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Weekly Reversal Report
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An Organized Compilation of the Summaries of Selected Decisions, Mostly Reversals, Released by Our New York State Appellate Courts and Posted on the New York Appellate Digest Website July 4 – 8, 2022. The Entries in the Table of Contents Link to the Summaries Which Link to the Decisions on the Official New York Courts Website. Right Click on the Citations to Keep Your Place in the Reversal Report.

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ANIMAL LAW, DOG-BITE, CIVIL PROCEDURE, DISCOVERY OF VETERINARY RECORDS.

IN THIS DOG-BITE CASE, VETERINARY RECORDS ARE DISCOVERABLE BY SUBPOENA (FOURTH DEPT).

The Fourth Department, in this dog bite case, determined veterinary records are not protected by Education Law 6714 and are discoverable:

Education Law § 6714 (1) provides that, "[u]pon written request from the owner of an animal which has received treatment from or under the supervision of a veterinarian, such veterinarian shall provide to such owner within a reasonable time period a copy of all records relating to the treatment of such animal. For the purposes of this section, the term 'records' shall mean all information concerning or related to the examination or treatment of the animal kept by the veterinarian in the course of his or her practice. A veterinarian may impose a reasonable charge for providing copies of such records. A veterinarian may make available to the owner either the original or a copy of such record or document including x-rays, electrocardiograms and other diagnostic tests and may impose a reasonable fee for the reproduction of such copies."

Nothing in the plain language of that statute prohibits a veterinarian from providing a copy of treatment records pursuant to a subpoena. Had the legislature intended to create such an exemption, it could have done so using language similar to that found in Education Law § 6527 (3), which provides that "records relating to

performance of a medical or a quality assurance review function . . . shall [not] be subject to disclosure under article thirty-one of the [CPLR] except as hereinafter provided or as provided by any other provision of law" … . Ashley M. v Marcinkowski, 2022 NY Slip Op 04437, Fourth Dept 7-8-22

Practice Point: Pursuant to Education Law 6714, veterinary records in this dog-bite case are discoverable by subpoena.

CIVIL PROCEDURE, STATUTE OF LIMITATIONS, DEBTOR-CREDITOR, GENERAL OBLIGATIONS LAW.

PETITIONERS SOUGHT FUNDS THE DECEDENT HAD TAKEN OUT OF THE CORPORATION AS CLAIMS ON DECEDENT'S ESTATE, ALLEGING THAT THE STATUTE OF LIMITATIONS STARTED ANEW WHEN THE DECEDENT ACKNOWELDGED THE DEBT IN A DEPOSITION; THE STATUTE-OF-LIMITATIONS TOLL IN THE GENERAL OBLIGATIONS LAW ONLY APPLIES TO AN ACKNOWLEDGMENT OF THE DEBT IN WRITING SIGNED BY THE PARTY TO BE CHARGED, NOT TO THE QUASI-CONTRACT ALLEGED BY PETITIONERS (FOURTH DEPT).

The Fourth Department, reversing Surrogate's Court, determined decedent's acknowledgement of a debt in a deposition did not start the statute of limitations anew because there was no written contract to which General Obligations Law 17-101 could apply:

In 2011, decedent removed funds from the corporate entity, and he later acknowledged that some of those funds belonged to petitioners. Decedent died in 2018 without returning the funds owed to petitioners. * * *

The tolling provision that the Surrogate relied on is General Obligations Law § 17—101. That provision states, in pertinent part, that "[a]n acknowledgment or promise contained in a writing signed by the party to be charged thereby is the only competent evidence of a new or continuing contract whereby to take an action out of the operation of the provisions of limitations of time for commencing actions

under the civil practice law and rules." Here, petitioners did not allege that they had a contract with decedent; rather, they alleged claims sounding in quasi-contract, which is "not [a] contract[] at all" … . Thus, General Obligations Law § 17—101, which applies only where there is "competent evidence of a new or existing contract," does not apply here … . Matter of Reich, 2022 NY Slip Op 04446, Fourth Dept 7-8-22

Practice Point: In order to start the statute of limitations anew on a debt pursuant to General Obligations Law 17-101, the debt must be acknowledged in a writing signed by the party to be charged.

CIVIL PROCEDURE, RELATION-BACK DOCTRINE.

AFTER THE STATUTE OF LIMITATIONS HAD RUN IN THIS SLIP AND FALL CASE PLAINTIFF SOUGHT TO AMEND HER COMPLAINT TO ADD PARTIES UNDER THE "RELATION BACK" DOCTRINE; HOWEVER THE ADDED PARTIES DID NOT MEET THE "UNITY OF INTEREST" REQUIREMENT; THE MOTION TO AMEND SHOULD HAVE BEEN DENIED (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined the plaintiff's motion to amend the complaint after the statute of limitations had run to add parties under a "relation back" doctrine should not have been granted. The decision includes comprehensive discussions of the "unity of interest" component of the "relation back" doctrine which are too detailed to fairly summarize here:

"[T]he relation back doctrine allows a claim asserted against a defendant in an amended filing to relate back to claims previously asserted against a codefendant for [s]tatute of [l]imitations purposes where the two defendants are united in interest" … . Group, however, "was not a codefendant" when plaintiff moved for leave to amend the complaint because the court had already granted Group's motion for summary judgment seeking dismissal of the complaint against it on the ground that it was a similarly named, but unrelated entity mistakenly sued by plaintiff that conducted a different business in a different state and never had any relationship to the subject plaza … .

.. [P]aintiff also failed to meet her burden of establishing that appellants were united in interest with Square. The record … indicates that appellants and Square are " 'separate and distinct business entities which have no jural relationship' " … , and plaintiff "failed to come forward with evidence that there is any type of interrelationship between them that would give rise to vicarious liability and entitle [her] to rely upon the relation back doctrine" … . Stepanian v Bed, Bath, & Beyond, Inc., 2022 NY Slip Op 04477, Fourth Dept 7-8-22

Practice Point: To add parties under the "relation back" doctrine, the parities must be "united in interest" with those named in the original complaint. This decision discusses the criteria for "united in interest" in some detail and is worth consulting on that issue.

CRIMINAL LAW, ASSAULT, PHYSICAL INJURY.

THE EVIDENCE OF PHYSICAL INJURY WAS LEGALLY INSUFFICIENT; ASSAULT SECOND CONVICTION REDUCED TO ATTEMPTED ASSAULT SECOND (FOURTH DEPT).

The Fourth Department, reducing defendant's assault second conviction to attempted assault second, determined the proof o physical injury was not legally sufficient:

… [T]he evidence is legally insufficient to establish that he caused physical injury to the victim by means of a dangerous instrument and thus that the conviction of assault in the second degree is not supported by legally sufficient evidence … . The evidence, viewed in the light most favorable to the People … , establishes that defendant attempted to stab the victim and the two struggled over the knife; however, the victim suffered no more than minor cuts to her hands that did not require bandaging and caused only transient pain … . … [T]he evidence is legally sufficient to establish defendant's guilt of the lesser included offense of attempted assault in the second degree … . People v Lopez-Sarmiento,2022 NY Slip Op 04493, Fourth Dept 7-8-22

Practice Point: Here the evidence the victim suffered "physical injury" as defined in the Penal Law was deemed legally insufficient. The assault second conviction was reduced to attempted assault second.

CRIMINAL LAW, RIGHT TO CONFRONT THE CREATOR OF A TESTIMONIAL DOCUMENT.

THE CJA FORM WAS PUT IN EVIDENCE TO PROVE WHERE DEFENDANT LIVED, WHICH WAS AN ELEMENT OF THE CRIMINAL-POSSESSION-OF-A-WEAPON CHARGE; BUT THE CJA EMPLOYEE WHO TESTIFIED WAS NOT THE EMPLOYEE WHO CREATED THE DOCUMENT; BECAUSE THE CJA EMPLOYEE COULD NOT BE CROSS-EXAMINED ABOUT THE CREATION OF THE DOCUMENT, ITS ADMISSION VIOLATED THE CONFRONTATION CLAUSE (SECOND DEPT).

The Second Department, reversing defendant's conviction and ordering a new trial, determined the Criminal Justice Agency (CJA) form which indicated defendant lived where the weapon (the subject of the criminal-possession-of-a-weapon charge) was found constituted testimonial evidence which violated the Confrontation Clause. The witness through whom the form was admitted in evidence did not create the form and, therefore, could not be cross-examined about its contents:

… [T]he testimony of the CJA employee and the CJA form were admitted in order to establish an essential element of the charges of criminal possession of a weapon in the second and third degrees, in violation of the defendant's right of confrontation … . The defendant was never given the opportunity to cross-examine the CJA employee who prepared the CJA form, and, in admitting the CJA form through an employee who did not prepare the form, the Supreme Court failed to ensure that the defendant's Sixth Amendment right of confrontation was protected … . People v Franklin, 2022 NY Slip Op 04308, Second Dept 7-6-22

Practice Point: Here a document was admitted into evidence to prove where defendant lived, which was an element of the criminal-possession-of-a-weapon

charge. Because the person who created the document did not testify and therefore could not be cross-examined about its contents, defendant's right to confront the witnesses against him was violated. New trial ordered.

CRIMINAL LAW, ILLEGAL CONCURRENT SENTENCES.

ALTHOUGH THE ISSUES WERE NOT RAISED ON APPEAL, THE APPELLATE COURT VACATED THE SENTENCES EITHER BECAUSE THE CONCURRENT SENTENCES WERE ILLEGAL OR BECAUSE THE GUILTY PLEAS WERE INDUCED BY THE PROMISE OF ILLEGAL CONCURRENT SENTENCES (FOURTH DEPT).

The Fourth Department, raising issues not raised in the appeals, determined the concurrent sentences imposed by the judge had to be vacated because the judge did not put the reasons for the concurrent sentences on the record. All the sentences were vacated because the guilty pleas were induced by a promise of illegal concurrent sentences:

… [D]efendant committed the crimes to which he pleaded guilty in appeal Nos. 2 and 3 while released on recognizance for the charge to which he pleaded guilty in appeal No. 1, and defendant also committed the crime to which he pleaded guilty in appeal No. 2 while released on recognizance for the charge to which he pleaded guilty in appeal No. 3. Thus, in the absence of a statement of the facts and circumstances warranting concurrent sentences set forth on the record, the court was required to direct that the felony sentences run consecutively (see § 70.25 [2-b] …). …

A court may, in the interest of justice, impose a concurrent sentence for a conviction of assault in the second degree under Penal Law § 120.05 (7), provided that the court sets forth in the record its reasons for imposing a concurrent sentence (see Penal Law § 70.25 [5] [c] …) … [T]he court imposed a concurrent sentence without setting forth its reason on the record.

… [B]ecause defendant's guilty pleas in appeal Nos. 1 through 5 were all induced by the promise of illegal concurrent sentencing, we must also vacate the sentence

imposed in appeal No. 4, and in each of the five appeals we remit the matter to County Court to afford defendant the opportunity to either withdraw his guilty plea or be resentenced in compliance with Penal Law § 70.25 (2-b) and (5) … . People v Horton, 2022 NY Slip Op 04501, Fourth Dept 7-8-22

Practice Point: Sentences for crimes committed when defendant has been released on his own recognizance can not be concurrent unless the judge puts the relevant facts and reasoning on the record. The same goes for assault second. Here the reasons for the concurrent sentences were not put on the record, rendering the concurrent sentences illegal. Because all the guilty pleas were induced by the promise of concurrent sentences, all the sentences were vacated. The "illegal concurrent sentences" issue had not been brought up on appeal.

CRIMINAL LAW, POLICE ACTING IN THE PUBLIC SERVICE FUNCTION, SEARCH OF INJURED PERSON.

THE POLICE WERE "ACTING IN THE PUBLIC SERVICE FUNCTION" WHEN THEY SEARCHED THE INJURED DEFENDANT AND FOUND A CARTRIDGE; DEFENDANT WAS DRIFTING IN AND OUT OF CONSCIOUSNESS; THE POLICE PROPERLY SEARCHED HIS POCKETS FOR IDENTIFICATION; SUPPRESSION DENIED (FIRST DEPT).

The First Department determined the search of plaintiff's clothing by the police did not require suppression of the cartridge found in defendant's pocket because the police were "acting in the public service function" in aiding the injured defendant:

… [T]he hearing court … denied suppression of a cartridge recovered from defendant's pants pocket, correctly finding that "the police were acting in their public service function in rendering aid when searching the defendant's clothing for identification." When police arrived, defendant was lying on the ground and screaming that he had been shot. He appeared to have been shot in the leg, he was drifting in and out of consciousness, and he could not state his name. At that point, the officers were treating defendant as an injured victim rather than a suspect, and were not performing a law enforcement function … . Under the circumstances, it was reasonable for the officers to believe defendant needed immediate assistance

and to search his pants for identification as they waited for him to be transported to the hospital … In performing this public service function, it was reasonable for the police to ascertain the identity of the person they were aiding and to supply that information to medical personnel, and defendant did not appear capable of communicating his identity. People v Hatchett, 2022 NY Slip Op 04282, First Dept 7-5-22

Practice Point: When the police aid an injured person and search the person's pockets for identification, they are "acting in the public service function." Suppression of any contraband found in the search will be denied.

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA), INEFFECTIVE ASSISTANCE.

THE PEOPLE DID NOT PRESENT EVIDENCE OF THE TEMPORAL REQUIREMENTS FOR AN ASSESSMENT OF 20 POINTS FOR RISK FACTOR 4 AND DEFENSE COUNSEL AGREED WITH THAT 20-POINT ASSESSMENT, THEREBY WAIVING ANY OBJECTION TO IT ON APPEAL; DEFENDANT DID NOT RECEIVE EFFECTIVE ASSISTANCE OF COUNSEL; NEW SORA HEARING ORDERED (SECOND DEPT).

The Second Department, reversing the SORA risk level assessment, determined defendant did not receive effective assistance of counsel at the SORA hearing. The People did not present evidence of defendant's commission of two or more sexual offenses separated by more than 24 hours or three or more over at least two weeks to justify the relevant 20 point assessment (risk factor 4). Defense counsel agreed to that 20 point assessment. Defense counsel contested a different assessment but that argument was deemed to have no merit. Defendant's counsel was deemed ineffective and a new SORA hearing was ordered:

… [T]he sole argument advanced by the defendant's assigned counsel, challenging the assessment of points under risk factor 9, was clearly devoid of merit. Counsel then expressly conceded that the points in all other categories had been properly assessed, even though there was at least a colorable argument to be made that the

People had failed to establish that the temporal requirements for the assessment of points under risk factor 4 were satisfied … Contrary to the People's contention, it cannot be said that such an argument would have had little or no chance of success. Although the case summary established that the defendant committed multiple offending acts, it did not contain any information as to when these acts occurred relative to each other, and therefore, standing alone, was insufficient to support the assessment of 20 points under risk factor 4 … . Moreover, counsel's argument regarding risk factor 9, and other statements made by counsel during the hearing, indicated that counsel was not adequately familiar with the applicable law … . In addition, counsel stated that he was seeking a downward departure, but failed to articulate any argument in support of such a departure … . People v Echols, 2022 NY Slip Op 04310, Second Dept 7-6-22

Practice Point: At the SORA risk-level hearing, defense counsel agreed with an assessment of 20 points for risk level 4 despite the People's failure to submit any evidence in support of it. Because counsel agreed to the assessment, any objection to it was waived and could not be raised on appeal. However, the ineffective-assistance argument, based upon defense counsel's failure to object to that same 20 point assessment, was properly raised on appeal and was the basis for reversal.

CRIMINAL LAW, STREET STOPS, PURSUIT BY POLICE.

GIVEN WHAT THE INFORMANT TOLD THE POLICE, THE FACT THAT DEFENDANT GRABBED AT HIS WAISTBAND WHEN THE POLICE APPROACHED HIM ON THE STREET PROVIDED REASONABLE SUSPICION THE DEFENDANT HAD A WEAPON AND THEREBY JUSTIFIED PURSUIT; THE DISSENT ARGUED THE INFORMATION FROM THE INFORMANT WAS NOT ENOUGH BY ITSELF AND THE PEOPLE DID NOT PROVE DEFDENDANT GRABBED AT HIS WAISTBAND BEFORE OR AFTER THE CHASE STARTED (FOURTH DEPT).

The Fourth Department, over a two-justice dissent, determined the police had "reasonable suspicion" to pursue defendant as he fled when the police approached on the street. The defendant discarded a handgun as he fled:

… [P]olice responded to a 911 call that a parolee wanted on an outstanding warrant and who was known to possess guns was a passenger in a certain vehicle. The officers found a vehicle matching the description given by the 911 caller and followed it, losing sight of the vehicle momentarily but then spotting it stopped on a curb with the passenger standing outside the vehicle. As one of the officers exited the police vehicle and began to approach the passenger, the passenger ran away while holding the left side of his waistband and the officer chased after him. …

The court properly determined that the officers had at least an objective, credible reason to approach defendant and request information … . Defendant's subsequent flight with his hand on his waistband from the approaching officer, combined with the 911 caller's report about a wanted violent parolee who was potentially armed, and the police officers' observations confirming the vehicle and suspect descriptions from the 911 call, provided the officers with reasonable suspicion to pursue defendant … .

From the dissent:

The People assert that the court properly determined that the pursuit was justified because, in addition to the information provided by the informant, the arresting officer observed defendant grabbing the front of his pants while running away, as if he had a gun in his waistband. Although defendant's act of grabbing his waistband increased the degree of suspicion, perhaps even to the level required for pursuit, the evidence at the suppression hearing does not establish whether the arresting officer observed that conduct before or after he gave chase. People v Leonard, 2022 NY Slip Op 04468, Fourth Dept 7-8-22

Practice Point: Coupled with information provided from an informant claiming the defendant had guns and was violent, the defendant's grabbing at his waistband as the police approached him on the street provided the police with reasonable suspicion the defendant had a weapon, thereby justifying police pursuit when defendant fled. The dissent argued the information from the informant did not provide reasonable suspicion and the People did not prove defendant grabbed at his waistband before he fled.

FAMILY LAW, CONSENT TO ADOPTION.

FATHER DID NOT DEMONSTRATE HIS CONSENT TO ADOPTION WAS REQUIRED; ALTHOUGH FATHER WAS INCARCERATED FOR MUCH OF THE TIME SINCE THE CHILD WAS BORN, FATHER DID NOT SUPPORT THE CHILD OR MAKE ANY EFFORT TO GAIN PARENTAL ACCESS TO THE CHILD DURING THE PERIODS HE WAS NOT INCARCERATED (SECOND DEPT).

The Second Department, reversing Family Court, determined father's consent to adoption was not required. Although father, who never married mother, was incarcerated for much of the time since the child was born, and there was an order of protection prohibiting him from seeing the child, the Second Department held father could have, but did not, make an effort to support the child and have the order of protection lifted during the periods he was not incarcerated:

The father bore the burden of establishing that he was a consent father pursuant to Domestic Relations Law § 111(1)(d) … . The father provided no support for the child, and no evidence was submitted that he lacked the means to do so … . Further, the fact that the father was incarcerated, or that there was no order directing child support, did not absolve him of the obligation to support the child … . Moreover, there were substantial periods of time when the father was out of prison and, therefore, could have petitioned for contact with the child. Although an order of protection in favor of the child was in effect until November 2018, that order specifically provided that it could be modified by a subsequent order issued by the Family Court or the Supreme Court in a parental access proceeding. Further, there was a substantial period in 2019 when the father was out of prison, but the father failed to seek contact with the child through the Family Court….Matter of Statini v Reed, 2022 NY Slip Op 04304, Second Dept 7-6-22

Practice Point: In the context of whether father's consent to adoption of his child (born out-of-wedlock) is required, the fact that father was incarcerated for much of the time since the child was born did not relieve him of his obligation to support the child. Father made no effort to gain parental access to the child, or to support the child, during the periods he was not in prison. Father's consent to adoption of the child was not required.

FAMILY LAW, NEGLECT.

ONE OF MOTHER'S CHILDREN OPENED A LOCKED WINDOW, TOOK OUT THE SCREEN AND DROPPED HIS SIBLING TWO STORIES WHILE MOTHER WAS HOME; MOTHER COULD NOT HAVE FORESEEN THE INCIDENT; THE NEGLECT FINDING WAS REVERSED (FOURTH DEPT).

The Fourth Department, reversing Family Court, determined the evidence did not support the neglect findings. Although mother knew one of her children was sometimes aggressive, she could not have known he would open a locked window, take out the screen, and drop his sibling two stories. Apparently mother was in the bathroom with the door open when this happened. In addition, neither the children's hygiene nor the condition of the apartment established neglect. The Fourth Department noted that, although no appeal lies from a decision, as opposed to an order, the paper here met the essential requirements of an order:

… [T]here was nothing intrinsically dangerous about leaving two of the children to eat and watch television while the mother was in the bathroom with the door open … . The record establishes that the mother knew that one of her children was sometimes aggressive towards his younger siblings, but there is no evidence in the record that she was aware that he may open a locked window, remove the screen, and drop his sibling from a height of two stories … . In making that determination, we note that the window involved in the incident was not deemed dangerous by a caseworker during a home visit less than a month before the incident.

… [P]etitioner's evidence regarding the hygiene of the children and the condition of the apartment, which petitioner's caseworker testified met "minimal standards," was not sufficient to establish neglect … . Further, although a "finding of neglect may be entered where, though [being] financially able to do so or offered financial or other reasonable means to do so, a parent fails to provide the child[ren] with adequate clothing and basic medical care" … , here, "[n]o evidence was presented at the fact-finding hearing concerning the financial status of the mother" … . Matter of Silas W., 2022 NY Slip Op 04506, Fourth Dept 7-8-22

Practice Point: Mother was in the bathroom with the door open when one of her children opened a locked window, took out the screen and dropped his sibling two

stories. That scenario did not support the neglect finding. Neither the children's hygiene nor the condition of the apartment warranted a neglect finding.

FAMILY LAW, QUALIFIED DOMESTICE RELATION ORDER (QDRO).

THE QUALIFIED DOMESTIC RELATION ORDER (QDRO) AS DESCRIBED IN THE STIPULATION OF SETTLEMENT INCORPORATED BUT NOT MERGED INTO THE JUDGMENT OF DIVORCE CANNOT BE MODIFIED BY THE COURT; NO APPEAL LIES OF RIGHT FROM A QDRO, AN APPLICATION FOR LEAVE TO APPEAL MUST BE MADE (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined the qualified domestic relations order (QDRO) should not have been modified by the court because the stipulation of settlement, which was incorporated but not merged into the judgment of divorce, controls. The Fourth Department noted that no appeal lies of right from a QRDO but it treated the notice of appeal as an application for leave to appeal and granted the application:

A stipulation of settlement that is incorporated but not merged into a judgment of divorce "is a contract subject to the principles of contract construction and interpretation" … . Where such an agreement is clear and unambiguous, the intent of the parties must be gleaned from the language used in the stipulation of settlement and not from extrinsic evidence … , and the agreement in that instance " 'must be enforced according to the plain meaning of its terms' " … . "A proper QDRO obtained pursuant to a stipulation of settlement can convey only those rights to which the parties stipulated as a basis for the judgment" … . "An alternative result would undermine litigants' freedom of contract by allowing QDROs to create new rights—or litigants to generate new claims—unexpressed in the settlement stipulation" … . Thus, "a court cannot issue a QDRO encompassing rights not provided in the underlying stipulation . . . , or one that is more expansive than the stipulation" … . Gay v Gay, 2022 NY Slip Op 04480, Fourth Dept 7-8-22

Practice Point: A qualified domestic relations order (QDRO) as described in a stipulation of settlement incorporated but not merged into the judgment of divorce

cannot be modified by the court. No appeal lies of right from a QDRO, an application for permission to appeal must be made.

FAMILY LAW, TEMPORARY CUSTODY, HEARING REQUIRED.

RE: A MOTION FOR TEMPORARY CUSTODY, IF ALLEGATIONS IN THE AFFIDAVITS ARE CONTROVERTED, A HEARING MUST BE HELD; TO BASE A TEMPORARY-CUSTODY RULING ON CONTROVERTED ALLEGATIONS IS AN ERROR OF LAW (SECOND DEPT).

The Second Department, reversing Supreme Court, determined controverted allegations in the affidavits required a hearing on the motion for temporary residential custody of the child:

… [W]hile temporary custody may generally "be properly fixed without a hearing where sufficient facts are shown by uncontroverted affidavits, it is error as a matter of law to make an order respecting custody, even in a pendente lite context, based on controverted allegations without having had the benefit of a full hearing" … .

… [T]he record demonstrates disputed factual issues so as to require a hearing on the plaintiff's motion, in effect, for temporary primary residential custody of the child … . Chukwuemeka v Chukuemeka, 2022 NY Slip Op 04287, Second Dept 7-6-22

Practice Point: A motion for temporary custody may be decided on the papers if the allegations are not controverted. If allegations are controverted, it is an error of law to determine the issue without a hearing.

FAMILY LAW, JUDGES, ATTORNEYS, ADJOURNMENTS.

THE JUDGE HAD BEEN MADE AWARE A WEEK BEFORE THE HEARING THAT MOTHER'S ATTORNEY WAS NO LONGER REPRESENTING HER; AT THE HEARING MOTHER EXPLAINED SHE HAD COMMUNICATED WITH ANOTHER LAWYER WHO COULD NOT ATTEND THAT DAY; MOTHER ASKED FOR AN ADJOURNMENT; THE JUDGE ABUSED HER DISCRETION IN DENYING THE REQUEST (FOURTH DEPT).

The Fourth Department, reversing Family Court in this custody proceeding, determined mother's request for an adjournment should have been granted. Mother's relationship with her attorney had broken down. The attorney had notified the judge a week before and the attorney did not appear for the hearing. At the hearing, mother told the judge she had communicated with another lawyer (who had other obligations) and asked for an adjournment. The request denied and mother represented herself:

Approximately one week prior to the hearing on the father's petition, the mother's attorney informed Family Court that there had been a breakdown in her attorney-client relationship with the mother, as a result of which she was no longer representing the mother, and she requested an adjournment of the hearing. On the morning of the hearing, the court failed to make any inquiry of the mother concerning the fact that her attorney was not present at the hearing, nor did the court make any mention of the attorney's adjournment request. The mother herself then sought an adjournment and confirmed to the court that there had been a fundamental breakdown in the relationship with her attorney. The mother explained that she had spoken to, and scheduled a meeting with, a new attorney and that the new attorney could not be present due to a preexisting obligation. …

… [T]he court abused its discretion in denying her request to adjourn the hearing … . The record establishes that the mother's request was not a delay tactic and did not result from her lack of diligence in retaining new counsel … . We therefore reverse the order and remit the matter to Family Court for a new hearing on the petition. Matter of Dupont v Armstrong, 2022 NY Slip Op 04509, Fourth Dept 7-8-22

Practice Point: Here mother had never requested an adjournment before and the judge was aware mother's relationship with her attorney had broken down. At the time of the hearing mother told the judge she had communicated with another lawyer who could not attend that day and asked for an adjournment. The judge's denial of the request was an abuse of discretion.

FAMILY LAW, JUDGES, COVID-RELATED ADJOURNMENT.

MOTHER WAS EXPERIENCING COVID-LIKE SYMPTOMS AND THE COURT RULES PROHIBITED HER ENTRY; HER REQUEST FOR AN ADJOURMENT SHOULD HAVE BEEN GRANTED (FOURTH DEPT).

The Fourth Department, reversing Family Court, determined the court abused its discretion in denying mother's request for an adjournment:

… [T]he court abused its discretion in denying her attorney's request for an adjournment. The mother had not previously requested an adjournment, and there was no indication in the record that an adjournment would have adversely affected the child … . Further, the mother was experiencing COVID-like symptoms and, under the court's own rules, she was prohibited from entering the courthouse … . We therefore vacate those parts of the order determining that the mother permanently neglected the subject child and terminating her parental rights … . Matter of Jiryan S., 2022 NY Slip Op 04514. Fourth Dept 7-8-22

Practice Point: Here mother was experiencing COVID-like symptoms and requested an adjournment. Court rules prohibited her entry into the building. Her request for an adjournment should have been granted.

FORECLOSURE, BANKRUPTCY, CIVIL PROCEDURE.

IN THIS FORECLOSURE ACTION, THE BANKRUPTCY STAY DID NOT TERMINATE WHEN DEFENDANT BOUGHT THE SUBJECT PROPERTY FROM THE BANKRUPTCY ESTATE; THE STAY TERMINATED LATER WHEN DEFENDANT RECEIVED A DISCHARGE FROM THE BANKRUPTCY COURT; THE FORECLOSURE ACTION WAS THEREFORE TIMELY (SECOND DEPT).

The Second Department, in a full-fledged opinion by Justice Dowling, in a matter of first impression, determined the foreclosure action, which had been stayed when defendant twice filed for bankruptcy, was timely brought. If the stay ceased when defendant bought the subject property from the bankruptcy estate, the foreclosure would have been untimely. But the Second Department held that the stay did not cease until the subsequent discharge order, rendering the action timely:

… [D]efendant's purchase of the Middle Pond Road property from the bankruptcy estate pursuant to the November 26, 2013 order did not terminate the automatic bankruptcy stay barring commencement of the instant foreclosure action, but rather, under the circumstances of this case, the automatic bankruptcy stay terminated when the defendant received a discharge from the Bankruptcy Court on November 3, 2014.

Pursuant to the plain language of 11 USC § 362(c)(1), the discharge of the … property from the bankruptcy estate pursuant to the November 26, 2013 order terminated the stays of an act against "property of the estate," which stays are established by 11 USC § 362(a)(3) and (4). Here, however, upon the defendant's purchase of the … property from the bankruptcy estate pursuant to November 26, 2013 order, ownership of the … property returned to the defendant, as debtor in the bankruptcy proceeding … . Consequently, the termination of the stay of an act against "property of the estate" provided for by 11 USC § 362(c)(1) has no bearing on the stays established by 11 USC § 362(a)(1) and (5), which expressly apply to acts taken against "the debtor" or "property of the debtor," and which continued in effect. Deutsche Bank Natl. Trust Co. v Lubonty, 2022 NY Slip Op 04288, Second Dept 7-6-22

Practice Point: Here whether the foreclosure action was timely depended on when the bankruptcy stay terminated. The defendant in the foreclosure action was the

"debtor" in the bankruptcy proceeding. The defendant bought the property which was the subject of the foreclosure action from the bankruptcy estate. Based on the applicable bankruptcy statute, the bankruptcy stay did not terminate when defendant bought the property. It terminated later when defendant received a discharge from the Bankruptcy Court. Because the stay terminated on the later date, the foreclosure action was timely.

FORECLOSURE, REFEREE'S REPORT MUST BE SUPPORTED BY BUSINESS RECORDS.

THE PROOF OF THE AMOUNT DUE PURSUANT TO THE MORTGAGE WAS NOT SUPPORTED BY THE RELEVANT BUSINESS RECORDS; THEREFORE THE REFEREE'S REPORT SHOULD NOT HAVE BEEN CONFIRMED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the referee's report in this foreclosure action was based on hearsay and should not have been confirmed:

"The report of a referee should be confirmed whenever the findings are substantially supported by the record, and the referee has clearly defined the issues and resolved matters of credibility" … . "The referee's findings and recommendations are advisory only and have no binding effect on the court, which remains the ultimate arbiter of the dispute" … .

Here, as the defendant correctly contends, the affidavit of the plaintiff's servicing agent, submitted for the purpose of establishing the amount due and owing under the subject mortgage loan, "constituted inadmissible hearsay and lacked probative value because the affiant did not produce any of the business records [s]he purportedly relied upon in making [her] calculations" … . Thus, the referee's findings with respect to the total amount due upon the mortgage were not substantially supported by the record … . U.S. Bank N.A. v Barton, 2022 NY Slip Op 04319, Second Dept 7-6-22

Practice Point: In foreclosure actions where the proof is presented by affidavit, if the affidavit relies on business records which are not attached, the affidavit is inadmissible hearsay.

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

PLAINTIFF BANK DID NOT PRESENT SUFFICIENT EVIDENCE OF STRICT COMPLIANCE WITH THE NOTICE-OF-FORECLOSURE MAILING REQUIREMENTS OF RPAPL 1304; PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff's motion for summary judgment in this foreclosure action should not have been granted. Plaintiff did not prove the RPAPL 1304 was properly mailed to the defendants:

… [P]laintiff failed to establish its strict compliance with RPAPL 1304. The plaintiff relied on copies of the RPAPL 1304 notices allegedly mailed, purported domestic return receipts, and an affidavit of Catherine Rogers, a foreclosure specialist for Seterus, Inc., the plaintiff's purported servicer. However, the domestic return receipts were unsigned and undated, and there was no other indication that the certified or first class mailings were accepted by the post office for mailing. Rogers also did not aver that she had personal knowledge of the mailing or of Seterus, Inc.'s standard office procedure designed to ensure that the notices were mailed. Thus, contrary to the plaintiff's contention, it failed to establish, prima facie, that it strictly complied with RPAPL 1304 … . The plaintiff also failed to establish, prima, facie, that it complied with the notice of default requirement of the mortgage agreement … . Federal Natl. Mtge. Assn. v Young, 2022 NY Slip Op 04292, Second Dept 7-6-22

Practice Point: The mailing requirements of RPAPL 1304 must be strictly complied with and compliance must be proven in the bank's summary judgment motion papers. Without proof of strict compliance, the motion must be denied.

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

THE NOTICE OF FORECLOSURE WAS SENT TO DEFENDANT IN AN ENVELOPE WHICH INCLUDED OTHER NOTICES, A VIOLATION OF RPAPL 1304 (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the bank violated the "separate envelope" rule (RPAPL 1304) in that the foreclosure notice sent to defendant included notices in addition to the foreclosure notice:

… [T]he plaintiff failed to establish, prima facie, that it complied with the "separate envelope" requirement of RPAPL 1304(2). "[I]nclusion of any material in the separate envelope sent to the borrower under RPAPL 1304 that is not expressly delineated in these provisions constitutes a violation of the separate envelope requirement of RPAPL 1304(2)" … . The envelope containing the requisite notice under RPAPL 1304 included notices pertaining to the Federal Fair Debt Collection Practices Act (15 USC et seq.) and bankruptcy, and, therefore, the plaintiff failed to establish, prima facie, its strict compliance with RPAPL 1304 … . US Bank N.A. v Lanzetta, 2022 NY Slip Op 04322, Second Dept 7-6-22

Practice Point: Here the notice of foreclosure was sent to defendant in an envelope with other notices, a violation of RPAPL 1304, which must be strictly complied with.

INSURANCE LAW, CONTRACT LAW, COVENANT OF GOOD FAITH AND FAIR DEALING.

PLAINTIFF ALLEGED DEFENDANT INSURER BREACHED THE INSURANCE CONTRACT BY FAILING TO PAY THE FULL AMOUNT OF THE COVERAGE; THAT ALLEGATION DOES NOT SUPPORT AN ADDITIONAL CAUSE OF ACTION FOR BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined the cause of action for breach of the implied covenant of good faith and fair dealing duplicated the breach of contract cause of action and should have been dismissed. Plaintiff alleged defendant insurer failed to pay her the full amount of the supplemental uninsured motorist (SUM) coverage:

In the context of insurance contracts specifically, the implied covenant of good faith and fair dealing includes a duty on the part of the insurer " 'to investigate in good faith and pay covered claims' " … "[I]n order to establish a prima facie case of bad faith, the plaintiff must establish that the insurer's conduct constituted a 'gross disregard' of the insured's interests—that is, a deliberate or reckless failure to place on equal footing the interests of [the] insured with [the] insurer's own interests" … .

… [T]he allegations in plaintiff's complaint that defendant violated its duty of good faith and fair dealing are predicated solely upon the claim that defendant failed or refused to pay her the full amount of SUM coverage under the insurance policy, i.e., that defendant had breached the terms of the policy. Consequently, plaintiff failed to state a cause of action for breach of the implied duty of good faith and fair dealing … , and the court should have granted defendant's motion insofar as it sought to dismiss that cause of action as duplicative of the breach of contract cause of action … . Brown v Erie Ins. Co., 2022 NY Slip Op 04459, Fourth Dept 7-8-22

Practice Point: In the context of an insurance policy, a cause of action for breach of the implied covenant of good faith and fair dealing must be supported by allegations of the insurer's gross disregard of the insured's interests, which is not

demonstrated by the alleged failure to pay the full amount of the coverage (a simple breach of contract).

LABOR LAW-CONSTRUCTION LAW, STATUTORY AGENT.

HERE THE FRAMING COMPANY HIRED BY THE GENERAL CONTRACTOR AND GIVEN SUPERVISORY CONTROL OVER PLAINTIFF'S WORK WAS LIABLE FOR PLAINTIFF'S INJURY AS A "STATUTORY AGENT" OF THE GENERAL CONTRACTOR WITHIN THE MEANING OF THE LABOR LAW 240 (1) (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant South Ocean Framing was a statutory agent liable for plaintiff's injury pursuant to Labor Law 240(1). The general contractor hired South Ocean Framing, which in turn subcontracted the framing work to plaintiff's employer. Plaintiff stepped on a beam which flipped out from under him and he fell 15 feet. He was entitled to summary judgment. With respect to the statutory-agent question, the court wrote:

Contrary to South Ocean's … contention, it is liable under Labor Law § 240(1) as a statutory agent of the owner or general contractor, since it had the authority to supervise and control the particular work in which the plaintiff was engaged at the time of his injury .. . Once South Ocean became such an agent, it could not escape liability by delegating its work to another entity [i.e., plaintiff's employer]. Mogrovejo v HG Hous. Dev. Fund Co., Inc., 2022 NY Slip Op 04299, Second Dept 7-6-22

Practice Point: The general contractor hired the framing company. The framing company hired plaintiff's employer to do the framing. Because the framing company had supervisory control over plaintiff's work, it was liable for plaintiff's injury as a statutory agent under Labor Law 240 (1) and could not escape liability by delegating its supervisory role.

LABOR LAW-CONSTRUCTION LAW.

THERE WERE QUESTIONS OF FACT WHETHER THE ACCIDENT—THE COLLAPSE OF A DECK—EVER HAPPENED IN THIS LABOR LAW 24O (1) ACTION; SUPREME COURT REVERSED (FOURTH DEPT).

The Fourth Department, reversing Supreme Court in this Labor Law 240(1) action, determined there were questions of fact about whether the accident (the collapse of a deck) ever happened at all:

Contrary to plaintiff's contention and the court's determination, the assertion of defendant that an accident resulting from a collapse or dislodging of the deck as described by plaintiff and the foreman may not have occurred at all is not based on "speculation without factual support" … . Rather, defendant's assertion is based on the supervisors' firsthand observations of an intact deck on the morning after the alleged accident, coupled with the testimony of the foreman, which calls into question whether a repair of the deck could have been made before the supervisors' inspection, from which a factfinder could permissibly draw the inference that the alleged collapse did not occur at all … . Hann v S&J Morrell, Inc., 2022 NY Slip Op 04447, Fourth Dept 7-8-22

Practice Point: Unusual Labor Law 240(1) case where Supreme Court granted plaintiff's summary judgment motion but the appellate court held there were questions of fact whether the accident—the collapse of a deck—ever happened.

LANDLORD-TENANT, CASUALTY CLAUSE IN LEASE, COVID.

THE CASUALTY CLAUSE IN THE LEASE DID NOT APPLY TO EXCUSE DEFENDANT-TENANT'S NONPAYMENT OF RENT DURING THE COVID PANDEMIC; THE FORCE MAJEURE, FRUSTRATION OF PURPOSE AND UNCLEAN HANDS DOCTRINES ALSO DID NOT APPLY (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined (1) the casualty clause in the lease did not excuse defendant's failure to pay rent during the COVID

pandemic, (2) the force majeure doctrine did not apply, (3) and the frustration-of-purpose and unclean-hands doctrines did not apply:

… [W]e conclude that plaintiff established as a matter of law that defendant was not entitled to a rent abatement under the section of the lease providing that defendant was "not required to pay [r]ent when the [r]ental [s]pace [was] unusable" as a result of "damage" caused by a "fire or other casualty." "That [section] of the lease refers to singular incidents causing physical damage to the premises and does not contemplate loss of use due to a pandemic or resulting government lockdown" … . * * *

… [T]he lease "contain[s] no force majeure provision, much less one specifying the occurrence that defendant would now have treated as a force majeure, and, accordingly, there is no basis for a force majeure defense" … . * * *

… "[T]he doctrine of frustration of purpose does not apply as a matter of law where, as here, the tenant was not 'completely deprived of the benefit of its bargain' " … .

… [T]here is no triable issue of fact on its unclean hands defense because, even if defendant had made genuine attempts to procure another tenant, plaintiff was under no contractual obligation to seek or approve a sublease with a third party for the relatively short period remaining on the commercial lease, and there is nothing immoral or unconscionable about plaintiff's decision to seek the unpaid rent that defendant was contractually obligated to pay … . Arista Dev., LLC v Clearmind Holdings, LLC, 2022 NY Slip Op 04451, Fourth Dept 7-8-22

Practice Point: The casualty clause in the lease applied only to singular events, not to the COVID pandemic. Defendant's nonpayment of rent during the COVID pandemic was not excused by the terms of the lease.

MEDICAL MALPRACTICE, CONFLICTING EXPERT OPINIONS.

CONFLICTING EXPERT OPINIONS PRECLUDED DISMISSAL OF MEDICAL MALPRACTICE CAUSES OF ACTION STEMMING THE ALLEGED PREMATURE DISCHARGE OF PLAINTIFF FROM EMERGENCY CARE AFTER SHE EXPERIENCED SYMPTOMS OF A STROKE (FOURTH DEPT).

The Fourth Department, reversing (modifying) Supreme Court, determined plaintiff's medical malpractice causes of action against the doctor who discharged her from emergency care and the hospital should not have been dismissed because the expert affidavits presented conflicting opinions. Plaintiff experienced symptoms consistent with a stroke and went to the hospital. An MRI was done but plaintiff was released before a final review of the MRI. Evidence of a stroke was ultimately found on the MRI. Plaintiff's expert opined that the event which caused plaintiff to go to the hospital was a transient ischemic attack (TIA), not a stroke, and that the stroke occurred at the hospital about when the MRI was performed:

… [B]y submitting the affidavit of their expert, [plaintiffs] raised an issue of fact on the issue whether Dr. Kandel deviated from the standard of care … . Dr. Kandel permitted plaintiff to leave the hospital before her brain MRI had undergone a final review by a neuroradiologist. Plaintiffs' expert opined that discharging plaintiff before a final review of the scans was complete constituted a deviation from the standard of care in light of plaintiff's medical history, which indicated a significant stroke risk.

… [P]laintiffs raised a question of fact with respect to causation … . The hospital defendants relied upon the affirmation of Dr. Kandel's medical expert, who opined that any alleged negligence is not the proximate cause of plaintiff's injuries inasmuch as plaintiff suffered a stroke at or before 3 a.m. on October 27, and that the window in which to administer tPA, an anti-clot medication, had closed long before plaintiff arrived at the hospital for treatment approximately 13 hours later. … [P]laintiffs submitted an expert affidavit asserting … that the symptoms plaintiff experienced on the morning of October 27 were the result of a transient ischemic attack (TIA), which results in temporary stroke-like symptoms but does not result in a blockage, and that she did not experience the actual blockage until sometime later in the day, around the time of her brain MRI. Plaintiffs' expert further opined that, had plaintiff stayed at the hospital overnight and had the MRI

been read correctly, tPA could have been administered when plaintiff's new symptoms presented. Clark v Rachfal, 2022 NY Slip Op 04472, Fourth Dept 7-8-22

Practice Point: Conflicting expert opinions preclude summary judgment in medical malpractice actions.

MEDICAL MALPRACTICE, NEGLIGENCE OF NONPARTY DOCTORS.

THE PLAINTIFF'S VERDICT IN THIS MEDICAL MALPRACTICE ACTION SHOULD HAVE BEEN SET ASIDE IN THE INTEREST OF JUSTICE; THE JUDGE PRECLUDED CROSS-EXAMINATION OF PLAINTIFF'S EXPERT ABOUT WHETHER THE OTHER DOCTORS WHO CONSULTED ON PLAINTIFF'S TREATMENT DEPARTED FROM ACCEPTED PRACTICE BY FAILING TO DO FURTHER DIAGNOSTIC TESTING; IF SO, FAULT WOULD BE SHARED PURSUANT TO CPLR 1601 (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant doctor's (Sourour's) motion to set aside the verdict in the interest of justice in this medical malpractice action should have been granted. The evidence supported the jury's finding that the failure to do diagnostic testing decreased the plaintiff's chance of a better outcome. During the trial Sourour sought to but was precluded from cross-examining plaintiff's expert about whether other doctors who consulted on the case also departed from accepted practice by not performing the additional diagnostic testing. That was deemed reversible error:

"A motion pursuant to CPLR 4404(a) to set aside a verdict and for a new trial in the interest of justice encompasses errors in the trial court's rulings on the admissibility of evidence, mistakes in the charge, misconduct, newly discovered evidence, and surprise" … . "In considering such a motion, [t]he Trial Judge must decide whether substantial justice has been done, whether it is likely that the verdict has been affected . . . and must look to his [or her] own common sense, experience and sense of fairness rather than to precedents in arriving at a decision" … . …

If, as Sourour proposes, a jury were to find that these doctors departed from accepted medical practice and that their departures were a substantial factor in depriving the decedent of a chance for an improved outcome, they could be found at fault together with Sourour … . As a result, any evidence as to the culpability of these doctors was relevant under CPLR 1601(1) … . The court's error in precluding testimony on this issue deprived Sourour of "substantial justice" … . Schuster v Sourour, 2022 NY Slip Op 04317, Second Dept 7-6-22

Practice Point: Here the defendant doctor's failure to do further diagnostic testing for cancer was deemed to have decreased the chance of a better outcome. Therefore the plaintiff's verdict was supported by the evidence and properly survived a motion set aside as a matter of law. However, the judge erroneously precluded cross-examination of plaintiff's expert about whether the other doctors who consulted on plaintiff's treatment departed from accepted practice failing to order further diagnostic testing. If so, fault would have been shared pursuant to CPLR 1601.

MENTAL HYGIENE LAW, GUARDIANSHIPS, AUTISM NOT A DISABILITY.

PETITIONER, WHO IS MILDLY AUTISTIC, DEMONSTRATED (1) HE IS NOT DISABLED WITHIN THE MEANING OF SURROGATE'S COURT PROCEDURE ACT (SCPA) ARTICLE 17-A AND (2) HE UNDERSTANDS AND IS ABLE TO MANAGE HIS FINANCIAL AFFAIRS; THE PETITION TO DISSOLVE THE GUARDIANSHIP OF HIS PROPERTY SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Surrogate's Court, determined petitioner, who is mildly autistic, demonstrated he did not have a disability within the meaning of Surrogate's Court Procedure Act (SCPA) article 17-a and, therefore, his petition to dissolve the guardianship of his property should have been granted. Petitioner held a job was up-to-date on all his bills:

The petitioner established that he did not have a disability as defined in SCPA article 17-A, as his evidence showed that his ability to "understand and appreciate the nature and consequences of decisions" was not impaired (id. § 1750-a[1]). The

petitioner presented medical evidence that his autism was mild and that he did not have significant deficits in adaptive functioning. He also showed, through his own testimony, that he understood the consequences of decisions in financial and other areas. * * *

The petitioner understood, for example, how his rent was calculated, the importance of staying up to date with his bills, what expenses were nonessential and could be eliminated when he needed to conserve money, how to open a bank account, how to obtain advice from the bank on improving his financial situation, and that he would not have direct access to his trust funds if the guardianship were dissolved and that those funds were placed into a pooled trust. Matter of Robert C. B., 2022 NY Slip Op 04301, Second Dept 7-6-22

Practice Point: The medical records demonstrated petitioner's mild autism is not a disability within the meaning of the Surrogate's Court Procedure Act. Petitioner demonstrated through his own testimony that he understands and is able to manage his financial affairs. The petition to dissolve the guardianship of his property should have been granted.

MUNICIPAL LAW, FAILURE TO SCHEDULE 50-H HEARING.

PLAINTIFF'S FAILURE TO SCHEDULE A 50-H HEARING AFTER ADJOURNING IT TWICE REQUIRED DISMISSAL OF THE RELEVANT CAUSES OF ACTION IN THIS DEFAMATION SUIT AGAINST A COUNTY EXECUTIVE (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined plaintiff's failure to schedule a 50-h hearing after adjourning it twice required dismissal (without prejudice) of certain causes of action in this defamation suit against a county executive:

Supreme Court erred in denying the motion insofar as it sought to dismiss the first through fourth causes of action on the ground that plaintiff failed to comply with defendant's demand for an oral examination pursuant to General Municipal Law § 50-h (1), and we therefore modify the order accordingly. "[A] plaintiff who has not

complied with General Municipal Law § 50—h (1) is precluded from maintaining an action against a municipality" … . Here, plaintiff adjourned the examination on two separate occasions and failed to respond to defendant's subsequent request that she choose from a list of dates when she would be available for examination. Under the circumstances, plaintiff bore the burden of rescheduling the examination … , and because plaintiff failed to reschedule, she was barred by statute from commencing an action … .

"Although compliance with General Municipal Law § 50—h (1) may be excused in 'exceptional circumstances' " … , there were no such circumstances here. Contrary to defendant's contention, however, the first through fourth causes of action should be dismissed without prejudice … .Landa v Poloncarz, 2022 NY Slip Op 04490, Fourth Dept 7-8-22

Practice Point: Here plaintiff twice adjourned the 50-h hearing and then did not respond to defendant's attempt to schedule a third. Under those circumstances it was plaintiff's responsibility to schedule a hearing. Failure to do so required dismissal of the relevant causes of action (without prejudice).

NEGLIGENCE, SUMMARY JUDGMENT MOTION MUST ADDRESS AFFIRMATIVE DEFENSES.

A PLAINTIFF BRINGING A SUMMARY JUDGMENT MOTION MUST ADDRESS AFFIRMATIVE DEFENSES RAISED IN THE ANSWER; HERE IN THIS TRAFFIC ACCIDENT CASE THE GRAVES AMENDMENT, WHICH PROVIDES THAT THE OWNER OF A LEASED CAR IS NOT LIABLE FOR THE NEGLIGENCE OF THE DRIVER, WAS RAISED AS AN AFFIRMATIVE DEFENSE; BECAUSE PLAINTIFF DID NOT ADDRESS THAT ISSUE IN THE SUMMARY JUDGMENT MOTION, THE MOTION SHOULD HAVE BEEN DENIED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff in this traffic accidence case did not demonstrate the owner of defendants' vehicle, PV Holding, was vicariously liable for the negligence of the driver of the vehicle.

Therefore plaintiff's summary judgment motion with respect to PV Holding should not have been granted. Defendants apparently raised the affirmative defense that the vehicle was leased from PV Holding and therefore was not liable under the Graves Amendment. Because that defense was not addressed in plaintiff's summary judgment papers, the motion should have been denied:

… [I]n 2005, Congress enacted the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users. That act included the Graves Amendment (49 USC § 30106), which provides that the owner of a leased or rented motor vehicle cannot be held liable for personal injuries resulting from the use of such vehicle if the owner (1) is engaged in the trade or business of renting or leasing motor vehicles, and (2) engaged in no negligence or criminal wrongdoing contributing to the accident … .* * *

"CPLR 3212(b) requires the proponent of a motion for summary judgment to demonstrate the absence of genuine issues of material fact on every relevant issue raised by the pleadings, including any affirmative defenses" … . Pierrelouis v Kuten, 2022 NY Slip Op 04314, Second Dept 7-6-22

Practice Point: A plaintiff bringing a motion for summary judgment must address affirmative defenses raised in the answer. Failure to do so requires denial of the motion. Here the Graves Amendment was raised as an affirmative defense in this traffic accident case. The Graver Amendment provides that companies in the business of leasing cars are not vicariously liable for the negligence of the drivers. Plaintiff did not address that defense in the motion for summary judgment.

NEGLIGENCE, WORKERS' COMPENSATION, ACCIDENTAL DISCHARGE OF A FIREARM BY COWORKER.

THE ACCIDENTAL DISCHARGE OF A FIREARM BY PLAINTIFF'S COWORKER DURING A FIREARMS TRAINING SESSION FOR ARMORED-CAR GUARDS WAS WITHIN THE DEFENDANT COWORKER'S SCOPE OF EMPLOYMENT; WORKERS' COMPENSATION IS PLAINTIFF'S EXCLUSIVE REMEDY (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined plaintiff's exclusive remedy in this accidental shooting case was Workers' Compensation. Plaintiff and defendant coworker were both armored-car guards attending a firearms training course required by their employer when plaintiff was shot. When plaintiff and defendant coworker were seated at a table waiting for the course to begin the coworker took out his loaded firearm and it discharged as he attempted to disassemble it. The bullet went through the table and struck plaintiff in the leg:

The record establishes that firearms were permitted in the classroom and that trainees would generally keep the weapons in a holster or a gun box but were prohibited from taking out and handling firearms in the classroom. Defendant was thus attending a mandatory firearms training course at which he was required to have the pistol for which he was seeking certification, the training was directly related to his job duties that involved carrying a firearm, he was permitted to have the firearm in the classroom, and he simply violated a safety rule by handling the firearm in the classroom, thereby causing it to accidentally discharge. Defendant's violation of the safety provision "was not, in these circumstances, of such type or magnitude as to take . . . defendant out of the scope of his employment" … . In other words, defendant's conduct constituted a simple lack of reasonable care, i.e., negligence … , and "[t]he Workers' Compensation Law offers the only remedy for injuries caused by the coemployee's negligence" … . Guida v Rivera Investigations, Inc., 2022 NY Slip Op 04443, Fourth Dept 7-8-22

Practice Point: During a firearms training course required by plaintiff's employer, a coworker negligently took out his loaded firearm which accidentally discharged, striking plaintiff. Because the coworker's actions, although negligent, were within

the scope of the coworker's employment, Workers' Compensation was plaintiff's exclusive remedy.

NEGLIGENCE, WORKERS' COMPENSATION, COLLATERAL ESTOPPEL.

THE IDENTITY OF PLAINTIFF'S EMPLOYER WAS NOT A DISPUTED ISSUE IN THE WORKERS' COMPENSATION PROCEEDING; THEREFORE DEFENDANTS WERE NOT COLLATERALLY ESTOPPED FROM CONTESTING THE IDENTITY OF PLAINTIFF'S EMPLOYER IN THIS RELATED NEGLIGENCE ACTION AND ARGUING PLAINTIFF'S EXCLUSIVE REMEDY IS WORKERS' COMPENSATION; HOWEVER DEFENDANTS PRESENTED CONFLICTING EVIDENCE OF THE IDENTITY OF PLAINTIFF'S EMPLOYER AND THEREFORE WERE NOT ENTITLED TO SUMMARY JUDGMENT (SECOND DEPT).

The Second Department determined the collateral estoppel doctrine preclude defendants from disputing the identity of plaintiff's employer because the issue was not in dispute the Workers' Compensation proceeding. Plaintiff was a matron on a school bus and was injured when the bus was involved in a collision. Plaintiff sued the bus driver (Bonhome) and the bus company (Reliant). Defendants alleged plaintiff and Bonhome were both employed by Reliant and, therefore, Workers' Compensation was plaintiff's only remedy. But the defendants submitted conflicting evidence of the identity of plaintiff's employer and therefore were not entitled to summary judgment:

… Bonhome and Reliant were not barred by the doctrine of collateral estoppel from disputing the identity of the plaintiff's employer. "Under the doctrine of collateral estoppel, a party is precluded from 'relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party or those in privity, whether or not the tribunals or causes of action are the same'" … . "The quasi-judicial determinations of administrative agencies are entitled to collateral estoppel effect where the issue a party seeks to preclude in a subsequent civil action is identical to a material issue that was necessarily decided by the administrative tribunal and where there was a full and fair opportunity to litigate before that tribunal" … . Here, the plaintiff failed to

demonstrate that the identity of her employer was a disputed issue at a proceeding before the Workers' Compensation Board, or that the Workers' Compensation Board specifically adjudicated that issue…. .

… [T]he defendants submitted conflicting evidence regarding the identity of the plaintiff's employer. Thus, they failed to demonstrate, prima facie, that both Bonhome and the plaintiff were employees of Reliant at the time of the accident … . Calixte v City of New York, 2022 NY Slip Op 04286, Second Dept 7-6-22

Practice Point: In this traffic accident case the identity of plaintiff's employer was not in dispute in the prior Workers' Compensation proceeding. The collateral estoppel doctrine, therefore, did not apply and defendant can contest the identity of plaintiff's employer in the related negligence proceeding. If both plaintiff and defendant were employees of the same employer, Workers' Compensation would be plaintiff's only remedy.

REAL ESTATE, CONTRACT LAW, MERGER OF PURCHASE AGREEMENT AND DEED.

PLAINTIFFS ALLEGED THE CONTRACT FOR THE PURCHASE OF LAND INCLUDED A PARCEL OF LAND NOT INCLUDED IN THE DEED AND SOUGHT A CORRECTED DEED; PURSUANT TO THE MERGER DOCTRINE, THE CONTRACT AND THE DEED MERGED AT THE CLOSING AND THE PROPERTY DESCRIPTION IN THE DEED IS DEEMED TO REFLECT THE FINAL AGREEMENT OF THE PARTIES (ABSENT FRAUD OR AMBIGUITY IN THE DEED); PLAINTIFFS' COMPLAINT SHOULD HAVE BEEN DISMISSED (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined, pursuant to the merger doctrine, the contract for the sale of land merged with the deed when the deal was closed. The deed therefore represents the final agreement of the parties. The plaintiff alleged the deed description did not match the description in the contract and demanded that the deed be "corrected" to include an additional parcel of land:

… [W]e agree with defendants that the court erred in denying the motion with respect to the breach of contract and quiet title causes of action. Those causes of action are barred by the merger doctrine. "It is settled law that, where a contract for the sale of land has been executed by a conveyance, the terms of the contract concerning the nature and extent of property conveyed merge into the deed and any inconsistencies between the contract and the deed are to be explained and governed solely by the deed, which is presumed to contain the final agreement of the parties" … . Exceptions to the merger doctrine include "where the parties have expressed their intention that [a] provision shall survive delivery of the deed" … , where the deed is ambiguous with respect to the land conveyed …, and where there exists a valid fraud cause of action … . Pickard v Campbell, 2022 NY Slip Op 04442, Fourth Dept 7-8-22

Practice Point: Any discrepancy between the property as described in a real estate contract and as described in the deed is resolved by the merger doctrine. Absent fraud or ambiguity in the deed, the deed description controls.

SLIP AND FALL, CONSTRUCTIVE NOTICE.

DEFENDANTS DID NOT DEMONSTRATE THEY DID NOT CREATE OR HAVE CONSTRUCTIVE KNOWLEDGE OF THE PUDDLE ON THE FLOOR WHERE PLAINTIFF SLIPPED AND FELL; DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (FOURTH DEPT).

The Fourth Department, reversing (modifying) Supreme Court, determined defendants (Niagara County Jail and County Sheriff) did not demonstrate they did not create or have constructive notice of the puddle on the floor where plaintiff slipped and fell:

… [D]efendants failed to establish that they did not create the dangerous condition and thus that the court erred in granting the motion with respect to that claim, and we modify the order accordingly … . Defendants submitted evidence that adult visitors and inmates were not allowed to bring drinks to the visitation room, but correction officers, at least three of whom were in the room during visits, were allowed to have drinks in the room. Defendants did not submit evidence that the

correction officers in the room did not create the puddle of water on the floor. Although defendants submitted evidence that child visitors were allowed at the time to bring drinks in bottles or sippy cups, they did not submit evidence that any children were in the visitation room that morning before plaintiff entered the room. …

Defendants submitted evidence that employees performed safety inspections of the visitation room, including looking for slipping hazards on the floor, on a routine basis. In particular, the room was inspected before the first visit, throughout the day, and at the end of a shift. Defendants submitted evidence that a correction officer inspected the room at 7:45 a.m. before the first group of visitors arrived at 8:30 a.m. Plaintiff was one of the second group of visitors that day and entered the visitation room at approximately 9:30 a.m. We conclude that the reasonableness of defendants' inspection practices and whether the dangerous condition existed for a sufficient length of time prior to the accident to permit defendants' employees to discover and remedy it are issues for a jury to determine … , and defendants failed to establish as a matter of law that they did not have constructive notice of the dangerous condition … . Propst v Niagara County Jail, 2022 NY Slip Op 04486, Fourth Dept 7-8-22

Practice Point: To warrant summary judgment in a slip and fall case, a defendant must show it did not create or have notice of the condition, here a puddle on the floor, which caused plaintiff to fall. The absence of constructive notice is usually demonstrated by an inspection of the area close in time to the fall. Here the defendants presented evidence of an inspection an hour and 45 minutes before the fall, which was deemed to raise a question of fact on constructive notice for the jury.

TRUSTS AND ESTATES, CONTRACT LAW, DEMENTIA IS NOT INCAPACITY OR INCOMPETENCE.

PETITIONER SOUGHT TO DEMONSTRATE THAT HIS DECEASED MOTHER DID NOT HAVE THE CAPACITY TO EXECUTE A DOCUMENT DESIGNATING RESPONDENT AS HER AGENT TO CONTROL THE DISPOSITION OF HER REMAINS; PETITIONER SUBMITTED PROOF HIS MOTHER HAD BEEN DIAGNOSED WITH DEMENTIA, BUT DEMENTIA IS NOT THE EQUIVALENT OF INCOMPETENCE OR INCAPACITY; THE PETITION SHOULD HAVE BEEN DISMISSED (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, held that the petition pursuant to Public Health Law 4201 for a determination concerning the disposition of petitioner's deceased mother's remains should have been dismissed. The deceased was also the mother of the respondent in this action. The issue was whether the deceased had the capacity to execute a document designating the respondent as her agent to control the disposition of her remains. The proceeding under the Public Health Law is handled like a motion for summary judgment. Although petitioner demonstrated his mother was diagnosed with dementia in 2014, dementia is not the equivalent of incompetence:

Every dispute relating to the disposition of the remains of a decedent shall be resolved . . . pursuant to a special proceeding" (Public Health Law § 4201 [8]). Upon the return date of the petition in a special proceeding, "[t]he court shall make a summary determination upon the pleadings, papers and admissions to the extent that no triable issues of fact are raised," and "may make any orders permitted on a motion for summary judgment" (CPLR 409 [b] …). "[E]very hearing of a special proceeding is equivalent to the hearing of a motion for summary judgment" … . …

Even assuming, arguendo, that the heightened contractual capacity standard is applicable in this case … , we conclude that petitioner failed to establish that the decedent was incapable "of comprehending and understanding the nature of the transaction at issue" … . Although petitioner submitted evidence establishing that the decedent had been diagnosed with dementia in 2014, "there is no presumption that a person suffering from dementia is wholly incompetent" … . "Rather, it must be demonstrated that, because of the affliction, the individual was incompetent at

the time of the challenged transaction" … . Here, petitioner failed to set forth any evidence that the decedent was without capacity to execute the designating document in September 2017 … . Matter of Hurlbut v Leo M. Bean Funeral Home, Inc., 2022 NY Slip Op 04439, Fourth Dept 7-8-22

Practice Point: A proceeding pursuant to the Public Health Law to determine the disposition of the remains of a decedent is in the nature of a special proceeding and is handled like a summary judgment motion. Here the petitioner did not raise a question of fact about whether the decedent had the capacity to designate the respondent as her agent to control the disposition of her remains. Proof decedent had been diagnosed with dementia did not raise a question of fact about decedent's competence or capacity.