NEW YORK APPELLATE DIGEST, LLC

Weekly Reversal Newsletter
July 11 – 15, 2022

An Organized Compilation of Summaries of Selected Decisions, Mostly Reversals, Released by Our New York Appellate Courts July 11 – 15, 2022, and Posted on the New York Appellate Digest Website on Monday, July 18, 2022, Distilled to Practice Points, One or Two Sentences Each. The Entries in the Table of Content Link to the Summaries Which Link to the 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 Reversal Newsletter.

Table of Contents

Contents

APPEALS, INTERLOCUTORY DECISIONS, WORKERS' COMPENSATION. 4

AN APPEAL FROM A WORKERS' COMPENSATION DECISION WHICH IS INTERLOCUTORY IN NATURE MUST BE DISMISSED; THE DECISION MAY BE REVIEWED IN AN APPEAL FROM THE FINAL DETERMINATION (THIRD DEPT). 4

CIVIL PROCEDURE, FAMILY LAW, PROPER VENUE FOR FAMILY OFFENSE PROCCEEDING. 4

A FAMILY OFFENSE PROCEEDING MAY BE BROUGHT IN THE COUNTY WHERE THE FAMILY MEMBER RESIDES, AS WELL AS IN THE COUNTY WHERE THE OFFENSE OC (SECOND DEPT). 4

CRIMINAL LAW, PROSECUTORIAL MISCONDUCT. 5

THE DEFENDANT WAS CHARGED WITH CRIMINALLY NEGLIGENT HOMICIDE BASED UPON STRIKING THE VICTIM WITH HER CAR; IN SUMMATION THE PROSECUTOR CHARACTERIZED DEFENDANT'S ACTIONS AS INTENTIONAL, DENIGRATED THE DEFENSE THEORIES, REFERRED TO IRRELEVANT CONDUCT, AND ASSUMED FACTS NOT IN EVIDENCE; DEFENDANT WAS DEPRIVED OF A FAIR TRIAL BY THE PROSECUTORIAL MISCONDUCT; THE APPEAL WAS CONSIDERED IN THE INTEREST OF JUSTICE (SECOND DEPT). 5

CRIMINAL LAW, ASSAULT, PHYSICAL INJURY. 5

THE EVIDENCE OF "PHYSICAL INJURY" WAS LEGALLY INSUFFICIENT; ASSAULT THIRD CONVICTION VACATED (SECOND DEPT). 5

CRIMINAL LAW, INEFFECTICE ASSISTANCE, FAILURE TO INVESTIGATE. 6

AFTER THE SECOND DEPARTMENT'S VACATION OF DEFENDANT'S "ENDANGERING THE WELFARE OF A PHYSICALLY DISABLED CHILD" CONVICTION (BY GUILTY PLEA) ON "ACTUAL INNOCENCE" GROUNDS WAS REVERSED BY THE COURT OF APPEALS, THE SECOND DEPARTMENT AGAIN VACATED THE CONVICTION ON "INEFFECTIVE ASSISTANCE" GROUNDS; THE MEDICAL RECORDS INDICATED THE CHILD WAS NOT BURNED BY HOT WATER, BUT RATHER SUFFERED AN ALLERGIC REACTION TO MEDICATION (SECOND DEPT). 6

CRIMINAL LAW, INVALID PORTIONS OF CELL PHONE SEARCH WARRANT SEVERED, PLAIN VIEW DOCTRINE APPLIES TO CELL PHONE SEARCH. 7

HERE THE APPELLATE COURT SEVERED PORTIONS OF THE SEARCH WARRANT AS OVERBROAD; THE VALID PORTIONS AUTHORIZED A SEARCH OF THE PHONE FOR EVIDENCE OF CHILD ABUSE; THE SEARCH OF THE PHONE AS AUTHORIZED BY THE VALID PORTIONS OF THE WARRANT TURNED UP A VIDEO OF A RAPE; THAT VIDEO WAS PROPERLY SEIZED PURSUANT TO THE PLAIN VIEW DOCTRINE (THIRD DEPT). 7

Table of Contents

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA), MULTIPLE INDICTMNENTS, ONE SORA HEARING. 7

WHERE CONVICTIONS UNDER MULITPLE INDICTMENTS COME UP FOR REVIEW IN THE SAME SORA HEARING, THE BOARD OF EXAMINERS OF SEX OFFENDERS SHOULD PREPARE A SINGLE RISK ASSESSMENT INSTRUMENT ENCOMPASSING ALL THE OFFENSES (SECOND DEPT). 7

CRIMINAL LAW, WITNESS ELIMINATION MURDER. 8

THE EVIDENCE OF "WITNESS ELIMINATION MURDER" WAS INSUFFICIENT; THERE WAS NO EVIDENCE THE VICTIM, DEFENDANT'S WIFE, WITNESSED THE DEFENDANT'S SEXUAL RELATIONSHIP WITH HIS DAUGHTER AND NO EVIDENCE DEFENDANT FEARED CRIMINAL PROCEEDINGS WERE IMMINENT; MURDER FIRST DEGREE REDUCED TO MURDER SECOND DEGREE (THIRD DEPT). 8

FAMILY LAW, DERIVATIVE NEGLECT, DENIAL OF DUE PROCESS. 8

THE THREE-DAY FACT-FINDING HEARING RELATED TO THE NEGLECT PETITION RE: SERENA, NOT THE NEWLY-FILED DERIVATIVE NEGLECT PETITION RE: VINCENT; FAMILY COURT IMPROPERLY CONSOLIDATED THE TWO PETITIONS FOR THE DISPOSITIONAL HEARING DEPRIVING MOTHER OF DUE PROCESS (SECOND DEPT). 8

FORECLOSURE, REFEREE'S REPORT BASED UPON BUSINESS RECORDS NOT PRODUCED. 9

SUPREME COURT SHOULD NOT HAVE CONFIRMED THE REFEREE'S REPORT IN THIS FORECLOSURE ACTION BECAUSE THE BUSINESS RECORDS UPON WHICH THE CALCULATIONS IN THE REPORT WERE BASED WERE NOT PRODUCED (SECOND DEPT). 9

FORECLOSURE, REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL), SEPARATE ENVELOPE RULE. 9

THE BANK DID NOT COMPLY WITH THE "SEPARATE ENVELOPE" REQUIREMENT OF RPAPL 1304 IN THIS FORECLOSURE ACTION ENTITLING THE DEFENDANTS TO SUMMARY JUDGMENT DISMISSING THE COMPLAINT (SECOND DEPT). 9

FORECLOSURE, REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL). 10

PLAINTIFF BANK IN THIS FORECLOSURE ACTION DID NOT DEMONSTRATE STRICT COMPLIANCE WITH THE NOTICE REQUIREMENTS OF RPAPL 1304, AS WELL AS THE NOTICE REQUIRMENTS SPELLED OUT IN THE MORTGAGE (SECOND DEPT). 10

Table of Contents

INSURANCE LAW, MEDICAL MALPRACTICE, EMPLOYMENT LAW. 10

WHERE THE EMPLOYER OF A PHYSICIAN HAS PAID THE PREMIUMS FOR MEDICAL MALPRACTICE INSURANCE AND THE INSURANCE COMPANY DEMUTUALIZES, ABSENT AN AGREEMENT TO THE CONTRARY, THE PROCEEDS GO TO THE PHYSICIAN, NOT THE EMPLOYER (FIRST DEPT). 10

LABOR LAW-CONSTRUCTION LAW. 11

CLAIMANT WAS INJURED WHEN A TRUCK STRUCK THE BASKET OF THE MAN LIFT SHE WAS USING; THE FACT THAT CLAIMANT DIDN'T FALL FROM THE BASKET DID NOT WARRANT THE DISMISSAL OF THE LABOR LAW 240(1) CAUSE OF ACTION (SECOND DEPT). 11

NEGLIGENCE, TRAFFIC ACCIDENTS, REAR-END COLLISIONS. 11

IN A REAR-END COLLISION CASE, THE ALLEGATION THAT PLAINTIFF STOPPED SUDDENLY IS NOT SUFFICIENT TO DEFEAT PLAINTIFF'S SUMMARY JUDGMENT MOTION (SECOND DEPT). 11

NEGLIGENCE, WORKERS' COMPENSATION, EMPLOYMENT LAW. 12

PLAINTIFF SUED HER EMPLOYER IN NEGLIGENCE BASED UPON AN ALLEGED ASSAULT BY A COWORKER; THERE WERE QUESTIONS OF FACT ABOUT WHETHER THE INJURY WAS IN THE COURSE OF PLAINTIFF'S EMPLOYMENT; THE WORKERS' COMPENSATION BOARD HAS PRIMARY JURISDICTION OVER THE DETERMINATION OF THE APPLICABILITY OF THE WORKERS' COMPENSATION LAW; RATHER THAN DISMISSING THE NEGLIGENCE CAUSES OF ACTION, SUPREME COURT SHOULD HAVE REFERRED THE MATTER TO THE WORKERS' COMPENSATION BOARD (SECOND DEPT). 12

TAX LAW, SALES TAX ON CONCRETE USED FOR CAPITAL IMPROVEMENTS. 13

IF PETIONER HAD PURCHASED CONCRETE AS A PART OF A SERVICE FOR THE INSTALLATION OF CAPITAL IMPROVEMENTS, THE PURCHASE WOULD HAVE BEEN EXEMPT FROM SALES TAX; BUT PETITIONER PURCHASED THE CONTRACT IN "RAW" FORM AND PETITIONER'S EMPLOYEES AND SUBCONTRACTORS USED IT TO BUILD CAPITAL IMPROVEMENTS; THE PURCHASE OF THE CONCRETE WAS THEREFORE SUBJECT TO SALES TAX (THIRD DEPT). 13

ZONING, VARIANCE FOR SETBACK VIOLATION. 13

DUE TO A CONTRACTOR'S ERROR, PETITIONER'S SWIMMING POOL WAS INSTALLED SIX FEET FROM THE PROPERTY LINE, VIOLATING THE 14-FOOT SETBACK REQUIREMENT; THE ZONING BOARD OF APPEALS PROPERLY DENIED THE PETITIONER'S APPLICATION FOR A VARIANCE; SUPREME COURT REVERSED (SECOND DEPT). 13

Table of Contents

APPEALS, INTERLOCUTORY DECISIONS, WORKERS' COMPENSATION.

AN APPEAL FROM A WORKERS' COMPENSATION DECISION WHICH IS INTERLOCUTORY IN NATURE MUST BE DISMISSED; THE DECISION MAY BE REVIEWED IN AN APPEAL FROM THE FINAL DETERMINATION (THIRD DEPT).

Matter of Polizzano v Medline Indus., 2022 NY Slip Op 04604, Third Dept 7-14-22

Practice Point: A decision from the Workers' Compensation Board which does not reach issues that may be determinative of the claim is interlocutory in nature and will not be considered on appeal. However, the interlocutory decision may be reviewed in an appeal from the final determination.

CIVIL PROCEDURE, FAMILY LAW, PROPER VENUE FOR FAMILY OFFENSE PROCCEEDING.

A FAMILY OFFENSE PROCEEDING MAY BE BROUGHT IN THE COUNTY WHERE THE FAMILY MEMBER RESIDES, AS WELL AS IN THE COUNTY WHERE THE OFFENSE OC (SECOND DEPT).

Matter of VanDunk v Bonilla, 2022 NY Slip Op 04554, Second Dept 7-13-22

Practice Point: A family offense proceeding may be brought in the county where the family member resides, as well as the county where the offense occurred.

Table of Contents

CRIMINAL LAW, PROSECUTORIAL MISCONDUCT.

THE DEFENDANT WAS CHARGED WITH CRIMINALLY NEGLIGENT HOMICIDE BASED UPON STRIKING THE VICTIM WITH HER CAR; IN SUMMATION THE PROSECUTOR CHARACTERIZED DEFENDANT'S ACTIONS AS INTENTIONAL, DENIGRATED THE DEFENSE THEORIES, REFERRED TO IRRELEVANT CONDUCT, AND ASSUMED FACTS NOT IN EVIDENCE; DEFENDANT WAS DEPRIVED OF A FAIR TRIAL BY THE PROSECUTORIAL MISCONDUCT; THE APPEAL WAS CONSIDERED IN THE INTEREST OF JUSTICE (SECOND DEPT).

People v Drago, 2022 NY Slip Op 04561, Second Dept 7-13-22

Practice Point: Even if the errors are not preserved, prosecutorial misconduct during summation may require reversal. The defendant was charged with criminal negligence, yet in summation the prosecutor kept characterizing her conduct as intentional. In addition, the prosecutor denigrated the defense theories, referred to defendant's conduct which was not relevant to the charge and assumed facts not in evidence.

CRIMINAL LAW, ASSAULT, PHYSICAL INJURY.

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

People v Medina, 2022 NY Slip Op 04566, Second Dept 7-13-22

Practice Point: The complainant testified he was not in pain at the time of the attack and his bruises lasted a couple of weeks. He did not testify that he was in pain after the attack or that he took any medication or sought medical attention. The evidence of "physical injury" was legally insufficient. Defendant's assault third conviction was vacated.

Table of Contents

CRIMINAL LAW, INEFFECTICE ASSISTANCE, FAILURE TO INVESTIGATE.

AFTER THE SECOND DEPARTMENT'S VACATION OF DEFENDANT'S "ENDANGERING THE WELFARE OF A PHYSICALLY DISABLED CHILD" CONVICTION (BY GUILTY PLEA) ON "ACTUAL INNOCENCE" GROUNDS WAS REVERSED BY THE COURT OF APPEALS, THE SECOND DEPARTMENT AGAIN VACATED THE CONVICTION ON "INEFFECTIVE ASSISTANCE" GROUNDS; THE MEDICAL RECORDS INDICATED THE CHILD WAS NOT BURNED BY HOT WATER, BUT RATHER SUFFERED AN ALLERGIC REACTION TO MEDICATION (SECOND DEPT).

People v Tiger, 2022 NY Slip Op 04568, Second Dept 7-13-22

Practice Point: Here defense counsel told defendant to plead guilty to endangering the welfare of a disabled child (by bathing the child in hot water), causing burns. But the medical records included a skin biopsy report which indicated the child suffered an allergic reaction to medication, not thermal burns. The failure to investigate the medical records and the failure to consult a medical expert were deemed to constitute ineffective assistance.

CRIMINAL LAW, INVALID PORTIONS OF CELL PHONE SEARCH WARRANT SEVERED, PLAIN VIEW DOCTRINE APPLIES TO CELL PHONE SEARCH.

HERE THE APPELLATE COURT SEVERED PORTIONS OF THE SEARCH WARRANT AS OVERBROAD; THE VALID PORTIONS AUTHORIZED A SEARCH OF THE PHONE FOR EVIDENCE OF CHILD ABUSE; THE SEARCH OF THE PHONE AS AUTHORIZED BY THE VALID PORTIONS OF THE WARRANT TURNED UP A VIDEO OF A RAPE; THAT VIDEO WAS PROPERLY SEIZED PURSUANT TO THE PLAIN VIEW DOCTRINE (THIRD DEPT).

People v Alexander, 2022 NY Slip Op 04585, Third Dept 7-14-22

Practice Point: Here portions of the search warrant for defendant's cell phone were invalid as overbroad (the warrant authorized a search for evidence of all the sex offenses listed in Article 130 of the Penal Law). The Third Department "severed the overbroad portions" and determined the valid portions authorized the search for evidence of sex abuse. In conducting the search pursuant to the valid portions of the warrant, a video of a rape was found. That video was properly seized pursuant to the plain view doctrine.

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA), MULTIPLE INDICTMNENTS, ONE SORA HEARING.

WHERE CONVICTIONS UNDER MULITPLE INDICTMENTS COME UP FOR REVIEW IN THE SAME SORA HEARING, THE BOARD OF EXAMINERS OF SEX OFFENDERS SHOULD PREPARE A SINGLE RISK ASSESSMENT INSTRUMENT ENCOMPASSING ALL THE OFFENSES (SECOND DEPT).

People v Songster, 2022 NY Slip Op 04570, Second Dept 7-13-22

Practice Points: Where sex-offense convictions under multiple indictments are the subject of the same SORA hearing, the Board should prepare a singe risk assessment instrument (RAI) encompassing all the offenses.

Table of Contents

CRIMINAL LAW, WITNESS ELIMINATION MURDER.

THE EVIDENCE OF "WITNESS ELIMINATION MURDER" WAS INSUFFICIENT; THERE WAS NO EVIDENCE THE VICTIM, DEFENDANT'S WIFE, WITNESSED THE DEFENDANT'S SEXUAL RELATIONSHIP WITH HIS DAUGHTER AND NO EVIDENCE DEFENDANT FEARED CRIMINAL PROCEEDINGS WERE IMMINENT; MURDER FIRST DEGREE REDUCED TO MURDER SECOND DEGREE (THIRD DEPT).

People v Agan, 2022 NY Slip Op 04581, Third Dept 7-14-22

Practice Point: Here two elements of "witness elimination murder" were not supported by legally sufficient evidence. There was no evidence the victim, defendant's wife, was a witness to defendant's sexual relationship with his daughter. And there was no evidence defendant feared an imminent criminal prosecution based upon his sexual relationship with his daughter. The first-degree murder conviction was reduced to second-degree murder.

FAMILY LAW, DERIVATIVE NEGLECT, DENIAL OF DUE PROCESS.

THE THREE-DAY FACT-FINDING HEARING RELATED TO THE NEGLECT PETITION RE: SERENA, NOT THE NEWLY-FILED DERIVATIVE NEGLECT PETITION RE: VINCENT; FAMILY COURT IMPROPERLY CONSOLIDATED THE TWO PETITIONS FOR THE DISPOSITIONAL HEARING DEPRIVING MOTHER OF DUE PROCESS (SECOND DEPT).

Matter of Serena G. (Monica M.), 2022 NY Slip Op 04547, Second Dept 7-13-22

Practice Point: Here the court held a hearing which was confined to the neglect petition re: Serena and did not address the newly-filed derivative neglect petition re: Vincent. By combining the two petitions for the dispositional hearing mother

was deprived of an opportunity to be heard (due process) on the derivative neglect petition.

FORECLOSURE, REFEREE'S REPORT BASED UPON BUSINESS RECORDS NOT PRODUCED.

SUPREME COURT SHOULD NOT HAVE CONFIRMED THE REFEREE'S REPORT IN THIS FORECLOSURE ACTION BECAUSE THE BUSINESS RECORDS UPON WHICH THE CALCULATIONS IN THE REPORT WERE BASED WERE NOT PRODUCED (SECOND DEPT).

Wilmington Trust, N.A. v Mahone, 2022 NY Slip Op 04580, Second Dept 7-13-22

Practice Point: In a foreclosure action, if the business records upon which the calculations in the referee's report are based are not produced, Supreme Court should not confirm the report.

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

THE BANK DID NOT COMPLY WITH THE "SEPARATE ENVELOPE" REQUIREMENT OF RPAPL 1304 IN THIS FORECLOSURE ACTION ENTITLING THE DEFENDANTS TO SUMMARY JUDGMENT DISMISSING THE COMPLAINT (SECOND DEPT).

JPMorgan Chase Bank, N.A. v Dedvukaj, 2022 NY Slip Op 04541, Second Dept 7-13-22

Practice Point: If the defendants demonstrate the bank in a foreclosure action did not comply with the "separate envelope" requirement of RPAPL 1304 (by including other information in the envelope containing the notice of foreclosure), the defendants will be granted summary judgment dismissing the complaint.

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

PLAINTIFF BANK IN THIS FORECLOSURE ACTION DID NOT DEMONSTRATE STRICT COMPLIANCE WITH THE NOTICE REQUIREMENTS OF RPAPL 1304, AS WELL AS THE NOTICE REQUIRMENTS SPELLED OUT IN THE MORTGAGE (SECOND DEPT).

Deutsche Bank Natl. Trust Co. v Pariser, 2022 NY Slip Op 04534, Second Dept 7-13-22

Practice Point: Yet again, summary judgment in favor of the bank in a foreclosure proceeding is reversed because the bank did not prove strict compliance with the notice requirements of RPAPL 1304 and the mortgage. Reversals on these grounds have appeared every week for at least five years, maybe more.

INSURANCE LAW, MEDICAL MALPRACTICE, EMPLOYMENT LAW.

WHERE THE EMPLOYER OF A PHYSICIAN HAS PAID THE PREMIUMS FOR MEDICAL MALPRACTICE INSURANCE AND THE INSURANCE COMPANY DEMUTUALIZES, ABSENT AN AGREEMENT TO THE CONTRARY, THE PROCEEDS GO TO THE PHYSICIAN, NOT THE EMPLOYER (FIRST DEPT).

Mid-Manhattan Physician Servs., P.C. v Dworkin, 2022 NY Slip Op 04523, First Dept 7-12-22

Similar issues and result in Sullivan v Northwell Health, Inc., 2022 NY Slip Op 04525, First Dept 7-12-22

Practice Point: Where the employer of a physician has paid the premiums for medical malpractice insurance and the insurance company demutualizes, absent an agreement to the contrary, the proceeds go to the physician, not the employer.

Table of Contents

LABOR LAW-CONSTRUCTION LAW.

CLAIMANT WAS INJURED WHEN A TRUCK STRUCK THE BASKET OF THE MAN LIFT SHE WAS USING; THE FACT THAT CLAIMANT DIDN'T FALL FROM THE BASKET DID NOT WARRANT THE DISMISSAL OF THE LABOR LAW 240(1) CAUSE OF ACTION (SECOND DEPT).

Johnsen v State of New York, 2022 NY Slip Op 04540, Second Dept 7-13-22

Practice Point: Here claimant was in the basket of a man lift when a truck struck the basket causing it to "ricochet back and forth." The fact that claimant didn't fall from the basket did not support the dismissal of the Labor Law 240(1) cause of action. Labor Laq 240(1) requires that the injury directly flow from the "application of gravity" to the person.

NEGLIGENCE, TRAFFIC ACCIDENTS, REAR-END COLLISIONS.

IN A REAR-END COLLISION CASE, THE ALLEGATION THAT PLAINTIFF STOPPED SUDDENLY IS NOT SUFFICIENT TO DEFEAT PLAINTIFF'S SUMMARY JUDGMENT MOTION (SECOND DEPT).

Gil v Manhattan Beer Distribs., LLC, 2022 NY Slip Op 04537, Second Dept 7-13-22

Practice Point: The defendant in a rear-end collision case does not raise a question of fact about a non-negligent explanation for the accident by alleging plaintiff stopped suddenly.

Table of Contents

NEGLIGENCE, WORKERS' COMPENSATION, EMPLOYMENT LAW.

PLAINTIFF SUED HER EMPLOYER IN NEGLIGENCE BASED UPON AN ALLEGED ASSAULT BY A COWORKER; THERE WERE QUESTIONS OF FACT ABOUT WHETHER THE INJURY WAS IN THE COURSE OF PLAINTIFF'S EMPLOYMENT; THE WORKERS' COMPENSATION BOARD HAS PRIMARY JURISDICTION OVER THE DETERMINATION OF THE APPLICABILITY OF THE WORKERS' COMPENSATION LAW; RATHER THAN DISMISSING THE NEGLIGENCE CAUSES OF ACTION, SUPREME COURT SHOULD HAVE REFERRED THE MATTER TO THE WORKERS' COMPENSATION BOARD (SECOND DEPT).

Chin v Doherty Enters., 2022 NY Slip Op 04532, Second Dept 7-13-22

Practice Point: Here plaintiff alleged she was assaulted by a coworker and sued her employer in negligence. There were questions of fact whether plaintiff was injured during the course her employment. The Workers' Compensation Board has primary jurisdiction over determinations of the applicability of the Workers' Compensation Law.. Therefore the negligence causes of action should not have been dismissed and the matter should have been referred to the Board.

TAX LAW, SALES TAX ON CONCRETE USED FOR CAPITAL IMPROVEMENTS.

IF PETIONER HAD PURCHASED CONCRETE AS A PART OF A SERVICE FOR THE INSTALLATION OF CAPITAL IMPROVEMENTS, THE PURCHASE WOULD HAVE BEEN EXEMPT FROM SALES TAX; BUT PETITIONER PURCHASED THE CONTRACT IN "RAW" FORM AND PETITIONER'S EMPLOYEES AND SUBCONTRACTORS USED IT TO BUILD CAPITAL IMPROVEMENTS; THE PURCHASE OF THE CONCRETE WAS THEREFORE SUBJECT TO SALES TAX (THIRD DEPT).

Matter of M&Y Devs. Inc. v Tax Appeals Trib. of the State of N.Y., 2022 NY Slip Op 04600, Third Dept 7-14-22

Practice Point: Concrete purchased as part of a service which not only supplies the concrete but builds capital improvements with the concrete is exempt from sales tax. But here petitioner purchased the concrete which was then used by petitioner's employees and subcontractors to build the capital improvements. The "capital improvement' sales-tax exemption did not apply.

ZONING, VARIANCE FOR SETBACK VIOLATION.

DUE TO A CONTRACTOR'S ERROR, PETITIONER'S SWIMMING POOL WAS INSTALLED SIX FEET FROM THE PROPERTY LINE, VIOLATING THE 14-FOOT SETBACK REQUIREMENT; THE ZONING BOARD OF APPEALS PROPERLY DENIED THE PETITIONER'S APPLICATION FOR A VARIANCE; SUPREME COURT REVERSED (SECOND DEPT).

Matter of Dutt v Bowers, 2022 NY Slip Op 04546, Second Dept 7-13-22

Practice Point: Due to a contractor's error, the petitioner's swimming pool was installed six feet from the properly line, violating the 14-foor setback requirement. The petitioner applied for a variance. The Zoning Board of Appeal properly

considered all the factors prescribed the Town Law and denied the variance. Supreme Court granted the variance. The Second Department reversed.