY A TRAIN AND ALLEGED THE ALLOWED SPEED FOR ENTERING A STATION WAS TOO HIGH; DEFENDANT TRANSIT AUTHORITY SHOULD HAVE BEEN ALLOWED TO PRESENT EVIDENCE THAT SPEED STUDIES HAD BEEN CONDUCTED IN SUPPORT OF THE QUALIFIED IMMUNITY DEFENSE (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Mazzarelli, determined the NYC Transit Authority's (TA's) motion to aside the plaintiff's verdict in this subway accident case should have been granted. Plaintiff was on the tracks when he was struck by a train. Plaintiff argued the speed regulations allowed the train to enter the station at an unsafe speed. The trial judge prohibited the TA from introducing evidence demonstrating it was entitled to qualified immunity because it had conducted studies to determine the appropriate train speed:

The evidence that the TA proffered, and that the trial court precluded, suggested that it may have been entitled to qualified immunity. … Korach's (the TA's expert's] testimony indicated that the TA's speed policy was consistent with "universally accepted rapid transit system operating practice" … . Accordingly, Korach should have been permitted to testify about the policies that other rapid transit systems have in place with respect to speed restrictions in subway and train stations, including in cases where those stations are situated on curved sections of track. Further, … the testimony that the TA's own witnesses would have given was designed to demonstrate that the speed policy enabled the "efficient running of a transportation system which serves millions of passengers every year" … . This language suggests that the trial court's decision to limit evidence of speed policy decisions to their effects on a particular subway line was too restrictive, since the cases applying qualified immunity in subway speed cases take into account the effects that slower speeds would have on the entire subway system. Pedraza v New York City Tr. Auth., 2022 NY Slip Op 00255, First Dept 1-13-22

NEGLIGENCE, LOSS OF SERVICES.

PLAINTIFFS-PARENTS' CAUSE OF ACTION FOR LOSS OF THEIR INJURED DAUGHTER'S SERVICES SHOULD HAVE BEEN DISMISSED; THE PARENTS DEMONSTRATED ONLY THAT THEIR DAUGHTER PERFORMED SERVICES IN HER EMPLOYMENT AT THE COMPANIES OWNED BY THE PARENTS (FIRST DEPT).

The Frist Department, reversing Supreme Court, determined defendants' motion for summary judgment dismissing the parents' cause of action for loss of their injured daughter's services should have been granted:

Defendants established prima facie that plaintiffs Arlene and Herbert Klaar, the parents of the injured plaintiff, Deborah Klaar, are not entitled to recover damages for loss of their daughter's services since they showed only that their claim rests entirely on the services Deborah performed in her employment at the two companies they own … .

… [P]laintiffs failed to raise an issue of fact. They cited deposition testimony demonstrating that Deborah served as a secretary, office manager, and assistant controller at her parents' companies, that she was expected to take over the businesses and provide her parents with a monthly payment, and that she had significant difficulty fulfilling all of her many duties following the accident. They did not submit evidence that Deborah regularly performed services for them as their daughter, such as doing chores or running errands for the household, nor that they sustained any pecuniary loss as a result of her failure to do so … .Klaar v Fedex Corp., 2022 NY Slip Op 01393, First Dept 3-3-22

NEGLIGENCE, NOTICE OF CLAIM, PORT AUTHORIETY.

THE NOTICE OF CLAIM ACT DOES NOT APPLY TO THE PORT AUTHORITY, WHICH IS A BISTATE ENTITY (NEW YORK AND NEW JERSEY) CREATED BY COMPACT (FIRST DEPT).

The Frist Department, reversing Supreme Court, determined the action against the Port Authority was time-barred pursuant to New York and New Jersey law, noting that the Notice of Claim Act does not apply:

… [N]either CPLR 217-a nor New York Unconsolidated Laws § 6412-a — both of which were enacted as part of the Uniform Notice of Claim Act … — extends the time in which an action may be commenced against the Port Authority. CPLR 217-a does not apply to the Port Authority because it is not a "political subdivision of the state, . . . instrumentality or agency of the state or a political subdivision, . . . public authority[,] or . . . public benefit corporation entitled to receive a notice of claim as a condition precedent to commencement of an action" within the meaning of the statute; rather, it is a bistate agency … . What is more, New Jersey has not enacted identical legislation … . and bistate entities created by compact are not subject to the unilateral control of any one state … . McKenzie v Port Auth. of N.Y. & N.J., 2022 NY Slip Op 00378, First Dept 1-25-22

NEGLIGENCE, SLIP AND FALL, CONTRACT LAW.

PLAINTIFF TRIPPED AND FELL ON AN UNEVEN MAT WHEN SHE STEPPED OFF THE DEFENDANT'S SKATING RINK; THE ACTION AGAINST THE COMPANY WHICH SOLD AND INSTALLED THE MAT SHOULD HAVE BEEN DISMISSED; THERE WAS NO CONTRACT BETWEEN THE OWNER OF THE SKATING RINK AND THE SELLER/INSTALLER OF THE MAT AND THERE WAS NO EVIDENCE THE SELLER/INSTALLER OF THE MAT LAUNCHED AN INSTRUMENT OF HARM (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, determined that the action against the company "Classic" which sold and installed a mat used on an entrance ramp for a skating rink should have been dismissed. Plaintiff alleged the mat was uneven with lumpy ice build-ups which caused her to fall after she stepped off the skating rink. Classic had no contractual relationship with the owner of the skating rink, WRO, and there was no evidence Classic "launched an instrument of harm:"

The record shows that WRO purchased the ramp matting from Classic and that Classic installed the matting. Classic owed no duty to plaintiff, and there was no contract between WRO and Classic. Thus, contrary to plaintiff's argument, Classic has no tort liability based upon Espinal v Melville Snow Contrs. (98 NY2d 136 [2002]), where under certain circumstances, a duty of care to noncontracting third parties may arise out of a contractual obligation. In any event, even if there had been a contractual relationship between WRO and Classic, the record does not raise any triable issue as to whether Classic "launche[d] a force or instrument of harm" … . Samuelsen v Wollman Rink Operations LLC, 2022 NY Slip Op 00149, First Dept 1-11-22

NEGLIGENCE, SLIP AND FALL.

PLAINTIFF TESTIFIED SHE DID NOT KNOW WHAT CAUSED HER SLIP AND FALL BUT STATED IN HER AFFIDAVIT IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHE SLIPPED ON ICE; THE AFFIDAVIT CREATED A FEIGNED ISSUE OF FACT; DEFENDANT'S MOTION SHOULD HAVE BEEN GRANTED (FIRST DEPT).

The First Department, reversing Supreme Court, determined plaintiff created only a feigned issue of fact in response to defendant's motion for summary judgment in this slip and fall case:

In this action in which plaintiff sustained injuries when she slipped and fell on the sidewalk owned by defendant, her affidavit that she slipped on ice on the sidewalk contradicted her earlier deposition testimony that she did not know what she slipped on, and thus created only a feigned issue of fact, which was insufficient to defeat defendant's motion … .

Plaintiff's decision to walk on the outside of a shoveled path in front of the building that had been cleared of snow and ice was the sole proximate cause of her accident … . Polanco v Durgaj, 2022 NY Slip Op 01258, First Dept 2-24-22

NEGLIGENCE, TRAFFIC ACCIDENTS, GRAVES AMENDMENT.

LESSOR OF THE VEHICLE INVOLVED IN THE REAR-END COLLISION WAS ENTITLED TO SUMMARY JUDGMENT PURSUANT TO THE GRAVES AMENDMENT; SUPREME COURT HAD THE AUTHORITY TO SEARCH THE RECORD AND GRANT SUMMARY JUDGMENT EVEN THOUGH NO MOTION HAD BEEN MADE (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, determined Bancorp, the lessor of the vehicle leased by Fordham and driven by Fajerman, was entitled to summary judgment in this rear-end collision case pursuant to the Graves

Amendment. The First Department noted Supreme Court had the authority to search the record and award summary judgment in the absence of a motion:

Bancorp's request to search the record and for summary judgment dismissing the complaint against it under the Graves Amendment (49 USC § 30106) should have been granted. "On a motion for summary judgment, the court may search the record and, if warranted, grant summary relief even in the absence of a cross motion" … . "Under the Graves Amendment, the owner of a leased or rented motor vehicle cannot be held vicariously liable 'for harm to persons or property that results or arises out of the use, operation, or possession of the vehicle during the period of the rental or lease, if — (1) the owner (or an affiliate of the owner) is engaged in the trade or business of renting or leasing motor vehicles; and (2) there is no negligence or criminal wrongdoing on the part of the owner (or an affiliate of the owner)'" … . Here, the commercial lease agreement submitted by Bancorp, as well as the affidavit of Erika Caesar, Chief Diversity Officer of Assistant General Counsel for Bancorp, clearly establish that Bancorp, a commercial lessor of motor vehicles, had leased the vehicle that Fajerman was driving, to defendant Fordham. The commercial lease further establishes that Fordham was responsible for the maintenance and repairs for the vehicle during the period of the lease and during the time in which the accident occurred. Additionally, plaintiff did not allege any mechanical defects in the subject vehicle, and Fajerman also stated in her affidavit that the car did not have any mechanical defects. As such, Bancorp is entitled to judgment as a matter of law under the Graves Amendment … . Kalair v Fajerman, 2022 NY Slip Op 01244, First Dept 2-24-22

NEGLIGENCE, TRAFFIC ACCIDENTS, POLICE CARS.

WILLIAMS, THE DRIVER OF THE VEHICLE IN WHICH PLAINTIFF WAS A PASSENGER, WAS NOT NEGLIGENT IN SLOWING DOWN FOR A WORK CREW AHEAD; THE WILLIAMS CAR WAS STRUCK FROM BEHIND BY A POLICE CAR PURSUING ANOTHER VEHICLE; PLAINTIFF WAS ENTITLED TO SUMMARY JUDGMENT (FIRST DEPT).

The First Department, reversing Supreme Court, determined plaintiff was entitled to summary judgment in this traffic accident case. A police officer pursuing

another vehicle rear-ended the vehicle in which plaintiff was a passenger as the driver (Williams) was slowing down for a work crew:

Williams's evidence in support of his motion demonstrated prima facie that he was operating his vehicle in a lawful, reasonable manner given the circumstances on the expressway at the time, and that he was not otherwise culpable in causing the police car to strike the rear of his vehicle. The burden having shifted, plaintiff and the City defendants each failed to offer evidence as would raise a factual issue regarding Williams's comparable negligence in the cause of the accident … . The City defendants failed to proffer a nonnegligent explanation for rear-ending Williams's vehicle, and the claim that the rear-ended vehicle stopped short, standing alone, is insufficient as a nonnegligent explanation for an accident … . Regardless of whether the actions of the police in this incident are to be considered under the reckless standard set forth in Vehicle and Traffic Law § 1104, the nonliability of Williams, given the unrefuted evidence of his nonculpable role in this accident, remains unchanged … . Grant v City of New York, 2022 NY Slip Op 01121, First Dept 2-22-22

NEGLIGENCE, PUBLIC HEALTH LAW, WRONGFUL DEATH ACTION AGAINST NURSING HOME.

THE WRONGFUL DEATH CAUSE OF ACTION AGAINST DEFENDANT NURSING HOME SHOULD NOT HAVE BEEN DISMISSED; CONFLICTING EXPERT OPINIONS RAISED A QUESTION OF FACT (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, determined the wrongful death cause of action against defendant nursing home should not have been dismissed. Conflicting expert opinions raised a question of fact:

Defendant made a prima facie showing that it was not liable for the decedent's injuries and death under Public Health Law § 2801-d(1) through the affirmation of its nursing expert, who opined that defendant did not violate the various federal and state regulations set forth in plaintiff's bill of particulars. In opposition, plaintiff failed to raise an issue of fact, because her expert did not address any rules or regulations that were violated … .

As for the wrongful death cause of action, the parties' nursing experts had similar credentials in gerontology and nursing, and both were qualified to opine on the applicable standard of care for residential nursing facilities … . Thus, the experts' conflicting opinions present an issue of fact as to whether defendant was liable for the decedent's injuries. Jackson v Northern Manhattan Nursing Home, Inc., 2022 NY Slip Op 00723, First Dept 2-3-22

PARTNERSHIP LAW, RIGHT TO AN ACCOUNTING.

THERE WAS A FIDUCIARY RELATIONSHIP BETWEEN THE PARTIES AS PARTNERS AND CO-OWNERS OF A BUSINESS, GIVING RISE TO AN ABSOLUTE RIGHT TO AN ACCOUNTING, NOTWITHSTANDING THE EXISTENCE OF AN ADEQUATE REMEDY AT LAW (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court determined the petitioners were entitled to an accounting for a business, Ocinomled, Ltd., because there was a fiduciary relationship between the parties as partners and co-owners of Ocinomled:

This Court has held "whenever there is a fiduciary relationship between the parties . . . there is an absolute right to an accounting notwithstanding the existence of an adequate remedy at law" … . It is undisputed that there is a fiduciary relationship between the parties as partners and co-owners of Ocinomled. An equitable accounting is "designed to require a person in possession of financial records to produce them, demonstrate how money was expended and return pilfered funds in his or her possession" … . While it is clear that respondents produced the full books and records, and the Special Referee went through thousands of documents and reviewed numerous expert reports, this is insufficient …, particularly because respondents' bookkeeping was described as inadequate, and sometimes nonexistent, and there was evidence respondents intentionally destroyed key financial data during the litigation. Matter of Grgurev v Licul, 2022 NY Slip Op 02088, First Dept 3-29-22

Practice Point: There is a fiduciary relationship between partners and co-owners of a business giving rise to an absolute right to an accounting, despite the existence of an adequate remedy at law.

PRODUCTS LIABILITY, CIRCUMSTANTIAL EVIDENCE.

ALTHOUGH PLAINTIFF, WHO WAS INJURED WHILE REPAIRING AN ESCALATOR, COULD NOT IDENTIFY THE CAUSE OF THE ESCALATOR'S SUDDEN START-UP, THE MOTION TO COMPEL HIM TO SUPPLEMENT HIS ANSWERS TO INTERROGATORIES WAS PROPERLY DENIED; PRODUCTS LIABILITY ACTIONS CAN BE PROVEN BY CIRCUMSTANTIAL EVIDENCE; AT THIS STAGE PLAINTIFF CAN TESTIFY UNDER OATH THAT HE DOES NOT KNOW THE CAUSE OF THE UNEXPECTED START-UP (FIRST DEPT).

The First Department determined the motion to compel plaintiff to supplement his interrogatories in this products liability case was properly denied. Plaintiff alleged the escalator he was working on started up without warning severely injured his leg. The fact that plaintiff can not identify the cause of the unexpected start-up did not require supplementing his interrogatories as he can so state "under oath:"

"It is well settled that a products liability cause of action may be proven by circumstantial evidence, and thus, a plaintiff need not identify a specific product defect" … . In the absence of evidence identifying a specific defect "a plaintiff must prove that the product did not perform as intended and exclude all other causes for the product's failure that are not attributable to [the] defendants" … . If a "plaintiff is unable to prove both elements, 'a jury may not infer that the harm was caused by a defective product unless [the] plaintiff offers competent evidence identifying a specific flaw'" …

In his interrogatory responses, plaintiff identified several alleged design defects, including the design of the pit, that contributed to his injury. However, he did not identify a cause for the unexpected start up of the escalator. … Presently, plaintiff asserts that he cannot pinpoint the defective component that allowed the escalator's machinery to begin moving without warning. In an instance where plaintiff

"presently lacks the knowledge" to specifically identify the nature of the defect, plaintiff can testify to that "under oath" … . … [I]f he acquires the pertinent information he would be under an obligation to promptly supplement his answers to the interrogatories at issue … . Berkovich v Judlau Contr., Inc., 2022 NY Slip Op 01733, First Dept 3-15-22

Practice Point: Products liability actions can be proven by circumstantial evidence. If a plaintiff does not know the cause of a product malfunction (here, an escalator which allegedly started running unexpectedly) at the discovery stage, the plaintiff can testify to that fact under oath.

REAL ESTATE, BROKER'S FIDICIARY DUTY.

THE COMPLAINT SUFFICIENTLY STATED FACTS AMOUNTING TO A BREACH-OF-FIDUCIARY-DUTY CAUSE OF ACTION AGAINST DEFENDANT REAL ESTATE BROKER, DESPITE PLAINTIFF-SELLER'S CONSENT TO THE BROKER'S "DUAL AGENCY;" IT WAS ALLEGED THE BROKER WAS AWARE THE PROPERTY WAS TO BE SUBDIVIDED AND SOLD BY THE BUYERS FOR THREE TIMES THE PRICE AND SHE WOULD BE THE BUYERS' BROKER FOR THE SUBSEQUENT SALES (FIRST DEPT).

The First Department, reversing Supreme Court, determined the complaint sufficiently stated a cause of action for breach of fiduciary duty by the defendant real estate broker, despite the plaintiff's consent to the broker's "dual agency:"

Although the complaint does not explicitly articulate a cause of action for breach of fiduciary duty, such a cause of action is manifest in its factual allegations, and the documentary evidence fails to utterly refute those allegations … . In connection with his sale of certain real property, plaintiff signed a disclosure form pursuant to Real Property Law § 443, giving his informed consent to a "dual agency with designated sales agent" relationship with defendants. The form states that a dual agent cannot give the seller or buyer "undivided loyalty." Nevertheless, it does not relieve defendants from all fiduciary duty. The form states that defendant Nikki Carchedi, of defendant Stone House Properties, "is appointed to represent the seller

in this transaction." The complaint establishes a cause of action for breach of a fiduciary duty beyond the acknowledged "divided" duty by alleging that [defendant] Carchedi failed to disclose that she had a personal stake in the sale to the buyers, who planned to subdivide the property immediately after purchase and retain her as the broker for the sale of the subdivided parcels, and that they did so, listing the subdivided parcels for almost three times the price plaintiff received in his sale … . We also note plaintiff's assertion that the agent representing the buyer was the son of Carchedi's longtime client about whom plaintiff had expressed concern. Hahn v Stone House Props. LLC, 2022 NY Slip Op 01416, First Dept 3-8-22

Practice Point: Even though breach-of-fiduciary-duty was not explicitly pled, the facts alleged stated a cause of action against defendant real estate broker.

Practice Point: Even though the seller signed a form consenting to the broker's "dual agency," the broker was not relieved of her fiduciary duty to the seller. Allegedly, the broker was aware the buyers were going to subdivide the property, sell it at three times the price, and that she would be the broker for the subsequent sales.

REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL), LICENSE TO ENTER NEIGHBORING BUILDING.

IN AN ACTION FOR A LICENSE PURSUANT TO RPAPL 881 TO ALLOW PETITIONER ACCESS TO RESPONDENTS' ABUTTING BUILDING TO FACILITATE CONSTRUCTION WORK ON PETITIONER'S BUILDING, RESPONDENTS ARE ENTITLED TO LICENSE FEES, ATTORNEY'S FEES, ENGINEERING FEES, ETC., ASSOCIATED WITH PROTECTING THEIR BUILDING AND TO COMPENSATE FOR INTERFERERENCE WITH THE USE OF THEIR BUILDING, IRRESPECTIVE OF WHETHER THERE IS ANY DAMAGE TO RESPONDENTS' BUILDING (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Acosta, affirmed the grant of a license to petitioner, pursuant to RPAPL 881, to enter respondents'

abutting property to protect the abutting property during construction work on petitioner's building, but vacated or reduced some of the specific costs and/or damages awarded. The First Department noted that attorney's fees, license fees and engineering fees, etc., associated with the respondents' efforts to protect their building and the loss of use and enjoyment of their building during construction are properly assessed to the petitioner:

What petitioner seeks is essentially to compel respondents to grant it a license on its own terms. However, as we have recognized, because "[t]he respondent to an 881 petition has not sought out the intrusion and does not derive any benefit from it . . . [e]quity requires that the owner compelled to grant access should not have to bear any costs resulting from the access" … . Thus, the grant of licenses pursuant to RPAPL 881 often warrants the award of contemporaneous license fees … . Contrary to petitioner's contention that a license fee constitutes a windfall unless there are some actual damages, such as lost business, we have found that a license fee is warranted "where the granted license will entail substantial interference with the use and enjoyment of the neighboring property during the [license] period, thus decreasing the value of the property during that time" … .

Similarly, a compulsory licensor should be entitled to reasonable attorneys' and engineering fees … . Matter of Panasia Estate, Inc. v 29 W. 19 Condominium, 2022 NY Slip Op 00975, First Dept 2-15-22