NEW YORK APPELLATE DIGEST, LLC

Weekly Reversal Report
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. 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 Report.

Table of Contents

Contents

Table of Contents

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).

The Third Department held that the Workers' Compensation Board decision was interlocutory in nature and could only be considered in an appeal from the final determination:

"In order to avoid piecemeal review of workers' compensation cases, a Board decision that is interlocutory in nature and does not dispose of all substantive issues nor reach legal threshold issues that may be determinative of the claim is not the proper subject of an appeal" … . "As none of the arguments raised on this appeal address potentially dispositive threshold legal questions, and 'the nonfinal decision may be reviewed upon an appeal from the Board's final determination, this appeal must be dismissed'" … . 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).

The Second Department, reversing Family Court, determined the family offense proceeding should not have been dismissed based on the allegation venue was

improper. A family offense proceeding may be brought based upon the residence of the family member, as well as were the offense took place:

A family offense proceeding pursuant to Family Court Act article 8 "may be originated in the county in which the act or acts referred to in the petition allegedly occurred or in which the family or household resides or in which any party resides" … . Here, since the mother resides in Rockland County, the mother commenced this proceeding in a proper venue. 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.

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).

The Second Department, reversing defendant's conviction, determined defendant was deprived of a fair trial by prosecutorial misconduct. Although some of the errors were not preserved, the appeal was considered in the interest of justice:

The charge of criminally negligent homicide arose from an incident in which the defendant, while operating her motor vehicle, struck Evelyn Rodriguez, who had been standing next to the defendant's vehicle, thereby causing Rodriguez's death. The remaining charges were related to the defendant's conduct of removing and damaging certain personal property placed by Rodriguez and her partner, Freddy Cuevas, on the sidewalk outside a residence owned by the defendant's mother. The

items were part of a memorial to Rodriguez's and Cuevas's daughter, Kayla, who had been murdered two years earlier and whose body had been discovered on the defendant's mother's property. * * *

The prosecutor mischaracterized the evidence relating to the charge of criminally negligent homicide and confused the jury by repeatedly using language to suggest that the defendant's conduct in striking Rodriguez with the vehicle was intentional or reckless. … [T]he prosecutor used language such as "conscious, blameworthy choices," "knowingly commit blameworthy acts," "took a risk that took [Rodriguez's] life," "you don't get to knowingly choose to do something wrong," "[y]ou don't get to drive over someone because you feel a mother's memorial is a nuisance," and, illogically, "[s]he failed to perceive that risk, and she chose to go ahead anyway" … .

The prosecutor continually denigrated the defense, referring to defense theories, repeatedly, as "excuses," and also as "garbage," and he falsely and provocatively claimed that the "defense repeatedly argued that the death of Kayla . . . was an inconvenience and a nuisance" … . The prosecutor continually evoked sympathy for Rodriguez using strong emotional terms, such as referring to her, and to her and Cuevas together, numerous times, as "the grieving mother" and the "grieving parents" and referring to Kayla repeatedly as Rodriguez's "murdered daughter" or "murdered teenage daughter" … .

… [I]n arguing that the defendant engaged in "blameworthy conduct creating or contributing to a substantial and unjustifiable risk" so as to meet the standard of criminally negligent homicide … , the prosecutor, throughout the course of his summation, referred to conduct not relevant to the driving conduct that formed the basis of the criminally negligent homicide charge. Specifically, the prosecutor encouraged the jury to consider the defendant's actions in removing the memorial, which he recurrently characterized as "blameworthy," when determining whether the defendant's conduct was sufficiently blameworthy to constitute criminally negligent homicide. The prosecutor compounded the prejudicial effect of this error by repeatedly using inflammatory and emotional language, and assuming facts not in evidence, to describe the defendant's conduct of removing the memorial. 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).

The Second Department, vacating defendant's assault third conviction, determined the evidence of physical injury was legally insufficient:

… [T]he evidence was legally insufficient to support the defendant's conviction of assault in the third degree, charged in count 6 of the indictment. The evidence, when viewed in the light most favorable to the prosecution … , was not legally sufficient to establish, beyond a reasonable doubt, that the complainant named in count 6 of the indictment sustained a physical injury within the meaning of Penal Law § 10.00(9). Physical injury is defined as "impairment of physical condition or substantial pain" … . Here, the evidence at trial established that this complainant was attacked and that he suffered bruises to his face and neck. This complainant testified at trial that he was not in pain during the time of the attack and that 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. 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.

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).

The Second Department, reversing County Court, determined defendant's motion to vacate her conviction by guilty plea on ineffective-assistance grounds should have been granted. Defendant, a nurse, was accused of endangering the welfare of a physically disabled child by bathing the child in hot water causing thermal burns. This case has a long history, including the vacation of the conviction by the Second Department on the ground of actual innocence. The Second Department was reversed by the Court of Appeals which held the "actual innocence" argument cannot be raised where the defendant has pled guilty. Here the Second Department vacated the conviction again on the ground of ineffective assistance. There was medical evidence which was consistent with the child's skin condition being caused by a reaction to medication, as opposed to hot water. Defendant's counsel did not obtain the skin biopsy report, which attributed the skin condition to an allergic reaction to medication, and did not consult a medical expert:

… [D]espite references in the hospital records indicating that a skin biopsy was ordered, the defendant's former counsel failed to obtain the skin biopsy pathology report, which would have supported the conclusion that the child's skin condition was caused, not by thermal burns, but by toxic epidermal necrolysis (hereinafter TEN), a condition associated with an allergic reaction to a medication that the child had been taking. In this regard, the pathology report, which was prepared by three pathologists, set forth that the skin biopsies were performed the day after the child was admitted to the hospital, and that the child's skin condition was "consistent with a diagnosis" of TEN if no oral lesions were present, or Stevens Johnson Syndrome (hereinafter SJS) if associated with oral lesions. An addendum

to the report indicated that the clinical data ruled out SJS, and, therefore, implicated TEN as the diagnosis.

The defendant also demonstrated that her former counsel failed to consult a medical expert, or take steps to either seek the services of a court-appointed medical expert, or find a source of funding to secure the services of a medical expert before counseling the defendant to plead guilty. At the hearing, the defendant offered the expert testimony of Bruce Farber, a physician board-certified in the fields of internal medicine and infectious diseases, who reviewed all the medical records, including the subject pathology report. He opined that, based upon his review of medical records, as well as the pathology report, the child's skin condition was caused by TEN, and not thermal burns. He testified that the medical records, including the hospital chart, showed that the various medical providers, including a pediatrician, emergency room physician, dermatologist, infectious disease expert, and a burn fellow formulated differential diagnoses including SJS, TEN, or staphylococcal scalded skin syndrome, none of which included thermal burns. 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).

The Third Department determined that the search warrant for defendant's cell phone was overbroad in that it authorized a search for evidence of all the sex offenses listed in Article 130 of the Penal Law. But the portions of the warrant which authorized a search for evidence of sexual abuse and child pornography were supported by probable cause. In searching the phone pursuant to the valid portion of the warrant, the police found a video of defendant committing rape. That video was correctly seized under the "plain view" doctrine:

We agree with defendant's overbreadth contention only insofar as the affidavit was insufficient to establish probable cause to search defendant's cell phone and seize evidence related to all of the many crimes classified under Penal Law article 130 … . Notwithstanding that overbreadth, probable cause existed to search and seize photographic and video evidence from defendant's cell phone related to his alleged June 2018 commission of the crime of sexual abuse in the first degree (see Penal Law § 130.65 [2] …). Furthermore, even though the June 2018 video itself was not child pornography as that term is generally understood under the Penal Law … , it was also reasonable for the issuing magistrate to conclude, based on the affidavit and the content of the June 2018 video, that a search of all data on defendant's cell phone would yield additional evidence of the crime of sexual abuse, along with crimes classified under Penal Law articles 235 and 263 … . Therefore, because "the warrant [i]s largely specific and based on probable cause" … , we need only sever the overbroad portion of the warrant that directed a search for evidence of Penal Law article 130 crimes other than sexual abuse.

… [O]ur severance decision does not require exclusion of the May 2018 videos allegedly depicting him committing the crime of rape in the first degree because

they are not "the fruit[s] of the invalid portion of the search warrant" … .. Rather, we find that those videos were properly seized pursuant to the plain view doctrine, which authorizes law enforcement to seize an item in plain view if "(i) they are lawfully in a position to observe the item; (ii) they have lawful access to the item itself when they seize it; and (iii) the incriminating character of the item is immediately apparent" … . 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).

The Second Department noted that where a defendant has been convicted of sex offenses under multiple indictment, Board of Examiners of Sex Offenders (the Board) should create one risk assessment instrument (RAI) for all the offenses:

… [W]here, as here, convictions under multiple indictments come up for disposition at the same SORA hearing, the Board should prepare a single RAI that "should be completed on the basis of all of the crimes" that are the subject of the disposition, considering them all together as the "Current Offense[s]" (Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 5-6 [2006] …), and the court should render a single SORA risk assessment

determination … . 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.

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).

The Third Department, over two separate concurrences, determined the evidence that the defendant murdered his wife to eliminate her as a witness was legally insufficient. Therefore defendant's first-degree murder conviction was reduced to second-degree murder. Defendant was in a sexual relationship with his minor daughter. The People alleged defendant killed his wife to prevent her from testifying about his sexual relationship with his daughter. But there was no evidence defendant's wife had witnessed the sexual relationship:

There was no evidence that the deceased victim observed defendant and the minor victim engage in sexual relations or sexual conduct, and the minor victim did not disclose the sex offenses to the deceased victim. At most, the deceased victim may have been a "coincidental witness" since she had suspicions of the sex offenses, but she would not have been in a position to provide "powerful, direct evidence" of defendant's criminal sexual acts … . Second, there was no evidence that defendant feared that criminal proceedings were imminent or that he was otherwise cognizant of the fact that the deceased victim might be called to testify against him. The People point to defendant's statement — in a recorded jail telephone conversation that took place with his mother after defendant was indicted on murder in the second degree — wherein he states that if the prosecution had recorded his jail

telephone conversations with the minor victim after the murder (and thus become aware of the sexual relationship between them), the People would be "using murder one." In our opinion this conclusory statement does not constitute an admission to witness elimination murder. Aside from its speculative nature, there is simply no evidence in the record that defendant was even aware of the elements of murder in the first degree, let alone that he had this concern at the time of the stabbing. Viewed in the light most favorable to the People, the evidence is simply insufficient to establish a witness elimination murder … . 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).

The Second Department, reversing Family Court, determined the court never held a hearing on the newly filed derivative neglect petition (re: Vincent). The three-day fact-finding hearing related only to the neglect petition (re: Serena). At the subsequent dispositional hearing, the court improperly consolidated the two petitions:

The right to due process encompasses a "meaningful opportunity to be heard" at a fact-finding hearing on a neglect petition … , and to "present evidence relevant to the proceedings" … . Accordingly, the proceeding with respect to Vincent must be remitted to the Family Court … for a fact-finding hearing, in order to afford the

parties an opportunity to introduce evidence relevant to the petition to adjudicate Vincent a derivatively neglected child, including, among other things, whether at the time the neglect petition was filed with respect to Vincent the mother had resolved the issues that were the basis of the finding of neglect as to Serena … . 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).

The Second Department, reversing Supreme Court, determined the bank's motion to confirm the referee's report in this foreclosure action should not have been granted. The business records upon which the calculations in the referee's report were based were not produced:

…]T]he Supreme Court should have denied those branches of JPMorgan's motion which were to confirm the referee's report and for a judgment of foreclosure and sale. "[T]he referee's findings with respect to the total amount due upon the mortgage were not substantially supported by the record inasmuch as the computation was premised upon unproduced business records" … . 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).

The Second Department, reversing Supreme Court, determined plaintiff bank in this foreclosure action was not entitled to summary judgment on its motion to confirm the referee's report and obtain a judgment of foreclosure. The defendants demonstrated the bank did not comply with the "separate envelope" rule in RPAPL 1304, which entitled to defendants to summary judgment dismissing the complaint:

… [T]he defendants established that the notices served by the plaintiff pursuant to RPAPL 1304 contained additional material in the same envelope as the RPAPL 1304 notice. The copies of the 90-day notice previously submitted by the plaintiff included additional notices not contemplated by RPAPL 1304(2), to wit, a notice pertaining to the rights of a debtor in bankruptcy, a notice to those in military service, and a notice advising customers to beware of any organization that attempts to charge a fee for housing counseling or modification of a delinquent loan … . Since the RPAPL 1304 notice was not "'served in an envelope that was separate from any other mailing or notice'" … , the plaintiff did not strictly comply with RPAPL 1304 … . 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).

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

… [P]laintiff failed to establish, prima facie, that RPAPL 1304 notices were mailed to each defendant by certified and first-class mail. The affidavit submitted in support of the plaintiff's motion does not contain an attestation that the affiant had personal knowledge of the purported mailings nor does the affiant attest to knowledge of the mailing practices of the Law Offices of McCabe, Weisberg, and Conway, P.C., the entity that allegedly sent the notices to the defendants on behalf of the loan servicer … . …

… [P]laintiff's submission also failed to demonstrate that the RPAPL 1304 notices allegedly sent to the defendants contained the requisite list of five housing counseling agencies serving the region in which the subject property is located … . …

… [P]laintiff further failed to establish that the RPAPL 1304 notices were sent by the "lender, assignee, or loan servicer" as required by the statute … . … [T]he RPAPL notices were allegedly sent on August 7, 2014, by the Law Offices of McCabe, Weisberg, and Conway, P.C., on behalf of Ocwen Financial, the plaintiff's loan servicer. However, the limited power of attorney authorizing Ocwen Financial to act on behalf of the plaintiff, which was submitted by the plaintiff in support of its motion, states that it was executed on and effective as of September 17, 2014. …

… [P]laintiff failed to establish, prima facie, that it complied with a condition precedent contained in the mortgage agreement, requiring the lender to send a notice of default prior to the commencement of the action. The plaintiff's

submission failed to show that the required notice was sent to the defendants by first-class mail or actually delivered to the notice address if sent by other means, as required by the terms of the mortgage agreement … . 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).

The First Department, reversing Supreme Court based on a recent Court of Appeals ruling, determined the proceeds from the demutualization of a medical malpractice insurer belong to the physician, not to the physician's employer (the plaintiff here):

The Court of Appeals has recently held that "when an employer pays premiums to a mutual insurance company to obtain a policy of which its employee is the policyholder, and the insurance company demutualizes, absent contrary terms in the contract of employment, insurance policy, or separate agreement, the policyholder is entitled to the proceeds from the demutualization" … .

… [D]efendant is entitled to the demutualization proceeds. There is no evidence of any contrary terms in the contract of employment, insurance policy, or separate agreement. In fact, defendant's employment agreement provides that "[t]he Employer agrees that it will pay or reimburse the Employee for that portion of such insurance premiums that are attributable to the period coinciding with the Term [of employment]." Plaintiff … acknowledged … that it paid the insurance premiums "as a fringe benefit to the Physician employee." … .

It is irrelevant that plaintiff, who is not listed as the policy administrator in the policy, paid the policy premiums during the relevant period and acted as the policy administrator … . 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.

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).

The Second Department, reversing (modifying) Supreme Court, determined the Labor Law 200 and 240(1) causes of action should not have been dismissed. Claimant was in the basket of a man lift when a car carrier (truck) struck the basket causing it to "ricochet back and forth/" The fact that claimant didn't fall from the basket did not take the incident outside the scope of Labor Law 240(1):

The Court of Claims erred in granting that branch of the defendant's motion which was for summary judgment dismissing the Labor Law § 240(1) cause of action. The defendant failed to demonstrate its prima facie entitlement to judgment as a matter of law. "The fact that the plaintiff did not actually fall from the [basket] is irrelevant as long as the 'harm directly flow[ed] from the application of the force of gravity to [her] person'" … . 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).

The Second Department, reversing Supreme Court, determined defendant in this rear-end collision case did not raise a question of fact by alleging plaintiff stopped suddenly:

… [P]laintiff established his prima facie entitlement to judgment as a matter of law on the issue of liability by averring that he had activated his right turn signal, had slowed to a speed of approximately five miles per hour, and was attempting to make a right turn when his vehicle was struck in the rear by the defendants' vehicle … .

In opposition, the defendants submitted an affidavit of the defendant driver in which he averred that the plaintiff's vehicle stopped short suddenly, causing the defendants' vehicle to collide with the plaintiff's vehicle. The defendants' assertion that it was the sudden stop of the plaintiff's vehicle which caused the accident was insufficient, in and of itself, to raise a triable issue of fact as to whether there was a nonnegligent explanation for the happening of the rear-end collision … . 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.

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).

The Second Department, reversing Supreme Court, determined the causes of action against plaintiff's employer for negligence alleging an assault by a coworker should not have been dismissed. Defendants' alleged that Workers' Compensation was the plaintiff's exclusive remedy. The Workers' Compensation Board has primary jurisdiction over determinations of the applicability of the Workers' Compensation Law. Because there were questions of fact about whether plaintiff was injured in the course of her employment, Supreme Court should have referred the matter to the Workers' Compensation Board:

… Supreme Court improperly granted those branches of the defendants' motion which were pursuant to CPLR 3211(a)(7) to dismiss the negligence causes of action … . Since "primary jurisdiction with respect to determinations as to the applicability of the Workers' Compensation Law has been vested in the Workers' Compensation Board," it is "inappropriate for the courts to express views with respect thereto pending determination by the board" … . Here, questions of fact were raised as to whether the plaintiff was injured during the course of her employment, and thus, the court should have referred the matter to the Workers' Compensation Board … . 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).

The Third Department determined the petitioner was not entitled to an exemption from sales tax on concrete purchased from suppliers. The work to install the capital improvements made from the concrete was done by petitioner's employees and subcontractors. Because the concrete suppliers merely supplied the concrete in raw form, the sales tax exemption for the installation of capital improvements did not apply:

The purchase would be exempt from sales tax … if it was not for the concrete itself and was instead for the service of "installing property which, when installed, will constitute an addition or capital improvement to real property, property or land" … . * * *

… [T]he hearing testimony of petitioner's own president left little doubt that it was petitioner's employees or its subcontractors, and not its concrete suppliers, who were installing capital improvements. Petitioner's president testified, in particular, that petitioner's employees or subcontractors performed all preparatory work for the installation, doing necessary excavation work, building the formwork and flatwork to shape the poured concrete and installing rebar and other supports for it. The concrete suppliers would prepare the amount and type of concrete required, arrive at the site, and pour or pump the concrete into the areas that had been

prepared. Petitioner then did "anything that need[ed] to be done" to ensure that the poured concrete would form the structure contemplated by the project specifications, such as smoothing the concrete and installing keys, details or lines in the concrete before it set, and petitioner bore responsibility for correcting any problems with the final product. 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).

The Second Department, reversing Supreme Court, determined the zoning board of appeals (ZBA) properly took into the considerations the factors prescribed by the Town Law when it denied petitioner's application for a setback variance. The setback requirement for a swimming was 14 feet. Due to an error made by the contractor, petitioner's pool was installed six feet from the property line:

The record indicates that the ZBA considered the five factors set forth in Town Law § 267-b(3) and conducted the relevant balancing test to reach its determination. The ZBA found that the requested variance would produce an undesirable change in the character of the neighborhood because there was no evidence of any similarly located in-ground pools. The ZBA explained that approving a pool with such a small setback where there are no similar structures in the neighborhood would establish an unwarranted precedent for future development of the area, which could result in a detriment to nearby properties.

The ZBA properly considered the possibility that granting the requested variance could set a negative precedent in the area … . Based on the property survey, the ZBA determined that the petitioner could have placed the pool in a conforming location. Moreover, the petitioner presented no evidence that the property could not be utilized without violating the zoning code. The ZBA determined that the requested variance was substantial because it asked for a 57% relaxation of the zoning code. Taking into account the rationale for the required setback, which was to protect the privacy and quiet enjoyment of adjacent residential properties, as well as the fact that the location of the pool was inconsistent with the nature and character of the surrounding area, and that the approval of the requested variance would establish an unwarranted precedent for future development of the area, the ZBA determined that granting the requested variance would have an adverse effect on the physical or environmental conditions in the neighborhood. Finally, the ZBA's finding that the petitioner's zoning violation, which was the result of the contractor's error, was self-created is well founded … . 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.