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Second Department
Quarterly Reversal
Report
April – June, 2022

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APPEALS, CRIMINAL LAW, SEX OFFENDER STATUS IS NOT PART OF A SENTENCE.

SEX OFFENDER CERTIFICATION IS NOT PART OF A SENTENCE AND THEREFORE IS NOT COVERED BY THE UNLAWFUL-SENTENCE EXCEPTION TO THE PRESERVATION REQUIREMENT; THEREFORE THE UNPRESERVED ISSUE COULD NOT BE CONSIDERED BY THE COURT OF APPEALS; HOWEVER, UPON REMITTAL, THE ISSUE CAN BE (AND WAS) CONSIDERED AT THE APPELLATE DIVISION LEVEL IN THE INTEREST OF JUSTICE (SECOND DEPT).

The Second Department, upon remittal from the Court of Appeals, adhered to its prior decision finding defendant's certification as a sex offender unlawful. The Court of Appeals ruled that sex-offender certification is not part of a sentence and therefore is not covered by an exception to the preservation requirement. But, because the Appellate Division, unlike the Court of Appeal, has "interest-of-

justice" jurisdiction, the prior decision was upheld in the interest of justice by the Second Department, despite the lack of preservation:

In an opinion dated November 23, 2021, the Court of Appeals concluded that sex offender certification is not part of a defendant's sentence, and thus, a contention regarding sex offender certification does not fall within the exception to the preservation rule for challenges to unlawful sentences … . However, the Court of Appeals noted that although it does not have interest-of-justice jurisdiction to review unpreserved issues, the "Appellate Division may have authority to take corrective action in the interest of justice based upon defendant's unpreserved challenge to the legality of his certification as a sex offender" … . Accordingly, the Court of Appeals remitted the matter to this Court for further proceedings … .

We now reach the defendant's unpreserved contention in the exercise of our interest of justice jurisdiction (see CPL 470.15[3][c]; [6][a]). For the reasons stated in our prior opinion and order, the defendant's certification as a sex offender was unlawful … .People v Buyund, 2022 NY Slip Op 03004, Second Dept 5-4-22

Practice Point: The Court of Appeals does not have interest-of-justice jurisdiction and therefore cannot consider appellate issues that are not preserved. The Appellate Division, however, can invoke interest-of-justice jurisdiction to consider unpreserved appellate issues.

APPEALS, FAMILY LAW, CUSTODY.

CHANGED CIRCUMSTANCES BROUGHT TO THE APPELLATE COURT'S ATTENTION BY THE ATTORNEYS FOR THE CHILDREN RENDERED THE RECORD INSUFFICIENT FOR REVIEW OF THE CUSTODY RULING; MATTER REMITTED (SECOND DEPT).

The Second Department determined changed circumstances brought to the Second Department's attention by the attorneys for children rendered the appellate record insufficient for review of Family Court's custody ruling. The matter was remitted:

… [T]he Family Court determined that it was in the best interests of the children for the mother to have sole residential custody. However, the respective attorneys for the children, in their briefs submitted to this Court, have brought to this Court's attention certain alleged new developments since the order under review was issued in June 2019. As the Court of Appeals has recognized, changed circumstances may have particular significance in child custody matters and may render the record on appeal insufficient to review whether a child custody determination is still in the best interests of the children … . Matter of Fitzsimmons v Fitzsimmons, 2022 NY Slip Op 02411, Second Dept 4-13-22

Practice Point: In a child custody case, changed circumstances may render the record on appeal insufficient. Here the attorneys for the children brought the changed circumstances to the attention of the appellate court in their briefs and the court remitted the matter to Family Court.

ARBITRATION, CONTRACT LAW, EMPLOYMENT LAW, AGREEMENT TO ARBITRATE MUST BE SPECIFIC.

TO BE ENFORCABLE, AN AGREEMENT TO ARBITRATE MUST BE CLEAR, EXPLICIT AND UNEQUIVOCAL; HERE THE WORD "DISAGREEMENTS" IN THE ARBITRATION CLAUSE WAS TOO VAGUE AND AMBIGUOUS TO REQUIRE PLAINTIFF TO ARBITRATE HER CLAIMS OF UNPAID COMMISSIONS AND WRONGFUL TERMINATION (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the arbitration clause in the employment agreement was ambiguous and vague. The clause could not be the basis for forcing plaintiff to arbitrate her claims that she was not paid commissions owed to her and was wrongfully terminated:

… "[A] party will not be compelled to arbitrate and, thereby, to surrender the right to resort to the courts, absent 'evidence which affirmatively establishes that the parties expressly agreed to arbitrate their disputes'" … . "The agreement must be clear, explicit and unequivocal and must not depend upon implication or subtlety" … .

Here, the provision, "[t]hird party in case of a disagreement: Rabbi Shlomo Gross (Belze Dayan) or Rabbi Meir Labin," does not expressly and unequivocally establish that the parties agreed to arbitrate the plaintiffs' claims for unpaid commissions or wrongful termination … . Moreover, this provision ambiguously refers to a disagreement, but does not specify the types of disagreements to which it applies … . Rubinstein v C & A Mktg., Inc., 2022 NY Slip Op 03136, Second Dept 5-11-22

Practice Point: Plaintiff alleged the defendant employer did not pay her commissions she was owed and wrongfully terminated her. Although the employment contract called for the arbitration of "disagreements," that term was not specific enough to serve as a basis for forcing plaintiff to arbitrate her unpaid-commission and wrongful-termination claims.

ARBITRATION, EDUCATION-SCHOOL LAW, EMPLOYMENT LAW.

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

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

… [T]he hearing officer's finding that there was insufficient evidence to support a finding that the petitioner acted intentionally is inconsistent with a finding that the petitioner was guilty of any of the charges. Each of the 41 charges against the petitioner alleged that she knowingly and willfully approved the conferral of credits with full knowledge that such credit was unlawful, as part of an intentional scheme to accelerate credit acquisition in order to artificially inflate graduation

rates. Because there was no allegation that the petitioner's conduct was anything other than knowing and intentional, and because the hearing officer found that there was insufficient evidence that the petitioner acted intentionally, the hearing officer's determination that the petitioner was guilty of all charges was arbitrary and capricious and without evidentiary support. At the hearing, the petitioner admitted to conduct that was, at most, negligent. There was no evidence to contradict the petitioner's testimony that she did not act intentionally. Matter of Simpson v Poughkeepsie City Sch. Dist., 2022 NY Slip Op 03730, Second Dept 6-8-22

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

ARBITRATION, IRRATIONAL DETERMINATION.

AN ARBITRATOR'S DETERMINATION WILL NOT BE REVERSED BECAUSE OF AN ERROR OF LAW, BUT WILL BE REVERSED WHERE, AS HERE, IT IS IRRATIONAL (SECOND DEPT).

The Second Department, reversing the arbitrator, noted that an arbitrator's determination will not be reversed because of an error of law, but will be reversed if the determination is irrational. Here the arbitrator's determinations with respect to no-fault insurance coverage were deemed irrational:

"[A] master arbitrator's determination of the law need not be correct: mere errors of law are insufficient to set aside the award of a master arbitrator" … . "If the master arbitrator vacates the arbitrator's award based upon an alleged error of 'a rule of substantive law,' the determination of the master arbitrator must be upheld unless it is irrational" … . …

The master arbitrator's determination that a denial of liability based upon a failure to appear at an examination under oath constitutes a defense of lack of coverage, which is not subject to preclusion, is irrational … . Further, the master arbitrator's application of 11 NYCRR 65-3.5(p) is irrational, as it effectively allows an insurer to avoid the statutory timeliness requirements set forth in 11 NYCRR 65-3.8(a). Where, as here, the initial request for an examination under oath is sent more than 30 days after receipt of the claim, the request is a nullity … , and the insurer's failure to timely notice the examination under oath is not excused by 11 NYCRR 65-3.5(p) … . Matter of Advanced Orthopaedics, PLLC v Country-Wide Ins. Co., 2022 NY Slip Op 02406, Second Dept 4-13-22

Practice Point: An arbitrator's determination will not be reversed because the arbitrator made an error of law. Only an irrational determination will be reversed by a court.

ATTORNEYS, CIVIL PROCEDURE, LAW OFFICE FAILURE.

HERE PLAINTIFF'S ATTORNEY OFFERED A DETAILED, CREDIBLE EXPLANATION OF THE LAW OFFICE FAILURE WHICH RESULTED IN MISSING THE DEADLINE FOR PROVIDING DISCOVERY, AS WELL AS THE DEMONSTRATION OF POTENTIALLY MERITORIOUS CAUSES OF ACTION; DEFENDANTS' MOTIONS TO ENFORCE THE PRECLUSION ORDER SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff's attorney offered a reasonable "law office failure" excuse for not complying with a discovery deadline (conditional order of preclusion):

"The court has discretion to accept law office failure as a reasonable excuse (see CPLR 2005) where that claim is supported by a detailed and credible explanation of the default at issue" … . "Conversely, where a claim of law office failure is conclusory and unsubstantiated or lacking in credibility, it should be rejected" … .

Here, in opposition to the defendants' separate motions, inter alia, in effect, to enforce the conditional order, the plaintiff's counsel provided a detailed and

credible explanation of the law office error that resulted in the failure to comply with the conditional order … . The plaintiff also demonstrated potentially meritorious causes of action … . Fortino v Wheels, Inc., 2022 NY Slip Op 02393, Second Dept 4-13-22

Practice Point: Here counsel offered a detailed, credible explanation for law office failure (failure to comply with a deadline for discovery). That explanation was coupled with the demonstration of potentially meritorious causes of action. Defendant's motion to enforce the conditional preclusion order should not have been granted.

ATTORNEYS, CRIMINAL CONTEMPT.

PLAINTIFF'S COUNSEL SHOULD HAVE BEEN HELD IN CRIMINAL CONTEMPT FOR ISSUING SUBPOENAS IN DEFIANCE OF AN ORDER STAYING THE PROCEEDINGS; DIFFERENCE BETWEEN CIVIL AND CRIMINIAL CONTEMPT EXPLAINED (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined plaintiff's counsel should have been found in criminal contempt for issuing subpoenas in defiance of Supreme Court order staying any further action in the case:

In contrast to civil contempt, because the purpose of criminal contempt is to vindicate the authority of the court, no showing of prejudice is required … . Instead, "[a]llegations of willful disobedience of a proper judicial order strike at the core of the judicial process and implicate weighty public and institutional concerns regarding the integrity of and respect for judicial orders" … . …

Notwithstanding [the court's order], the plaintiff's counsel issued subpoenas on six separate occasions. When … the Supreme Court reiterated the terms of the stay, both via interim relief granted in the order to show cause and in a separate order, the plaintiff's counsel did not desist but instead served four more subpoenas and moved to compel the production of subpoenaed documents. This conduct evidences a lack of "respect for judicial orders" and warranted holding the

plaintiff's counsel in criminal contempt … . Under the circumstances of this case, we deem the statutory maximum sanction of $1,000 per offense warranted and therefore impose a total sanction of $10,000. Madigan v Berkeley Capital, LLC, 2022 NY Slip Op 03237, Second Dept 5-18-22

Practice Point: Criminal contempt seeks to vindicate the authority of the court. Therefore no showing of prejudice is required. Here plaintiff's counsel issued subpoenas in defiance of an order of the court. A $10,000 sanction for criminal contempt was imposed on the attorney by the appellate court.

CIVIL PROCEDURE, AMENDMENT OF AFFIDAVIT OF SERVICE.

DEFENDANT RAISED A QUESTION OF FACT WHETHER THE ADDRESS AT WHICH SERVICE OF PROCESS WAS ATTEMPTED WAS DEFENDANT'S ACTUAL PLACE OF BUSINESS; AN AFFIDAVIT OF SERVICE MAY NOT BE AMENDED TO CURE AN ERRONEOUS ADDRESS (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the defendant's affidavit that the address at which service of process was made was not his business address and the affidavit of service could not be amended to cure the address-error:

… [A]n affidavit submitted by [defendant] Harooni … was sufficient to demonstrate that the address where service was alleged to have been effected in the affidavit of service … , was not in fact the address of Harooni's 'actual place of business' (CPLR 308[2] …). … Pursuant to CPLR 305(c), a court, '[a]t any time, in its discretion and upon such terms as it deems just, . . . may allow any . . . proof of service of a summons to be amended, if a substantial right of a party against whom the summons is issued is not prejudiced' … . An 'erroneous address' contained in an affidavit of service affects a defendant's substantial right to notice of the proceeding against him or her, and may not be corrected by an amendment …". **Jampolskaya v Ilona Genis, MD, P.C., 2022 NY Slip Op 03104, Second Dept 5-11-22**

Practice Point: An affidavit of service may be amended, but not to correct the wrong address.

CIVIL PROCEDURE, ATTORNEYS, FAILURE TO PROVIDE DISCOVERY, SANCTIONS.

A MONETARY PENALTY IMPOSED UPON PLAINTIFF'S ATTORNEY, AS OPPOSED TO DISMISSAL OF THE COMPLAINT, WAS THE APPROPRIATE SANCTION FOR PLAINTIFF'S FAILURE TO PROVIDE DISCOVERY (SECOND DEPT).

The Second Department, reversing Supreme Court, determined sanctioning plaintiff's attorney for failing to provide discovery, rather than dismissal of the complaint, was the best way to handle plaintiff's inaction:

… [T]he plaintiff's attorneys failed to comply with the defendants' demands for a bill of particulars and discovery, did not object to those demands, and did not respond in any way to follow-up communications from the defendants' attorneys until opposition to the motions was filed. Moreover, in response to the motions, the plaintiff's attorneys failed to articulate any excuse for this series of failures … .

Notwithstanding this dereliction of responsibility, at the time the defendants moved … to dismiss the complaint insofar as asserted against each of them, the plaintiff was not in violation of any court-ordered deadlines … . In fact, the defendants also both moved … to compel the plaintiff to comply with their respective discovery demands by a date certain. And … not long after the defendants' motions were filed, the plaintiff began to produce the requested materials, albeit with some alleged deficiencies.

Under these circumstances, we are of the view that reinstatement of the complaint conditioned upon the payment of a penalty by the plaintiffs' trial counsel personally to both defendants would be more appropriate than the outright denial of the plaintiff's right to a day in court … . Cook v SI Care Ctr., 2022 NY Slip Op 03225, Second Dept 5-18-22

Practice Point: Here a monetary penalty imposed personally upon plaintiff's attorney, as opposed to dismissal of the complaint, was deemed the appropriate penalty for plaintiff's failure to provide discovery.

CIVIL PROCEDURE, CHANGE OF VENUE, PROPER PROCEDURE.

WHEN A PARTY BRINGS A MOTION TO CHANGE VENUE IN THE COUNTY TO WHICH THE PARTY WANTS VENUE CHANGED, AS OPPOSED TO THE COUNTY WHERE THE ACTION WAS STARTED, THE PARTY MUST USE THE SPECIAL PROCEDURE IN CPLR 511 (A) AND (B), WHICH REQUIRES MAKING A DEMAND ON THE OTHER PARTY BEFORE BRINGING A MOTION; HERE THE SPECIAL PROCEDURE WAS NOT USED, THE MOTION TO CHANGE VENUE WAS MADE IN THE "WRONG COUNTY" AND SHOULD HAVE BEEN DISMISSED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the defendant nursing home's motion to change venue should have been denied. Unless a party follows the special procedure in CPLR 511(a) and (b), which requires making a demand on the other party before bringing a motion, a motion to change venue must be brought in the county where the action was started. Here the defendant did not use the special procedure and brought the motion to change venue in the county where defendant sought to move the proceedings. That was the wrong county for the motion:

This Court has stated that "[w]here . . . a motion to change venue . . . is made in the 'wrong county' and timely objection is raised to the improper venue of the motion itself, Special Term should deny the motion" … . Contrary to the defendant's contention, neither CPLR 501 nor CPLR 511(b) provided a basis for it to notice the motion in Nassau County. Allen v Morningside Acquisition I, LLC, 2022 NY Slip Op 03219, Second Dept 5-18-22

Practice Point: Here the party made a motion to change venue in the county to which the party wanted venue changed. That was deemed the "wrong county" and the motion was dismissed because the party did not first use the special procedure

in CPLR 511 (a) an (b) which requires making a demand on the other party before bringing the motion.

CIVIL PROCEDURE, CHILD VICTIMS ACT, NON-RESIDENT PLAINTIFF.

PLAINTIFF, A FLORIDA RESIDENT, ALLEGEDLY WAS ABUSED BY A PRIEST IN FLORIDA IN 1983 AND 1984; PLAINTIFF SUED THE DIOCESE OF BROOKLYN BECAUSE THE PRIEST WHO ALLEGEDLY ABUSED HIM WAS TRANSFERRED FROM BROOKLYN TO FLORIDA, ALLEGEDLY BECAUSE OF SEXUAL MISCONDUCT WITH CHILDREN; THE CHILD VICTIMS ACT DOES NOT APPLY TO THE NONRESIDENT PLAINTIFF AND THE BORROWING STATUTE DOES APPLY; THEREFORE FLORIDA'S FOUR-YEAR STATUTE OF LIMITATIONS RENDERED PLAINTIFF'S ACTION TIME-BARRED (SECOND DEPT).

The Second Department, in a full-fledged opinion, in a matter of first impression, by Justice Christopher, determined the New York Child Victims Act, CPLR 214-g, is not available to nonresident plaintiffs where the alleged acts of abuse occurred outside New York. CPLR 214-g extends the statute of limitations to allow lawsuits by plaintiffs who were children at the time of the abuse. The Second Department further determined CPLR 214-g does not preclude the application of the borrowing statute, CPLR 202. Here the plaintiff, a Florida resident, alleged the acts of abuse were committed in Florida in 1983 and 1984 by Father William Authenrieth. Plaintiff alleged Father Authenrieth was transferred from the Diocese of Brooklyn to the Florida Diocese of Orlando (Florida) in 1973 because of his sexual misconduct with children. Hence the suit by the Florida plaintiff against the Diocese of Brooklyn. Because CPLR 214-g does not apply and CPLR 202, the borrowing statute, requires the application of Florida's four-year statute of limitations, plaintiff's suit is time-barred:

… [U]nder the circumstances of this case, CPLR 214-g does not apply extraterritorially, where the plaintiff is a nonresident, and the alleged acts of sexual abuse were perpetrated by a nonresident outside of New York … . * * *

… [U]nder these circumstances the borrowing statute would apply, and since the plaintiff's action is time-barred in Florida, it would also be time-barred in New York, unless, as argued by the plaintiff, CPLR 214-g precludes the application of CPLR 202. … We answer that question in the negative. Therefore, even if CPLR 214-g applied extraterritorially, the plaintiff's action would be dismissed as time-barred pursuant to CPLR 202. S.H. v Diocese of Brooklyn, 2022 NY Slip Op 02982, Second Dept 5-4-22

Practice Point: The Child Victims Act, which extends the statute of limitations for plaintiffs who were abused as children, does not apply to this Florida plaintiff who was allegedly abused in Florida. Plaintiff sued the Diocese of Brooklyn under the theory that the priest who abused him in Florida in 1983 and 1984 was transferred to Florida from Brooklyn, allegedly because of sexual misconduct with children. New York's borrowing statute applied rendering the action time-barred under Florida's four-year statute of limitations.

CIVIL PROCEDURE, MOTIONS TO RENEW, SUCCESSIVE SUMMARY JUDGMENT MOTIONS.

WHEN THE FAILURE TO PRESENT FACTS IN A PRIOR MOTION IS NOT JUSTIFIED, THE SECOND MOTION DOES NOT FIT THE CRITERIA FOR A MOTION TO RENEW OR AN ALLOWABLE SUCCESSIVE SUMMARY JUDGMENT MOTION (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the bank's motion in this foreclosure action did not fit the criteria for a motion to renew or an allowable successive summary judgment motion. The judgment of foreclosure should not have been granted;

"When no reasonable justification is given for failing to present new facts on the prior motion, the Supreme Court lacks discretion to grant renewal" … . Here, the plaintiff failed to provide any justification for its failure to present the new evidence supporting its renewal motion as part of its prior motion.

Even considered as a successive motion for summary judgment, such a motion "should not be entertained in the absence of good cause, such as a showing of newly discovered evidence" … . Wells Fargo Bank, N.A. v Osias, 2022 NY Slip Op 03275, Second Dept 5-18-22

Practice Point: Attempting to bring a second motion which includes "new" facts, without a reasonable justification for leaving them out of the first motion, does not fit the criteria for a motion to renew or an allowable successive summary judgment motion.

CIVIL PROCEDURE, AMENDMENT OF BILL OF PARTICULARS.

PLAINTIFFS WERE ENTITLED TO AMEND THE BILL OF PARTICULARS TO THE EXTENT THE AMENDMENT AMPLIFIED THE ALLEGATIONS ALREADY MADE WITHOUT OBJECTION IN THE SUPPLEMENTAL BILL OF PARTICULARS (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined plaintiffs were entitled to amplify the allegations in the supplemental bill of particulars in second and proposed third supplemental and amended bill of particulars:

The plaintiffs were entitled to amend their bill of particulars once as of right at any time prior to the filing of the note of issue … . Such amendment enables a party to include whatever could have been included in the original bill of particulars … . "'Whatever the pleading pleads, the bill must particularize since the bill is intended to [afford] the adverse party a more detailed picture of the claim . . . being particularized'" … . B. E. M. v Warwick Val. Cent. Sch. Dist., 2022 NY Slip Op 02990, Second Dept 5-4-22

Practice Point: Here plaintiffs were entitled to amend the supplemental bill of particulars to the extent the amendment amplified allegations already made without objection in the supplemental bill of particulars.

CIVIL PROCEDURE, CONTRACT LAW, INSURANCE LAW, PUNITIVE DAMAGES.

PLAINTIFF'S CLAIM FOR PUNITIVE DAMAGES IN THIS BREACH OF AN INSURANCE CONTRACT ACTION SHOULD HAVE BEEN DISMISSED, CRITERIA EXPLAINED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the punitive damages claim against defendant insurer should have been dismissed. Plaintiff was struck by a vehicle when she was in a cross-walk. She settled with the driver's insurer, with her insurer's consent, for $25,000. She the brought this breach of contract action against defendant insurer for $225,000, plus punitive damages for a bad-faith breach of the insurance contract:

The elements required to state a claim for punitive damages when the claim arises from a breach of contract are: (1) the defendant's conduct must be actionable as an independent tort; (2) the tortious conduct must be of the egregious nature set forth in Walker v Sheldon [10 NY2d 401]; (3) the egregious conduct must be directed to the plaintiff; and (4) it must be part of a pattern directed at the public generally. Where a lawsuit has its genesis in the contractual relationship between the parties, the threshold task for a court considering a defendant's motion to dismiss a demand for punitive damages is to identify a tort independent of the contract … .

… [T]he plaintiff failed to allege an independent tort. There is no separate tort for bad faith refusal to comply with an insurance contract … . While an insurer may be held liable for damages to its insured for the bad faith refusal of a settlement offer … , the plaintiff here failed to state such a cause of action. …

The plaintiff has not alleged any facts from which an inference can be drawn that the defendant's conduct constituted a gross disregard of the plaintiff's interests. …

The plaintiff failed to allege any facts from which an inference can be drawn that the defendant's conduct was of an egregious nature as set forth in Walker v Sheldon, such that it was morally reprehensible and of such wanton dishonesty as to imply a criminal indifference to civil obligations … . Schlusselberg v New York Cent. Mut. Fire Ins. Co., 2022 NY Slip Op 03539, Second Dept 6-1-22

Practice Point: The criteria for punitive damages for breach of contract are difficult to meet. The defendant's conduct must amount to an independent tort, be morally reprehensible, wantonly dishonest, and criminally indifferent to civil obligations. Here, those criteria were not met by the allegations of breach of an insurance contract.

CIVIL PROCEDURE, COVID-RELATED DELAY.

DEFENDANTS WERE UNABLE TO COMPLETE DISCOVERY BECAUSE OF PLAINTIFF'S ILLNESS AND THE COVID-19 SHUTDOWN; DEFENDANTS' MOTION TO EXTEND THE TIME FOR FILING A SUMMARY JUDGMENT MOTION SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendants' motion to extend the time for making a summary judgment, for reasons related to COVID-19, should have been granted:

… [T]he defendants submitted evidence showing that after their prior motion was decided, the plaintiff did not attend scheduled independent medical examinations because of illness and that discovery was further delayed by the COVID-19 shutdown. As a result, the defendants established good cause for their failure to timely move for summary judgment … . Under these COVID-19-related circumstances, the Supreme Court improvidently denied those branches of the defendants' motion which were for leave to renew those branches of their prior motion which were to vacate the note of issue and certificate of readiness and extend the time to move for summary judgment. Upon renewal, the court should have granted those branches of the defendants' motion which were to vacate the note of issue and certificate of readiness and to extend the time to move for summary judgment. We therefore remit the matter to the Supreme Court, Kings County, for the selection of a new date by which summary judgment motions shall be filed…. . Newfeld v Midwood Ambulance & Oxygen Serv., Inc., 2022 NY Slip Op 02422, Second Dept 4-13-22

Practice Point: The COVID-19 shutdown was a valid excuse for defendants' inability to complete discovery. Defendants' motion to extend the time to file a summary judgment motion should have been granted.

CIVIL PROCEDURE, DEFAULT JUDGMENTS.

THE BANK DID NOT OFFER A REASONABLE EXCUSE FOR FAILURE TO TAKE PROCEEDINGS FOR A DEFAULT JUDGMENT WITHIN A YEAR AND DID NOT SUBMIT AN ADEQUATE LOST NOTE AFFIDAVIT; THE DEFAULT JUDGMENT IN THIS FORECLOSURE ACTION SHOULD NOT HAVE BEEN GRANTED; THE ACTION IS DEEMED ABANDONED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the bank in this foreclosure action did not submit sufficient evidence to support a late motion for default judgment against the borrower. The bank did not offer a reasonable excuse for failure to take proceedings for a default judgment within a year, and did not submit a sufficient lost note affidavit. The Second Department deemed the action abandoned pursuant to CPLR 3215:

… [T]he plaintiff failed to proffer a reasonable excuse for its failure to take proceedings for the entry of a judgment within one year after the action was released from the foreclosure settlement part … .

Further, a plaintiff moving for leave to enter default judgment against a defendant must submit proof of service of the summons and complaint, proof of the facts constituting the claim, and proof of the defendant's failure to answer or appear … . Pursuant to UCC 3-804, "[t]he owner of an instrument which is lost, whether by destruction, theft or otherwise, may maintain an action in his [or her] own name and recover from any party liable thereon upon due proof of his [or her] ownership, the facts which prevent his [or her] production of the instrument and its terms." Here, the plaintiff failed to set forth the facts that prevented the production of the original note … . The lost note affidavit submitted by the plaintiff in support of its motion, inter alia, for leave to enter a default judgment did not identify who conducted the search for the lost note or explain when or how the note was lost … . LaSalle Bank N.A. v Carlton, 2022 NY Slip Op 02785, Second Dept 4-27-22

Practice Point: If the bank does not present an adequate excuse for failing to take proceedings for a default judgment in a foreclosure action within one year, the action will be deemed abandoned pursuant to CPLR 3215.

CIVIL PROCEDURE, GOOD FAITH EFFORT TO FILE AND SERVE OPPOSITION PAPERS.

PETITIONER DEMONSTRATED A GOOD FAITH EFFORT TO TIMELY FILE AND SERVE HIS OPPOSITION PAPERS AND DEMONSTRATED A POTENTIALLY MERITORIOUS CAUSE OF ACTION; SUPREME COURT HAD REFUSED TO CONSIDER THE OPPOSITION PAPERS BEFORE ISSUING ITS ORDER DISMISSING THE PETITION; THE ORDER SHOULD HAVE BEEN VACATED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined petitioner's motion to vacate an order dismissing the petition issued after Supreme Court refused to consider petitioner's opposition papers should have been granted. Petitioner had made a good faith effort to timely file and serve the papers and demonstrated a potentially meritorious cause of action:

The petitioner, who had until July 13, 2018, to submit opposition papers to the respondents' motion, filed pro se opposition papers with the court on July 13, 2018. He failed, however, to properly serve the respondents with a copy of the opposition papers, or to provide the court with proper proof of service. Nonetheless, the petitioner did file with the court a defective affidavit of service, in which dates of service were blank and which was neither signed nor notarized. Moreover, a copy of the opposition papers that the petitioner had emailed to the respondents was later discovered in the "junk" email folder of the respondents' counsel. "Clearly, the [petitioner] made a good faith, albeit unsuccessful, attempt to timely . . . respond to the motion," and the court "should have considered the absence of any evidence that the [petitioner's] default was intentional, made in bad faith, or with an intent to abandon the action" … .

… [T]he petitioner's arguments in support of the amended petition demonstrate a potentially meritorious cause of action … . Lastly, the respondents have "neither alleged nor established that [they] would be prejudiced by vacating the default and hearing the matter on the merits" … . Matter of Brennan v County of Rockland, 2022 NY Slip Op 03240, Second Dept 5-16-22

Practice Point: Here petitioner's good faith effort to timely file and serve his opposition papers demonstrated he did not intend to abandon the action. Supreme Court should not have refused to consider his opposition papers before issuing its order dismissing the petition. The order should have been vacated.

CIVIL PROCEDURE, JUDGES, SUA SPONTE DISMISSAL.

ABSENT "EXTRAORDINARY CIRCUMSTANCES," A JUDGE DOES NOT HAVE THE AUTHORITY TO, SUA SPONTE, DISMISS A COMPLAINT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the judge should not have, sua sponte, dismissed the complaint because there were no "extraordinary circumstances:"

The Supreme Court erred … in, sua sponte, directing dismissal of the complaint … . "'A court's power to dismiss a complaint, sua sponte, is to be used sparingly and only when extraordinary circumstances exist to warrant dismissal'" … . Here, although the plaintiff's submissions were insufficient to demonstrate his entitlement to a default judgment, no extraordinary circumstances existed to warrant dismissal of the complaint … . Binder v Tolou Realty Assoc., Inc., 2022 NY Slip Op 03223, Second Dept 5-18-22

Practice Point: Absent so-called "extraordinary circumstances." a judge does not have the authority to, sua sponte, dismiss a complaint. Here plaintiff's evidence was not sufficient to support a default judgment, but that insufficiency did not justify dismissing the complaint.

CIVIL PROCEDURE, LATE ANSWER, MOTION TO COMPEL ACCEPTANCE.

PLAINTIFF SERVED THE COMPLAINT ON NOVEMBER 27, 2018; DEFENDANT ATTEMPTED TO SERVE AN ANSWER, WHICH WAS REJECTED, ON JANUARY 9, 2019; DEFENDANT'S EXCUSE WAS "THE DELAY WAS CAUSED BY THE INSURANCE CARRIER;" THAT EXCUSE WAS INSUFFICIENT AND DEFENDANT'S MOTION TO COMPEL PLAINTIFF TO ACCEPT THE ANSWER SHOULD HAVE BEEN DENIED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant did not offer a reasonable excuse for serving a late answer (which was rejected) in this slip and fall case. Therefore, defendant's motion to compel plaintiff to accept the answer should not have been granted. Defendant was served with the complaint on November 27, 2018, and defendant attempted to serve the answer on January 9, 2019:

The bare allegation by the defendant's attorney that the delay was caused by the defendant's insurance carrier is insufficient to excuse the delay in answering the complaint … . The absence of a reasonable excuse for the defendant's default renders it unnecessary to determine whether she demonstrated the existence of a potentially meritorious defense … . Goldstein v Ilaz, 2022 NY Slip Op 04154, Second Dept 6-29-22

Practice Point: Here the defendant attempted to serve an answer, which was rejected, about a month and a half after plaintiff served the complaint. Defendant moved to compel the plaintiff to accept the answer. Defendant's excuse was that the "delay was caused by the insurance carrier" with no further explanation. The Second Department deemed the excuse insufficient and ruled that the motion to compel acceptance of the answer should not have been granted.

CIVIL PROCEDURE, LATE MOTION TO SET ASIDE THE VERDICT.

ABSENT A SHOWING OF GOOD CAUSE FOR THE DELAY, A MOTION TO SET ASIDE A VERDICT MADE MORE THAN 15 DAYS AFTER THE VERDICT WAS RENDERED SHOULD NOT BE GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the defendants' motion to set aside the verdict as against the weight of the evidence should not have been granted because it was made more than 15 days after the jury verdict:

The Supreme Court should have denied the defendants' motion pursuant to CPLR 4404(a) as untimely, as it was made more than 15 days after the jury verdict was rendered, without good cause shown for the delay … . Galarza v Heaney, 2022 NY Slip Op 02395, Second Dept 4-13-22

Practice Point: A motion to set aside a verdict made more than 15 days after the verdict was rendered, without a demonstration of good cause for the delay, should not be granted.

CIVIL PROCEDURE, TRAFFIC ACCIDENTS, JOINT TRIAL.

PLAINTIFF'S TWO SEPARATE TRAFFIC ACCIDENTS SHOULD BE TRIED TOGETHER BECAUSE PLAINTIFF ALLEGED THE INJURIES FROM THE FIRST ACCIDENT WERE EXACERBATED BY THE SECOND ACCIDENT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff's two separate traffic accidents should be tried jointly because plaintiff claimed the second accident exacerbated the injuries from the first accident:

… [I]n view of the plaintiff's allegations that certain injuries which he sustained in the first automobile accident were exacerbated by the second automobile accident, in the interest of justice and judicial economy, and to avoid inconsistent verdicts, the two actions should be tried jointly … . The respondents failed to demonstrate prejudice to a substantial right if the actions are tried jointly … . Although the

plaintiff moved to consolidate the two actions, the appropriate procedure is a joint trial, particularly since the actions involve different defendants … . Frank v Y. Mommy Taxi, Inc., 2022 NY Slip Op 04151, Second Dept 6-29-22

Practice Point: Here two separate traffic accidents should be tried together because plaintiff alleged the second accident exacerbated his injuries from the first accident.

CIVIL PROCEDURE, UNTIMELY ANSWER AS NOTICE OF APPEARANCE.

DEFENDANT'S UNTIMELY ANSWER WAS REJECTED BY PLAINTIFF BUT PLAINTIFF DEEMED THE ANSWER TO BE A NOTICE OF APPEARANCE; DEFENDANT DID NOT OBJECT; AN APPEARANCE IS THE EQUIVALENT OF SERVICE OF A SUMMONS; THEREFORE DEFENDANT WAIVED THE LACK-OF-PERSONAL-JURISDICTION DEFENSE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant waived any claim of a lack of personal jurisdiction. The plaintiff, rejecting defendant's answer as untimely, indicated the answer was deemed to be a notice of appearance, which is the equivalent of personal service of the summons:

An appearance of the defendant is equivalent to personal service of the summons upon him or her, unless an objection to jurisdiction pursuant to CPLR 3211(a)(8) is asserted by motion or in the answer … . Here, the plaintiff submitted evidence that the defendant served an answer upon it on or about January 20, 2015. That answer did not assert the defense of lack of personal jurisdiction. The plaintiff rejected the answer as untimely and advised the defendant that it would deem the untimely answer a notice of appearance by the defendant. The defendant did not object to the plaintiff treating her untimely answer as a notice of appearance . The defendant did not assert lack of personal jurisdiction until moving, inter alia, pursuant to CPLR 3211(a)(8) to dismiss the complaint more than two years later … . Therefore, she waived the defense of lack of personal jurisdiction … . Deutsche Bank Natl. Trust Co. v Muzac, 2022 NY Slip Op 02978, Second Dept 5-4-22

Practice Point: Here defendant's late answer was rejected but plaintiff informed defendant it considered the answer to be a notice of appearance. Defendant did not object. An appearance is equivalent to service of a summons. Therefore defendant waived the lack-of-personal-jurisdiction defense.

CONTRACT LAW, CIVIL PROCEDURE, NURSING HOME ADMISSION AGREEMENT, CHOICE OF VENUE.

THE VENUE DESIGNATION IN THE NURSING HOME ADMISSION AGREEMENT, SIGNED BY PLAINTIFF'S DECEDENT'S WIFE, WAS NOT ENFORCEABLE BY THE NURSING HOME (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the nursing home admission agreement, signed by plaintiff's decedent's wife (Anderson), was not a sufficient basis for changing the venue of this action against the nursing home from plaintiff's residence, Bronx County, to the venue designated in the admission agreement, Westchester County. The decision is comprehensive and addresses several substantive issues (agency, rights of non-signatories, for example) not summarized here:

Although the defendant submitted a copy of the admission agreement, it did not provide an affidavit from anyone who signed the agreement, who was present when it was signed, or who otherwise claimed to have personal knowledge of that agreement. The admission agreement was not signed by the plaintiff or the decedent, and it did not identify or include the names of the plaintiff or the decedent anywhere on that document. * * *

An admission agreement may be enforced against an individual where it was properly executed by that individual's "designated representative" … . As relevant here, "[d]esignated representative shall mean the individual or individuals designated in accordance with [10 NYCRR 415.2(f)] to receive information and to assist and/or act in behalf of a particular resident to the extent permitted by State law" … . The subdivision lists three ways in which a designation may occur … .

As the plaintiff correctly contends, the defendant failed to establish that Anderson was properly designated in any of the three ways authorized by applicable law … . Sherrod v Mount Sinai St. Luke's, 2022 NY Slip Op 02826, Second Dept 4-27-22

Practice Point: Is this case, the venue designation in the nursing home admission agreement, signed by plaintiff's decedent's wife, could not be enforced by the nursing home.

CONTRACT LAW, FAILURE TO READ BEFORE SIGNING.

PLAINTIFFS ALLEGED THEY WERE OVERWHELMED BY THE DOCUMENTS THEY SIGNED AND DID NOT REALIZE THE DOCUMENTS TRANSFERRED THEIR PROPERTY TO DEFENDANT; THOSE ALLEGATIONS DID NOT SUPPORT SUMMARY JUDGMENT IN PLAINTIFFS' FAVOR ON THEIR FRAUDULENT INDUCEMENT, UNJUST ENRICHMENT AND QUIET TITLE CAUSES OF ACTION (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiffs' motion for summary judgment on their actions for fraudulent inducement, unjust enrichment and to quiet title should not have been granted. Plaintiffs alleged the were overwhelmed by the number of documents to sign and did not realize they documents transferred the property to the defendant:

… [T]he plaintiffs … each averred that the defendant misled them into believing that they were signing documents to arrange a short sale of the property when, in fact, they executed documents that transferred the property to the defendant. One of the documents … was the deed to the property that the plaintiffs signed. The plaintiffs do not aver in their affidavits or in the complaint that they failed to read the documents they signed or that they were illiterate, blind, or did not read English, nor do they allege that they expressed any difficulty in understanding what they were signing … . Instead, the plaintiffs contend that they were "overwhelmed by the paperwork" but do not allege any facts that would suggest that they were prevented from reading the documents prior to signing them or that they were forced to sign … . Holder v Folsom PL Realty, Inc., 2022 NY Slip Op 03890, Second Dept 6-15-22

Practice Point: Here the plaintiffs alleged they signed documents without realizing what they were agreeing to. Those allegations did not support summary judgment on their fraudulent inducement, unjust enrichment and quiet title causes of action. The plaintiffs did not allege they were prevented from reading the documents, or they could not understand the documents.

CONTRACT LAW, NURSING HOME ADMISSION AGREEMENT, PERSONAL LIABILITY OF SIGNATORY.

IN ACCORDANCE WITH THE NURSING HOME REFORM ACT (NHRA), THE ADMISSION AGREEMENT SIGNED BY THE NURSING-HOME RESIDENT'S GRANDDAUGHTER DID NOT IMPOSE PERSONAL LIABILITY UPON THE GRANDDAUGHTER FOR PAYMENT OF THE COSTS OF THE RESIDENT'S CARE; THE GRANDDAUGHTER'S MOTION TO VACATE THE DEFAULT JUDGMENT SHOULD HAVE BEEN GRANTED AND THE BREACH-OF-CONTRACT COMPLAINT SHOULD HAVE BEEN DISMISSED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the admission agreement signed by the nursing-home resident's granddaughter (who was appointed guardian of her grandfather's property) did not impose personal liability upon the granddaughter for payment of the cost of her resident's care (provided by the plaintiff facility). Therefore, plaintiff should not have seized the granddaughter's personal funds. The default judgment in favor of plaintiff should have been vacated, and the breach-of-contract complaint should have been dismissed:

… [t]he admission agreement in this case is subject to the Nursing Home Reform Act (hereinafter the NHRA). As relevant here, the NHRA provides that "[w]ith respect to admissions practices, a nursing facility must . . . not require a third party guarantee of payment to the facility as a condition of admission (or expedited admission) to, or continued stay in, the facility" … . However, that prohibition "shall not be construed as preventing a facility from requiring an individual, who has legal access to a resident's income or resources available to pay for care in the

facility, to sign a contract (without incurring personal financial liability) to provide payment from the resident's income or resources for such care" … .

The admissions agreement set forth the relevant contractual obligations of the granddaughter, and the admissions agreement demonstrates as a matter of law that it did not render the granddaughter a "third party guarantee of payment" … ."The admission[s] agreement merely required the [granddaughter] to facilitate payment from the . . . resident's available income and resources, and only to the extent that the [granddaughter] had access to such income and resources and only if [the granddaughter] could do so without incurring any personal financial liability" … . …

.. [T]he plaintiff failed to adequately allege a breach of the granddaughter's contractual obligation to facilitate payment to the plaintiff from the resident's "income or resources" … . Nassau Operating Co., LLC v DeSimone, 2022 NY Slip Op 04029, Second Dept 6-22-22

Practice Point: The Nursing Home Reform Act (NHRA) prohibits holding a third-party who signs an admission agreement personally liable for the costs of a resident's care. The agreement may only obligate the third party to pay the costs from the resident's assets (over which the third party exercises control).

CONTRACT LAW, REAL ESTATE, STATUTE OF FRAUDS.

THE REAL ESTATE PURCHASE CONTRACT DID NOT INCLUDE THE CLOSING DATE OR THE MORTGAGE TERMS; THE CONTRACT WAS THEREFORE UNENFORCEABLE PURSUANT TO THE STATUTE OF FRAUDS (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the seller was entitled to summary judgment dismissing the action for specific performance of the real estate purchase contract, because the contract did not meet the requirements of the statute of frauds:

Under the statute of frauds, a contract for the sale of real property must be evidenced by a writing (see General Obligations Law § 5-703[1]). The writing must "identify the parties, describe the subject matter, be signed by the party to be charged, and state all of the essential terms of an agreement" … . "In a real estate transaction, the essential terms of a contract typically include the purchase price, the time and terms of payment, the required financing, the closing date, the quality of title to be conveyed, the risk of loss during the sale period, and adjustments for taxes and utilities" … . "'[T]he writing must set forth the entire contract with reasonable certainty so that the substance thereof appears from the writing alone . . . If the contract is incomplete and it is necessary to resort to parol evidence to ascertain what was agreed to, the remedy of specific performance is not available'" … . …

In addition to the document not specifying the closing date, the evidence established that the parties never agreed with respect to the mortgage terms. At his deposition, the plaintiff testified that he was purchasing the property "subject" to the existing mortgage and that he had the "option" of obtaining a purchase money mortgage. The document, however, did not state whether the plaintiff was purchasing the property subject to the existing mortgage, obtaining a purchase money mortgage, or obtaining his own mortgage. The failure to include such terms makes the purported real estate contract unenforceable … . Cohen v Holder, 2022 NY Slip Op 02778, Second Dept 4-27-22

Practice Point: A real estate purchase contract which does not include all the material terms is not enforceable pursuant to the Statute of Frauds. Here the contract did not include the closing date or the mortgage terms. It was deemed unenforceable and the action for specific performance was dismissed.

COURT OF CLAIMS, LABOR LAW-CONSTRUCTION LAW, NOTICE OF CLAIM.

CLAIMANTS' MOTION FOR LEAVE TO FILE AND SERVE A LATE NOTICE OF CLAIM IN THIS CONSTRUCTION-ACCIDENT CASE SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing the Court of Claims, determined claimants' should have been allowed to file a late notice of claim in this construction accident case. The delay in filing was minimal, claimants made a sufficient showing the defendants were not prejudiced by the delay and defendants did not demonstrate prejudice:

The claimants showed that any delay in ascertaining actual notice of all of the essential facts underlying the claims was minimal … , and that the defendants were provided with an adequate opportunity to investigate the circumstances underlying the claims in light of, among other things, the information contained in an accident report and a medical release, which were both prepared by the defendants' general contractor on the date of the accident…. . …

… [T]he defendants failed to come forward with "a particularized evidentiary showing that [they] will be substantially prejudiced" if the late claims are permitted … . Schnier v New York State Thruway Auth., 2022 NY Slip Op 03267, Second Dept 5-18-22

Practice Point: The claimants adequately demonstrated defendants in this construction-accident case were not prejudiced by the minimal delay in filing the notice of claim and defendants were unable to demonstrate any prejudice as they had time to investigate the incident after timely receiving the accident report. Claimants' motion for leave to file and serve a late notice of claim should have been granted.

CRIMINAL LAW, FOR CAUSE CHALLENGES.

THE FOR CAUSE CHALLENGE TO THE PROSPECTIVE JUROR WHO WAS AN ASSISTANT DISTRICT ATTORNEY IN THE OFFICE PROSECUTING THE DEFENDANT SHOULD HAVE BEEN GRANTED; NEW TRIAL ORDERED (SECOND DEPT).

The Second Department, ordering a new trial, determined defense counsel's for cause challenge to a juror who was an assistant district attorney in the office which was prosecuting the defendant should have been granted:

… [D]uring jury selection, the subject prospective juror informed the Supreme Court that she was presently working as an assistant district attorney, within the Queens County District Attorney's Office, the same agency that was prosecuting the defendant, and that she was familiar with the prosecutor, the defense attorney, and the Justice. As the People correctly concede, the juror's contemporaneous working relationship with the agency prosecuting the defendant required that juror's dismissal for cause … . People v Cortes, 2022 NY Slip Op 02561, Second Dept 4-20-22

Practice Point: The for cause challenge to the prospective juror who was an assistant district attorney in the same office which was prosecuting the defendant should have been granted; new trial ordered.

CRIMINAL LAW, FOR CAUSE CHALLENGES.

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Practice Point: The for cause challenge to the prospective juror who was an assistant district attorney in the same office which was prosecuting the defendant should have been granted; new trial ordered.

CRIMINAL LAW, REPUGNANT VERDICT.

PRESUMABLY THE ROBBERY AND GRAND LARCENY CHARGES STEMMED FROM THE THEFT OF THE TAXI CAB (THE FACTS ARE NOT EXPLAINED); THE ACQUITTAL OF UNAUTHORIZED USE OF A MOTOR VEHICLE RENDERED THE ROBBERY AND GRAND LARCENY CONVICTIONS REPUGNANT (SECOND DEPT).

The Second Department vacated defendant's robbery second and grand larceny fourth convictions as repugnant to the acquittal of unauthorized use of a vehicle third:

The defendant was charged with various crimes arising from an incident during which the defendant, a codefendant, and a third perpetrator who was never apprehended, robbed the complainant, a cab driver, at knife point. The jury convicted the defendant of robbery in the first degree (Penal Law § 160.15[3]), robbery in the second degree (id. § 160.10[3]), grand larceny in the fourth degree (id. § 155.30[8]), and menacing in the second degree (id. § 120.14[1]), and acquitted him of unauthorized use of a vehicle in the third degree (id. § 165.05[1]).

"A verdict is repugnant when, evaluated only in terms of the elements of the crimes as charged to the jury—and without regard to the evidence as to what

actually occurred—acquittal on one count necessarily negates an . . . element of a crime of which the defendant was convicted" … .. Here, as the crimes were charged to the jury, the acquittal on the charge of unauthorized use of a vehicle in the third degree rendered repugnant the convictions of robbery in the second degree and grand larceny in the fourth degree … . People v Rodriguez, 2022 NY Slip Op 03403, Second Dept 5-25-22

Practice Point: A rare example of a repugnant verdict requiring vacation of the convictions. The facts are not explained. The Second Department determined the acquittal of unauthorized use of a vehicle rendered the robbery and grand larceny convictions repugnant. Presumably the charges stemmed from the theft of the vehicle.

CRIMINAL LAW, RESTITUTION, OBJECTION TO.

BECAUSE DEFENDANT OBJECTED TO THE AMOUNT OF RESTITUTION A HEARING TO DETERMINE THE AMOUNT SHOULD HAVE BEEN HELD (SECOND DEPT).

The Second Department, reversing County Court, determined, because the defendant objected to the restitution-amount, a hearing to determined the amount was required:

"'Before a defendant may be directed to pay restitution a hearing must be held if either: (1) the defendant objects to the amount of restitution and the record is insufficient to establish the proper amount; or (2) the defendant requests a hearing'" … .

Here, the defendant objected to the amount of restitution payable to the complainant, and the record was insufficient to establish the value of damages to the complainant's property in the amount of $7,630 … . People v Jensen, 2022 NY Slip Op 03250, Second Dept 5-18-22

Practice Point: Where a defendant objects to the amount of restitution and the record is insufficient to establish the proper amount, a hearing must be held.

CRIMINAL LAW, SECOND FELONY OFFENDER, OUT-OF-STATE CONVICTION.

WHETHER DEFENDANT'S CONNECTICUT CONVICTION CAN SERVE AS A PREDICATE FOR SECOND FELONY OFFENDER STATUS CANNOT BE DETERMINED WITHOUT THE CONNECTICUT ACCUSATORY INSTRUMENT; THE UNPRESERVED ISSUE WAS CONSIDERED IN THE INTEREST OF JUSTICE; MATTER REMITTED FOR A HEARING (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, ruled a hearing was required to determined whether defendant's Connecticut conviction could serve as a predicate offense for second felony offender status. The issue was not preserved and was considered in the interest of justice:

Although the defendant did not preserve for appellate review the issue of whether he was properly sentenced as a second felony offender, we reach that issue in the exercise of our interest of justice jurisdiction. The defendant's prior conviction in Connecticut was for larceny in the first degree under Connecticut General Statutes former § 53a-122(a). This statute defined grand larceny differently under several subdivisions, not all of which are felonies under New York law. To determine which subdivision applied to this defendant, the Supreme Court could have looked at the Connecticut accusatory instrument to determine the subdivision of the Connecticut statute under which the defendant was convicted … . However, the Connecticut accusatory instrument is not in the record.

Accordingly, in the interest of justice, we vacate the defendant's adjudication as a second felony offender and the sentence imposed, and remit the matter to the Supreme Court, Queens County, for a second felony offender hearing and for resentencing thereafter. People v Robinson, 2022 NY Slip Op 03010, Second Dept 5-4-22

Practice Point: Here portions of the Connecticut larceny statute were equivalent to a New York felony and other portions were not. Therefore, whether the Connecticut conviction could serve as a predicate for second felony offender status cannot be determined without examining the Connecticut accusatory instrument.

The issue was not preserved for appeal but was considered in the interest of justice. Matter remitted for a hearing.

CRIMINAL LAW, SENTENCING.

THE SENTENCE FOR WEAPON-POSSESSION SHOULD BE CONCURRENT WITH THE SENTENCES FOR THE SHOOTING-RELATED CONVICTIONS (SECOND DEPT).

The Second Department determined the sentence for weapon-possession should be concurrent with the sentences for the shooting-related convictions:

… [T]he sentence imposed on the conviction of criminal possession of a weapon in the second degree should not run consecutively to the concurrent sentences imposed on the convictions of manslaughter in the first degree and attempted murder in the second degree. The evidence adduced at trial failed to establish that the defendant's "possession of a gun was separate and distinct from his shooting [at the two victims, resulting in the death of one of them]" … .People v Burgess, 2022 NY Slip Op 02814, Second Dept 4-27-22

Practice Point: Unless the possession of a weapon charge is somehow distinct and separate from the possession of the weapon used in the shooting, the sentences for possession of a weapon and the shooting-related convictions should be concurrent.

CRIMINAL LAW, SPEEDY TRIAL 21-YEAR DELAY.

THE 21-YEAR DELAY BETWEEN THE CRIME AND DEFENDANT'S ARREST DID NOT VIOLATE DEFENDANT'S SPEEDY-TRIAL RIGHTS (SECOND DEPT).

The Second Department determined the 21-year delay between the crime (rape) defendant's arrest did not violate defendant's right to a speedy trial:

… [T]he People met their burden of demonstrating good cause for the delay … . Nineteen years of the subject delay was due to the lack of connection between the semen sample collected at the time of the rape in 1994 and the defendant's DNA profile, which was not developed and uploaded to the law enforcement databases until 2013. Once the police were able to identify a viable suspect, they had a good-faith basis to wait until they could locate the victim to arrest the defendant. Furthermore, the detectives' hearing testimony established that the police made reasonable and diligent efforts to locate the victim, and the defendant was arrested immediately after a detective located and interviewed the victim … . The extent of the delay in prosecution is outweighed by the People's good cause for the delay, the nature of the crime, the fact that there was no period of pretrial incarceration during the period at issue, and the lack of any prejudice from the delay identified by the defendant. We are satisfied that the defendant was not deprived of his due process right to prompt prosecution … . People v Gardner, 2022 NY Slip Op 02816, Second Dept 4-27-22

Practice Point: The 21-year delay between the crime and defendant's arrest in this rape case was adequately explained. The DNA sample was not connected to a person until nearly 20 years after the rape and the victim was not located until a year or so after that.

CRIMINAL LAW, IMMIGRATION LAW, INEFFECTIVE ASSISTANCE, DEPORTATION CONSEQUENCES OF GUILTY PLEA.

DESPITE THE STRENGTH OF THE EVIDENCE AGAINST HIM, DEFENDANT DEMONSTRATED A DECISION TO GO TO TRIAL WOULD HAVE BEEN RATIONALE BECAUSE OF HIS FAMILY OBLIGATIONS; DEFENDANT WAS ENTITLED TO A HEARING ON HIS MOTION TO VACATE HIS CONVICTION ON INEFFECTIVE ASSISTANCE GROUNDS; DEFENDANT ALLEGED HIS ATTORNEY MISADVISED HIM ON THE DEPORTATION CONSEQUENCES OF A GUILTY PLEA (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined defendant should have been afforded a hearing on his motion to vacate his

conviction on ineffective assistance grounds. Defendant alleged he was misadvised of the deportation consequence of his guilty plea.

… [N]either the fact that the defendant had previously been convicted of an offense that may subject him to removal, nor the seemingly strong evidence against him with respect to the instant offense, nor the favorable plea bargain he received, necessarily requires a finding that the defendant was not prejudiced by his counsel's alleged misadvice … . The defendant's averments, including that he has resided in the United States since he was 10 years old, that he is married to his spouse with whom he has two minor children, that his spouse is unable to work due to a medical condition, that he is gainfully employed, and that he is the sole source of financial support to his family, sufficiently alleged that a decision to reject the plea offer would have been rational … . People v Samaroo, 2022 NY Slip Op 03128, Second Dept 5-11-22

Practice Point: Even if the evidence of defendant's commission of the crime is strong, a defendant may demonstrate a decision to go to trial, rather than accept a plea offer, would have been rationale based upon family obligations. Here defendant, who is a legal resident and has lived in the US since he was ten, has two minor children, is employed, and his wife can't work because of medical problems. Defendant brought a motion to vacate his conviction (by guilty plea) on the ground his attorney did not inform him of the deportation consequences of the plea. Defendant was entitled to a hearing on his motion.

CRIMINAL LAW, INDICTMENT JURISDICTIONALLY DEFECTIVE, AMENDMENT IMPROPER, ERRONEOUS SANDOVAL RULING.

THE BURGLARY COUNT WAS JURISDICTIONALLY DEFECTIVE BECAUSE IT ALLEGED DEFENDANT WAS ARMED WITH A "KNIFE" WHICH IS NOT NECESSARILY A "DEADLY WEAPON;" THE ATTEMPT TO AMEND THE COUNT WAS NOT AUTHORIZED; THE SANDOVAL RULING WAS (HARMLESS) ERROR (SECOND DEPT).

The Second Department dismissed a jurisdictionally defective count of the indictment, held the People's attempt to amend that count was not authorized, held

that certain Sandoval evidence should not have been admitted, but deemed the Sandoval error harmless and upheld defendant's convictions on the other counts:

… [C]ount 1 of the indictment alleged that "in the course of effecting entry into said dwelling," the defendant "was armed with a dangerous weapon, to wit: a knife." Inasmuch as the offense of burglary in the first degree requires that the defendant be armed with a "deadly weapon," a term which is specifically defined in Penal Law § 10.00(12) and which definition includes only certain specified knives, count 1 of the indictment was jurisdictionally defective because it failed to effectively charge the defendant with the commission of a crime (see id. §§ 10.00, 140.30[1]).

… CPL 200.70(2)(a) prohibits any amendment of an indictment when the amendment is needed to cure "[a] failure thereof to charge or state an offense" … .

… Although "questioning concerning other crimes is not automatically precluded simply because the crimes to be inquired about are similar to the crimes charged" … , "'cross-examination with respect to crimes or conduct similar to that of which the defendant is presently charged may be highly prejudicial, in view of the risk, despite the most clear and forceful limiting instructions to the contrary, that the evidence will be taken as some proof of the commission of the crime charged rather than be reserved solely to the issue of credibility'" … . People v Bloome, 2022 NY Slip Op 03398, Second Dept 5-25-22

Practice Point: Only certain knives meet the definition of "deadly weapon" as used in the burglary first statute. Therefore the count which alleged defendant was armed with a knife did not allege burglary first and was therefore jurisdictionally defective. A count which does not state an offense cannot be amended pursuant to CPL 200.70. The Sandoval ruling, which allowed defendant to be cross-examined about crimes similar to those with which he was charged, was (harmless) error.

CRIMINAL LAW, INTERFERENCE BY JUDGE DURING TRIAL.

THE JUDGE'S INTERFERENCE IN AND RESTRICTIONS ON THE DEFENSE SUMMATION AND IMPROPER EXCLUSION AND ADMISSION OF EVIDENCE REQUIRED REVERSAL IN THE INTEREST OF JUSTICE (SECOND DEPT).

The Second Department, reversing defendant's murder, assault and weapon-possession convictions in the interest of justice, determined the judge improperly restricted defense counsel's summation and evidence submissions, and improperly allowed hearsay identification evidence which supported the People's theory. Identification of the shooter was the key issue, and the eyewitness accounts were inconsistent and contradictory. The judge prohibited defense counsel from questioning the fairness of the identification procedure (line up) in summation and repeatedly interposed "objections" during the defense summation, in the absence of any objection by the prosecutor:

The Supreme Court's limitation of the defendant's cross-examination of the police witness and its sua sponte admonishments to defense counsel during summation improperly limited the defendant's right to challenge the lineup procedures as unfair and suggestive … . Moreover, the court erred in informing the jury and the parties in front of the jury that it had already determined that the pretrial identification procedure was fair and not suggestive, and that the lineup was "constitutional," wrongly intimating that those facts were not within the jury's province to determine … . …

The Supreme Court also substantially impaired the defendant's right "to make an effective closing argument" … through sua sponte "objection sustained" interruptions without any actual objection being posited by the People…. . …

The Supreme Court also erred in admitting into evidence the hearsay statement of an unidentified woman that a man "wearing all gray had the firearm" as an excited utterance exception to the hearsay rule … .. The record contained no evidence from which a trier of fact could reasonably infer that the statement was based on the woman's personal observation … . …

… [T]he Supreme Court should have granted the defendant's application to admit into evidence the photographs of the defendant and Cruzado [who was also at the scene] to allow the jury to compare their likenesses, since, under the circumstances of this case, such evidence was highly probative of the defense of third-party culpability and plainly outweighed any danger of delay, prejudice, and confusion … .People v Aponte, 2022 NY Slip Op 02813, Second Dept 4-27-22

Practice Point: In this case, where identification of the shooter was the central issue, the judge improperly prohibited defense counsel from questioning the fairness of the line-up procedure in summation. This and other substantial interference and evidentiary errors by the judge required reversal of the murder conviction in the interest of justice.

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

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

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

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

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

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

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

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

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

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA), SEALING OF RECORD.

AT THE TIME DEFENDANT COMMITTED THE OFFENSE IN 2007, IT WAS NOT A REGISTRABLE OFFENSE UNDER THE SEX OFFENDER REGISTRATION ACT; THEREFORE DEFENDANT'S MOTION TO SEAL THE RECORD SHOULD NOT HAVE BEEN SUMMARILY DENIED; MATTER REMITTED FOR A HEARING (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the crime for which defendant was convicted, at the time of its commission in 2007, was not a registrable offense under the Sex Offender Registration Act (SORA). Therefore

defendant's motion to seal the record should not have been summarily denied. The matter was remitted for a hearing:

… [A]t the time of the defendant's conviction for attempted promoting prostitution in the third degree (Penal Law §§ 110.00, 230.25), the definition of "sex offense" in Correction Law § 168-a(2) did not include convictions of an attempt to commit Penal Law § 230.25 … . Further, the defendant has never been required to register under SORA for this conviction. Accordingly, under the plain language of the statute, the defendant has not been not convicted of "an offense for which registration as a sex offender is required pursuant to article six-C of the correction law" (CPL 160.59[1][a] …). Thus, the Supreme Court should not have determined that the defendant's conviction falls into the category of excluded offenses … . Likewise, although CPL 160.59(3)(a) provides that the reviewing court must summarily deny the defendant's application when, inter alia, "the defendant is required to register as a sex offender pursuant to article six-C of the correction law," here, the defendant is not required to do so.

As the defendant's motion was not subject to mandatory denial under CPL 160.59(3) and the district attorney opposed the defendant's motion, a hearing on the defendant's motion was required … . People v Miranda, 2022 NY Slip Op 03009, Second Dept 5-4-22

Practice Point: If an offense is now a registrable offense pursuant to the Sex Offender Registration Act, but was not a registrable offense when committed (here in 2007), a defendant's motion to seal the record cannot be summarily denied. The motion may still be denied after a hearing, however.

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA).

THE 20-YEAR DURATION OF REGISTRATION AND VERIFICATION OF A LEVEL ONE SEX OFFENDER STARTS ANEW WHEN THE OFFENDER, ALREADY REGISTERED IN ANOTHER STATE, MOVES TO NEW YORK AND NOTIFIES THE DIVISION OF CRIMINAL JUSTICE SERVICES (SECOND DEPT).

The Second Department, in a full-fledged opinion by Justice Brathwaite Nelson, in a matter of first impression, determined that the 20-year duration of registration and verification of a level one sex offender starts anew when a sex offender registered in another state moves to New York:

The defendant contends that the 20-year period set forth in Correction Law § 168-h(1) must be diminished by the period of time that he was registered as a sex offender in another state. We disagree and hold that the "initial date of registration" referred to in that statutory provision means the initial date of the offender's registration with the Division of Criminal Justice Services pursuant to New York's Sex Offender Registration Act (Correction Law art 6-C; hereinafter SORA). People v Corr, 2022 NY Slip Op 04183, Second Dept 6-29-22

Practice Point: A level one sex offender who was registered in another state before moving to New York does not get credit for the duration of the out-of-state registration.

CRIMINAL LAW, TRAFFIC STOPS, NO PROBABLE CAUSE.

THE STOP OF THE TAXI IN WHICH DEFENDANT WAS A PASSENGER WAS NOT SUPPORTED BY PROBABLE CAUSE TO BELIEVE DEFENDANT HAD COMMITTED A CRIME; BECAUSE DEFENDANT PLED GUILTY TO ALL OFFENSES BASED UPON A PROMISE OF CONCURRENT SENTENCES, ALL CONVICTIONS REVERSED (SECOND DEPT).

The Second Department, reversing defendant's convictions by guilty pleas, determined the police officer who stopped the taxi in which defendant was a

passenger did not have probable cause to believe defendant had committed a crime. Because defendant pled guilty to several offenses based upon a promise of concurrent sentences, all convictions were reversed:

Upon our evaluation of the totality of the circumstances in this case, we conclude that, at the time the police officer stopped the taxi in which the defendant was a passenger, the officer lacked reasonable suspicion to believe that the defendant had committed a crime. The stop was based merely on the report of an identified citizen, made 40 minutes after the fight had occurred, that the neighbor with whom she was talking to on the phone was presently observing the defendant getting into a black taxi on the block where the fight occurred. There was no evidence that the informant or the neighbor saw the fight, and the neighbor, who testified at the hearing, did not state that she knew that the defendant was involved in the fight. Indeed, the police officer who stopped the taxi admitted that, when he made the stop, he did not know whether the defendant was a victim, a perpetrator, or involved "in anything." Under these circumstances, the gun recovered by that officer upon the vehicle stop should have been suppressed … . …

The defendant correctly contends that the judgments relating to the drug cases also must be reversed inasmuch as his pleas of guilty in those cases were premised on the promise of sentences that would run concurrently with the sentence imposed on the weapon possession charge … . People v Gomez, 2022 NY Slip Op 03399, Second Dept 5-25-22

Practice Point: One of the charges to which defendant pled guilty was overturned because the police did not have probable cause to make a vehicle stop. The guilty pleas to all the charges were reversed because of the promise the sentences would run concurrently with the sentence for the overturned conviction.

CRIMINAL LAW, VEHICLE AND TRAFFIC LAW, IGNITION INTERLOCK DEVICE.

IN ORDER TO DIRECT A DEFENDANT TO INSTALL AN IGNITION INTERLOCK DEVICE, THE DEFENDANT MUST BE SENTENCED TO A PERIOD OF PROBATION OR A CONDITIONAL DISCHARGE (SECOND DEPT).

The Second Department, reversing County Court, determined defendant could not be directed to install an ignition interlock device in the absence of a sentence to probation or a conditional discharge. Matter remitted for resentencing:

Vehicle and Traffic Law § 1193(1)(b)(ii) provides that the court shall "sentence such person convicted of . . . a violation of [Vehicle and Traffic Law § 1192(2), (2-a), or (3)] to a term of probation or conditional discharge, as a condition of which it shall order such person to install and maintain, in accordance with the provisions of [Vehicle and Traffic Law § 1198], an ignition interlock device in any motor vehicle owned or operated by such person."

In directing the defendant to install and maintain a functioning ignition interlock device, the County Court failed to also impose a sentence of probation or conditional discharge and therefore failed to comply with the requirements of the statute … . People v Dancy, 2022 NY Slip Op 03904, Second Dept 6-15-22

Practice Point: The Vehicle and Traffic Law requires that the direction to install an ignition interlock device be part of a sentence to a period of probation or a conditional discharge.

DEBTOR-CREDITOR, REAL PROPERTY LAW, DEED AS SECURITY INTEREST.

THE STIPULATION ACKNOWLEDGING THE PRIOR DEBT DEMONSTRATED THAT THE DEED TRANSFERRING THE PROPERTY CREATED ONLY A SECURITY INTEREST AND DID NOT TRANSFER LEGAL TITLE (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined the transfer of property by deed did not transfer title, but rather was a security interest for a loan (a mortgage):

… [T]he … deed never conveyed legal title to the plaintiff, but merely created a security interest in the subject property. "A deed conveying real property, which, by any other written instrument, appears to be intended only as a security in the nature of a mortgage, although an absolute conveyance in terms, must be considered a mortgage; and the person for whose benefit such deed is made, derives no advantage from the recording thereof, unless every writing, operating as a defeasance of the same, or explanatory of its being desired to have the effect only of a mortgage, or conditional deed, is also recorded therewith, and at the same time" (Real Property Law § 320).

Here, the … stipulation clearly recited the existence of a prior debt, authorized the decedent to continue occupying the property subject to certain terms and conditions, obligated her to maintain the property, and, most importantly, expressly authorized her to "retain ownership of the subject [p]roperty" … upon full repayment of the debt. Contrary to the plaintiff's contention, such characteristics bear all the hallmarks of a security interest—not an outright conveyance of legal title … . RTT Holdings, LLC v Nacht, 2022 NY Slip Op 03916, Second Dept 6-15-22

Practice Point: Here a deed transferring the property was deemed to have created a security interest for a prior debt which was acknowledged in a stipulation. Legal title, therefore, was not transferred by the deed.

DEFAMATION, "CRIMINAL SLURS," PURE OPINION.

EVEN CRIMINAL SLURS ARE NOT ACTIONABLE AS DEFAMATION IF THEY ARE PURE OPINION; HERE DEFENDANT'S TWEET ACCUSING PLAINTIFF OF MAKING "THREATS" WAS NOT ACTIONABLE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined even communications which could be considered "criminal slurs" are not actionable as defamation if they are "pure opinion." The defendant was a member of the NYC council representing Queens. When defendant opposed the construction of an Amazon corporate headquarters in Queens, plaintiff, a local restaurant owner, in text messages, indicated defendant's career would be ended if defendant did not withdraw his opposition to the Amazon project: Defendant then put out a tweet accusing plaintiff of making "threats." Plaintiff brought this defamation action based on that tweet.. Supreme Court denied defendant's motion to dismiss and the Second Department reversed:

The defendant's characterization of the plaintiff's text as containing "several threats rolled into one" is not a statement which can be proved true or false but was, instead, an opinion … . Moreover, "there is simply no special rule of law making criminal slurs actionable regardless of whether they are asserted as opinion or fact" … . Instead, "accusations of criminality [can] be regarded as mere hypothesis and therefore not actionable if the facts on which they are based are fully and accurately set forth" … . Here, the defendant's statement amounts to no more than "nonactionable opinion or rhetorical hyperbole" … . Bowen v Van Bramer, 2022 NY Slip Op 02975, Second Dept 5-4-22

Practice Point: A tweet accusing plaintiff of making "threats" against defendant city council member (representing Queens) was not actionable as defamation. Plaintiff, a restaurant owner, had texted defendant saying that people would work to end defendant's political career if he didn't retract his opposition to Amazon's building a corporate headquarters in Queens. Defendant then posted plaintiff's comments in a tweet and accused plaintiff of making "threats." Plaintiff sued for defamation based on that tweet. In dismissing the complaint, the Second Department noted that even "criminal slurs" are not actionable where, as here, they are "pure opinion."

ELECTION LAW, VERIFICATION OF PETITION.

THE VALIDATING PETITION SHOULD NOT HAVE BEEN DISMISSED ON THE GROUND THE PETITION WAS NOT VERIFIED; THE FAILURE TO RAISE THE OBJECTION WITH DUE DILIGENCE WAIVED IT; ALTHOUGH THE LANGUAGE IN THE PETITION WAS NOT EXACTLY THAT IN CPLR 3021, THE PETITION WAS IN FACT VERIFIED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined petitioner's validating petition petition should not have been dismissed on the ground that the petition was not verified because: (1) the respondents waived the issue by not objecting with due diligence; and (2) although the exact words re: verification in CPLR 3021 were not used, the language used in the petition had the same effect as verification:

"Section 16-116 of the Election Law requires that a special proceeding brought under article 16 of the Election Law shall be heard upon a verified petition. The requirement is jurisdictional in nature" … . However, the objection to the alleged lack of verification of the validating petition was waived by the objectors' failure to raise that objection with due diligence as required by CPLR 3022 … .

Moreover, the mere fact that a petition does not use the exact words set forth in CPLR 3021 does not mean that the petition is not verified, so long as the language used has the same effect as a verification … . Here, the language used in the validating petition had the same effect as a verification and, therefore, the validating petition was "verified" within the meaning of Election Law § 16-116. Matter of Francois v Rockland County Bd. of Elections, 2022 NY Slip Op 03190, Second Dept 5-12-22

Practice Point: Under the Election Law a validating petition must be verified and the absence of verification is a jurisdictional defect. The failure raise the issue with due diligence, however, waives the objection pursuant to CPLR 3021. In addition, to constitute a valid verification, the exact language in CPLR 3021 need not be used. Here he language in the validating petition. although not exactly as prescribed in CPLR 3021, was deemed sufficient to verify it.

EMPLOYMENT LAW, CIVIL PROCEDURE, RESTRICTIVE COVENANTS, INJUNCTIONS.

THERE ARE SUBSTANTIVE QUESTIONS OF FACT ABOUT THE NATURE OF THE AGREEMENTS BETWEEN PLAINTIFF EMPLOYER AND DEFENDANT EMPLOYEE RE: THE SALE OF DEFENDANT'S TAX PREPARATION BUSINESS TO PLAINTIFF AND WHETHER DEFENDANT SOLD HER CLIENT LIST TO PLAINTIFF; PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION ENFORCING THE RESTRICTIVE COVENANT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff-employer's motion for a preliminary injunction in this violation-of-a-restrictive-covenant case should not have been granted. There were too many issues of fact about the nature of the parties' agreement re: plaintiff's purchase of defendant's tax preparation business, including whether defendant turned over her client list to the plaintiff:

… [T]he plaintiff commenced this action against the defendant, its former employee, to recover damages for breach of contract. The plaintiff alleged … the parties entered into three agreements: a purchase agreement whereby the plaintiff purchased the defendant's tax preparation business, including her client list; an agreement whereby the plaintiff employed the defendant as a tax preparer; and a confidentiality, nonsolicit, and noncompete agreement which, inter alia, contained restrictive covenants that, among other things, prohibited the defendant from soliciting the plaintiff's clients. …

… [T]he plaintiff failed to demonstrate a clear right to relief and, thus, did not demonstrate a likelihood of success on the merits. "'[A] restrictive covenant will only be subject to specific enforcement to the extent that it is reasonable in time and area, necessary to protect the employer's legitimate interests, not harmful to the general public and not unreasonably burdensome to the employee'" … . An employer's interests justifying a restrictive covenant are limited "to the protection against misappropriation of the employer's trade secrets or of confidential

customer lists, or protection from competition by a former employee whose services are unique or extraordinary" … . Here, there are issues of fact as to what the parties agreed to, including whether the plaintiff purchased the rights to the defendant's clients pursuant to the parties' agreements and whether the plaintiff breached its own obligations pursuant to those agreements. Since these issues of fact exist, the plaintiff did not show a likelihood of success on the merits and, thus, failed to establish a clear right to preliminary injunctive relief … . R&G Brenner Income Tax Consultants v Fonts, 2022 NY Slip Op 04039, Second Dept 6-22-22

Practice Point: Where there are substantive questions of fact, a preliminary injunction should not be granted because a likelihood of success on the merits has not been demonstrated.

EMPLOYMENT LAW, CONSTRUCTIVE DISCHARGE.

VAGUE, CONCLUSORY ALLEGATIONS WILL NOT SUPPORT A CONSTRUCTIVE DISCHARGE CAUSE OF ACTION (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the plaintiff did not state a cause of action for constructive discharge from his employment as a civil engineer for the City of New York:

The plaintiff was employed by the New York City Department of Transportation (hereinafter DOT) as an assistant civil engineer from 1997 until 2014, when he resigned. He commenced this action in 2017 alleging, inter alia, that he had been constructively discharged because he had reported other employees' misconduct … . * * *

"An employee is constructively discharged when her or his employer, rather than discharging the plaintiff directly, deliberately created working conditions so intolerable that a reasonable person in the plaintiff's position would have felt compelled to resign" … . Here, affording the complaint a liberal construction, accepting the facts as alleged to be true, and according the plaintiff the benefit of every possible favorable inference … , the complaint fails to state a cause of action alleging constructive discharge, as the allegations are either vague and conclusory

… , or pertain to events that occurred after the plaintiff resigned. Dhar v City of New York, 2022 NY Slip Op 02779, Second Dept 4-27-22

Practice Point: Vague and conclusory allegations will not support a cause of action for constructive discharge, i.e., working conditions which are intolerable, "forcing" plaintiff to resign.

EMPLOYMENT LAW, EDUCATION-SCHOOL LAW.

THE SCHOOL PRINCIPAL HAD THE AUTHORITY TO MAKE A PROBABLE CAUSE DETERMINATION IN THIS DISCIPLINARY PROCEEDING WHICH RESULTED IN THE TERMINATION OF A TENURED TEACHER (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the NYC Department of Education's (DOE's) motion to dismiss the petition to vacate the arbitrator's award should have been granted. The arbitrator determined the petitioner, a tenured teacher, was properly charged with incompetence, misconduct and neglect of duty and termination the teacher's employment was appropriate. The teacher petitioner argued unsuccessfully that the initial probable cause determination must be made by the school board, not, as was the case here, the school principal:

… [T]he absence of a vote on probable cause by the "employing board" (Education Law § 3020-a[2]), did not deprive the hearing officer of the jurisdictional authority to hear and determine the underlying disciplinary charges. Rather, … the Chancellor was vested with the authority "[t]o exercise all of the duties and responsibilities of the employing board as set forth in [Education Law § 3020-a]" … , and with the authority to "delegate the exercise of all such duties and responsibilities" … . Matter of Cardinale v New York City Dept. of Educ., 2022 NY Slip Op 02791, Second Dept 4-27-22

Practice Point: In New York City, a school principal has the authority to determine whether there is probable cause to charge a tenured teacher with, for example, incompetence, misconduct and neglect of duty.

EMPLOYMENT LAW, HUMAN RIGHTS LAW.

PLAINTIFF'S CAUSES OF ACTION FOR CONSTRUCTIVE DISCHARGE AND HOSTILE WORK ENVIRONMENT SHOULD HAVE BEEN DISMISSED, CRITERIA EXPLAINED (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court determined plaintiff's causes of action for constructive discharge and hostile work environment should have been dismissed. The court laid out the criteria for those causes of action:

"An employee is constructively discharged when her or his employer, rather than discharging the plaintiff directly, deliberately created working conditions so intolerable that a reasonable person in the plaintiff's position would have felt compelled to resign" … . Here, the defendants established, prima facie, that the plaintiff's complaints were insufficient to show an intolerable work environment that would lead a reasonable person in that position to feel compelled to resign … . …

A hostile environment claim "involves repeated conduct," not "[d]iscrete acts such as termination, failure to promote, denial of transfer, or refusal to hire" … . Here, the two discrete acts alleged by the plaintiff were insufficient to create a hostile work environment … . Blackman v Metropolitan Tr. Auth., 2022 NY Slip Op 03490, Second Dept 6-1-22

Practice Point: A "constructive discharge" employment-discrimination cause of action requires the deliberate creation of intolerable working conditions designed to force the plaintiff to quit (not demonstrated here). A "hostile work environment" employment-discrimination cause of action requires "repeated conduct" which is not demonstrated discrete acts such as termination, failure to promote, denial of transfer or refusal to hire.

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

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

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

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

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

ENVIRONMENTAL LAW, NAVIGATION LAW, SPOLIATION.

THE PLAINTIFF SHOULD NOT HAVE DESTROYED THE UNDERGROUND OIL TANKS WHICH WERE ALLEGED TO HAVE LEAKED, CONTAMINATING PLAINTIFF'S PROPERTY; HOWEVER THE DEFENDANT OIL COMPANIES DID NOT DEMONSRTATE THE DESTRUCTION OF THE TANKS MADE IT IMPOSSIBLE TO PROVE A DEFENSE; THEREFORE AN ADVERSE INFERENCE JURY INSTRUCTION, NOT THE STRIKING OF THE COMPLAINT, WAS THE APPROPRIATE SANCTION (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined that the plaintiff should have preserved the underground oil tanks which allegedly leaked and contaminated plaintiff's property, but that striking the complaint was not warranted under the doctrine of spoliation. Because the defendants did not demonstrate the destruction of the tanks made it impossible to mount a defense, an adverse inference instruction was the appropriate sanction:

The plaintiff commenced this action, inter alia, to recover damages for a violation of Navigation Law § 181, alleging that the defendants Chevron U.S.A., Inc., Getty Oil Company, Getty Refining and Marketing Company, and Getty Oil Company (Eastern Operations), Inc. (hereinafter collectively the defendants), discharged petroleum from underground storage tanks on the plaintiff's property. * * *

… [T]he defendants demonstrated that the plaintiff had an obligation to preserve the tanks at the time they were disposed of, which was before the defendants had an opportunity to inspect the tanks, that the tanks were destroyed with a culpable state of mind, and that the tanks were relevant to the litigation … . However, the defendants failed to establish that their ability to prove a defense was fatally compromised by the destruction of the tanks, or that the destruction of the tanks was willful and contumacious … . Dagro Assoc. II, LLC v Chevron U.S.A., Inc., 2022 NY Slip Op 03884, Second Dept 6-15-22

Practice Point: Where spoliation of evidence does not take away the defendants' ability to prove a defense, and where spoliation was not done willfully and contumaciously, striking the complaint is not warranted. The appropriate sanction is an adverse inference jury instruction.

FAMILY LAW, ATTORNEYS, HOME VISITS.

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

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

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

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

FAMILY LAW, FAMILY OFFENSE, INTIMATE RELATIONSHIP.

THE RELATIONSHIP BETWEEN PETITIONER AND RESPONDENT IN THIS FAMILY OFFENSE PROCEEDING MET THE DEFINITION OF "INTIMATE RELATIONSHIP" SUCH THAT FAMILY COURT HAD SUBJECT MATTER JURISDICTION (SECOND DEPT).

The Second Department, reversing Family Court, determined the family-offense petition should not have been dismissed for lack of subject matter jurisdiction. The Second Department determined the respondent met the "intimate relationship" criteria which provided Family Court with subject matter jurisdiction:

"[T]he determination as to whether persons are or have been in an 'intimate relationship' within the meaning of Family Court Act § 812(1)(e) is a fact-specific determination which may require a hearing" … . Although Family Court Act § 812(1)(e) expressly excludes a "casual acquaintance" and "ordinary fraternization between two individuals in business or social contexts" from the definition of "intimate relationship," "the legislature left it to the courts to determine on a case-by-case basis what qualifies as an intimate relationship within the meaning of Family Court Act § 812(1)(e) based upon consideration of factors such as 'the nature or type of relationship, regardless of whether the relationship is sexual in nature; the frequency of interaction between the persons; and the duration of the relationship'" …. .

… [T]he record demonstrated that the petitioner knew the respondent for more than 20 years, and the respondent and the petitioner's sister held themselves out as husband and wife. During that period of time, the petitioner and the respondent engaged in general social activities at each other's homes, attended holiday and birthday celebrations together, and traveled together. The petitioner's sister and the respondent had a daughter together who identified the petitioner as her aunt. The petitioner resided in one of the units of a three-family home. The petitioner's sister, the respondent, and their daughter, who was approximately 18 years old at the time of the hearing, resided in one of the other units of that three-family home. The home was owned by the mother of the petitioner and the petitioner's sister. Under the circumstances, the Family Court should have denied the respondent's application to dismiss the petition for lack of subject matter jurisdiction (see

Family Ct Act § 812[1]). Matter of Charter v Allen, 2022 NY Slip Op 04167, Second Dept 6-29-22

Practice Point: This case demonstrates that an "intimate relationship" which gives Family Court subject matter jurisdiction in a family offense proceeding need not be a sexual relationship.

FAMILY LAW, STIPULATION OF SETTLEMENT, COLLEGE EXPENSES.

THE DIVORCE STIPULATION OF SETTLEMENT REQUIRED DEFENDANT TO PAY THE CHILDREN'S COLLEGE EXPENSES FOR FOUR YEARS AND DID NOT MENTION AN AGE CUT-OFF; SUPREME COURT SHOULD NOT HAVE DETERMINED DEFENDANT'S OBLIGATION CEASED AT AGE 21 (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the stipulation of settlement in the divorce stated that defendant would pay the children's college expenses for four years with no mention of a cut-off at age 21. Supreme Court should not have ruled that the obligation ceased when the child turned 21:

… [T]he stipulation clearly and unambiguously required the defendant to pay 50% of the costs and expenses for each child's college education for a total of four years, though his obligation to contribute to room and board expenses would be offset by any child support payments he made during that time. Contrary to the defendant's contention, no age limitation or restriction was placed on his obligation to pay his share of these costs and expenses, and the stipulation cannot be fairly interpreted to provide that this obligation terminated upon the child's emancipation … . Pape v Pape, 2022 NY Slip Op 03246, Second Dept 5-18-22

Practice Point: Here the divorce stipulation of settlement clearly stated defendant was obligated to pay the children's college expenses for four years. Supreme Court should not have ruled the obligation ceased at age 21.

FAMILY LAW, CUSTODY MODIFICATION, FAILURE TO APPEAR.

MOTHER FAILED TO APPEAR IN THE PROCEEDING TO DETERMINE FATHER'S PETITION FOR MODIFICATION OF CUSTODY; THE PETITION WAS GRANTED; BUT NO EVIDENCE WAS PRESENTED ON WHETHER MODIFICATION WAS IN THE BEST INTERESTS OF THE CHILDREN; MOTHER'S MOTION TO VACATE THE ORDER GRANTING FATHER'S PETITION SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Family Court, determined the judge should not have granted father's petition for a modification of custody upon mother's failure to appear. No evidence was taken on whether modification was in the best interests of the children. Mother's motion to vacate the order should have been granted:

"A custody determination, whether made upon the default of a party or not, must always have a sound and substantial basis in the record" … .

… Family Court … granted the father's oral application and modified the order of custody and visitation … , so as to grant the father relief which far exceeded that requested in his petition, without first receiving any testimony or other admissible evidence in the matter upon which it could determine whether modification was required to protect the best interests of the children. Under these circumstances, and in light of the policy favoring resolutions on the merits in child custody proceedings, the court improvidently exercised its discretion in denying the mother's motion to vacate the final order of custody and visitation … . Matter of Hogan v Smith, 2022 NY Slip Op 03894, Second Dept 6-15-22

Practice Point: Even when mother fails to appear in the proceeding to determine father's petition for modification of custody, the petition should not be granted in the absence of evidence modification in in the best interests of the children.

FAMILY LAW, CUSTODY, FINDINGS OF FACT, APPELLATE REVIEW.

FAMILY COURT HELD A HEARING IN THE MODIFICATION OF CUSTODY PROCEEDING BUT DID NOT STATE IN ITS DECISION THE FACTS RELIED UPON TO DENY THE PETITION; THE APPELLATE DIVISION REVIEWED THE EVIDENCE, REVERSED FAMILY COURT, AND GRANTED MOTHER'S PETITION (SECOND DEPT).

The Second Department, reversing Family Court, determined mother's petition to modify custody should have been granted. Family Court held a hearing but did not, in its decision, state the facts relied upon to deny the petition. Because the record was sufficient, the Second Department exercised its authority to review the evidence and make its own determination:

… [T]o facilitate effective appellate review, the hearing court "must state in its decision 'the facts it deems essential' to its determination" … .

… [W]hile the Family Court stated in its decision that the allegations in the mother's petition "largely stem from the difficulties that the parties have in co-parenting which predate her petition," and that "both parties contribute to continuing the conflict between one another," the court did not identify the facts adduced at the hearing that supported its denial of the mother's petition. … . …

The evidence at the hearing showed that, on numerous occasions after the issuance of the 2018 custody order, the father, in the child's presence, denigrated the mother and behaved inappropriately toward her … . The father consistently failed to make the child available for telephone and video calls with the mother as required by the original custody order, routinely ignored the mother's attempted communications with the child, and repeatedly failed to adhere to the court-ordered parental access schedule … . The hearing testimony established that the father not only refused to foster a good relationship between the mother and the child—he expressly testified that he did not believe he had an obligation to do so—but actively sought to thwart such a relationship. "Parental alienation of a child from the other parent is an act so inconsistent with the best interests of the child[ ] as to, per se, raise a strong probability that the offending party is unfit to act as custodial parent" …

… [T]he father demonstrated a lack of interest in the child's education and development by, among other things, refusing to have the child evaluated for learning disabilities or treated for his speech impediment … . … [T]he father failed to respond to the mother's inquiries about the child's health, education, and safety. Matter of Smith v Francis, 2022 NY Slip Op 04026, Second Dept 6-22-22

Practice Point: After a hearing on a petition to modify custody, Family Court, in its decision, must, but did not, state the facts relied upon in making its ruling denying the petition. The appellate division exercised its authority to review the evidence and make its own determination (reversing Family Court and granting mother's petition for residential custody).

FAMILY LAW, DELEGATION OF JUDGE'S AUTHORITY TO A PARTY.

FAMILY COURT IMPROPERLY DELEGATED TO FATHER THE COURT'S AUTHORITY TO DETERMINE MOTHER'S ACCESS TO THE CHILD (SECOND DEPT).

The Second Department, reversing (modifying) Family Court, determined father should not have been given the power to suspend mother's access to the child:

… [T]he Family Court erred in including two provisions in the order appealed from that effectively allow the father to determine whether parental access with the mother should be suspended. These provisions do not appear to give the mother the opportunity to judicially challenge the father's determinations concerning her compliance with the Personalized Recovery Oriented Services (PROS) program or whether she had unsupervised parental access with the child … , and, consequently, constitute an improper delegation of authority by the Family Court to the father to determine when the child can have parental access time with the mother … . Matter of Felgueiras v Cabral, 2022 NY Slip Op 02410, Second Dept 4-13-22

Practice Point: Here Family Court should not have allowed father to control mother's access to the child—an improper delegation of the court's authority.

FAMILY LAW, IMMIGRATION LAW.

FAMILY COURT SHOULD HAVE MADE FINDINGS TO ENABLE THE CHILD TO PETITION FOR SPECIAL IMMIGRANT JUVENILE STATUS (SIJS) SUCH THAT THE CHILD WOULD NOT BE RETURNED TO GUATEMALA (SECOND DEPT).

The Second Department, reversing Family Court, determined Family Court should have made findings to enable the child to petition for special immigrant juvenile status (SIJS) such that the child would not be returned to Guatemala:

… [A] special immigrant juvenile is a resident alien who … is under 21 years of age, unmarried, and dependent upon a juvenile court or legally committed to an individual appointed by a state or juvenile court. … [F]or a child to qualify for SIJS, a court must find that reunification of the child with one or both parents is not viable due to parental abuse, neglect, abandonment, or a similar basis found under state law … , and that it would not be in the child's best interests to be returned to his or her country of nationality or country of last habitual residence … . …

The Family Court should have granted that branch of the child's motion which was for a specific finding that reunification with his father is not viable due to parental neglect. Based upon our independent factual review, the record demonstrates that the child's father physically and emotionally mistreated the child, and prevented him from attending school for more than one year and on other occasions without a reasonable justification, and that the child's mother failed to protect him from such mistreatment. Thus, the record supports the requisite finding that reunification with the child's father is not viable due to parental neglect … . Matter of Jose F. M. P. (Francisco D. M. G.), 2022 NY Slip Op 02414, Second Dept 4-13-22

FAMILY LAW, NEGLECT, INEFFECTIVE ASSISTANCE.

MOTHER WAS ENTITLED TO A HEARING ON HER CLAIM SHE ADMITTED TO PERMANENT NEGLECT BECAUSE HER COUNSEL WAS INEFFECTIVE; MOTHER ALLEGED COUNSEL DID NOT INFORM HER OF THE RELEVANT BURDENS OF PROOF AT TRIAL (SECOND DEPT).

The Second Department, reversing Family Court, determined mother was entitled to a hearing on whether her counsel was ineffective in failing to inform her of the applicable burdens of proof and in allowing her to admit to permanent neglect:

"'A respondent in a proceeding pursuant to Social Services Law § 384-b has the right to the assistance of counsel (see Family Ct Act § 262[a][iv]), which encompasses the right to the effective assistance of counsel'" … . "[T]he statutory right to counsel under Family Court Act § 262 affords protections equivalent to the constitutional standard of effective assistance of counsel afforded to defendants in criminal proceedings" … . Effective assistance is predicated on the standard of "meaningful representation" … .

… [M]other submitted an affidavit alleging that, prior to entering her admission to permanent neglect, counsel failed to inform her of the burden and standard of proof at trial and that she made the admission "because [she] was advised that it was necessary in order to have [her] children returned." She further alleged that she "would not have made the statements that [she] made to the court if [she] had been fully advised of [her] rights." The Family Court did not ameliorate these purported deficiencies in its colloquy with the mother, and also omitted any reference to the possible consequences of the finding, including termination of her parental rights … . Matter of Skylar P. J., 2022 NY Slip Op 02793, Second Dept 4-27-22

Practice Point: A party in a neglect proceeding has a right to effective assistance of counsel. Here mother was entitled to a hearing on her claim she would not have admitted to permanent neglect had she been informed of the relevant burdens of proof at trial.

FAMILY LAW, SOCIAL SERVICES LAW, TERMINATION OF PARENTAL RIGHTS.

THE "ABANDONMENT" EVIDENCE WAS NOT SUFFICIENT; MOTHER'S PARENTAL RIGHTS SHOULD NOT HAVE BEEN TERMINATED (SECOND DEPT).

The Second Department, reversing Family Court, determined the petitioner did not prove mother had abandoned her children. Mother's parental rights should not have been terminated:

… [T]he petitioner failed to establish by clear and convincing evidence that the mother evinced an intent to forego her parental rights. The record demonstrates that, during the six-month abandonment period, the mother visited with the children on two occasions, saw the children on at least one additional occasion at a family gathering, purchased clothing for the children, spoke with the case worker on the phone multiple times, and objected to the goal for the children's placement changing to a kinship adoption rather than returning the children to the mother. Under these circumstances, the Family Court should have denied the petitions on the merits, insofar as asserted against the mother … . We further note that the record contains testimony from a case worker that, during family visits subsequent to the filing of the petitions, the mother's interactions with the children were "very positive." "While a parent's conduct outside the abandonment period is not determinative in an abandonment proceeding, it may be relevant to assessing parental intent" … . Matter of Grace E. W.-F. (Zanovia W.), 2022 NY Slip Op 03119, Second Dept 5-11-22

Practice Point: The petitioner did not present clear and convincing evidence that mother abandoned her children. The termination of parental rights petition should not have have been granted. Mother had visited the children, seen the children at a family gathering, purchased clothing for the children and frequently talked to the case worker.

FORECLOSURE, ACCELERATION OF THE DEBT IS PREREQUISITE FOR FORECLOSURE ACTION.

THE NOTICE SENT TO THE BORROWERS IN 2012 WAS NOT SUFFICIENT TO ACCELERATE THE MORTGAGE DEBT; THEREFORE THE FORECLOSURE COMPLAINT WAS PROPERLY DISMISSED (SECOND DEPT).

The Second Department determined the notice sent to the defendants was not sufficient to accelerate the mortgage debt and, therefore, the debt had not been accelerated at the time this foreclosure action was brought: Supreme Court properly dismissed the foreclosure complaint:

\… [T]he defendants' submissions in support of that branch of their cross motion which was for summary judgment dismissing the complaint demonstrated that the loan matured in 2038 and that the defendants had not commenced a prior foreclosure action. The defendants also submitted a copy of the 2012 notice, which did not demand the entire outstanding balance on the loan, but, as the Supreme Court found, only demanded the amount due as of that date. Notably, the 2012 notice stated that if the plaintiffs were unable to pay the arrears, there were "various options that may be available . . . to prevent a foreclosure sale of [the] property" such as a repayment plan, loan modification, sale of the property, or deeding the property to the noteholder. Thus, the 2012 notice did not set forth the defendants' clear and unequivocal election to accelerate the debt, but instead, was a letter discussing acceleration as a possible future event … . Accordingly, the defendants established, prima facie, that the consolidated mortgage had not been accelerated at the time the plaintiffs commenced this action.

In opposition, the plaintiffs failed to raise a triable issue of fact. Contrary to the plaintiffs' contention, the plain meaning of the word "may" as it appears in paragraph 22 of the consolidated mortgage renders that provision optional, and "[w]here, as here, the acceleration of the maturity of a mortgage debt is made optional with the holder of the note and mortgage, 'some affirmative action must be taken evidencing the holder's election to take advantage of the accelerating provision, and until such action has been taken the provision has no operation'" … . Knox v Countrywide Home Loans, Inc., 2022 NY Slip Op 03107, Second Dept 5-11-22

Practice Point: Here the notice sent by the bank to the borrowers in 2012 did not unambiguously accelerate the debt within the meaning of the mortgage document. Therefore the foreclosure complaint was properly dismissed.

FORECLOSURE, BANK'S STANDING.

TO CHALLENGE THE BANK'S STANDING TO FORECLOSE THE DEFENDANT MUST ASSERT THE LACK OF STANDING AS AN AFFIRMATIVE DEFENSE; MERELY DENYING THE RELEVANT ALLEGATIONS IN THE COMPLAINT IS NOT ENOUGH (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined that the bank in this foreclosure action was not required to affirmatively demonstrate standing, the defendant, to raise the issue, must assert lack of standing as an affirmative defense, and merely denying the relevant allegations in the complaint is not enough:

… [T]he plaintiff was not required to show its standing to maintain the action. "[W]here, as here, standing is not an essential element of the cause of action, under CPLR 3018(b) a defendant must affirmatively plead lack of standing as an affirmative defense in the answer in order to properly raise the issue in its responsive pleading" … . The mere denial of the allegation that the plaintiff was the owner and holder of the note and mortgage in the answer of Republic First Bank, without more, was insufficient to assert that the plaintiff lacks standing … . Aurora Loan Servs., LLC v Jemal, 2022 NY Slip Op 02970, Second Dept 5-4-22

Practice Point: Lack of standing in a foreclosure action must be raised as an affirmative defense. It is not enough to deny the relevant allegations in the foreclosure complaint.

FORECLOSURE, BUSINESS RECORDS.

THE AFFIDAVIT SUBMITTED BY THE BANK TO PROVE STANDING TO FORECLOSE LAID AN ADEQUATE FOUNDATION FOR THE RELEVANT BUSINESS RECORDS BUT THE RECORDS THEMSELVES WERE NOT SUBMITTED, RENDERING THE AFFIDAVIT HEARSAY; THE BANK DID NOT DEMONSTRATE COMPLIANCE WITH THE NOTICE PROVISION OF THE MORTGAGE, A CONDITION PRECEDENT (SECOND DEPT).

The Second Department, reversing Supreme Court determined the evidence that the bank had standing to bring the foreclosure action was insufficient and the bank did not demonstrate compliance with the notice provision of the mortgage, a condition precedent. Although the affidavit submitted by the bank laid a sufficient foundation for the business records described in the affidavit, the records themselves were not submitted:

Although the foundation for the admission of a business record may be provided by the testimony of the custodian, "it is the business record itself, not the foundational affidavit, that serves as proof of the matter asserted" … . "Without submission of the business records, a witness's testimony as to the contents of the records is inadmissable hearsay" … . HSBC Bank USA, N.A. v Boursiquot, 2022 NY Slip Op 02782, Second Dept 4-27-22

Similar issue (failure to submit records referenced in affidavits) and result in U.S. Bank N.A. v Tesoriero, 2022 NY Slip Op 02830, Second Dept 4-27-22

Practice Point: Even if an affidavit lays a proper foundation for business records, the affidavit is inadmissible hearsay if the records themselves are not also submitted.

FORECLOSURE, EVIDENCE OF DEFAULT & MAILING OF NOTICE INSUFFICIENT.

THE BANK'S PROOF OF DEFENDANT'S DEFAULT, MAILING OF THE NOTICE OF DEFAULT, AND COMPLIANCE WITH THE NOTICE REQUIREMENTS OF THE MORTGAGE IN THIS FORECLOSURE ACTION WAS INSUFFICIENT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the bank's proof of defendant's default and mailing of the notice of default was insufficient in this foreclosure action:

… [T]he plaintiff failed to establish its prima facie entitlement to judgment as a matter of law, as it failed to submit evidence demonstrating the defendant's default and that it complied with the notice of default provisions in the mortgage. In support of its motion, the plaintiff submitted an affidavit of Sonja Manderville, who averred that, in her position as a contract management coordinator of … the plaintiff's loan servicer, she has access to and is familiar with the business records related to the mortgage loan at issue. She averred that the records "were made at or near the time of the Transactions documented thereby by a person with knowledge of the Transactions . . . and are maintained in the regular and usual course of business." However, Manderville failed to aver to familiarity with the record-keeping practices and procedures of the entity that generated the records or establish that the records provided by the maker were incorporated into the recipient's own records and routinely relied upon by the recipient in its own business … .

… Manderville failed to identify the records upon which she relied, and the plaintiff failed to submit copies of the records themselves. …

… Manderville's assertions regarding the purported mailing of the notice of default were insufficient to establish a mailing … .Manderville failed to allege familiarity with the mailing practices and procedures of the third party that allegedly sent the notice of default in 2009 … . Since the plaintiff failed to provide evidence of the actual mailing, or "proof of a standard office mailing procedure designed to ensure that items are properly addressed and mailed, sworn to by someone with personal knowledge of the procedure," the plaintiff failed to establish that the notice of

default was sent in accordance with the terms of the mortgage … . Deutsche Bank Natl. Trust Co. Ams. v Banu, 2022 NY Slip Op 03231, Second Dept 5-18-22

Practice Point: In this foreclosure action, the affidavit submitted by the bank to demonstrate defendant's default and the mailing of the notice of default was deficient and the relevant business records were not submitted. These "foundational-affidavit" problems and the failure to submit the records referenced in the foundational affidavit have required reversal on appeal in literally hundreds cases over the last five or more years.

FORECLOSURE, FAILURE TO SUBMIT BUSINESS RECORDS.

ALTHOUGH THE LOAN SERVICER'S AFFIDAVIT MAY HAVE LAID A PROPER FOUNDATION FOR THE DOCUMENTS DEMONSTRATING DEFENDANTS' DEFAULT IN THIS FORECLOSURE ACTION, THE DOCUMENTS THEMSELVES WERE NOT PRODUCED, RENDERING THE AFFIDAVIT INADMISSIBLE HEARSAY (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the bank in this foreclosure action did not prove defendants' default. The affidavit from the loan servicer may have laid a proper foundation for the relevant documents, but the business records themselves were not attached:

Even assuming that the subject affidavit established a sufficient foundation for the records relied upon, "it is the business record itself, not the foundational affidavit, that serves as proof of the matter asserted" … . … [T]he affiant's assertions regarding the defendants' default, without the business records upon which he relied in making those assertions, constituted inadmissible hearsay … . U.S. Bank N.A. v Kahn Prop. Owner, LLC, 2022 NY Slip Op 03921, Second Dept 6-15-22

Practice Point: At the summary judgment stage, business records necessary to make out a prima facie case must be produced. An affidavit laying a proper foundation for the documents is inadmissible hearsay it the relevant business records themselves are not submitted.

FORECLOSURE, INSUFFICIENT PROOF FORECLOSURE ACTION ACCELERATED THE DEBT.

ALTHOUGH A FORECLOSURE ACTION USUALLY ACCELERATES THE DEBT AND STARTS THE STATUTE OF LIMITATIONS CLOCK, HERE THE DEFENDANTS-BORROWERS DID NOT DEMONSTRATE THAT THE 2009 FORECLOSURE ACTION SOUGHT THE ENTIRE AMOUNT DUE (THE 2009 COMPLAINT WAS NOT SUBMITTED); THEREFORE THE DEFENDANTS DID NOT DEMONSTRATE THE INSTANT ACTION IS UNTIMELY (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the defendants-borrowers in this foreclosure action did not demonstrate the debt was accelerated by the 2009 foreclosure action. Therefore the complaint in the instant action should not have been dismissed as untimely:

… [T]he defendants failed to demonstrate that the debt was validly accelerated by the commencement of the 2009 action. In support of their respective motions, the defendants submitted only the summons with notice from the 2009 action, which did contain a statement that BAC sought "payment of the full balance due," and a printout of the WebCivil Supreme-Case Detail related to the instant action … . Since the defendants did not submit the complaint or the notice of pendency filed in the 2009 action, it cannot be determined whether those documents elected to accelerate the mortgage loan … . GSR Mtge. Loan Trust v Epstein, 2022 NY Slip Op 03232, Second Dept 5-18-22

Practice Point: To demonstrate that a prior foreclosure action accelerated the debt and thereby started the statute of limitations clock, proof that the prior action called for payment of the entire debt must be submitted. Here the defendants-borrowers did not submit the 2009 foreclosure complaint and therefore did not prove the debt was accelerated by the 2009 foreclosure action.

FORECLOSURE, LACK OF STANDING, ACCELERATION OF DEBT.

BECAUSE THE PRIOR FORECLOSURE ACTION WAS DISMISSED FOR LACK OF STANDING, THE PRIOR ACTION DID NOT ACCELERATE THE DEBT; THEREFORE DEFENDANT DID NOT DEMONSTRATE THE INSTANT ACTION WAS TIME-BARRED (SECOND DEPT).

The Second Department noted that the defendant in this foreclosure action did not demonstrate the foreclosure action was time barred. The initial foreclosure action was dismissed for lack of standing. Therefore the debt was not accelerated by the prior action:

Since the prior action was dismissed for lack of standing, [defendant] failed to establish that the plaintiff had the authority to accelerate the debt through the complaint filed in the prior action … . Wells Fargo Bank, N.A. v Rutty, 2022 NY Slip Op 03926, Second Dept 6-15-22

Practice Point: If a prior foreclosure action was dismissed for lack of standing that action will not be deemed to have accelerated the debt. The prior action, therefore, will not have started the statute-of-limitations clock..

FORECLOSURE, REFEREE'S REPORT, INTEREST CALCULATION.

THE PLAINTIFF IN THIS FORECLOSURE ACTION DID NOT DEMONSTRATE THE INTEREST CALCULATION WAS DONE USING THE METHOD REQUIRED BY THE NOTE AND THE RELEVANT BUSINESS RECORDS WERE NOT SUBMITTED; 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 should not have been confirmed. There was no evidence the interest calculation was done in the manner required by the note and the relevant business records were not submitted:

… Supreme Court should have denied the plaintiff's motion to confirm the referee's report and for a judgment of foreclosure and sale because the plaintiff failed to present evidence that the interest on the loan was calculated using the method set forth in the note, and the referee's computations, including the amount due and owing and payments for taxes, insurance, and other advances, were premised upon unproduced business records … . Bank of N.Y. Mellon v Singh, 2022 NY Slip Op 03221, Second Dept 5-18-22

Practice Point: In a foreclosure action, the interest must be calculated using the method required by the note, and any relevant business records must be produced in order to warrant confirmation of the referee's report.

FORECLOSURE, SEVEN-YEAR DELAY IN MOVING FOR JUDGMENT, INTEREST TOLLED.

PLAINTIFF OFFERED NO EXPLANATION FOR THE SEVEN-YEAR DELAY BETWEEN THE ORDER OF REFERENCE AND THE MOTION FOR A JUDGMENT OF FORECLOSURE AND SALE; THE ACCRUAL OF INTEREST DURING THE DELAY SHOULD HAVE BEEN TOLLED (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined the defendant was prejudiced by the unexplained seven-year delay between the order of reference in 2009 and the motion for a judgment of foreclosure and sale in 2016, Therefore the accrual of interest during the delay should have been tolled:

… [A]pproximately seven years elapsed between the entry of the order of reference and the time the plaintiff moved for a judgment of foreclosure and sale. … [Plaintiff] failed to offer any explanation for this delay or establish that the defendant caused this delay, as the record demonstrates that the defendant's motions and the stays due to the defendant's bankruptcy petitions did not occur during the period for which the defendant sought to toll the accrual of interest. Since the defendant was prejudiced by the plaintiff's unexplained delay of approximately seven years, during which time interest had been accruing, the interest on the loan should have been tolled from October 9, 2009, … until

September 21, 2016 … . GMAC Mtge., LLC v Yun, 2022 NY Slip Op 03887, Second Dept 6-15-22

Practice Point: Here the plaintiff could not explain the seven-year delay between the order of reference and the motion for a judgment of foreclosure and sale. Interest should not have accrued during the delay.

FORECLOSURE, EVIDENCE, BUSINESS RECORDS.

THE BANK'S AFFIDAVIT IN THIS FORECLOSURE ACTION DID NOT LAY A SUFFICIENT FOUNDATION FOR THE ADMISSIBILITY OF BUSINESS RECORDS, INCLUDING PROOF OF COMPLIANCE WITH THE NOTICE REQUIREMENTS OF RPAPL 1304 (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined the bank's proof of compliance with the notice requirements of RPAPL 1304 was deficient because the foundation for the admission of business records was not laid:

… [T]he plaintiff submitted … an affidavit of an employee of its current mortgage loan servicer, along with copies of the 90-day notice, which was generated by the plaintiff's prior loan servicer, along with alleged proof of mailing, which was also generated by the prior loan servicer. The affiant averred … that the current mortgage loan servicer is responsible for maintaining the books and records pertaining to the subject mortgage, "including, but not limited to, the account ledgers, and prior servicer's records." However, the affiant did not aver to her familiarity with the prior loan servicer's business practices and procedures, or that the prior loan servicer's records were incorporated into the current loan servicer's records. Thus, the plaintiff's moving affidavit failed to satisfy the admissibility requirements of CPLR 4518(a) … , and the prior loan servicer's records, including the 90-day notice, were not admissible … . "Accordingly, the plaintiff failed to demonstrate, prima facie, that it complied with the notice provision of RPAPL 1304" … . Bank of N.Y. Mellon v Basta, 2022 NY Slip Op 02971, Second Dept 5-4-22

Practice Point: In a foreclosure action, at the summary judgment stage, even if business records demonstrating the bank's compliance with the notice requirements of RPAPL 1304 are submitted, they are not admissible unless a proper foundation (CPLR 4518(a)) is laid in the accompanying affidavit.

FORECLOSURE, FRAUD, REAL PROPERTY LAW, MARKETABLE TITLE.

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

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

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

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

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

ALTHOUGH THE RPAPL 1304 FORECLOSURE NOTICE, TO BE VALID, MUST ACCURATELY STATE THE DEFAULT AMOUNT AND THE LENGTH OF TIME THE BORROWER HAS BEEN IN DEFAULT, THERE WAS NO SHOWING HERE THE STATED AMOUNT WAS INACCURATE; THE BANK DID NOT DEMONSTRATE IT WAS IN POSSESSION OF THE NOTE AT THE TIME THE ACTION WAS COMMENCED AND THEREFORE DID NOT DEMONSTRATE STANDING TO FORECLOSE; THE EVIDENCE OF A MERGER SUBMITTED IN REPLY COULD NOT BE CONSIDERED ON THE STANDING ISSUE (SECOND DEPT).

The Second Department, reversing Supreme Court, in a full-fledged opinion by Justice Dillon, determined the notice of foreclosure required by RPAPL 1304, which, to be valid, must state the default amount and length of time the borrower has been in default, was not shown to be inaccurate. But the plaintiff bank did not demonstrate standing to foreclose. The evidence that the bank's standing was based on a merger with the holder of the note was not submitted until the reply, and therefore should not have been considered:

Where an RPAPL 1304 notice fails to reflect information mandated by the statute, including but not limited to the duration and an amount of the default, the statute will not have been strictly complied with and the notice will not be valid … . …

… [T]here is no reason for us to conclude at this juncture that the $64,862.12 default sum set forth in the plaintiff's RPAPL 1304 notice reflects any actual error. The second paragraph of the plaintiff's 30-day notice explains that the $64,862.12 amount claimed to be due includes principal, interest, escrow payments, and late charges, which would necessarily raise the gross amount due to a sum that exceeds the amount of the missed principal. * * *

… [T]he plaintiff failed to establish, prima facie, that it had standing to commence the action. The plaintiff is not the original lender. The subject note, though attached to the complaint, bears no indorsement. And further, the plaintiff failed to

produce evidence in admissible form as part of its prima facie case that the note was assigned to it prior to the date of commencement of the action … . …

The certificate of merger showing that ESB-LI merged into the plaintiff does not demonstrate that the plaintiff is the holder of the subject note. It was submitted to the Supreme Court for the first time in the plaintiff's reply papers, and therefore, could not be considered as part of the plaintiff's initial prima facie proof of standing … . Emigrant Bank v Cohen, 2022 NY Slip Op 02532, Second Dept 4-20-22

Practice Point: To be valid, the RPAPL 1304 notice of foreclosure must accurately state the amount of the default and the length of time the borrower has been in default (there was no showing the amount was inaccurate here). If the bank does not demonstrate it was holding the note at the time the foreclosure was commenced in its moving papers, it has not demonstrated standing to foreclose. Evidence of standing submitted in reply papers should not be considered.

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

IN THIS FORECLOSURE ACTION, THE RPAPL 1304 NOTICE DID NOT INCLUDE THE REQUIRED INFORMATION AND THE PROOF OF MAILING OF THE NOTICE WAS DEFICIENT; PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined proof of mailing of the RPAPL 1304 notice and failure to comply with the content-requirements for the RPAPL 1304 notice in this foreclosure action warranted denial of the plaintiff's motion for summary judgment:

The respondent failed to establish the plaintiff's strict compliance with RPAPL 1304. The respondent submitted an affidavit of Alfreda Johnson, a "Foreclosure Specialist" of Fay Servicing, LLC (hereinafter Fay), the plaintiff's servicer. Johnson did not have personal knowledge of the purported mailing … . Furthermore, while Johnson averred that she was familiar with Fay's mailing

practices and procedures, the record indicates that the notices were not mailed by Fay. The record indicates that the notices were mailed by an entity known as "Seterus" … . Johnson does not address this fact at all, let alone demonstrate that she was familiar with Seterus's mailing practices and procedures. Thus, the respondent failed to establish that the 90-day notices were properly mailed in strict compliance with RPAPL 1304 … .

Moreover, the content of the 90-day notices did not strictly comply with RPAPL 1304 … . Here, the 90-day notices omitted information that was required by RPAPL 1304 … . Prof-2014-S2 Legal Tit. Trust II v DeMarco, 2022 NY Slip Op 03263, Second Dept 5-18-22

Practice Point: Here, in this foreclosure action, not only was proof of mailing the RPAPL 1304 notice insufficient, but the notice did not include all the required information.

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

THE BANK IN THIS FORECLOSURE ACTION SENT THE RPAPL 1304 NOTICE TO BOTH BORROWERS IN THE SAME ENVELOPE, A VIOLATION OF THE "SEPARATE ENVELOPE" RULE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the bank's motion for summary judgment in this foreclosure action should not have been granted. The bank did not comply with the notice requirements of RPAPL 1304, specifically the "separate envelope for each borrower" rule:

…[T]he plaintiff failed to establish its strict compliance with RPAPL 1304. Although the plaintiff demonstrated that it mailed the RPAPL 1304 notice to the defendants by both certified and first-class mail … , and that the contents of the notice complied with RPAPL 1304(1), the plaintiff failed to establish that it sent a 90-day notice individually addressed to each defendant in separate envelopes, as required by the statute … . Instead, as the plaintiff concedes, the notice was mailed

in a single envelope jointly to both defendants. Deutsche Bank Natl. Trust Co. v Loayza, 2022 NY Slip Op 02392, Second Dept 4-13-22

Practice Point: In a foreclosure action, the RPAPL 1304 notice must be sent in a separate envelope to each borrower.

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

THE BANK IN THIS FORECLOSURE ACTION DID NOT DEMONSTRATE COMPLIANCE WITH THE NOTICE REQUIREMENTS OF RPAPL 1304; I.E., THE NOTICE MUST BE MAILED IN A SEPARATE ENVELOPE WITH NO OTHER MATERIALS, AND THE NOTICE MUST BE SENT SEPARATELY TO EACH BORROWER (SECOND DEPT).

The Second Department, reversing Supreme Court in this foreclosure action, determined plaintiff did not comply with the RPAPL 1304 requirements that the 90-day notice of foreclosure be mailed in a separate envelope and that the notice be sent separately to both borrowers:

… [T]he plaintiff failed to establish … that it strictly complied with RPAPL 1304, since additional material was sent in the same envelope as the 90-day notice required by RPAPL 1304 … , and a single notice was jointly addressed to both defendants … . HSBC Bank USA, N.A. v DiBenedetti, 2022 NY Slip Op 02983, Second Dept 5-4-22

Practice Point: RPAPL 1304, which must be strictly complied with by the bank in any foreclosure action, requires (1) that the 90-day notice of foreclosure be sent in a separate envelope which includes nothing else and (2) that the 90-day notice be sent separately to each borrower.

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

THE BANK DID NOT RAISE A QUESTION OF FACT ABOUT WHETHER IT VIOLATED THE SEPARATE-ENVELOPE RULE IN THIS FORECLOSURE ACTION; THE BANK'S SUMMARY JUDGMENT MOTION SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the defendants demonstrated the bank in this foreclosure action did not demonstrate compliance with the notice requirements of RPAPL 1304, which requires the notice of foreclosure be mailed in a separate envelope which includes nothing else:

… [T]he defendants established that the plaintiff failed to strictly comply with RPAPL 1304, on the ground that additional information was included in the same envelope as the 90-day notice required by RPAPL 1304 … . The plaintiff failed to raise a triable issue of fact in opposition. HSBC Bank USA, N.A. v Hibbert, 2022 NY Slip Op 03102. Second Dept 5-11-22

Practice Point: RPAL 1304 is violated if the bank in a foreclosure action mailed the notice of foreclosure to the borrower(s) in an envelope which included other materials along with the notice.

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

THE BANK DID NOT DEMONSTRATE COMPLIANCE WITH THE "SEPARATE ENVELOPE" RULE AND THEREFORE DID NOT DEMONSTRATE COMPLIANCE WITH THE NOTICE REQUIREMENTS OF RPAPL 1304; THE BANK'S SUMMARY JUDGMENT MOTION SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the bank in this foreclosure action failed to demonstrate the 90-day notice required by RPAPL 1304 was sent to the defendant in a separate envelope:

RPAPL 1304(2) also provides, in relevant part, that "[t]he notices required by this section shall be sent by the lender, assignee or mortgage loan servicer in a separate envelope from any other mailing or notice."

The plaintiff failed to establish, prima facie, that it sent 90-day notices to the defendant "in a separate envelope from any other mailing or notice" … . Since the plaintiff failed to establish, prima facie, its strict compliance with RPAPL 1304, the Supreme Court should have denied those branches of the plaintiff's motion which were for summary judgment on the complaint insofar as asserted against the defendant and dismissing his answer with affirmative defenses and for an order of reference, regardless of the sufficiency of the opposing papers … . Deutsche Bank Natl. Trust Co. v Bonal, 2022 NY Slip Op 03230, Second Dept 5-18-22

Practice Point: To warrant summary judgment in a foreclosure action, the bank must demonstrate that the RPAPL 1304 notice was sent to each borrower in a separate envelope which includes no other materials.

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

PLAINTIFF BANK DID NOT SEND THE 90-DAY FORECLOSURE NOTICE IN A SEPARATE ENVELOPE AS REQUIRED BY RPAPL 1304; THEREFORE THE BANK'S MOTION FOR SUMMARY JUDGMENT IN THIS FORECLOSURE ACTION SHOULD NOT HAVE BEEN GRANTED AND DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD 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 because the plaintiff did not sent the RPAPL 1304 notice in a separate envelope. Defendants' motion for summary judgment should have been granted for the same reason:

… [T]he copies of the 90-day notice submitted by the plaintiff in support of its motion included additional notices not contemplated by RPAPL 1304(2). The plaintiff acknowledged that the envelopes it sent to the defendants, which contained the requisite RPAPL 1304 notice, also included a separate notice pertaining to the rights of a debtor in military service and a debtor in bankruptcy, among others. This Court recently determined, in Bank of America, N.A. v Kessler (202 AD3d 10), that RPAPL 1304(2) requires that the requisite notice under its provision be mailed in an envelope separate from any other notice. Since the plaintiff failed to demonstrate that the RPAPL 1304 notice was "served in an envelope that was separate from any other mailing or notice" … . …

… [A]s the defendants established their prima facie entitlement to judgment as a matter of law dismissing the complaint insofar as asserted against them "by showing that the plaintiff failed to comply with RPAPL 1304 when it sent additional material in the same envelopes as the requisite notice under RPAPL 1304," and as the plaintiff failed to raise a triable issue of fact in opposition, the Supreme Court should have granted the defendants' cross motion for summary judgment dismissing the complaint insofar as asserted against them … . Wells Fargo Bank N.A. v Bedell, 2022 NY Slip Op 03413, Second Dept 5-25-22

Practice Point: If the bank doesn't send the foreclosure notice required by RPAPL 1304 in a separate envelope, the defendants in the foreclosure action are entitled to summary judgment.

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

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

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

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

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

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

IN THIS FORECLOSURE ACTION, A PARTY WHO DID NOT SIGN THE NOTE BUT DID SIGN THE MORTGAGE IS A "BORROWER" ENTITLED TO RPAPL 1304 NOTICE; PLAINTIFF BANK'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that a borrower, Ellen Weininger, who signed the mortgage but not the note, was entitled to notice of foreclosure pursuant to RPAPL 1304:

… [I]t is undisputed that the plaintiff failed to serve Ellen Weininger with timely notice pursuant to RPAPL 1304, and, contrary to the plaintiff's contention, Ellen Weininger was entitled to such notice as a "borrower" within the meaning of that statute. Although Ellen Weininger did not sign the underlying note, both of the defendants executed the mortgage as a "borrower." Where, as here, a homeowner defendant is referred to as a "borrower" in the mortgage instrument and, in that capacity, agrees to pay amounts due under the note, that defendant is a "borrower" for the purposes of RPAPL 1304, notwithstanding the absence of a consolidation, extension, and modification agreement signed by that defendant or any ambiguity created by a provision in the mortgage instrument to the effect that parties who did not sign the underlying note are not personally obligated to pay the sums secured … . Since Ellen Weininger signed the mortgage as a "borrower" and, in that capacity, agreed to pay the amounts due under the note, she was entitled to timely notice pursuant to RPAPL 1304 … As the plaintiff conceded that it did not send the requisite notice pursuant to RPAPL 1304 to Ellen Weininger until 17 days before commencement of this action, it failed to meet its prima facie burden of establishing compliance with RPAPL 1304, and those branches of the plaintiff's motion which were for summary judgment on the complaint insofar as asserted against the defendants, to strike their answer, and for an order of reference should have been denied. Deutsche Bank Natl. Trust Co. v Weininger, 2022 NY Slip Op 04008, Second Dept 6-22-22

Practice Point: In this foreclosure proceeding, a party who did not sign the note but did sign the mortgage is a "borrower" entitled to the notice required by RPAPL 1304.

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

THE BANK DID NOT DEMONSTRATE COMPLIANCE WITH THE NOTICE REQUIREMENTS OF RPAPL 1303, INCLUDING THE REQUIRED TYPE SIZE; THE BANK'S MOTION FOR SUMMARY JUDGMENT IN THIS FORECLOSURE ACTION SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the bank in this foreclosure action did not demonstrate compliance with the notice requirements of RPAPL 1303:

"RPAPL 1303 requires that a notice titled 'Help for Homeowners in Foreclosure' be delivered to the mortgagor along with the summons and complaint in residential foreclosure actions involving owner-occupied, one- to four-family dwellings" … . "The statute mandates that the notice be in bold, 14-point type and printed on colored paper that is other than the color of the summons and complaint, and that the title of the notice be in bold, 20-point type" … .

Here, the plaintiff failed to establish, prima facie, that it provided notice in compliance with RPAPL 1303. The plaintiff's submissions did not demonstrate that the notice served upon the defendant complied with the type-size requirements in RPAPL 1303 … . Bank of Am., N.A. v Keefer, 2022 NY Slip Op 02776, Second Dept 4-27-22

Practice Point: In foreclosure actions, the bank must demonstrate strict compliance with the notice provisions of the Real Property Actions and Proceedings Law. Here the bank did not demonstrate compliance with RPAPL 1303, included the required type size.

FREEDOM OF INFORMATION LAW (FOIL), PREVAILING PARTY, ATTORNEY'S FEES.

PETITIONER WAS ENTITLED TO ATTORNEY'S FEES IN THIS FOIL PROCEEDING; THE RESPONDENTS DID NOT PROVIDE THE BULK OF THE REQUESTED DOCUMENTS UNTIL AFTER THE ARTICLE 78 WAS BROUGHT; RESPONDENTS DID NOT PRESENT AN ADEQUATE EXCUSE FOR FAILING TO INITIALLY DISCLOSE THE REQUESTED DOCUMENTS (SECOND DEPT).

The Second Department, reversing Supreme Court, determined petitioner was entitled to attorney's fees as the prevailing party in this FOIL proceeding. It was only after petitioner brought an Article 78 petition that the respondents provided the bulk of the requested documents:

… [T]he respondents did not timely respond to the petitioner's FOIL request … . The first response, which consisted of four pages of materials, failed to address three of the four enumerated categories of material the petitioner sought. It was not until after the commencement of this proceeding that the respondents provided a significant number of additional documents responsive to the FOIL request. Under the circumstances of this case, the petitioner was the "substantially prevailing" party … . …

… [T]he respondents did not have a reasonable basis for initially denying the petitioner access to the responsive materials. Although a limited amount of material was reasonably withheld based on attorney-client privilege, the "petitioner's legal action ultimately succeeded in obtaining substantial unredacted post-commencement disclosure responsive to h[is] FOIL request" … . Matter of McNerney v Carmel Cent. Sch. Dist., 2022 NY Slip Op 02799, Second Dept 4-27-22

Practice Point: Respondents didn't disclose the bulk of the documents described in the FOIL request until the Article 78 proceeding was started and did not have an adequate excuse for the initial incomplete response. Petitioner was entitled to attorney's fees as the prevailing party.

INSURANCE LAW, RESCISSION OF ARBITRATION AGREEMENT, UNILATERAL MISTAKE.

IN THIS VEHICLE ACCIDENT CASE, PLAINTIFF ENTERED AN ARBITRATION AGREEMENT WHICH INDICATED THE AWARD WOULD BE BETWEEN $0 AND $50,000, BUT THE POLICY LIMITS WERE $100,000/300,000; THE UNILATERAL MISTAKE BY PLAINTIFF'S ATTORNEY RE: THE POLICY LIMITS WAS NOT INDUCED BY DEFENDANT OR DEFENDANT'S CARRIER, THEREFORE RESCISSION OF THE AGREEMENT WAS NOT AN AVAILABLE REMEDY (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant's motion to compel arbitration in this vehicle-accident case should have been granted. Plaintiff wanted the agreement to arbitrate rescinded because it did not reflect the actual policy limits. But the unilateral mistake by plaintiff's attorney was not induced by the defendant because defendant's insurance carrier had twice notified plaintiff's attorney of the policy limits. The agreement to arbitrate set the award at between $0 and $50,000, but the policy limits were $100,000/300,000:

"Generally, a party's unilateral mistake is a ground for rescission of a contract only where it was induced by fraud or other wrongful conduct by the other party" … . Moreover, "the equitable remedy of rescission is not available to relieve an allegedly mistaken party of the consequences of their failure to exercise ordinary care" … .

Contrary to the plaintiff's contention, he failed to establish that the arbitration agreement was subject to the equitable remedy of rescission on the ground of unilateral mistake by his attorney regarding the policy limits … . The purported mistake in the high-low agreement at issue arose not from any fraudulent inducement by the defendant, but from the failure of the plaintiff's attorney to exercise ordinary care under the circumstances … . Maynard v Smith, 2022 NY Slip Op 04017, Second Dept 6-22-22

Practice Point: A unilateral mistake by one party which was not induced by the other party is not a ground for rescission of a contract.

LABOR LAW-CONSTRUCTION LAW, LADDERS.

IN THIS LABOR LAW 240(1) CASE, PLAINTIFF ALLEGED THE LADDER WAS UNSECURED AND SHIFTED; DEFENDANT ALLEGED PLAINTIFF TOLD HIS SUPERVISOR HE LOST HIS BALANCE AND JUMPED FROM THE LADDER, RAISING A QUESTION OF FACT WHETHER PLAINTIFF'S ACTIONS WERE THE SOLE PROXIMATE CAUSE OF THE ACCIDENT (SECOND DEPT).

The Second Department determined conflicting facts precluded summary judgment in this Labor Law 240(1) ladder-fall case. Plaintiff alleged the ladder was unsecured and shifted when he attempted to descend. The defendant alleged plaintiff told his supervisor he lost his balance and jumped off the ladder which raised a question whether plaintiff's actions were the sole proximate cause of the accident:

… [T]he defendants raised a triable issue of fact as to whether the ladder shifted to the right and backwards, as the plaintiff testified, or whether the plaintiff's own actions were the sole proximate cause of the subject accident. The defendants submitted an affidavit from the plaintiff's supervisor, who averred that the plaintiff had told him, just after the accident occurred while he was still on the roof, that he had lost his balance as he descended the ladder and jumped off the ladder. The different versions of the accident given by the plaintiff create triable issues of fact that required denial of the motion, including a triable issue of fact as to the plaintiff's credibility … . Jurski v City of New York, 2022 NY Slip Op 02783, Second Dept 4-27-22

Practice Point: Evidence that plaintiff told his supervisor he lost his balance and jumped from the ladder created a triable issue of fact about whether plaintiff's action were the sole proximate cause of the accident in this Labor Law 240(1) action.

LABOR LAW-CONSTRUCTION LAW, HOMEOWNER'S EXEMPTION.

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

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

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

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

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

LABOR LAW-CONSTRUCTION LAW.

BOARDING UP A VACANT HOUSE WAS WITHIN THE SCOPE OF LABOR LAW 240(1) AND 241(6) (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined plaintiff's work, boarding up a vacant house to prevent access, was within the scope of work covered by Labor Law 240 (1) and Labor Law 241(6). Plaintiff allegedly fell from a ladder when attempting to board up a window:

… [P]laintiff's work of boarding up the house, thus making it uninhabitable, was "altering" the premises within the meaning of Labor Law § 240(1), as it constituted a significant physical change to the configuration or composition of the building … .. Further, as the work the plaintiff was engaged in constituted "alteration," it was within the scope of "construction work" for purposes of Labor Law § 241(6) … . Nucci v County of Suffolk, 2022 NY Slip Op 02423, Second Dept 4-13-22

Practice Point: Boarding up a vacant house is covered by Labor Law 240(1) and 241(6).

LABOR LAW-CONSTRUCTION LAW.

THE EIGHT-INCH WIDE BEAM CLAIMANT WAS MOVING ALONG WHEN HE FELL WAS THE FUNCTIONAL EQUIVALENT OF A SCAFFOLD, BRINGING THE ACTION WITHIN THE SCOPE OF LABOR LAW 240(1); THE SAFETY LINE PROVIDED TO CLAIMANT DID NOT PROTECT HIM FROM THE FALL; CLAIMANT WAS ENTITLED TO SUMMARY JUDGMENT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined claimant's motion for summary judgment on the Labor Law 240(1) cause of action should have been granted. Claimant, Lazo, was moving along an eight-inch wide, 17-foot long, beam suspended above a platform when he fell. He was attached to two safety lines which he had to detach and reattach to anchorage points. He fell while in the process of reattaching one of the lines. The second line did not prevent the fall:

Lazo would use a hook at the end of each safety line to secure it to various anchorage points on another horizontal beam located above him. To move across the beam, workers were instructed to unhook the first safety line from the first anchorage point, connect it to a second anchorage point, and then repeat this process with the second safety line. This effectively allowed workers to move along the beam while always having at least one safety line attached to an anchorage point. * * *

Lazo's deposition testimony established, prima facie, that his accident was within the purview of Labor Law § 240(1), since the beam from which he fell was being used as the functional equivalent of a scaffold … . Lazo's deposition testimony also established, prima facie, that his second safety line was attached to an anchorage point but was nevertheless insufficient to prevent him from falling … . Lazo v New York State Thruway Auth., 2022 NY Slip Op 02400, Second Dept 4-13-22

Practice Point: Here an eight-inch wide, 17 foot-long beam suspended eight feet above a platform was the functional equivalent of a scaffold. The fall from the beam therefore was within the scope of Labor Law 240(1).

LANDLORD-TENANT, LIABILITY FOR SHOOTING.

ALTHOUGH THE SPECIFIC CRIME, I.E., THE SHOOTING OF PLAINTIFF'S DECEDENT IN DEFENDANTS' BUILDING, MAY NOT HAVE BEEN FORESEEABLE, THE RELEVANT QUESTION IS WHETHER THE DOOR SECURITY WAS DEFICIENT AND THEREFORE WAS A CONCURRENT FACTOR IN THE SHOOTING (SECOND DEPT).

The Second Department determined the defendants (the building owner, the building manager, and the security company) were not entitled to summary judgment in this wrongful death case stemming from a shooting in the building. Although the specific crime, i.e., the shooting of plaintiff's decedent, may not have been foreseeable by the defendants, the relevant question was whether the building's door security was deficient and was therefore a concurrent factor in shooting:

… [U]nder this Department's jurisprudence, "[t]he test in determining summary judgment motions involving negligent door security should . . . not focus on whether the crime committed within the building was 'targeted' or 'random,' but whether or not, and to what extent, an alleged negligently maintained building entrance was a concurrent contributory factor in the happening of the criminal occurrence" … .

… [W]hile the precise nature and manner of [the shooter's] crime could not necessarily have been anticipated, the alleged longstanding inoperability of the front door intercom system, involving a front door that was unlocked remotely from an off-premises security booth, along with the alleged failure of the security officers to properly screen visitors, and the chronic problem of piggy-backing, "made it foreseeable that some form of criminal conduct could occur to the detriment of one or more of the residents therein, at some point in time" … . In examining whether there are triable issues of fact as to issues of foreseeability and proximate cause requiring a trial, "a jury could conceivably conclude" that the alleged condition of the front door security equipment that included the inoperable intercom system, along with the failure of the security officers to engage in proper screening of visitors, would result in the improper piggy-back "entry of intruders into the [subject apartment] building for the commission of criminal activities against known or unknown specific tenants" … . Carmona v Sea Park E., L.P., 2022 NY Slip Op 04149, Second Dept 6-29-22

Practice Point: In the Second Department, a landlord can be liable for a crime committed in the landlord's building if the door security system was deficient and was therefore a concurrent factor in the happening of the crime. The plaintiff need not demonstrate the specific crime, here the shooting of plaintiff's decedent, could have been foreseen by the landlord.

LIEN LAW, COMPOSITE LIEN.

THE COMPOSITE LIEN ENCOMPASSING SEVERAL PARCELS OF PROPERTY WAS NOT INVALID ON ITS FACE BECAUSE IT WAS NOT SHOWN INDIVIDUAL PROPERTY OWNERS HIRED THE RESPONDENT IN SEPARATE TRANSACTIONS; THE LIEN SHOULD NOT HAVE BEEN SUMMARILY DISCHARGED ON THE GROUND THE AMOUNT WAS WILFULLY EXAGGERATED, A FINDING WHICH CAN ONLY BE MADE IN A FORECLOSURE PROCEEDING (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the composite lien encompassing several parcels of real property was not invalid on its face and had not bee declared void for wilful exaggeration. Therefore the validity of the lien must be determined in a foreclosure proceeding:

… [T]he composite mechanic's lien was facially valid and the Supreme Court should not have summarily discharged it. … [T]he composite mechanic's lien was not invalid because of a failure to apportion the work and material furnished between the four parcels of real property that were identified in the composite mechanic's lien. The requirement to do so "applies where several transactions, involving the improvement of distinct parcels of property, have been effected at the request of independent owners" … . Here, the petitioners failed to establish that the individual and independent lot owners identified in the composite mechanic's lien hired BKS in separate and distinct transactions. Furthermore, the composite mechanic's lien was not invalid on its face merely because it identified multiple lots by their respective tax block and lot designations … . …

The Supreme Court also should not have summarily determined that branch of the petition which alleged that the amount claimed in the composite mechanic's lien was willfully exaggerated. "Pursuant to Lien Law § 39, the court may declare a lien void and deny recovery if the lienor has willfully exaggerated the amount claimed" … . This Court has held that the remedy in Lien Law § 39-a is "available only where the lien was valid in all other respects and was declared void by reason of willful exaggeration after a trial of the foreclosure action" … . Matter of Matrix Staten Is. Dev., LLC v BKS-NY, LLC, 2022 NY Slip Op 02795, Second Dept 4-27-22

Practice Point: Here the lien should not have have summarily discharged on the ground it encompassed several parcels of property because it was not shown the individual property owners hired respondent in separate transactions. The finding that the amount of the lien was wilfully exaggerated is not a ground for summary discharge. Wilful exaggeration will void a lien, but that determination must be made in a foreclosure proceeding.

MEDICAL MALPRACTICE, EMOTIONAL DISTRESS, BIRTH.

MOTHER'S CAUSES OF ACTION FOR EMOTIONAL DISTRESS WOULD NOT BE AVAILABLE IF HER BABY WAS BORN ALIVE; THERE WERE QUESTIONS OF FACT ABOUT WHETHER THE BABY WAS BORN ALIVE OR STILLBORN; THEREFORE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the defendants' motion for summary judgment in this medical malpractice action should not have been granted because there was a question of fact whether the baby was born alive or was stillborn:

The plaintiffs commenced this action to recover damages … for emotional distress allegedly sustained by the plaintiff Kristina Khanra as a result of the defendants' medical malpractice, which caused her to deliver a stillborn baby. The hospital records indicated that, upon removal from the womb by caesarean section, it was observed that the infant was "floppy," had "no spontaneous respirations," and had "no heart rate." The defendants … moved for summary judgment dismissing the first three causes of action insofar as asserted against them, which were premised, among other things, upon Kristina Khanra's emotional distress, on the ground that the plaintiffs could not recover for any alleged emotional distress because the infant was born alive. …

The defendants established their prima facie entitlement to judgment as a matter of law … , by tendering evidence that the infant born to Kristina Khanra by emergency cesarean section was born alive, as a heartbeat was generated 20 minutes after the infant was removed from the womb, as a result of continuous

resuscitative efforts … . However, in opposition, the plaintiffs raised a triable issue of fact as to whether the infant was in fact stillborn, as the infant had no respiratory response, the infant's Apgar score was zero at 1 minute, 5 minutes, 10 minutes, and 15 minutes after the infant was removed from the womb, the infant otherwise had no indicia of life, and the infant was declared deceased approximately two hours after being removed from a ventilator … . Khanra v Mogilyansky, 2022 NY Slip Op 04160, Second Dept 6-29-22

Practice Point: Whether mother can recover for emotional distress in this medical malpractice action depended upon whether her baby was born alive or stillborn. There can be no recovery for mother's emotional distress if the baby was born alive. Because there were questions of fact about whether the baby was born alive, the defendants' motion for summary judgment should not have been granted.

MUNICIPAL LAW, CONTRACT LAW, NOTICE OF CLAIM.

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

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

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

"'had actual knowledge of the claim or failed to demonstrate actual prejudice'" … . …

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

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

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

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

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

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

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

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

MUNICIPAL LAW, LOCAL LAW RE HISTORIC BUILDINGS.

THE LOCAL LAW REQUIRING APPROVAL OF PROPOSED ALTERATIONS TO BUILDINGS IDENTIFIED AS "HISTORIC" IS NOT UNCONSTITUTIONAL (SECOND DEPT).

The Second Department, reversing Supreme Court, determined a local law requiring permits for changes to buildings designated "historic" was not unconstitutional. The local law, the "Historic Building Preservation Law," gave the town's Historic Building Preservation Commission (HBPC) the power to approve or disapprove proposed alterations to historic buildings which were identified as such in a "Survey:"

"Legislative enactments enjoy a strong presumption of constitutionality . . . [and] parties challenging a duly enacted statute face the initial burden of demonstrating the statute's invalidity beyond a reasonable doubt" … . "The exceedingly strong presumption of constitutionality applies . . . to ordinances of municipalities" … . The Fifth and Fourteenth Amendments to the United States Constitution guarantee due process protections for life, liberty, and property (see US Const Amends V,

XIV). "The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property" … .

… Here, the petitioners/plaintiffs failed to identify any constitutionally protected property interest that was implicated in the enactment of the 2017 local law and, thus, the petitioners/plaintiffs were not entitled to a hearing prior to the enactment of that law … . Contrary to the petitioners/plaintiffs' contention, the 2017 local law did not require property owners to submit to warrantless searches of their properties in order to challenge a property's classification or inclusion on the Survey. Matter of Santomero v Town of Bedford, 2022 NY Slip Op 02552, Second Dept 4-20-22

Practice Point: A local law which designates certain buildings as "historic" and requires permits for alterations to the historic buildings is not unconstitutional.

MUNICIPAL LAW, NEGLIGENCE, COUNTY LIABILITY FOR JAIL CONDITIONS.

PLAINTIFF SUED BOTH THE COUNTY AND THE SHERIFF FOR ALLEGED EXPOSURE TO CONTAMINATED WATER IN THE SHOWER AT THE JAIL; THE ACTION AGAINST THE COUNTY WAS NOT BROUGHT UNDER A VICARIOUS LIABILITY THEORY (THE COUNTY IS NOT VICARIOUSLY LIABLE FOR THE ACTS OR OMISSIONS OF THE SHERIFF); RATHER THE CAUSE OF ACTION ALLEGED THE COUNTY WAS NEGLIGENT IN ITS OWN RIGHT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff, an inmate at the Orange County Correctional Facility (OCCF), stated a cause of action against the county, as well as the county sheriff. Plaintiff alleged he was exposed to contaminated shower water at the jail. The cause of action against the county was not based on a vicarious liability theory (the county is not vicariously liable for the acts or omissions of the sheriff's office). Rather plaintiff stated a cause of action alleging the county was negligent in failing to ensure the safety of the water

at the jail. That cause of action is distinct from the sheriff's duty to keep inmates safe. The issue was properly raised for the first time on appeal:

… [T]he complaint did not solely seek to hold the County vicariously liable for the actions and omissions of the sheriff and his deputies. The complaint alleged that the County had a duty to maintain the OCCF, including its water supply, in a safe and proper manner, and that the County's breach of that duty caused the plaintiff to sustain personal injuries. The County's duty to provide and maintain the jail building is distinguishable from the sheriff's duty to receive and safely keep inmates in the jail over which the sheriff has custody … . Contrary to the defendants' contention, the plaintiff's argument that the County is liable for its own negligence, as opposed to being vicariously liable for the negligence of the sheriff or his deputies, is not improperly raised for the first time on appeal. Aviles v County of Orange, 2022 NY Slip Op 02384, Second Dept 4-13-22

Practice Point: The county is not liable for the acts or omissions of the county sheriff under a vicarious liability theory. However, here the allegation that the shower water at the jail was contaminated stated a cause of action against the county for its own negligence. Therefore the action against the county should not have been dismissed.

MUNICIPAL LAW, NYC DEPARTMENT OF HOMELESS SERVICES, LANDLORD-TENANT.

THE CONTRACTUAL ARRANGEMENTS MADE WITH APARTMENT OWNERS AND SERVICE PROVIDERS BY THE NYC DEPARTMENT OF HOMELESS SERVICES (DHS) DID NOT CREATE "ILLUSORY TENANCIES" SUCH THAT THE PREVIOUSLY HOMELESS TENANTS WERE ENTITLED TO VACANCY LEASES WHEN THE DHS CONTRACTS WERE TERMINATED (SECOND DEPT).

The Second Department, over a dissent, determined that the previously homeless appellants who had been placed in apartments did not demonstrate the arrangement constituted an "illusory tenancy" such that the appellants were entitled to vacancy

leases. The owners of the apartments were entitled to possession after their contracts with the NYC Department of Homeless Services (DHS] were terminated:

… "[A]n illusory tenancy is defined generally as a residential leasehold created in a person who does not occupy the premises for his or her own residential use and subleases it for profit, not because of necessity or other legally cognizable reason"… . An illusory tenancy scheme exists, for example, where the "prime tenant" rents a rent-stabilized apartment, which it never intends to occupy, and then subleases it for an amount in excess of the legal rent so as to make a profit … . * * *

The leases in the present case did not lack a legitimate purpose. The subject premises were leased to, and by, both CAMBA and We Always for the "legally cognizable reason" of providing transitional housing in accordance with the terms of the Cluster Transitional Residence Program run by the City … The leases entered into by CAMBA and We Always both specified that the agreement was entered into "for the sole purpose of providing transitional housing and services in connection with the DHS Agreement," and the leases expired by their terms upon termination of the DHS [NYC Department of Homeless Services] Agreement (if not terminated earlier). * * *

… [T]he owners demonstrated, prima facie, that the appellants were not entitled to vacancy leases and related relief because illusory tenancies were not created to deprive them of the benefits of rent stabilization. Sapp v Clark Wilson, Inc., 2022 NY Slip Op 04184, Second Dept 6-29-22

Practice Points: The previously homeless tenants were not entitled to vacancy leases when the relevant contracts with the NYC Department of Homeless Services [DHS} were terminated. The tenants argued the contractual arrangements between the apartment owners and DHS created "illusory tenancies." An "illusory tenancy" is created, for example, when a party leases a rent-stabilized apartment for the sole purpose of subletting it for a profit. Here the leases served a legitimate purpose, the provision of transitional housing.

MUNICIPAL LAW, NEGLIGENCE, LATE NOTICE OF CLAIM.

THE NOTICE OF CLAIM WAS SERVED ONLY FIVE DAYS LATE WHICH WAS DEEMED TIMELY NOTICE OF THE NATURE OF THE ACTION AND A SHOWING OF THE ABSENCE OF PREJUDICE; THE CITY DID NOT AFFIRMATIVELY DEMONSTRATE PREJUDICE; THE ABSENCE OF AN ADEQUATE EXCUSE WAS NOT FATAL; LEAVE TO FILE A LATE NOTICE OF CLAIM SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the petitioner for leave to file a late notice of claim should have been granted. The notice of claim was served five days after the expiration of the 90-day time-limit. The court deemed that to constitute timely knowledge of the claim. The city did not demonstrate prejudice. The absence of an excuse was not a fatal defect:

… [T]he petitioner served the notice of claim upon the respondents five days after the 90-day period for service had expired and commenced the instant proceeding the next day. Under such circumstances, the respondents acquired actual knowledge of the essential facts constituting the claim within a reasonable time after the expiration of the 90-day statutory period … . Since the respondents acquired timely knowledge of the essential facts constituting the petitioner's claim, the petitioner met his initial burden of showing a lack of prejudice … .

… [T]he respondents "failed to come forward with particularized evidence showing that the late notice had substantially prejudiced [their] ability to defend the claim on the merits" … . Rather, the respondents' counsel made only conclusory assertions that the petitioner's five-day delay in serving the notice of claim had hindered the respondents' ability to conduct a prompt and thorough investigation of the subject incident, which "were insufficient to rebut the petitioner's initial showing of lack of prejudice" … .

Although the petitioner failed to offer a reasonable excuse for his failure to timely serve the notice of claim, "the absence of a reasonable excuse is not fatal to the petition where there was actual notice and absence of prejudice" … . Matter of Gabriel v City of Long Beach, 2022 NY Slip Op 04169, Second Dept 6-29-22

Practice Point: Here the notice of claim was served only five days late. The city was thereby deemed to have had timely notice of the nature of the claim and the petitioner was deemed to have demonstrated a lack of prejudice. The fact that the petitioner did not have an adequate excuse was not a fatal defect. Leave to file a late notice of claim should have been granted.

MUNICIPAL LAW, SLIP AND FALL, TREE WELLS.

UNDER THE NYC ADMINISTRATIVE CODE, ABUTTING PROPERTY OWNERS ARE LIABLE FOR THE CONDITION OF SIDEWALKS BUT NOT CITY OWNED TREE WELLS, UNLESS THEY AFFIRMATIVELY CREATE THE DANGEROUS CONDITION, NEGLIGENTLY REPAIR THE AREA, OR CREATE THE DANGEROUS CONDITION BY A SPECIAL USE; HERE PLAINTIFF SLIPPED AND FELL BECAUSE OF THE CONDITION OF THE TREE WELL, NOT THE SIDEWALK, AND NONE OF THE OTHER LIABILITY THEORIES APPLIED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the defendant property owner and manager could not be held liable for the condition of a tree will within a city sidewalk. Therefore there motion for summary judgment in this slip and fall case should have been granted:

Administrative Code of the City of New York § 7-210, which became effective September 14, 2003, shifted tort liability for injuries arising from a defective sidewalk from the City to the abutting property owner … . However, "section 7-210 does not impose civil liability on property owners for injuries that occur in city-owned tree wells" … . Thus, "liability may be imposed on the abutting landowner in such instances only where she or he has 'affirmatively created the dangerous condition, negligently made repairs to the area, [or] caused the dangerous condition to occur through a special use of that area'" … . Ivry v City of New York, 2022 NY Slip Op 04157, Second Dept 6-29-22

Practice Point: Under the NYC Administrative Code, abutting property owners can be liable for a slip and fall due to the condition of the sidewalk, but not a city-owned tree well.

NEGLIGENCE, ASSUMPTION OF RISK, SLIPPERY BASKETBALL COURT.

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

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

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

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

NEGLIGENCE, BUS-PASSENGER INJURY.

THERE WAS NO OBJECTIVE SUPPORT FOR PLAINTIFF BUS PASSENGER'S CLAIM THE MOVEMENT OF THE BUS WHICH CAUSED HER TO FALL WAS "UNUSUAL AND VIOLENT" (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the defendant bus company's, MTA's, motion to dismiss the complaint in this bus-passenger injury case should have been granted:

To establish a prima facie case of negligence against a common carrier for injuries sustained by a passenger as a result of the movement of the vehicle, a plaintiff must establish that the movement consisted of a jerk or lurch that was "'unusual and violent'" … . "Moreover, a plaintiff may not satisfy that burden of proof merely by characterizing the stop as unusual and violent" … . There must be "objective evidence of the force of the stop sufficient to establish an inference that the stop was extraordinary and violent, of a different class than the jerks and jolts commonly experienced in city bus travel and, therefore, attributable to the negligence of defendant" … . "In seeking summary judgment dismissing the complaint, however, common carriers have the burden of establishing, prima facie, that the movement of the vehicle was not unusual and violent" … .

… MTA established its prima facie entitlement to judgment as a matter of law. MTA demonstrated, by submitting the transcript of the plaintiff's deposition testimony, that the movement of the bus was not unusual and violent or of a "different class than the jerks and jolts commonly experienced in city bus travel" … . The nature of the incident, according to the plaintiff's deposition testimony, was that she was caused to fall as the bus stopped at the intersection. According to the plaintiff, who did not provide an estimate as to how fast the bus was traveling prior to stopping at the intersection, she was the only passenger on the bus who fell, although there was another passenger standing within two feet of her at the time. The plaintiff testified that she landed on the floor near where she was standing prior to falling down. This is not, in itself, sufficient to provide the objective support necessary to demonstrate that the movement of the bus was unusual and violent, and of a different class than the jerks and jolts commonly experienced in city bus travel … . Orji v MTA Bus Co., 2022 NY Slip Op 02811, Second Dept 4-27-22

Practice Point: In order to survive a motion to dismiss, a bus passenger's allegation his or her injury was caused by an "unusual and violent" movement of the bus must have some sort of "objective support," which was absent in this case.

NEGLIGENCE, MEDICAL MALPRACTICE, LATE NOTICE OF CLAIM, STATUTE OF LIMITATIONS.

ALTHOUGH THE SECOND ORDER TO SHOW CAUSE SEEKING LEAVE TO FILE A LATE NOTICE OF CLAIM WAS FILED TWO DAYS AFTER THE ONE-YEAR-NINETY-DAY LIMITATIONS PERIOD, THE STATUTE OF LIMITATIONS WAS TOLLED FOR THREE DAYS BETWEEN THE FILING AND THE DENIAL OF THE FIRST ORDER TO SHOW CAUSE; THE MEDICAL RECORDS PROVIDED THE MUNICIPALITY WITH NOTICE OF THE ESSENTAL FACTS OF THE CLAIM; THE MOTION FOR LEAVE TO FILE A LATE NOTICE SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the motion seeking leave to file a late notice of claim was timely and should have been granted. Although the second order to show cause was submitted two days beyond the one year-and-90-day deadline for suing a municipality. the statute of limitations was tolled for three days between the filing of the first order to show cause and the denial of that first motion:

Since the time to serve a notice of claim upon a public corporation cannot be extended beyond the time limited for commencement of an action against that party … , the court lacks authority to grant a motion for leave to serve a late notice of claim made more than one year and 90 days after the cause of action accrued, unless the statute of limitations has been tolled … . "CPLR 204(a) tolls the statute of limitations while a motion to serve a late notice of claim is pending" … . Where "a court declines to sign an initial order to show cause for leave to serve a late notice of claim on procedural grounds, but a subsequent application for the same relief is granted, the period of time in which the earlier application [was] pending [is also] excluded from the limitations period" … . …

… [T]he medical records provided the defendants with actual knowledge of the essential facts constituting the plaintiff's claim. The records evinced that a stroke code was called shortly after the plaintiff's presentation to the hospital, that, based on an assessment of her condition, it was decided that a tissue plasminogen activator was not needed, and that it was later determined that the plaintiff had suffered a stroke but that it was too late to administer that drug.

The plaintiff further made an initial showing that the defendants would not suffer any prejudice by the delay in serving the notice of claim, and the defendants failed to rebut the showing with particularized indicia of prejudice … .

Finally, where, as here, there is actual knowledge and an absence of prejudice, the lack of a reasonable excuse will not bar the granting of leave to serve a late notice of claim … . Ahmed v New York City Health & Hosp. Corp., 2022 NY Slip Op 02521, Second Dept 4-20-22

Practice Point: The one-year-ninety-day statute of limitations for suing a municipality is tolled for the time between submitting an order to show cause seeking leave to file a late notice of claim and the judge's refusal to sign the order to show cause. Here, although the second order to show cause seeking leave to file a late notice was submitted two days after the one-year-ninety-day statute had run, it was timely because of the three-day toll between the filing and denial of first order to show cause. Here the medical records sufficiently notified the municipality of the essential facts of the claim, the municipality did not demonstrate prejudice and there was no need for a reasonable excuse because there was actual knowledge and no prejudice.

NEGLIGENCE, SLIP AND FALL, CAUSE OF FALL.

PLAINTIFF IN THIS SLIP AND FALL CASE DID NOT SEE THE CONDITION THAT CAUSED HIM TO FALL NEAR A SINK IN DEFENDANTS' BATHROOM, BUT HIS PANTS WERE WET AFTER THE FALL; DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON THE GROUND THAT PLAINTIFF COULD NOT IDENTIFY THE CAUSE OF HIS FALL SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendants did not demonstrate plaintiff could not identify the cause of his slip and fall. Plaintiff fell near a sink in defendants' bathroom. Although he did not see the condition which caused him to fall, he pants were wet after the fall:

… [T]he defendants failed to establish, prima facie, that the plaintiff did not know what had caused him to fall. The plaintiff testified at his deposition that he did not see the condition that caused him to fall prior to the accident. However, he testified that, after he fell, his pants became wet. "Contrary to the defendants' contention, this testimony does not establish that the cause of the plaintiff's fall cannot be identified without engaging in speculation" … . Redendo v Central Ave. Chrysler Jeep, Inc., 2022 NY Slip Op 03411, Second Dept 5-25-22

Practice Point: Plaintiff did not see the condition which caused him to fall near a sink in defendants' bathroom, but his pants were wet after the fall. Defendants were not entitled to summary judgment on the ground the plaintiff could not identify the cause of his fall.

NEGLIGENCE, SLIP AND FALL, CONSTRUCTIVE NOTICE.

DEFENDANTS DID NOT DEMONSTRATE THEY DID NOT HAVE CONSTRUCTIVE NOTICE OF THE CONDITION OF THE STAIRS ALLEGED TO HAVE CAUSED PLAINTIFF'S SLIP AND FALL BECAUSE THEY OFFERED NO PROOF OF WHEN THE STAIRS WERE LAST INSPECTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendants' motion for summary judgment in this stairway slip and fall case should not have been granted. To warrant summary judgment on the issue of constructive notice, defendants must show when the stairway was last inspected, which they failed to do:

The defendants … failed to show … that they did not have constructive notice of the condition that the plaintiff alleged caused her to fall. "A defendant has constructive notice of a hazardous condition on property when the condition is visible and apparent, and has existed for a sufficient length of time to afford the defendant a reasonable opportunity to discover and remedy it" … . "To meet its initial burden on the issue of lack of constructive notice, the defendant must offer some evidence as to when the area in question was last . . . inspected relative to the time when the plaintiff fell" … . Here, the evidence submitted on the defendants' motion failed to demonstrate when the subject staircase was last inspected relative to the plaintiff's accident … . Weiss v Bay Club, 2022 NY Slip Op 03026, Second Dept 5-4-22

Practice Point: In a slip and fall case, to warrant summary judgment the defendant must show it did not have constructive notice of the dangerous condition by demonstrating that the area of the fall was inspected close in time to the incident.

NEGLIGENCE, SLIP AND FALL, CONSTRUCTIVE NOTICE.

DEFENDANTS PRESENTED NO PROOF OF WHEN THE AREA OF THE SLIP AND FALL WAS LAST INSPECTED; THERFORE DEFENDANTS DID NOT DEMONSTRATE A LACK OF CONSTRUCTIVE NOTICE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendants' motion for summary judgment in this slip and fall case should not have been granted. The defendants did not submit proof of when the area was last inspected and therefore did not demonstrate they lacked constructive notice of the condition:

A defendant has constructive notice of a hazardous condition on property when the condition is visible and apparent, and has existed for a sufficient length of time prior to the accident to afford the defendant a reasonable opportunity to discover and remedy it … . To meet its burden on the issue of constructive notice, a defendant is required to offer evidence as to when the accident site was last inspected relative to the time when the plaintiff fell … . Here, the defendants failed to demonstrate when they last inspected the walkway prior to the incident and they failed to establish, prima facie, that they did not have constructive notice of the alleged hazardous condition … . The defendants also failed to establish, prima facie, that the cinder block was open and obvious and not inherently dangerous … . Ferrer v 120 Union Ave., LLC, 2022 NY Slip Op 03096, Second Dept 5-11-22

Practice Point: For years hundreds of cases were reversed because there was no evidence of when the area of a slip and fall was last inspected by a defendant and therefore defendant did not demonstrate a lack of constructive notice and was not entitled to summary judgment. Now there are just a few cases reversed for this reason in a given year. The bar has learned this lesson.

NEGLIGENCE, SLIP AND FALL, CONTRACTOR LIABILTY.

A CONTRACTOR WHICH CREATES A DANGEROUS CONDITION ON A PUBLIC SIDEWALK MAY BE LIABLE FOR A SLIP AND FALL BY A MEMBER OF THE PUBLIC (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the defendant sidewalk-repair contractor's motion for summary judgment in this slip and fall case should not have been granted. There was a question of fact whether the contractor who repaired the sidewalk created the hole which caused plaintiff to trip. A contractor may be liable for an affirmative act of negligence which results in a dangerous condition on a public street or sidewalk:

"A contractor may be [held] liable for an affirmative act of negligence which results in the creation of a dangerous condition upon a public street or sidewalk" … . Here, Amato [the defendant contractor] failed to establish its prima facie entitlement to judgment as a matter of law.

At his deposition, Victor Amato, Amato's owner, testified that his company had replaced a portion of the sidewalk at the subject location. … He acknowledged … that a two-by-four had been installed as a vertical "stake" to support a form that was used when the concrete was poured, and that he or one of his employees would have removed the stake after the concrete had set.

… [T]he plaintiff testified that she had not seen the hole because, from the direction she was walking, it was on the other side of an uneven, or sloped, portion of the sidewalk. Victor Amato admitted that this slope had been created deliberately (through a process known as "feathering") because the new portion of the sidewalk was at a different height from the existing sidewalk. Pizzolorusso v Metro Mech., LLC, 2022 NY Slip Op 03018, Second Dept 5-4-22

Practice Point: Contactors which create a dangerous condition on a public sidewalk or road may be liable to a member of the public who is injured by the dangerous condition. The theory is similar to the "launch an instrument of harm" theory of contractor liability under the Espinal case.

NEGLIGENCE, SLIP AND FALL.

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

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

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

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

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

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

NEGLIGENCE, SUPPPLEMENTAL VS AMENDED BILL OF PARTICULARS.

THE DOCUMENT LABELED A "SUPPLEMENTAL" BILL OF PARTICULARS WAS ACTUALLY AN "AMENDED" BILL OF PARTICULARS BECAUSE IT ADDED NEW INJURIES AFTER THE NOTE OF ISSUE WAS FILED; THE DEFENDANT'S MOTION TO STRIKE THE AMENDED BILL OF PARTICULARS SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court in this slip and fall case, determined the document labeled a "supplemental" bill of particulars was actually a post-note-of-issue "amended" bill of particulars which should not have been served without leave of the court:

… [T]he document that they denominated a "supplemental bill of particulars" … , was, in reality, an amended bill of particulars, as they sought to add new injuries (see CPLR 3043[b]). Accordingly, the Supreme Court erred in denying that branch of [defendant's] motion which was to strike the amended bill of particulars … , denominated as a supplemental bill of particulars, which was served without leave of court and after the note of issue had been filed … . Naftaliyev v GGP Staten Is. Mall, LLC, 2022 NY Slip Op 02556, Second Dept 4-20-22

Practice Point: A "supplemental" bill of particulars which adds new injuries after the note of issue is filed is actually an "amended" bill of particulars which can only be served with leave of the court.

NEGLIGENCE, TRAFFIC ACCIDENTS, LATE NOTICE OF CLAIM.

IN THIS TRAFFIC ACCIDENT CASE INVOLVING THE DEFENDANT NYC TRANSIT AUTHORITY'S BUS, THE AUTHORITY GAINED TIMELY KNOWLEDGE OF THE POTENTIAL CLAIM WHEN IT INVESTIGATED THE ACCIDENT AND WAS NOT PREJUDICED BY THE DELAY; THE PETITION FOR LEAVE TO FILE A LATE NOTICE OF CLAIM SHOULD HAVE BEEN GRANTED, NOTWITHSTANDING THE ABSENCE OF A REASONABLE EXCUSE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the petition seeking leave to file a late notice of claim in this traffic accident case should have been granted. It was alleged defendant NYC Transit Authority's bus collided with a NYC sanitation truck which then collided with petitioner's car. The Transit Authority investigated the accident and therefore had knowledge of the essential facts of the claim. Because the defendant had timely actual knowledge of the potential claim and did not demonstrate prejudice from the delay, petitioner did not need to present a reasonable excuse for the late notice:

… [A]s the Authority acquired timely knowledge of the essential facts constituting the petitioner's claim, the petitioner met his initial burden of showing that the Authority would not be prejudiced by the late notice of claim … . In response to the petitioner's initial showing, the Authority failed to come forward with particularized evidence demonstrating that the late notice of claim substantially prejudiced its ability to defend the claim on the merits … . Since the Authority had actual knowledge of the essential facts underlying the claim and no substantial prejudice to the Authority was demonstrated, the petitioner's failure to provide a reasonable excuse for the delay in serving the notice of claim did not serve as a bar to granting leave to serve a late notice of claim … . Matter of Manbodh v New York City Tr. Auth., 2022 NY Slip Op 02544, Second Dept 4-20-22

Practice Point: Here the defendant NYC Transit Authority investigated the traffic accident involving petitioner's car and therefore had timely notice of the essential facts of the potential lawsuit. In that situation, in the absence of prejudice to the defendant caused by petitioner's failure to timely file a notice of claim (none here),

petitioner need not provide a reasonable excuse and leave to file a late notice should be granted.

NEGLIGENCE, SLIP AND FALL, EMPLOYMENT LAW, WORKERS' COMPENSATION.

DEFENDANT PROPERTY OWNER FAILED TO DEMONSTRATE IT WAS THE ALTER EGO OF PLAINTIFF'S EMPLOYER OR THAT PLAINTIFF WAS DEFENDANT'S SPECIAL EMPLOYEE; THEREFORE PLAINTIFF'S PERSONAL INJURY ACTION WAS NOT PRECLUDED BY THE EXCLUSIVE REMEDY ASPECT OF THE WORKERS' COMPENSATION LAW (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant Zorn Realties, the owner of the property, did not demonstrate it was the alter ego of plaintiff's employer, Zorn Poultry Farm, and did not demonstrate plaintiff was a special employee of Zorn Realties. Therefore, the negligence action stemming from plaintiff's fall through a chute or a hole on defendant's property was not precluded by the exclusive-remedy aspect of the Workers' Compensation Law:

"'A defendant moving for summary judgment based on the exclusivity defense of the Workers' Compensation Law under this theory must show, prima facie, that it was the alter ego of the plaintiff's employer'" … . "A defendant may establish itself as the alter ego of a plaintiff's employer by demonstrating that one of the entities controls the other or that the two operate as a single integrated entity" … . However, "a mere showing that the entities are related is insufficient where a defendant cannot demonstrate that one of the entities controls the day-to-day operations of the other" … .

… Although the defendant presented evidence that the two entities were related inasmuch as they shared an address and a liability insurance policy, the defendant failed to establish that the entities shared officers or had identical owners. Additionally, the evidence showed that the entities served different purposes, had separate bank accounts, filed separate tax returns, and did not have a shared workers' compensation policy … . …

"Many factors are weighed in deciding whether a special employment relationship exists, and generally no single one is decisive . . . Principal factors include who has the right to control the employee's work, who is responsible for the payment of wages and the furnishing of equipment, who has the right to discharge the employee, and whether the work being performed was in furtherance of the special employer's or the general employer's business . . . The most significant factor is who controls and directs the manner, details, and ultimate result of the employee's work'" … .

… [T]he defendant failed to establish … that the plaintiff was its special employee at the time of the accident because it did not submit sufficient evidence to establish, inter alia, that it controlled and directed the manner, details, and ultimate result of the plaintiff's work, nor did it establish that the plaintiff had knowledge of and consented to a special employment relationship … . Mauro v Zorn Realties, Inc., 2022 NY Slip Op 03509, Second Dept 6-1-22

Practice Point: Here the defendant property owner was not able to take advantage of the exclusive-remedy aspect of the Workers' Compensation Law in this personal injury action. Plaintiff's employer was not the alter ego of defendant and plaintiff was not defendant's special employee.

NEGLIGENCE, TRAFFIC ACCICENTS, VEHICLE AND TRAFFIC LAW, GRAVES AMENDMENT, LIABILITY OF LESSOR.

PLAINTIFF DID NOT DEMONSTRATE THE GRAVES AMENDMENT, WHICH RELIEVES THE OWNER OF A LEASED VEHICLE FROM LIABILITY FOR A TRAFFIC ACCIDENT, DID NOT APPLY TO THE DEFENDANT OWNER; THEREFORE PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff did not demonstrate the Graves Amendment did not apply to the owner of the vehicle involved in the accident, relieving the owner of a leased vehicle of liability:

Pursuant to Vehicle and Traffic Law § 388(1), "[e]very owner of a vehicle used or operated in this state shall be liable and responsible for death or injuries to person or property resulting from negligence in the use or operation of such vehicle, in the business of such owner or otherwise, by any person using or operating the same with the permission, express or implied, of such owner." However, pursuant to the Graves Amendment, which "preempt[s] conflicting New York law" … , the owner of a leased or rented motor vehicle (or an affiliate of the owner) cannot be held liable by reason of being the owner of the vehicle (or an affiliate of the owner) for personal injuries resulting from the use of such vehicle if: (1) the owner (or an affiliate of the owner) is engaged in the trade or business of renting or leasing motor vehicles, and (2) there is no negligence or criminal wrongdoing on the part of the owner (or an affiliate of the owner) (see 49 USC § 30106[a] …). Keys v PV Holding Corp., 2022 NY Slip Op 03105, Second Dept 5-11-22

Practice Point: If the owner of a leased vehicle is not negligent (i.e., improper maintenance, etc.), the Graves Amendment relieves the owner of liability for a traffic accident involving the leased vehicle. Here the plaintiff did not demonstrate the Graves Amendment didn't apply. Therefore the burden to prove the amendment did apply never shifted to the defendant vehicle-owner and plaintiff's motion for summary judgment should not have been granted.

NEGLIGENCE, TRAFFIC ACCIDENTS, VEHICLE AND TRAFFIC LAW.

DEFENDANT ATTEMPTED A LEFT TURN IN VIOLATION OF VEHICLE AND TRAFFIC LAW 1141; PLANTIFF'S MOTION FOR SUMMARY JUDGMENT IN THIS INTERSECTION TRAFFIC-ACCIDENT CASE SHOULD HAVE BEEN GRANTED (FIRST DEPT).

The Second Department, reversing (modifying) Supreme Court, determined plaintiff's motion for summary judgment in this intersection traffic accident case should have been granted. Plaintiff was a passenger in a taxi cab when the cab collided with the Katz-defendants' vehicle which was making a left turn in front of the cab:

"Pursuant to Vehicle and Traffic Law § 1141, '[t]he operator of a vehicle intending to turn left within an intersection must yield the right-of-way to any oncoming vehicle that is within the intersection or so close to it as to constitute an immediate hazard'" … . "A violation of this statute constitutes negligence per se" … . Here, the evidence submitted by the plaintiff in support of her motion, which included the deposition testimony of Gabriel Katz as to the happening of the accident, established, prima facie, that Gabriel Katz was negligent in making a left turn when it was not safe for him to do so in violation of Vehicle and Traffic Law §§ 1141 and 1163, and that his negligence was a proximate cause of the collision … . While there are some discrepancies between the deposition testimony of the plaintiff and Gabriel Katz as to the relative position of the vehicles at the time of the impact, even under Gabriel Katz's account, he was "negligent in attempting to make a left turn when the turn could not be made with reasonable safety" … . In opposition, the Katz defendants failed to raise a triable issue of fact. Contrary to their contention, the evidence did not support the possible applicability of the emergency doctrine under the circumstances … . Lindo v Katz, 2022 NY Slip Op 03379, Second Dept 5-25-22

Practice Point: A left turn in violation of Vehicle and Traffic Law 1141 is negligence per se.

NEGLIGENCE, TRAFFIC ACCIDENTS.

ALTHOUGH PLAINTIFF WAS STRUCK IN THE ON-COMING LANE WHILE ATTEMPTING A LEFT TURN IN AN INTERSECTION, THERE WERE QUESTIONS OF FACT WHETHER DEFENDANT SHOULD HAVE SEEN THE PLAINTIFF (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the defendant's motion for summary judgment in this intersection traffic accident case should not have been granted. Although plaintiff was making a left turn when he was struck by defendant in the on-coming lane, there was a question of fact whether defendant should have seen plaintiff. Plaintiff was making the turn after a stopped driver in the on-coming law gestured to him:

… [A]lthough the defendant submitted evidence that the plaintiff failed to yield the right-of-way when turning left in violation of Vehicle & Traffic Law § 1141, the defendant failed to establish, prima facie, that the plaintiff's failure to yield was the sole proximate cause of the collision and that the defendant was free from fault … . While testifying, the defendant admitted that he saw nothing out of the ordinary prior to the collision, that he could not recall if he observed the plaintiff's vehicle, and that he only realized that there was a collision from hearing the sound. However, the defendant also testified that he was only driving at approximately 25 miles per hour and was looking straight ahead on a sunny afternoon with no obstructions to his view … . Moreover, the defendant acknowledged that he did not know if his vehicle or the plaintiff's vehicle entered the intersection first. Thus, the defendant's evidentiary submissions failed to eliminate triable issues of fact as to whether the plaintiff's vehicle was already in the intersection as the defendant approached and whether the defendant should have observed the plaintiff's vehicle making a left turn in time to take evasive action to avoid the accident … . Blake v Francis, 2022 NY Slip Op 02974, Second Dept 5-4-22

Practice Point: Although plaintiff may have violated the Vehicle and Traffic Law by making a left turn in the path of defendant's car, there can be more than one proximate cause of an accident. Here there was a question of fact whether defendant should have seen the plaintiff as he attempted the turn.

NEGLIGENCE, VEHICLE AND TRAFFIC LAW.

THE RIGHT LANE WAS FOR RIGHT TURNS ONLY; THE MIDDLE LANE WAS FOR EITHER GOING STRAIGHT OR TURNING RIGHT; HERE THE DRIVER IN THE FAR RIGHT LANE DID NOT TURN RIGHT AND STRUCK THE CAR IN THE MIDDLE LANE WHICH WAS MAKING A RIGHT TURN; THE DRIVER IN THE MIDDLE LANE WAS ENTITLED TO SUMMARY JUDGMENT DISMISSING THE COMPLAINT (SECOND DEPT).

The Second Department, reversing Supreme Court in this traffic accident case, determined plaintiff's motion for summary judgment against defendant Rubio should not have been granted and defendant Rubio's motion for summary judgment should have been granted. Plaintiff was a passenger in a taxi driven by

defendant Muy-Angamarca. Muy-Angamarca was in the far right lane, which was for right turns only. Rubio was in the middle lane which could be used to go straight or turn right. When Rubio attempted the right turn, Muy-Angamarco continued straight and struck Rubio's car:

… [T]he Rubio defendants established their prima facie entitlement to judgment as a matter of law by demonstrating that the sole proximate cause of the accident was Muy-Angamarca's vehicle continuing straight through the intersection in disregard of a traffic sign directing that his lane was for right turns only … . Based upon Muy-Angamarca's disregard of the traffic sign, he was in violation of the Vehicle and Traffic Law, and thus, he was negligent as a matter of law (see Vehicle and Traffic Law § 1110[a] …). Rubio was entitled to assume that Muy-Angamarca would obey the traffic sign requiring Muy-Angamarca to turn right … . Indeed, the plaintiff testified at his deposition that he observed that Rubio had signaled before making a legal right turn from the middle lane, that Muy-Angamarca "started to accelerate" toward the intersection while Rubio's vehicle was turning, and that he did not believe Rubio was at fault in the happening of the accident. Ellsworth v Rubio, 2022 NY Slip Op 02781, Second Dept 4-27-22

SLIP AND FALL, ASSAULT AND BATTERY.

PLAINTIFF'S DEPOSITION TESTIMONY THAT HE DID NOT RECALL HOW OR WHERE HE SLIPPED AND FELL AND DID NOT RECALL A FIGHT OR BEING HIT WERE FATAL TO THE SLIP AND FALL AND ASSAULT CAUSES OF ACTION (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff's deposition testimony that he didn't recall how or where he slipped and fell, and, with respect to his assault cause of action, did not recall the fight or being hit, was fatal to the complaint:

In a slip-and-fall case, a plaintiff's inability to identify the cause of the fall is fatal to the cause of action, because a finding that the defendant's negligence, if any, proximately caused the plaintiff's injuries would be based on speculation … . Here, with regard to that branch of their motion which was for summary judgment

dismissing the cause of action alleging negligence, the defendants established, prima facie, that the plaintiff could not identify the cause of his alleged fall without engaging in speculation … . …

"To sustain a cause of action to recover damages for assault, there must be proof of physical conduct placing the plaintiff in imminent apprehension of harmful contact" … . Here, the plaintiff testified at his deposition that he could not recall a physical altercation at the premises on the date of the alleged incident and did not "recall being hit." Barnett v Fusco, 2022 NY Slip Op 04147, Second Dept 6-29-22

Practice Point: In a slip and fall case, the failure to recall the cause of the fall requires dismissal. In an assault and battery case, the failure to recall the fight or being hit requires dismissal.