NEW YORK APPELLATE DIGEST, LLC

Weekly Reversal Report
June 6 – 10, 2022

An Organized Compilation of Summaries of Selected Decisions, Mostly Reversals, Released by Our New York State Appellate Courts June 6 – 10, 2022, and Posted on the New York Appellate Digest Website on Monday, June 13, 2022. The Entries in the Table of Contents Link to the Summaries Which Link to Full Decisions on the Official New York Courts Website. Click on "Table of Contents" in the Header on Any Pager to Return There. Right Click on the Citations to Keep Your Place in the Reversal Report.

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ARBITRATION, EDUCATION-SCHOOL LAW, EMPLOYMENT LAW.

THE HIGH SCHOOL PRINCIPAL WAS CHARGED WITH GIVING STUDENTS UNAUTHORIZED CREDITS TO INCREASE GRADUATION RATES; THE CHARGES REQUIRED INTENTIONAL CONDUCT; THE HEARING OFFICER DETERMINED THE PRINCIPAL DID NOT ACT INTENTIONALLY BUT WAS GUILTY OF THE CHARGES; THE INCONSISTENCY RENDERED THE RULING ARBITRARY AND CAPRICIOUS (SECOND DEPT).

The Second Department, reversing the hearing officer's ruling terminating petitioner's employment as a high school principal, determined the hearing officer's finding that petitioner did not act intentionally was inconsistent with finding petitioner guilty of any of the charges. Petitioner allegedly gave unauthorized credits to students in an effort to increase graduation rates:

… [T]he hearing officer's finding that there was insufficient evidence to support a finding that the petitioner acted intentionally is inconsistent with a finding that the petitioner was guilty of any of the charges. Each of the 41 charges against the petitioner alleged that she knowingly and willfully approved the conferral of credits with full knowledge that such credit was unlawful, as part of an intentional scheme to accelerate credit acquisition in order to artificially inflate graduation rates. Because there was no allegation that the petitioner's conduct was anything other than knowing and intentional, and because the hearing officer found that there was insufficient evidence that the petitioner acted intentionally, the hearing officer's determination that the petitioner was guilty of all charges was arbitrary and capricious and without evidentiary support. At the hearing, the petitioner admitted to conduct that was, at most, negligent. There was no evidence to

contradict the petitioner's testimony that she did not act intentionally. Matter of Simpson v Poughkeepsie City Sch. Dist., 2022 NY Slip Op 03730, Second Dept 6-8-22

Practice Point: The high school principal was charged with giving students unauthorized credits to increase graduation rates. All the charges alleged intentional conduct. The hearing officer (correctly) found the principal did not act intentionally, but sustained the charges and terminated her employment. The inconsistency rendered the hearing officer's ruling in the arbitration arbitrary and capricious.

CIVIL PROCEDURE, AMENDMENT OF ANSWER, REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL), REAL PROPERTY LAW.

ALTHOUGH DEFENDANT'S MOTION TO AMEND ITS ANSWER (ADDING AFFIRMATIVE DEFENSES) WAS MADE AFTER A TWO-YEAR DELAY, THE DELAY ALONE DID NOT DEMONSTRATE THE PLAINTIFF WAS PREJUDICED; THE MOTION TO AMEND SHOULD HAVE BEEN GRANTED (FIRST DEPT).

The First Department, reversing Supreme Court, determined defendant's motion to amend its answer to add additional affirmative defenses should have been granted. The two-year delay was not enough to show plaintiff was prejudiced. Discovery was ongoing:

The court should have granted defendant's motion to amend its answer to add the four affirmative defenses of RPAPL 1951, adverse possession, mutual breach, and unclean hands, as leave to amend is freely given and plaintiff did not show that it would be prejudiced by the delay in asserting the defenses (CPLR 3025[b] …). While over two years had passed since defendant served its original answer, discovery was still ongoing … . Plaintiff's claim of significant prejudice is unpersuasive, as all it points to is mere delay, which is insufficient to show prejudice … . Nor did plaintiff rebut defendant's showing that the proffered amendment is not palpably insufficient or clearly devoid of merit … . Board of

Mgrs. of the Porter House Condominium v Delshah 60 Ninth LLC, 2022 NY Slip Op 03680, First Dept 6-7-22

Practice Point: Here defendant moved to amend its answer by adding affirmative defenses two years after the answer was served. Discovery was still ongoing. The delay alone was not enough to demonstrate the plaintiff was prejudiced. The motion to amend should have been granted.

CONVERSION, IDENTIFIABLE FUND, ATTORNEY IOLA ACCOUNT.

ALTHOUGH THE PLAINTIFFS' $96,000, CONSTITUTING TWO MONTHS' RENT AND A SECURITY DEPOSIT, WAS TRANSFERRED TO DEFENDANT FROM AN ATTORNEY'S IOLA ACCOUNT, THE $96,000 CONSTITUTED AN "IDENTIFIABLE FUND" WHICH DEFENDANT "CONVERTED" WHEN IT WAS NOT RETURNED (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Rodriguez, over a two-justice dissent, determined the $96,000 transferred from an attorney's IOLA account to defendant landlord was an "identifiable fund" which was a proper subject of this conversion action. The fund was for two months rent and a security deposit on a lease. But the lease was never signed. By keeping the $96,000 defendant had converted the "identified fund." One of the points in the opinion was that the transfer of funds to an attorney's IOLA account does not necessarily render the funds incapable of being "identified:"

… [W]e now clarify that our prior decision in SH575 Holdings [195 AD3d 429], which found that funds were not specifically identifiable by virtue of being transferred into the IOLA account of an attorney involved in a Ponzi scheme, should not be read to preclude a cause of action for conversion when funds at issue have been commingled to any extent. Here, notwithstanding the funds' transmission through plaintiffs' attorney's IOLA account, the funds' temporary presence in that account did not constitute commingling under any measure pertinent to this cause of action. While the funds were in plaintiffs' attorneys' IOLA account, they remained plaintiffs' funds. Consequently, this conclusion is

not at odds with this Court's holding in SH575 Holdings. Family Health Mgt., LLC v Rohan Devs., LLC, 2022 NY Slip Op 03796, First Dept 6-9-22

Practice Point: Here the plaintiffs' security deposit and two-months rent amounting to $96,000 were transferred to defendant landlord from an attorney's IOLA account. However the lease was never signed and defendant did not return the money. Despite the fact that the money was deposited in the IOLA account, it remained an "identifiable fund" and was therefore a proper subject for this conversion action.

CRIMINAL LAW, ROBBERLY, LESSER INCLUDED OFFENSES.

ROBBERY THIRD AND ASSAULT SECOND CONVICTIONS REVERSED AS LESSER INCLUDED OFFENSES OF ROBBERY SECOND (FOURTH DEPT).

The Fourth Department, reversed the robbery third and assault second convictions as lesser included offenses of robbery second:

… [R]obbery in the third degree is a lesser included offense of robbery in the second degree … . Moreover, although not raised by the parties, we note that assault in the second degree under section 120.05 (6) is a lesser included offense of robbery in the second degree under section 160.10 (2) (a) … . We therefore modify the judgment by reversing those parts convicting defendant of robbery in the third degree and assault in the second degree and dismissing counts one and three of the indictment … . People v Coleman, 2022 NY Slip Op 03842, Fourth Dept 6-9-22

Practice Point: Here the robbery third and assault second convictions were reversed as lesser included offense of robbery second.

CRIMINAL LAW, ASSAULT, PHYSICAL INJURY.

THE EVIDENCE OF "PHYSICAL INJURY" WAS LEGALLY INSUFFICIENT; ASSAULT SECOND CONVICTION REVERSED (FOURTH DEPT).

The Fourth Department, reversing defendant's assault second conviction, determined the evidence the police officer sustained "physical injury" was legally insufficient:

" 'Physical injury' means impairment of physical condition or substantial pain" (Penal Law § 10.00 [9]). Although pain is subjective, the Court of Appeals has cautioned that "the Legislature did not intend a wholly subjective criterion to govern" … . "Factors relevant to an assessment of substantial pain include the nature of the injury, viewed objectively, the victim's subjective description of the injury and his or her pain, whether the victim sought medical treatment, and the motive of the offender" … . Here, the officer testified that he experienced "quite a bit of pain" to his "left upper thigh/groin area" after struggling with defendant when he resisted arrest and that his pain was a 6 or 7 out of 10 on the pain scale. There was only a vague description of the injury, and no medical records for the officer were introduced in evidence … . In addition, there was no testimony that the officer took any pain medication for the injury … and the officer did not miss any work or testify that he was unable to perform any activities because of the pain. People v Bunton, 2022 NY Slip Op 03856, Fourth Dept 6-9-22

Practice Point: Here there was only a vague description of pain and no medical records were introduced. The assault conviction was not supported by legally sufficient evidence the police officer suffered "physical injury."

CRIMINAL LAW, COURT CLERK'S QUESTIONING PROSPECTIVE JURORS, MODE OF PROCEEDINGS ERROR.

AN INQUIRY MADE BY THE COURT CLERK OF PROSPECTIVE JURORS ABOUT WHETHER THEY COULD SERVE IN THIS SEXUAL-ASSAULT-OF-A-CHILD CASE DID NOT AMOUNT TO AN IMPROPER DELEGATION OF JUDICIAL AUTHORITY; THERE WAS NO MODE OF PROCEEDINGS ERROR (FIRST DEPT).

The First Department determined the judge did not improperly delegate judicial authority to the court clerk who made a preliminary inquiry of a group of prospective jurors:

Defendant was charged with committing sex crimes against his girlfriend's six-year-old daughter. The evidence included two videos, taken with defendant's phone, showing defendant having sexual intercourse with the child. On the first day of jury selection, to identify and dismiss prospective jurors who could not be fair and impartial in light of the nature of the charges and the graphic evidence, the court addressed the approximately 200 prospective jurors in groups of approximately 50. The court told each group about the charges and described the video evidence. All panelists who stated that they could not be fair and impartial in light of these circumstances were excused.

When jury selection continued two days later, 92 panelists remained. Because of the size of the group, they were placed in an assembly room down the hall from the courtroom and in the courtroom next door. The court informed the parties that some of the remaining panelists had approached court officers, stating that they had "thought about it" and now believed they could not serve as jurors. The court proposed sending the court clerk to each of the rooms where the jurors were waiting "to ask generally the question of since Tuesday is there anybody who in thinking about the judge's questions believe they can't serve on the case." Any prospective jurors who answered in the affirmative would be brought into the courtroom for further questioning by the court. Defense counsel consented to this procedure.

Upon returning to the courtroom, the clerk reported that there were 10 prospective jurors who had "an issue." The 10 panelists were brought to the courtroom, where

the court inquired whether, based on "the nature of the case [and] the kind of evidence you will be seeing during the course of this trial," the panelists now thought they could not be fair and impartial. People v Ocampo, 2022 NY Slip Op 03803, First Dept 6-9-22

Practice Point: Here defense counsel consented to the court clerk's asking prospective jurors whether they could serve in this sexual-assault-of-a-child case. The inquiry was not an improper delegation of judicial authority. There was no mode of proceedings error (which would have required reversal on appeal even though the issue was not preserved).

CRIMINAL LAW, LARCENY, INTENT TO PERMANENTLY DEPRIVE OWNER OF PROPERTY.

DEFENDANT TOOK A KEY, GOT IN A U-HAUL VAN, SAT FOR TWO MINUTES AND GOT OUT OF THE VAN; THE PEOPLE DID NOT PROVE DEFENDANT INTENDED TO PERMANENTLY DEPRIVE THE OWNER OF ITS PROPERTY; GRAND LARCENY AND POSSESSION OF STOLEN PROPERTY CONVICTIONS REVERSED (SECOND DEPT).

The Second Department, reversing larceny and possession of stolen property convictions, determine the evidence defendant intended to permanently deprive the owner of the U-Haul van of its property was insufficient. Defendant took a key to the van, sat in it for two minutes, and then got out of the van:

… [I]n order to sustain a conviction for grand larceny the People must establish that the defendant had the requisite larcenous intent, which means the "intent to deprive another of property or to appropriate the same to himself or to a third person" (Penal Law § 155.05[1]).

"[T]he concepts of 'deprive' and 'appropriate,' which 'are essential to a definition of larcenous intent,' 'connote a purpose . . . to exert permanent or virtually permanent control over the property taken, or to cause permanent or virtually permanent loss to the owner of the possession and use thereof" … . For that

reason, "[t]he mens rea element of larceny . . . is simply not satisfied by an intent temporarily to use property without the owner's permission" … .

… [T]he evidence failed to establish beyond a reasonable doubt that the defendant intended to cause permanent or virtually permanent loss to the owner of the U-Haul van. …

… [A]jury could rationally infer that the defendant intended to use the van temporarily. To prove grand larceny, however, the People had to do more than prove that the defendant intended to use the van temporarily. They had to prove, in addition, that the defendant intended to "permanently deprive an owner of his or her property or to deprive the owner of it for so extended a period of time that a major portion of its economic value is lost" … . People v Golding, 2022 NY Slip Op 03741, Second Dept 6-8-22

Practice Point: Grand Larceny includes the intent to permanently deprive the owner of the property. Here defendant took a key to a U-Haul van, got in the van, sat for two minutes, and got out of the van. There was, therefore, proof of an intent to permanently deprive the owner of its property. Because grand larceny was not proven, possession of stolen property was not proven as well.

CRIMINAL LAW, MISTRIAL, DOUBLE JEOPARDY.

AFTER THE TRIAL HAD BEGUN AND WITNESSES HAD TESTIFIED, THE JUDGE BECAME ILL AND SOUGHT A COVID TEST; AFTER THE NEGATIVE TEST-RESULT, THE JUDGE, SUA SPONTE, WITHOUT DEFENDANT'S CONSENT, DECLARED A MISTRIAL; THE JUDGE'S FAILURE TO CONSIDER A CONTINUANCE OR THE SUBSTITUTION OF ANOTHER JUDGE WAS AN ABUSE OF DISCRETION; THE DOUBLE-JEOPARDY PROHIBITION PRECLUDED RETRIAL (FOURTH DEPT).

The Fourth Department granted defendant's petition for a writ of prohibition barring retrial on the ground of double jeopardy. A jury was selected and three witnesses had testified when the trial judge became ill and scheduled a COVID test (which came back negative). The judge ultimately, sua sponte, declared a mistrial

without defendant's consent. Because there were alternatives to a mistrial, a continuance, for example, the double-jeopardy prohibition precluded retrial:

… [T]here was no manifest necessity for the mistrial, and the court therefore abused its discretion in granting it sua sponte … . The record establishes that the court did not consider the alternatives to a mistrial, such as a continuance … or substitution of another judge … . "[I]f the judge acts so abruptly as to not permit consideration of the alternatives . . . or otherwise acts irrationally or irresponsibly . . . or solely for convenience of the court and jury . . . , retrial will be barred" … . "The court has the duty to consider alternatives to a mistrial and to obtain enough information so that it is clear that a mistrial is actually necessary" … . Matter of McNair v McNamara, 2022 NY Slip Op 03825, Fourth Dept 6-9-22

Practice Point: Here the judge became ill after the trial had begun and declared a mistrial without defendant's consent and without considering a continuance or the substitution of another judge. There was no manifest necessity for the mistrial. The double-jeopardy prohibition therefore precluded retrial.

CRIMINAL LAW, MOLINEUX, MODUS OPERANDI.

THE SEXUAL ABUSE ALLEGATIONS FROM THE 1990'S WERE NOT SUFFICIENTLY SIMILAR TO THE CHARGED OFFENSES AND THEREFORE DID NOT MEET THE "MODUS OPERANDI" CRITERIA UNDER MOLINEUX TO PROVE IDENTITY; NEW TRIAL ORDERED (FOURTH DEPT).

The Fourth Department, reversing defendant's convictions and ordering a new trial, determined the Molineux evidence allowed by County Court did not meet the "modus operandi" criteria:

Before trial, County Court granted the People's motion seeking to introduce testimony that defendant sexually abused his eldest son in the 1990s, on the ground that the earlier, uncharged conduct was admissible under the modus operandi exception to the Molineux rule … . …

Modus operandi evidence is a means of establishing the defendant's identity as the perpetrator … . Here, even assuming, arguendo, that defendant's identity as the person who committed the crimes was not conclusively established … , we conclude that the similarities between the uncharged acts and the charged crimes were not "sufficiently unique to make the evidence of the uncharged crimes probative of the fact that [defendant] committed the [crimes] charged" … .People v Mountzouros, 2022 NY Slip Op 03840, Fourth Dept 6-9-22

Practice Point: If the identity of the perpetrator is an issue and the manner in which the charged crime was committed is unique, evidence of defendant commission of an uncharged crime involving the same unique "modus operandi" may be admissible under Molineux. Here sexual abuse allegations from the 1990's were not sufficiently similar to the charged offenses. The uncharged-crime evidence should not have been admitted. New trial ordered.

CRIMINAL LAW, STREET STOPS, REASONABLE SUSPICION, FRISK.

THE POLICE DID NOT HAVE A REASONABLE SUSPICION DEFENDANT WAS ARMED AND THEREFORE SHOULD NOT HAVE ATTEMPTED TO FRISK HIM; THE POLICE DID NOT HAVE PROBABLE CAUSE TO ARREST DEFENDANT WHEN HE THREW HIS COAT AT AN OFFICER AND RAN BECAUSE THE POLICE WERE NOT AUTHORIZED TO ATTEMPT THE FRISK; INDICTMENT DISMISSED; AN APPELLATE COURT CANNOT CONSIDER A THEORY WHICH WOULD SUPPORT DENIAL OF SUPPRESSION BUT WHICH WAS NOT RAISED BY THE PEOPLE BELOW (FOURTH DEPT).

The Fourth Department, dismissing the indictment, over a two-justice dissent, determined the police did not have a reasonable suspicion defendant was armed and therefore should not have attempted to frisk him when he got out of the vehicle. The fact that defendant threw his coat at the officer and ran did not justify defendant's arrest for obstructing governmental administration because the police conduct (the attempted frisk) was not authorized:

… [T]he police proceeded to an attempted frisk by approaching the passenger side of the truck, opening the door, and directing defendant to exit the truck so that, as they informed defendant, they could perform a frisk of his person … . The attempted frisk was unlawful, however, because the record establishes that the police did not have " 'knowledge of some fact or circumstance that support[ed] a reasonable suspicion that . . . [defendant was] armed or pose[d] a threat to [their] safety' " … . Furthermore, even though defendant, despite being instructed to leave his coat in the truck, grabbed the coat, threw it onto one of the officers, and fled in the grassy area by the side of the interstate highway, instead of submitting to the frisk of his person, the police lacked probable cause to arrest defendant for obstructing governmental administration in the second degree based on his alleged obstruction of the officers' attempted frisk, because that police conduct was not authorized … . Moreover, while the officers had also indicated to defendant that they were going to perform a search of the truck, the People did not rely below on the theory that defendant was properly arrested for obstructing a lawful search of the truck, nor, as the dissent states, did the court "explicitly base[] its decision on that theory." We thus conclude that, as "an appellate court[, we] may not uphold a police action on a theory not argued before the suppression court" … . People v Hodge, 2022 NY Slip Op 03821, Fourth Dept 6-9-22

Practice Point: Here the police did not have a reasonable suspicion that the defendant was armed and therefore should not have attempted to frisk him. The fact that the defendant threw his coat at an officer and ran did not provide probable cause for arrest because the police conduct (attempting to frisk him) was not authorized. An appellate court cannot consider a theory which would support the denial of suppression but with was not raised below.

CRIMINAL LAW, STREET STOPS.

THE LEVEL THREE STREET STOP WAS NOT JUSTIFIED BY THE VAGUE DESCRIPTION OF A ROBBERY SUSPECT WHICH DEFENDANT DID NOT MATCH; THAT THE DEFENDANT HID HIS FACE AND WALKED QUICKLY WHEN THE POLICE FOLLOWED HIM DID NOT PROVIDE THE POLICE WITH THE REQUISITE REASONABLE SUSPICION (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Manzanet-Daniels, over a dissent, determined the police did not have reasonable suspicion defendant had committed a crime and the level-three stop of the defendant was not justified. The suppression motion was granted and the indictment dismissed. The street stop was based upon a vague description of a robbery suspect which did not match the defendant. The fact that the defendant acted "suspiciously" when the police followed him was not enough to validate the stop:

The officers did not have reasonable suspicion to conduct a level three forcible stop and detention by ordering defendant to put his hands against a wall, grabbing his arms, and forcing him to the ground. Defendant matched the description only in that he was a black male. … That a defendant matches a vague, general description, such as the one the complainant gave of the perpetrator, is insufficient to give rise to reasonable suspicion, particularly where, as here, key parts of the description do not match … . …

Although defendant was walking at a fast pace and hiding his face from the officers, such equivocal behavior was just as susceptible to an innocent interpretation and may not increase the level of suspicion so as to justify a forcible stop … . Walking at a quick pace is not considered flight … . Defendant was under no obligation to walk more slowly or to show his face to the officers since he had a right to be let alone and refuse to respond to police inquiry … . Defendant's desire not to make eye contact with the officers was equally consistent with an innocent desire as a black male to avoid interactions with the police. People v Thorne, 2022 NY Slip Op 03696, First Dept 6-7-22

Practice Point: Here the police conducted a level-three street stop based upon a vague description of a robbery suspect which the defendant did not match. The

stop was not justified by defendant's hiding his face and walking quickly when the police followed him.

ELECTION LAW.

EVEN THOUGH THE STATE ASSEMBLY REDISTRICTING MAP WAS DECLARED INVALID BY THE COURT OF APPEALS IN APRIL 2022, THE MAP WILL BE USED UNTIL THE GENERAL ELECTION IN 2024 (FIRST DEPT).

The First Department determined the state assembly redistricting mag declared invalid by the Court of Appeals on April 27, 2022, shall be used in the upcoming 2022 elections and any new map will not be used before the 2024 general election:

… [T]he February 2022 map is invalid, based on its procedural infirmity as previously determined by the Court of Appeals in Matter of Harkenrider v Hochul (__ NY3d __, 2022 NY Slip Op 02833 [Apr. 27, 2022]), … will remain in effect for the 2022 assembly primary election to be held on June 28, 2022 and the general election to be held on November 8, 2022, and … , upon the formal adoption and implementation of a new legally compliant state assembly map, for use no sooner than the 2024 regular election, the February 2022 map will be void and of no effect … . Matter of Nichols v Hochul, 2022 NY Slip Op 03809, First Dept 6-10-22

Practice Point: The Court of Appeals, in April 2022, declared the state assembly redistricting map invalid. Here the First Department determined the map will continue to be used until the general election in 2024.

EMPLOYMENT LAW, LABOR LAW (PAYMENT OF WAGES), CORPORATION LAW.

CORPORATE SHAREHOLDERS AND OFFICERS MAY ONLY BE LIABLE FOR LABOR LAW (WAGE-PAYMENT-RELATED) VIOLATIONS IF THEY EXERCISE CONTROL OVER THE DAY-TO-DAY OPERATIONS OF THE CORPORATION, WHICH WAS ALLEGED HERE (SECOND DEPT).

The Second Department, reversing Supreme Court and reinstating defendants' counterclaims alleging violations of the Labor Law, noted that corporate shareholders and officers can only be liable for Labor Law (wage-payment-related) violations if they exercise control of a corporation's day-to-day operations, which was alleged here:

"[C]orporate shareholders and officers generally may not be subjected to civil liability for corporate violations of the Labor Law absent allegations that such persons exercised control of the corporation's day-to-day operations by, for example, hiring and firing employees, supervising employee work schedules, and determining the method and rate of pay" … . Here, the defendants adequately alleged, inter alia, that the additional defendants controlled the day-to-day operations of the plaintiff, including the plaintiff's payment practices. Interstate Home Loan Ctr., Inc. v United Mtge. Corp., 2022 NY Slip Op 03715, Second Dept 6-8-22

Practice Point: Corporate shareholders and officers may be liable for Labor Law (wage-payment-related) violations only if they exercise control over the day-to-day operations of the corporation.

FAMILY LAW, ATTORNEYS, HOME VISITS.

NO REASON MOTHER'S ATTORNEY COULD NOT BE PRESENT, EITHER IN PERSON OR ELECTRONICALLY, DURING A HOME VISIT BY THE ADMINISTRATION FOR CHILDREN'S SERVICES (ACS) (SECOND DEPT).

The Second Department, reversing Family Court, determined there was no reason mother's attorney could not be present, either in person of electronically, during a home visit by the Administration for Children's Services (ACS):

Where, as here, the Family Court issued an order temporarily releasing a child who is the subject of a neglect proceeding to a parent pending a final order of disposition (see Family Ct Act § 1027[d]), the order may include a direction for the parent to "cooperat[e] in making the child available for . . . visits by the child protective agency, including visits in the home" (id. § 1017[3]). However, there are no provisions of the Family Court Act—nor does ACS cite to any other authority—prohibiting a respondent in a proceeding pursuant to Family Court Act article 10 from having counsel present during a home visit. Thus, the respondent is not automatically prohibited from having an attorney—or any other individual—present in her home during the home visit, either in person or electronically. Matter of Lexis B. (Natalia B.), 2022 NY Slip Op 03721, Second Dept 6-8-22

Practice Point: The Administration for Children's Services (ASC) did not cite any authority for its attempt to preclude mother's attorney from being present, either in person or electronically, during ASC's home visits.

FAMILY LAW, CUSTODY, ADOPTION.

ALTHOUGH FATHER, WHO HAD BEEN IN THE MILITARY, HAD NOT PROCURED HOUSING FOR HIMSELF AND HIS UNDER-SIX-MONTH-OLD SON, HE DEMONSTRATED HE WAS WILLING AND ABLE TO CARE FOR THE CHILD; THEREFORE HIS CONSENT TO ADOPTION BY PETITIONERS-RESPONDENTS WAS REQUIRED AND CUSTODY WAS PROPERLY AWARDED TO HIM; THE DISSENT ARGUED FATHER'S FAILURE TO PROCURE HOUSING RENDERED HIM UNABLE TO CARE FOR THE CHILD (FOURTH DEPT).

The Fourth Department, over a dissent, determined father demonstrated he is willing and able to enter a full relationship with his under-six-year-old child and, therefore, his consent to adoption by the petitioners-respondents was required and he was properly awarded custody of the child. The dissent argued father, who was in the military, made no attempt to procure housing for himself and the child and, therefore, did not demonstrate he was able to care for the child:

We … disagree with our dissenting colleague and conclude that the father established his ability to assume custody of the child. Contrary to the position of the dissent and petitioners, custody and housing are separate and distinct concepts. A parent who lacks housing for a child is not legally precluded from obtaining custody. Certainly, active military members should not lose custody of a child due to their service to our country. Many parents enlist the aid of family members to help them provide housing, including single parents who serve in the military. That temporary inability to provide housing should not preclude them from asserting their custodial rights to the children where, as here, they have established their intent to embrace their parental responsibility. Matter of William, 2022 NY Slip Op 03831, Fourth Dept 6-9-22

Practice Point: The Fourth Department noted that custody and housing are separate and distinct concepts. Although father, who had been in the military, had not procured housing for himself and the child, he demonstrated he was willing and able to care for the child. Therefore his consent to adoption by the petitioners-respondents was required and custody was properly awarded to him.

FAMILY LAW. PRENUPTIAL AGREEMENTS.

THE WIFE RAISED QUESTIONS OF FACT ABOUT (1) THE FAIRNESS OF THE NEGOTIATIONS FOR THE PRENUPTIAL AGREEMENT, (2) WHETHER HER ATTORNEY, CHOSEN FOR HER, ENGAGED IN MEANINGFUL NEGOTIATIONS, (3) WHETHER SHE RATIFIED THE AGREEMENT, AND (4) WHETHER SHE WAS ENTITLED TO TEMPORARY MAINTENANCE (THIRD DEPT).

The Third Department, reversing Supreme Court, determined the wife raised questions of fact about the fairness of the prenuptial agreement negotiations and whether she ratified the agreement. The wife alleged her husband chose the attorney who represented her merely to ensure she understood the agreement and not to negotiate its terms. In addition, Supreme Court should not have denied the wife's motion for temporary maintenance:

On the last day of negotiations between counsel, the wife averred that she was preparing to travel to Florida with the parties' children. While the communications submitted by the husband in support of his motion indicate that counsel for the parties continued discussing potential changes to the agreement, there is conflicting evidence establishing the extent that the wife was meaningfully involved in those discussions. The wife further averred that the first opportunity she had to review the agreement was in Florida, at which point it was already in its final form. We find that the foregoing facts, if established, raise issues concerning whether the wife was meaningfully represented during the abbreviated negotiations, and also raise an inference that the husband did not intend on engaging in a good faith negotiation of the agreement from the outset, which, if true, would be sufficient to establish overreaching on his part … . …

We further … the husband's contention that the wife ratified the agreement and is therefore foreclosed from challenging its validity. … [I]t is clear that the wife did not begin receiving benefits under the agreement until the husband commenced this divorce action, and she took sufficiently prompt action to challenge the validity of the agreement in the context of this litigation … . …

… Supreme Court improperly denied the wife's cross motion for temporary maintenance. To this end, the wife argues that the maintenance provision of the agreement must be invalidated for failing to comply with the requirements of Domestic Relations Law former § 236 (B) (5-a) (f). We agree. Spiegel v Spiegel, 2022 NY Slip Op 03778, Third Dept 6-9-22

Practice Point: Here in this divorce action there were questions of fact whether the wife was meaningfully represented in the prenuptial-agreement negotiations and whether she ratified the agreement. In addition, pursuant to the Domestic Relation Law, Supreme Court should have awarded temporary maintenance.

FORECLOSURE, FRAUD, REAL PROPERTY LAW, MARKETABLE TITLE.

AFTER THE FORECLOSURE SALE BUT BEFORE THE CLOSING, THE MORTGAGOR STARTED AN ACTION ALLEGING FRAUD IN THE FORECLOSURE PROCEEDINGS; THE FRAUD ACTION DID NOT RENDER THE TITLE UNMARKETABLE SUCH THAT THE PURCHASER COULD SET ASIDE THE FORECLOSURE SALE AND HAVE THE DOWN PAYMENT RETURNED (SECOND DEPT).

The Second Department determined the fact that the mortgagor, after the foreclosure sale but before the closing, started an action alleging fraud in the foreclosure proceeding did not render the title to the property unmarketable. Therefore the purchaser at the foreclosure auction did not have right to set aside the foreclosure sale and have the down payment returned:

"A marketable title is a title free from reasonable doubt, but not from every doubt" … . "[S]omething more than a mere assertion of a right is essential to create an unmarketable or doubtful title" … . Here, contrary to the purchaser's contention, the mortgagor's action did not render title unmarketable. Therefore, the Supreme Court properly denied those branches of the purchaser's motion which were to set aside the foreclosure sale and to direct the plaintiff to return the down payment. DiTech Fin., LLC v Steplight, 2022 NY Slip Op 03710, Second Dept 6-8-22

Practice Point: The title to the property sold at the foreclosure auction was not rendered unmarketable by a subsequent action brought by the mortgagor alleging fraud in the foreclosure proceedings. Therefore the purchaser's motion to set aside the foreclosure sale and return the down payment was properly denied.

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

COMPLIANCE WITH THE NOTICE PROVISIONS OF RPAPL 1304, PARTICULARLY THE MAILING REQUIREMENTS, WAS NOT SHOWN IN THIS FORECLOSURE ACTION (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff in this foreclosure action did not demonstrate compliance with the notice requirements of RPAPL 1304:

… [A}lthough the plaintiff submitted a certified mail receipt, the receipt did not contain a postal stamp, indication that postage was paid, or an attendant signature, and the plaintiff did not submit any United States Postal Service tracking information … . The affidavit of Nancy Sczubleski, submitted by the plaintiff for the first time in opposition to the defendant's cross motion, also failed to establish strict compliance with RPAPL 1304. Sczubleski did not have personal knowledge of the purported mailing … . Furthermore, while Sczubleski averred that she was familiar with the plaintiff's mailing practices and procedures, the notices submitted by the plaintiff in support of its motion for summary judgment indicate that they were not mailed by the plaintiff, but rather were mailed by an entity known as MGC Mortgage, Inc. (hereinafter MGC). Sczubleski, who stated in her affidavit that she was employed by Dovenmuehle Mortgage, Inc., a sub-servicer of the loan, does not address this fact at all, let alone demonstrate that she was familiar with MGC's mailing practices and procedures … . LNV Corp. v Allison, 2022 NY Slip Op 03716, Second Dept 6-8-22

Practice Point: Yet another example of the mortgagee's failure to demonstrate the RPAPL 1304 notice was properly mailed in its foreclosure motion papers.

INSURANCE LAW, PROPERTY, "DETERIORATION" EXCLUSION.

THE PROPERTY-INSURANCE EXCLUSION FOR "DETERIORATION" APPLIED TO THE BULGING WALL CAUSED BY THE DETERIORATION OF BRICKS, PRECLUDING COVERAGE (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined the "deterioration" exclusion in the property insurance policy applied to a bulging wall, precluding coverage:

Defendant met its initial burden on its motion by establishing as a matter of law that plaintiff's loss is not covered under the policy because it resulted from "deterioration," which condition was specifically excluded from coverage, and plaintiff failed to raise an issue of fact in opposition … . Unambiguous policy provisions are to be given their plain and ordinary meaning … , and the plain meaning of the exclusion in question "was to relieve the insurer of liability when its insured sought reimbursement for costs incurred in correcting . . . deterioration of the subject [premises]" … . Here, both defendant's expert and plaintiff's expert opined that the wall bulged due to deterioration of the bricks from exposure to moisture and freeze-thaw cycles. The only difference was that defendant's expert opined that the wall had been deteriorating over an extended period of time, whereas plaintiff's expert opined that the deterioration occurred over two months. Either way, the damage was the result of deterioration, and thus the policy exclusion applies and defendant is entitled to summary judgment … . S & J Props. of Watertown, LLC v Main St. Am. Group, 2022 NY Slip Op 03837, Fourth Dept 6-9-22

Practice Point: Here the bulging wall was caused by the deterioration of bricks. The "deterioration" exclusion in the policy applied and precluded coverage.

INSURANCE LAW, REINSURANCE.

THE "FOLLOW THE SETTLEMENTS" DOCTRINE DOES NOT APPLY TO A REINSURER WHERE THE PAYMENTS MADE BY THE PRIMARY INSURER WERE CLEARLY BEYOND THE SCOPE OF THE ORIGINAL POLICY (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined the defendant reinsurer was not required to indemnify the plaintiff primary insurer because the primary insurer was not obligated to make the pay-out under its umbrella policy. The so-called "follow the settlements" doctrine did not apply because the payments made by the plaintiff were clearly beyond the scope of the original policy:

Where it applies, the follow-the-settlements doctrine "ordinarily bars challenge by a reinsurer to the decision of [the cedent] to settle a case for a particular amount" … . Specifically, under that doctrine, "a reinsurer is required to indemnify for payments reasonably within the terms of the original policy, even if technically not covered by it. A reinsurer cannot second guess the good faith liability determinations made by its reinsured . . . The rationale behind this doctrine is two-fold: first, it meets the goal of maximizing coverage and settlement and second, it streamlines the reimbursement process and reduces litigation" … There are, however, limitations to the doctrine. The follow-the-settlements doctrine "insulates a reinsured's liability determinations from challenge by a reinsurer unless they are fraudulent, in bad faith, or the payments are clearly beyond the scope of the original policy or in excess of [the reinsurer's] agreed-to exposure" … . Utica Mut. Ins. Co. v Abeille Gen. Ins. Co., 2022 NY Slip Op 03815, Fourth Dept 6-9-22

Practice Point: Here the "follow the settlements" doctrine did not apply to a reinsurer who refused to cover payments made by the primary insurer because those payments were clearly beyond the scope of the original policy.

LABOR LAW-CONSTRUCTION LAW, HOMEOWNER'S EXEMPTION.

HOMEOWNER'S EXEMPTION PRECLUDED THE LABOR LAW 240(1) AND 241(6) CAUSES OF ACTION AGAINST THE DEFENDANT PROPERTY OWNER, A RELIGIOUS ORGANIZATION; THE LABOR LAW 200 AND NEGLIGENCE CAUSES OF ACTION ALLEGING THE HOMEOWNER'S LADDER WAS DEFECTIVE PROPERLY SURVIVED SUMMARY JUDGMENT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the homeowner's exemption applied to preclude plaintiff's Labor Law 240(1) and 241(6) causes of action in this ladder-fall case. The Labor Law 200 and negligence causes of action (alleging defendant property-owners' ladder was defective) properly survived summary judgment. The fact that the property-owner is a religious organization did not affect the applicability of the homeowner's exemption:

The deposition transcripts of the plaintiff and of the defendant's employee demonstrated that the defendant did not direct or control the plaintiff's work. Additionally, the deposition transcript of the defendant's employee and the affidavit of the defendant's expert architect demonstrated that the defendant was the owner of a one-family dwelling to which the meditation room [which plaintiff was painting when he fell] was an accessory. Contrary to the plaintiff's contention, the defendant is entitled to the protections of this exemption even though it is a religious organization … . …

The defendant failed to demonstrate, prima facie, that it lacked notice of the allegedly dangerous or defective condition with respect to the ladder … . Reinoso v Han Ma Um Zen Ctr. of N.Y., Inc., 2022 NY Slip Op 03755, Second Dept 6-8-22

Practice Point: The homeowner's exemption precludes Labor Law 240(1) and 241(6) causes of action against a homeowner which/who does not direct plaintiff's work, even if the homeowner is a religious organization. The homeowner's exemption does not apply to Labor Law 200 or negligence causes of action, here based on allegations the homeowner's ladder was defective.

MUNICIPAL LAW, CONTRACT LAW, NOTICE OF CLAIM.

DEFENDANT DID NOT FILE A NOTICE OF CLAIM AGAINST PLAINTIFF VILLAGE IN THIS CONTRACT ACTION AS REQUIRED BY CPLR 9802; THEREFORE DEFENDANT'S ANTICIPATORY-REPUDIATION COUNTERCLAIM SHOULD HAVE BEEN DISMISSED; THE VILLAGE'S PARTICIPATION IN DISCOVERY WAS NOT DESIGNED TO MISLEAD THE DEFENDANT AND DID NOT TRIGGER THE ESTOPPEL DOCTRINE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the defendant's failure to file a notice of claim required dismissal of its counterclaim (anticipatory repudiation of contract) against the village:

Pursuant to CPLR 9802, "no action shall be maintained against the village upon or arising out of a contract of the village . . . unless a written verified claim shall have been filed with the village clerk within one year after the cause of action shall have accrued." "'[S]tatutory requirements conditioning suit [against a governmental entity] must be strictly construed'" … . This is true even when the municipality "'had actual knowledge of the claim or failed to demonstrate actual prejudice'" … . …

… [T]he plaintiff's exchanging of discovery and participation in the depositions of witnesses did not estop it from raising a defense pursuant to CPLR 9802, as mere participation in litigation does not constitute action calculated to mislead or discourage the defendant from filing a notice of claim … . Incorporated Vil. of Freeport v Freeport Plaza W., LLC, 2022 NY Slip Op 03713, Second Dept 6-8-22

Practice Point: In a contract action against a municipality, here an anticipatory-repudiation-of-contract counterclaim, a notice of claim must be filed (CPLR 9802). No notice of claim was filed here and the counterclaim should have been dismissed. The fact that the municipality participated in discovery did not give rise to the estoppel doctrine because there was no intent to mislead the defendant with respect to the notice-of-claim requirement.

MUNICIPAL LAW, EMPLOYMENT LAW, FIREFIGHTERS, ARBITRATION, GENERAL MUNICIPAL LAW 207-A BENEFITS.

THE MANNER IN WHICH THE FIREFIGHTER'S GENERAL MUNICIPAL LAW 207-A INJURY CLAIM SHOULD BE PROCESSED IS ARBITRABLE BECAUSE THE ISSUE IS ADDRESSED IN THE COLLECTIVE BARGANING AGREEMENT (CBA); THE PETITION TO STAY ARBITRATION SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the petition to stay arbitration in this General Municipal Law 207-a injury claim by a firefighter should not have been granted. The manner in which a section 207-a claim is processed is an arbitrable matter:

… [T]he union filed a grievance alleging, inter alia, that the City was in violation of the CBA [collective bargaining agreement] and the negotiated General Municipal Law § 207-a policy by failing to adhere to the required procedures in processing a claim by one of the union's members for General Municipal Law § 207-a benefits. . …

It is undisputed that there is no constitutional, statutory, or public policy provision prohibiting the arbitration of the dispute at issue in this matter…. [G]iven the breadth of the arbitration clause in this case, the dispute regarding the City's processing of claims for General Municipal Law § 207-a benefits bore a reasonable relationship to the general subject matter of the CBA, since Article 10 of the CBA expressly refers to the negotiated policy for the provision of such benefits … . "[T]he question of the scope of the substantive provisions of the CBA is a matter of contract interpretation and application reserved for the arbitrator" … . Matter of City of New Rochelle v Uniformed Fire Fighters Assn., Inc., 2022 NY Slip Op 03722, Second Dept 6-8-22

Practice Point: Here the issue (how a firefighter's General Municipal Law 207-a injury claim should be processed) was addressed in the collective bargaining agreement (CBA) was therefore arbitrable. The petition to stay arbitration should not have been granted.

MUNICIPAL LAW, GENERAL MUNICIPAL LAW 207-A BENEFITS, FIREFIGHTERS.

A FIREFIGHTER INJURED ON THE JOB RETURNED TO THE JOB BUT COULD NOT WORK THE 10 TO 24 HOUR SHIFTS WHICH ARE THE "REGULAR DUTIES" OF A FIREFIGHTER; BECAUSE SHE WAS NOT OFFERED THE FULL-TIME EQUIVALENT OF THE SHORTER SHIFTS OR LIGHT-DUTY WORK, SHE WAS ENITLTED TO GENERAL MUNICIPAL LAW 207-A BENEFITS (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined petitioner, a firefighter who had injured her shoulder on the job, was entitled to General Municipal Law 207-a benefits:

A firefighter seeking section 207-a benefits must show "that his or her injury or illness results from the performance of his or her duties and that he or she is physically unable to perform his or her regular duties as a firefighter … . The regular duties of a firefighter for the City required shifts of between 10-24 hours, and the medical evidence is undisputed that petitioner could work only 8-hour shifts. Inasmuch as the evidence established that petitioner could not work the longer shifts, and she was not offered the full-time equivalent of the shorter shifts or light-duty work, the determination that she is not entitled to General Municipal Law § 207-a benefits is arbitrary and capricious. Matter of Newman v City of Tonawanda, 2022 NY Slip Op 03834, Fourth Dept 6-9-22

Practice Point: Here petitioner-firefighter was injured on the job. When she returned to the job she could not work the 10 to 24 hour shifts which are the "regular duties' of a firefighter. She was assigned shorter shifts which resulted in less pay. She was therefore entitled to General Municipal Law 207-a benefits.

NEGLIGENCE, ASSUMPTION OF RISK, SLIPPERY BASKETBALL COURT.

PLAINTIFF ASSUMED THE RISK OF SLIPPING ON THE BASKETBALL COURT WHICH WAS WET WITH CONDENSATION; PLAINTIFF WAS AWARE OF THE RECURRING CONDITION (SECOND DEPT).

The Second Department determined defendants were entitled to summary judgment in this basketball-injury case. Plaintiff was deemed to have assumed the risk of slipping and falling on condensation on the floor of the court:

… [T]he defendants established … ,that the plaintiff was aware of and had assumed the risk that the floor of the basketball court would be slippery from condensation that had formed due to humid conditions in the gymnasium. The defendants' submissions, including the plaintiff's own deposition testimony, demonstrated that the plaintiff had played basketball in the gymnasium on more than 50 occasions prior to the day of the accident, knew that the gymnasium air was "humid" and had dry-mopped the gymnasium floor while playing basketball in the past when it was "getting wet" from "[c]ondensation," and nevertheless continued playing basketball in the gymnasium on multiple occasions up until the date of the accident despite his awareness of this condition. Under these circumstances, the plaintiff assumed the risk of injury inherent in playing basketball on an indoor court which he knew to become slippery due to humid conditions in the gymnasium … . Lungen v Harbors Haverstraw Homeowners Assn., Inc., 2022 NY Slip Op 03717, Second Dept 6-8-22

Practice Point: Plaintiff was aware that the basketball court routinely became wet with condensation. Therefore he assumed the risk of slipping on the condensation while playing basketball.

NEGLIGENCE, SLIP AND FALL.

A FLATTENED CARDBOARD BOX ON THE FLOOR WAS NOT ACTIONABLE IN THIS SLIP AND FALL CASE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined a flattened cardboard box was not actionable in this slip and fall case;

The plaintiff commenced this action to recover damages for personal injuries after she slipped and fell on a flattened cardboard box that was lying on the floor in an aisle of the defendant's grocery store. At her deposition, the plaintiff testified that she saw the cardboard box prior to the accident, as well as an employee of the defendant stocking shelves in the aisle close by. The plaintiff testified that, prior to her fall, it was her intention to step onto the cardboard in order to reach a product on a nearby shelf. …

While a possessor of real property has a duty to maintain that property in a reasonably safe condition … , "there is no duty to protect or warn against an open and obvious condition that, as a matter of law, is not inherently dangerous" … .

Here, the defendant established its prima facie entitlement to judgment as a matter of law dismissing the complaint by submitting evidence demonstrating that the flattened cardboard box, which was readily observable to the plaintiff prior to her fall, was open and obvious, and not inherently dangerous … . DiScalo v Mannix Family Mkt. @ Forest & Richmond Ave, LLC, 2022 NY Slip Op 03708, Second Dept 6-8-22

Practice Point: A flattened cardboard box on the floor was not actionable in this slip and fall case because it was "open and obvious."