NEW YORK APPELLATE DIGEST, LLC

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An Organized Compilation of Summaries of Selected Decisions, Mostly Reversals, Released by the First Department and Posted on the New York Appellate Digest Website October – December 2022. The Entries in the Table of Contents Link to the Summaries Which Link to the Decisions on the Official New York Courts Website. Click on “Table of Contents” in the Header on Any Page to Return There. Right Click on the Citations to Keep Your Place in the Reversal Report.

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APPEALS, CIVIL PROCEDURE.

THE ORDER DENYING A MOTION TO VACATE OR MODIFY A PRIOR ORDER DID NOT MEET THE CRITERIA FOR AN ORDER "APPEALABLE AS OF RIGHT" AND THEREFORE WAS NOT CONSIDERED BY THE APPELLATE DIVISION; THE CRITERIA FOR AN "ORDER APPEALABLE AS OF RIGHT" WERE EXPLAINED (FIRST DEPT)

The First Department noted that the order refusing to vacate or modify a prior order was not appealable:

… [T]his Court lacks jurisdiction to consider the portion of defendants' appeal from the denial of the motion to vacate. Pursuant to CPLR 5701(a)(3), a party may appeal to this Court as of right from an order refusing to vacate or modify a prior order, but only where the prior order "would have been appealable as of right" pursuant to CPLR 5701(a)(2) if it had been the result of a motion on notice. Here, the Extension Denial Order would not have been appealable as of right if it had been the result of a motion made on notice. The Extension Denial Order was not a substantive ruling, rather it denied defendants' request for an extension of its time to post a bond. The order did not "involve[] some part of the merits" of the case (CPLR 5701[a][2][iv]) or "affect[] a substantial right" (CPLR 5701[a][2][v]) of the parties, or otherwise fit within CPLR 5701(a)(2) such that it would be appealable

as of right. Largo 613 Baltic St. Partners LLC v Stern, 2022 NY Slip Op 06168, First Dept 11-3-22

Practice Point: An order denying a motion to vacate or modify a prior order must meet the criteria for "an order appealable as of right" to be considered on appeal. Here the denial of the motion to vacate the prior order was not a substantive ruling (it asked for an exension of time to post a bond) and therefore did not meet the "appealable as of right" criteria.

NOVEMBER 3, 2022

CIVIL PROCEDURE, LAW-OFFICE FAILURE.

DEFENDANT'S COUNSEL MISCALENDARED THE RETURN DATE FOR THE MOTION FOR SUMMARY JUDGMENT; THE MOTION TO VACATE THE JUDGMENT DUE TO LAW OFFICE FAILURE SHOULD HAVE BEEN GRANTED (FIRST DEPT).

The First Department, reversing Supreme Court, determined defendant's motion to vacate the judgment due to law office failure should have been granted. Plaintiff's unopposed motion for summary judgment had been granted:

The law office failure of miscalendaring dates has been deemed a reasonable excuse … . Here, defendant's counsel miscalendared the return date of plaintiff's summary judgment motion for July 1, 2021 rather than June 1, 2021. Counsel explained that it is his regular practice to calendar motion dates once a return date is set; to review his calendar daily and on or about the first of each month; and that he had been working part-time at home with a less robust system compared to his office … . Accordingly, defendant proffered a reasonable excuse in the form of law office failure and should not be deprived of its day in court for counsel's error … . First Am. Tit. Ins. Co. v Successful Abstract, LLC, 2022 NY Slip Op 07186, First Dept 12-20-22

Practice Point: Miscalendaring the return date for the motion for summary judgment was deemed a reasonable excuse for the default (law office failure).

DECEMBER 20, 2022

CIVIL PROCEDURE, MOTION TO RENEW.

IF THE EVIDENCE PRESENTED IN A MOTION TO RENEW WAS AVAILABLE AT THE TIME OF THE ORIGINAL MOTION, THE FAILURE TO INCLUDE IT MUST BE EXPLAINED; HERE THE FAILURE WAS NOT EXPLAINED AND THE MOTION SHOULD NOT HAVE BEEN GRANTED (FIRST DEPT).

The First Department, reversing Supreme Court, determined the evidence presented in plaintiff's motion to renew was available at the time of the initial motion. Therefore plaintiff's failure to explain the failure to include it required denial of the renewal motion:

Plaintiff moved under CPLR 2221(e) for leave to renew defendants' motion to vacate the default and compel arbitration. In support of its motion, plaintiff submitted public court filings showing that the prior attorney was not incapacitated as he claimed between September 18 … and December 31 … and that the prior attorney had appeared in at least one hearing during that time. Plaintiff argued that the prior attorney's explanation for his failure to appear on behalf of defendants, on which Supreme Court relied upon to vacate the default, contained material misrepresentations and that these new facts were sufficient to warrant renewal. In opposition, defendants submitted an affirmation from the prior attorney essentially reasserting the circumstances of his default. Supreme Court granted renewal, vacated the prior order, and reinstated the default judgment.

The record demonstrates that the court filings plaintiff relies on, which are matters of public record, existed at the time it submitted opposition to defendants' vacatur motion. Plaintiff, however, did not provide in the renewal motion a "reasonable justification for the failure to present such facts on the prior motion" (CPLR 2221[e][3]…). Chris Grant Brohawk Films v Digital Seven LLC, 2022 NY Slip Op 06635, First Dept 11-22-22

Practice Point: If a motion to renew is based upon evidence which was available at the time of the original motion, the failure must be explained. Here the absence of any explanation required denial of the motion to renew.

NOVEMBER 22, 2022

CIVIL PROCEDURE, FAILURE TO COMPLY WITH DISCOVERY ORDERS.

DEFENDANT'S FAILURE TO COMPLY WITH DISCOVERY ORDERS WAS WILLFUL AND CONTUMACIOUS WARRANTING STRIKING ITS ANSWER (FIRST DEPT).

The First Department, reversing Supreme Court, determined the defendant's (Motors's) failure to turn over records despite four court orders and defendant's attempt to mislead plaintiff about its compliance with the discovery requirements warranted striking defendant's answer:

We find that Motors's failure to produce these records was willful and contumacious, in view of the fact that it did not do so despite four courts orders, and in light of its interrogatory response implying that it had complied with its discovery obligations in an apparent attempt to mislead plaintiff (see CPLR 3216 …). Although the other defendants were represented by the same counsel as Motors, there is no indication that they exercised control over Motors or were in possession of Motors's records … .

Motors's dilatory behavior warrants striking its answer … . Lopez v Bronx Ford, Inc., 2022 NY Slip Op 06068, First Dept 10-27-22

Practice Point: Here defendant's failure to comply with four discovery orders and its attempt to mislead plaintiff about its compliance was deemed willful and contumacious warranting striking defendant's answer.

OCTOBER 27, 2022

CIVIL PROCEDURE, JUDGES.

BOTH PARTIES MOVED TO EXTEND THE DEADLINE FOR FILING A NOTE OF ISSUE BECAUSE DISCOVERY WAS NOT COMPLETE; DENYING THE MOTION MADE IT IMPOSSIBLE FOR THE CASE TO PROGRESS; SUPREME COURT REVERSED (FIRST DEPT).

The First Department, reversing Supreme Court, determined the motion to extend the deadline for filing the note of issue should not have been denied because discovery was incomplete:

The motion court improvidently denied the motions of both parties to extend the deadline to file the note of issue and to complete discovery since discovery was not complete. Under the circumstances, the court's denial of plaintiff's motion left the parties in limbo where they could neither move forward to trial nor complete the discovery necessary to move forward to trial, thereby frustrating the strong public policy favoring open disclosure to allow the parties to adequately prepare (CPLR 3101[a] …). Additionally, as defendant demonstrated a need for additional discovery and to depose plaintiff's expert, who was hired to calculate damages in this commercial case, its motion should have been granted (see 22 NYCRR 202.70, Rule 13[c] …). 361 Broadway Assoc. Holdings, LLC v Foundations Group I, Inc., 2022 NY Slip Op 06571, First Dept 11-17-22

Practice Point: if the judge makes it impossible for the case to progress, here by denying both parties' motions to extend the deadline for filing the note of issue to complete discovery, the appellate court will reverse.

NOVEMBER 17, 2022

CIVIL PROCEDURE, JURISDICTION, PRODUCTS LIABILITY.

NEW YORK DOES NOT HAVE GENERAL OR LONG-ARM JURISDICTION OVER A UK CORPORATION WHICH ALLEGEDLY MANUFACTURED A DEFECTIVE PART OF AN EXCAVATOR (FIRST DEPT).

The First Department, reversing Supreme Court, determined the Miller defendants, a UK corporation, were not amenable to general or long-arm jurisdiction in New York. Plaintiff alleged a part (a coupler) made by Miller failed causing an excavator bucket to detach and fall:

General jurisdiction exists over a corporate entity only in the state(s) in which it is incorporated and has its principal place of business … . * * *

Defendants have also failed to establish specific jurisdiction over the Miller parties pursuant to CPLR 302(a)(1), CPLR 302 (a)(3)(i) or CPLR 302 (a)(3)(ii). Although the Miller parties might have placed the coupler involved in plaintiff's accident into the stream of commerce, and while they tout having a global customer base and business model, the Supreme Court of the United States has made clear that "the 'fortuitous circumstance' that a product sold in another state later makes its way into the forum jurisdiction through no marketing or other effort of [the] defendant," or "'the mere likelihood that a product will find its way into the forum[,]' cannot establish the requisite connection between [the] defendant and the forum" to support an exercise of specific personal jurisdiction … . Cruz v City of New York, 2022 NY Slip Op 06546, First Dept 11-17-22

Practice Point: The 'fortuitous circumstance' that a product sold in another state later makes its way into the forum jurisdiction through no marketing or other effort of [the] defendant," or "'the mere likelihood that a product will find its way into the forum[,]' cannot establish the requisite connection between [the] defendant and the forum" to support an exercise of specific personal jurisdiction. Here New York did not have general or long-arm jurisdiction over a UK corporation which manufactured a part on an excavator which allegedly failed causing the excavator bucket to detach.

NOVEMBER 17, 2022

CIVIL PROCEDURE, STIPULATIONS SHOULD BE ENFORCED BY THE COURT.

THE PARTIES HAD ALREADY STIPULATED TO RESTORE THE ACTION TO THE CALENDAR; THE JUDGE SHOULD HAVE GRANTED PLAINTIFF'S MOTION TO VACATE THE DISMISSAL OF THE ACTION FOR FAILURE TO APPEAR AT CONFERENCES OR OUTLINE REMAINING DISCOVERY (FIRST DEPT).

The First Department, reversing Supreme Court, determined plaintiff's motion to vacate the order dismissing the action based on plaintiff's failure to appear at conferences or file a stipulation outlining discovery should have been granted. The parties had already stipulated to restore the action to the calendar and the court should have enforced the stipulation:

The motion court improvidently exercised its discretion when it denied plaintiff's motion to vacate the order for failure to appear at conferences or to file a stipulation outlining the remaining discovery … . Defendants had already stipulated to restore the matter to the calendar, and stipulations between the parties are binding on the parties and generally enforced by the courts … . Moreover, the assertion by plaintiff's counsel that two of the court's notices were inadvertently routed to counsel's spam folder constitutes an excusable law office failure … . Nor is there evidence in the record that counsel has engaged in a pattern of dilatory behavior … . Finally, plaintiff's pleadings, along with the depositions of the witnesses, established a potentially meritorious cause of action … . Navarro v Joy Constr. Corp., 2022 NY Slip Op 05602, First Dept 10-6-22

Practice Point: Here excusable law office failure explained plaintiff's failure to appear at conferences or outline remaining discovery. The parties had already stipulated to restore the action to the calendar. Plaintiff's motion to vacate the dismissal of the action should have been granted. The parties' stipulation should have been enforced, not ignored, by the judge.

OCTOBER 6, 2022

CIVIL PROCEDURE.

THE SIX-MONTH PERIOD FOR REFILING A COMPLAINT AFTER DISMISSAL (CPLR 205(A)) BEGAN TO RUN ONLY WHEN THE APPEAL OF THE DENIAL OF THE MOTION TO VACATE THE DISMISSAL WAS EXHAUSTED (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined the six-month period for filing a new complaint after dismissal started to run when the appeal of the denial of the motion to vacate the dismissal was exhausted:

Where a plaintiff has sought to appeal as of right from the denial of a motion to vacate the dismissal of its action, the action terminates for purposes of CPLR 205 (a) when the appeal "is truly 'exhausted,' either by a determination on the merits or by dismissal of the appeal, even if the appeal is dismissed as abandoned … . "Here, the dismissal of the 2012 action "did not constitute a final termination of that action within the meaning of CPLR 205 (a) because plaintiff's predecessor in interest was statutorily authorized to file a motion to vacate [the dismissal] and to appeal from the denial of that motion" … . The 2012 action thus terminated for purposes of CPLR 205 (a) on November 30, 2018, when this Court dismissed the appeal and plaintiff's predecessor in interest thereby exhausted its right of appeal … . Inasmuch as the instant action was commenced within six months of November 30, 2018, we conclude that it was timely commenced. MTGLQ Invs., LP v Zaveri, 2022 NY Slip Op 06335, Fourth Dept 11-10-22

Practice Point: The six-month period for refiling a complaint after dismissal (CPLR 208(a)) begins to run only after the appeal from the denial of a motion to vacate the dismissal is exhausted.

NOVEMBER 10, 2022

CONTRACT LAW, CEERTIFICATION OF ACKNOWLEDGMENT AS PROOF OF EXECUTION BY DECEDENT.

THE CERTIFICATION OF ACKNOWLEDGMENT IS PRIMA FACIE EVIDENCE THE DECEDENT EXECUTED THE CONTRACT, BUT THAT EVIDENCE CREATES ONLY A REBUTTABLE PRESUMPTION; PLAINTIFF PRESENTED SUFFICIENT EVIDENCE TO RAISE A QUESTION OF FACT WHETHER DECEDENT SIGNED THE AGREEMENT (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, determined the certification of acknowledgment is prima facie proof the contract was executed by decedent but the certification only creates a rebuttable presumption:

… [T]he agreement was notarized by defendant Rosemary Bellini. "Certification of the acknowledgment or proof of a writing . . . in the manner prescribed by law for taking and certifying the acknowledgment or proof of a conveyance of real property within the state is prima facie evidence that it was executed by the person who purported to do so" (CPLR 4538). * * *

"The certification of acknowledgment becomes prima facie evidence that the writing was executed by the person who acknowledged having done so. [This] [p]rima facie evidence" is not conclusive; rather, it "creates a rebuttable presumption" … . Plaintiff marshalled considerable evidence casting doubt on whether decedent actually signed the purported agreement and, if so, whether he knew or understood what he was signing. Thus, plaintiff should be given a chance to rebut the presumption created by Bellini's notarization … . Langbert v Aconsky, 2022 NY Slip Op 06067, First Dept 10-27-22

Practice Point: Here the certification of acknowledgment was prima facie proof decedent signed the agreement but that proof only creates a rebuttable presumption. But plaintiff raised a question of fact whether decedent actually executed the agreement.

OCTOBER 27, 2022

CONTRACT LAW, TYPOGRAPHICAL ERROR.

THE TYPOGRAPHICAL ERROR IN THE CONTRACT RENDERED A CRUCIAL SENTENCE AMBIGUOUS; THE ERROR COULD NOT BE CORRECTED WITHOUT POSSIBLY ALTERING THE PARTIES' INTENT; THEREFORE EXTRINSIC EVIDENCE IS NECESSARY TO INTERPRET THE CONTRACT (FIRST DEPT).

The First Department, in full-fledged opinion by Justice Webber, over an extensive two-justice dissent, determined there was a typographical error in the sentence describing the effective date of the contract which rendered the contract ambiguous. The dissent argued the intended meaning of the sentence was clear and the error should be corrected by the court: The effective date of the contract was crucial to a determination whether the contract was enforceable or had expired:

… [W]e are not ascribing one interpretation over the other. Rather, we are pointing out the multiple reasonable interpretations and concluding that additional information is necessary to ascertain the proper interpretation (see Castellano v State of New York, 43 NY2d 909 [1978]). In Castellano, when faced with a word in a lease clause that was grammatically inconsistent with the rest of the lease, the Court considered the different ways the parties proposed to change the clause to render it grammatically correct, both of which were reasonable. Each required altering a word in the lease. Rather than choosing one alteration over another, the Court found that there should be an exploration to ascertain the proper interpretation. …

… [T]hese are not "inadvertent errors," or a "mistake" that can be corrected without altering the intent of the parties … . While "mistakes in grammar, spelling or punctuation should not be permitted to alter, contravene or vitiate manifest intention of the parties as gathered from the language employed" … , the [contract language] cannot be rendered grammatically correct without possibly altering the parties' intent. "[T]he question of whether an ambiguity exists must be ascertained from the face of an agreement without regard to extrinsic evidence" … . Here, the … language is literally unclear and ambiguous and must be interpreted in light of extrinsic evidence. Mak Tech. Holdings Inc. v Anyvision Interactive Tech. Ltd., 2022 NY Slip Op 07507, First Dept 12-29-22

Practice Point: Although a court can correct an obvious typographical error in a contract, here the majority concluded there was more than one way to make the language grammatically correct, rendering the contract ambiguous. Extrinsic evidence was therefore necessary to interpret the contract.

DECEMBER 29, 2022

CONTRACT LAW, CONSTRUCTION-DELAY DAMAGES.

IN A CONSTRUCTION CONTRACT TRIAL, IT IS IMPROPER TO DETERMINE ADDITIONAL LABOR COST DUE TO DELAY BY USING A DEFENDANT'S PRECONTRACT ESTIMATE OF LABOR COST (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court in this construction contract case, determined the labor cost associated with a delay could not be determined by using the defendant's precontract estimate of what its labor cost would be:

The trial court should not have awarded damages for additional labor costs due to defendants' delays in the construction project. In general, it is impermissible to calculate delay damages for additional labor costs based on a comparison of the contractor's precontract estimate of what its labor cost would be and what it claimed its labor cost actually turned out to be … . Nevertheless, in calculating the additional labor costs that plaintiff incurred from defendants' delays, plaintiff's expert improperly used plaintiff's pre-bid estimate of the project's expected labor costs, and Supreme Court erred in basing the award on this improper method of calculation. Five Star Elec. Corp. v A.J. Pegno Constr. Co., Inc./Tully Constr. Co., Inc.,2022 NY Slip Op 05659, First Dept 10-11-22

Practice Point: Here in this construction-contract trial, plaintiff's expert should not have calculated the additional labor cost due to delay by using the defendant's precontract labor cost estimate.

OCTOBER 11, 2022

CONTRACT LAW, LANDLORD-TENANT, REPUDIATION, BREACH OF CONTRACT.

THERE CAN BE NO REPUDIATION WHERE THERE HAS BEEN A BREACH OF CONTRACT, TWO JUSTICE DISSENT (FIRST DEPT).

The First Department, over a two-justice dissent, determined plaintiff in this landlord-tenant dispute could not seek separate redress on a theory of repudiation for the breach of contract cause of action. The decision is fact-specific and cannot be fairly summarized here:

… [B]ecause a party cannot repudiate a contract it has already breached, if the landlord is found to have breached the lease in 2015, there can be no repudiation in 2021 … . * * *

From the dissent:

A party "cannot simultaneously pursue a breach of contract claim and an anticipatory breach claim premised on the same underlying conduct" … . However, where an obligation is ongoing or serial in nature, a subsequent material breach can support a claim on a theory of repudiation notwithstanding earlier claims for partial breach … . Audthan LLC v Nick & Duke, LLC, 2022 NY Slip Op 06880, First Dept 12-6-22

Practice Point: The majority held plaintiff could not seek redress on a theory of repudiation where there had been a breach of contract. There was a two-justice dissent.

DECEMBER 6, 2022

CONTRACT LAW, REAL PROPERTY LAW, LIQUIDATED DAMAGES.

PLAINTIFFS WERE ENTITLED TO LIQUIDATED DAMAGES OF $1000 PER DAY FOR THE TIME PLAINTIFFS WERE UNABLE TO LIVE IN THEIR TOWNHOUSE BECAUSE OF THE DEFENDANTS' RENOVATIONS NEXT DOOR (FIRST DEPT).

The First Department, in a decision addressing many issues not summarized here, determined the plaintiffs were entitled to liquidated damages of $1000 per day for the time plaintiffs were unable to live in their townhouse because of the renovation work undertaken by the defendants next door:

On May 2, 2013, after intensive negotiations guided by legal counsel, Mr. Seymour [plaintiff] and the Hovnanians [defendants] executed a license agreement. The purpose of the license agreement was to grant the Hovnanians 18 months of access to the Seymours' property while simultaneously protecting the Seymours' property from further harm during construction. The license agreement contained a liquidated damages clause providing that if the "Project Owner failed to obtain a temporary certificate of occupancy (TCO) within Eighteen (18) months from the date of this Agreement, he shall pay liquidated damages to the Adjacent Owner of $1,000 per day for every day thereafter until the TCO is issued." The Hovnanians never obtained a temporary certificate of occupancy but, 318 days after the expiration of the 18-month license term, they obtained a certificate of occupancy. …

The court correctly awarded plaintiffs $318,000 in liquidated damages, plus interest, comprised of $1,000 per day for the period of November 2, 2014 to September 15, 2015. "Liquidated damages constitute the compensation which, the parties have agreed, should be paid in order to satisfy any loss or injury flowing from a breach of their contract" … . These provisions "have value in those situations where it would be difficult, if not actually impossible, to calculate the amount of actual damage" … . Liquidated damages will be sustained if, at the time of the contract, "the amount liquidated bears a reasonable proportion to the probable loss and the amount of actual loss is incapable or difficult of precise estimation" … . Seymour v Hovnanian, 2022 NY Slip Op 07172, First Dept 12-15-22

Practice Point: Here the license agreement properly required liquidated damages of $1000 per day for the time plaintiffs were not able to live in their townhouse because of defendants' renovations next door.

DECEMBER 15, 2022

COOPERATIVES, INTER VIVOS GIFTS, STATUTE OF FRAUDS.

THE PLAINTIFF DID NOT DEMONSTRATE HIS DECEASED BROTHER MADE AN INTER VIVOS GIFT OF THE COOPERATIVE APARTMENT TO PLAINTIFF; THE STATUTE OF FRAUDS APPLIES AND THERE WAS NO WRITING; AND THE FAILURE TO FOLLOW THE TRANSFER PROVISIONS OF THE PROPRIETARY LEASE NEGATED A FINDING OF DONATIVE INTENT (FIRST DEPT).

The First Department, reversing Supreme Court, determined plaintiff did not demonstrate his deceased brother made an inter vivos gift of a cooperative apartment to plaintiff. The alleged transfer of the property was subject to the Statute of Frauds and there was no writing memorializing the alleged gift:

Defendant established that there was no valid inter vivos gift to plaintiff of the shares and proprietary lease for the apartment, as the statute of frauds applies to the sale of stock in a housing cooperative and there was no writing to effect the transfer … . …

Plaintiff's claim further fails as a matter of law, as the decedent — his brother — failed to follow the transfer provisions of the proprietary lease, which required, among other things, a written assignment of shares signed by the shareholder and the approval of defendant's board of directors to make a valid transfer of the shares to the apartment within the decedent's lifetime … .

… [E]ven if the decedent had not been required to abide by the terms of the proprietary lease to make a valid inter vivos gift of the apartment, the lack of a writing also militates against establishing the decedent's donative intent, which is a necessary element of a valid inter vivos gift … . Not only does the decedent's

failure to follow the procedures in the proprietary lease contradict any donative intent, but plaintiff also acknowledges that the delivery of the share certificate and proprietary lease were not made by the decedent himself, and the conflicting affidavits of the decedent's girlfriend fail to establish that she was acting as decedent's agent for that purpose. Rivera v 98-100 Ave. C Hous. Dev. Fund Corp., 2022 NY Slip Op 06074, First Dept 10-27-22

Practice Point: Plaintiff did not demonstrate his deceased brother made an inter vivos gift of a cooperative apartment. The Statute of Frauds applies and there was no writing. In addition the failure to follow the transfer provisions in the proprietary lease negated donative intent.

OCTOBER 27, 2022

CORPORATION LAW, PIERCING THE CORPORATE VEIL.

WHETHER THE CORPORATE VEIL SHOULD BE PIERCED IS A FACT-BASED DETERMINATION GENERALLY NOT SUITED FOR SUMMARY JUDGMENT; THE FINDINGS BY THE MOTION COURT WERE NOT SUPPORTED BY UNDISPUTED FACTS; SUMMARY JUDGMENT ALLOWING THE CORPORTE VEIL TO BE PIERCED REVERSED (FIRST DEPT).

The First Department, reversing Supreme Court, determined the motion court should not have granted summary judgment allowing the corporate veil to be pierced and holding the defendants liable for a judgment against the corporation (DJJMS). The appellate division noted that a determination the corporate veil should be pierced is a fact-based analysis not suited to summary judgment:

The elements of veil piercing are that (1) the owners exercised complete domination and control of the corporation with respect to the transaction attacked; and (2) such domination was used to commit a fraud or wrong against the plaintiff, resulting in the plaintiff's injury … . Plaintiffs who seek to pierce the corporate veil bear a heavy burden … .

"[C]omplete domination of the corporation is the key to piercing the corporate veil" … , but the motion court did not cite sufficient, undisputed facts to show that defendants exercised complete domination of DJJMS. It noted that veil piercing occurs "when the principals are using the corporation 'as their personal piggy-bank'" but cited no facts to support its apparent determination that defendants so used DJJMS … . The motion court did not adequately detail relevant, undisputed facts to show that defendants have "abused the privilege of doing business in the corporate form," including facts showing that, as a matter of law "there was a failure to adhere to corporate formalities, inadequate capitalization, commingling of assets, and use of corporate funds for personal use" … . … The motion court apparently presumed that the transfer at issue … caused DJJMS to be judgment proof, but the court does not cite any undisputed fact, other than the fact of the transfer itself, to support its conclusion. Etage Real Estate LLC v Stern, 2022 NY Slip Op 07499, First Dept 12-29-22

Practice Point: Whether the corporate veil should be pierced is a fact-laden inquiry which is not suited for summary judgment.

DECEMBER 29, 2022

CORPORATION LAW.

THE "INTERNAL AFFAIRS DOCTRINE," WHICH ADDRESSES RELATIONSHIPS BETWEEN A COMPANY AND ITS DIRECTORS AND SHAREHOLDERS, APPLIES TO THE OFFICERS AND DIRECTORS AT THE TIME OF THE CONDUCT ALLEGED IN THE LAWSUIT, NOT AT THE TIME THE LAWSUIT WAS BROUGHT; CONTRARY AUTHORITY SHOULD NO LONGER BE FOLLOWED (FIRST DEPT).

The First Department, reversing Supreme Court, determined the "internal affairs doctrine" required the application of the law of the jurisdiction of FanDuel, a Scottish company. The "internal affairs doctrine" addresses the relationships between a company and its directors and shareholders. The doctrine applies to officers and directors at the time of the conduct alleged in the suit, not at the time of the lawsuit. Prior authority to the contrary should not be followed:

We reject plaintiff's argument that the internal affairs doctrine applies only to officers and directors at the time of the lawsuit. Rather, the question is whether defendants were "current officers [or] directors" … at the time of the events giving rise to the lawsuit … . Application of the doctrine to former directors protects the parties' justified expectations, promotes uniformity and predictability of outcome, and prevents different laws from applying to different directors who all engaged in the same challenged transaction simply because of the date on which plaintiff chose to sue … . To the extent our past decisions could be interpreted as suggesting otherwise we clarify that the internal affairs doctrine applies to an officer or director at the time of the conduct at issue … . Eccles v Shamrock Capital Advisors, LLC, 2022 NY Slip Op 05750, First Dept 10-13-22

Practice Point: In corporation law, the "internal affairs doctrine," which addresses the relationships between a company and its officers and directors, applies to the officers and directors at the time of the conduct alleged in the lawsuit, not at the time the lawsuit was brought. Authority to the contrary should no longer be followed.

OCTOBER 13, 2022

CRIMINAL LAW, ATTORNEYS, CONFLICT OF INTEREST, FEE PAID BY ANOTHER.

THE EVIDENCE AT THE HEARING ON DEFENDANT'S MOTION TO VACATE HIS CONVICTION DID NOT SUPPORT THE ALLEGATION DEFENDANT'S FRIEND PAID DEFENDANT'S LEGAL FEES CREATING A CONFLICT OF INTEREST FOR DEFENDANT'S ATTORNEY (FIRST DEPT).

The First Department determined Supreme Court properly denied defendant's motion to vacate his conviction on the ground his attorney had a conflict of interest which deprived him of effective assistance of counsel. The case had gone to the Court of Appeals which held the defendant was entitled to a hearing on the motion:

The record supports the hearing court's factual determination that defendant's friend Salaam, whom his counsel represented on an unrelated criminal case, and

who had initially been a suspect in the murder of which defendant was convicted, did not pay defendant's legal fees. At the hearing, defendant did not meet his burden of proving the necessary facts by a preponderance of the evidence … . The hearing evidence showed that Salaam physically handed cash to defendant's attorney for his retainer and for much of the balance of the fee, but that there was no proof as to the ultimate source of the cash. Counsel credibly testified that he viewed Salaam as his contact person and believed that the legal fees were being collectively raised by a group of defendant's friends and relatives, including Salaam. The court's finding was also supported by defendant's recorded calls made while incarcerated, and the fact that Salaam always delivered cash to the attorney while accompanied by other friends of defendant. The evidence also shows that defendant chose and hired the attorney. People v Brown, 2022 NY Slip Op 06889, First Dept 12-6-22

Practice Point: Defendant alleged his friend paid his legal fees. Defendant's friend had been represented in another criminal matter by defendant's attorney and was a suspect in the murder of which defendant was convicted. The evidence at the hearing on defendant's motion to vacate his conviction did not support the allegation defendant's friend was the source of the funds paid to defendant's attorney. Therefore defendant's argument he was deprived of effective assistance because of his attorney's conflict of interest was not supported by the evidence.

DECEMBER 6, 2022

CRIMINAL LAW, PROSECUTION BY ATTORNEY GENERAL.

IT IS ONLY PURSUANT TO EXECUTIVE LAW 63(3) THAT THE ATTORNEY GENERAL (AS OPPOSED TO A COUNTY PROSECUTOR) IS EMPOWERED BRING A CRIMINAL PROSECUTION; THE EXECUTIVE LAW ALLOWS REQUESTS FOR AN AG PROSECUTION ONLY FROM THE EXECUTIVE BRANCH, NOT THE JUDICIAL BRANCH; HERE THE CHIEF JUDGE REQUESTED THE PROSECUTION; A WRIT OF PROHIBITION ENJOINING THE PROSECUTION WAS GRANTED (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Higgitt, determined the petitioner's request for a writ of prohibition to enjoin the attorney general (AG) from prosecuting him for alleged criminal offenses should be granted. The request for the prosecution came from a judge. Executive Law 63(3) does not authorize a request for prosecution from the judicial, as opposed to the executive, branch:

This CPLR article 78 proceeding seeking a writ of prohibition raises an issue of apparent first impression: whether the Attorney General may criminally prosecute an individual based on an Executive Law § 63(3) referral from the Chief Administrative Judge of the Unified Court System. Executive Law § 63(3) authorizes the Attorney General of the State of New York, "[u]pon request of the governor, comptroller, secretary of state, commissioner of transportation, superintendent of financial services, commissioner of taxation and finance, commissioner of motor vehicles, or the state inspector general, or the head of any other department, authority, division or agency of the state," to investigate and prosecute criminality relating to any matter connected with the referring entity. Petitioner, the subject of the criminal prosecution initiated and maintained by the AG based on the purported Executive Law § 63(3) referral by an officer within the Unified Court System, commenced this special proceeding for a writ of prohibition challenging the validity of the referral and the legality of the AG's authority to prosecute him. We hold that an Executive Law § 63(3) referral can come only from an agency within the executive branch. Therefore, a referral from an officer within the Unified Court System — that is, the judicial branch of government — is not permitted by the statute, and, for the reasons discussed below, we grant prohibition

relief to petitioner. Matter of Makhani v Kiesel, 2022 NY Slip Op 06556, First Dept 11-17-22

Practice Point: The attorney general can bring a criminal prosecution only upon request from an executive agency listed in Executive Law 63(3). Here the chief judge made the request. A writ of prohibition enjoining the prosecution was granted.

NOVEMBER 17, 2022

CRIMINAL LAW, "RAISE THE AGE ACT."

BG, AN ADOLESCENT OFFENDER (AO) WITHIN THE MEANING OF THE "RAISE THE AGE ACT," ASSAULTED A MAN AND THREW HIM ON THE SUBWAY TRACKS; A BYSTANDER JUMPED DOWN TO HELP THE ASSAULT VICTIM; THE BYSTANDER WAS KILLED BY A SUBWAY TRAIN WHICH STOPPED BEFORE REACHING THE ASSAULT VICTIM; THE JUDGE RULED THE MATTER SHOULD BE TRANSFERRED TO FAMILY COURT; THE PEOPLE SOUGHT A WRIT OF PROHIBITION WHICH WAS DENIED (FIRST DEPT).

The First Department denied the People's request for a writ of prohibition to prevent respondent judge from sending a criminal case involving an adolescent offender (AO) to Family Court pursuant to the "Raise the Age Law." In criminal matters involving AO's the Raise the Age Law allows judges to decide whether the matter should heard in Family Court. Here BG, the AO, assaulted the victim in a subway station and threw the victim on the tracks. A bystander jumped down to try to help the victim. The train was able to stop before reaching the assault victim, but the bystander who tried to help the victim was killed by the train:

Justice Semaj rejected the People's argument that BG engaged in "heinous" conduct by pushing the surviving victim onto the tracks and leaving him there unconscious, observing that this argument was "rebutted by the video footage offered by the People," which showed that the surviving victim "was conscious at the time he was pushed on to the tracks and even if he became unconscious once on the tracks, [BG] and another young person are seen going into the tracks and

seemingly moving [him], possibly inadvertently, but . . . out of harm's way." The court further noted that Hueston [the bystander] chose to jump onto the train tracks, and that BG left after he "was told to leave by [Hueston]." … . * * *

"A writ of prohibition against a judge may be issued only when a court acts or threatens to act without jurisdiction in a matter of which it has no power over the subject matter or where it exceeds its authorized powers in a proceeding over which it has jurisdiction" … . "Prohibition cannot be used merely to correct errors of law, however egregious and however unreviewable" … . The Court of Appeals has stressed that, in the context of criminal proceedings, the writ should be issued "only when a court exceeds its jurisdiction or authorized power in such a manner as to implicate the legality of the entire proceeding, as for example, the prosecution of a crime committed beyond the county's geographic jurisdiction" … . "Although the distinction between legal errors and actions in excess of power is not always easily made, abuses of power may be identified by their impact upon the entire proceeding as distinguished from an error in a proceeding itself" … . Matter of Clark v Boyle, 2022 NY Slip Op 06316, First Dept 11-10-22

Practice Point: Pursuant to the "Raise the Age Law" criminal cases involving adolescent offenders (AO's) are reviewed by a judge who can chose to have the case heard in Family Court. The AO in this case assaulted a man and threw him onto subway tracks. The man survived but a bystander who tried to help him was killed by the train. The People sought a writ of prohibition to prevent the transfer to Family Court. The First Department laid out the strict criteria for a writ of prohibition and denied it.

NOVEMBER 10, 2022

CRIMINAL LAW, ASSAULT, SERIOUS OR PROTRACTED DISFIGUREMENT.

THE PROOF THE VICTIM SUFFERED "SERIOUS OR PROTRACTED DISFIGUREMENT" IN THIS ASSAULT FIRST CASE WAS INSUFFICIENT; CONVICTION REDUCED TO ATTEMPTED ASSAULT FIRST (FIRST DEPT).

The First Department, reversing defendant's assault first conviction and reducing it to attempted assault first, determined the People did not prove the scar on the victim's cheek met the definition of "serious and protracted disfigurement." The People introduced two photos of the scar and the doctor who treated the injury testified. The victim did not testify:

Defendant's convictions were not supported by legally sufficient evidence because the People failed to prove that the victim suffered serious and permanent disfigurement, which was the basis of both counts (see Penal Law §§ 120.10[1], [2]). The People relied solely on two photos of the victim depicting a scar on his cheek, and the scar was briefly described by the doctor who treated the victim on the day of the slashing. Despite the scar's prominent location, neither the photos nor the doctor's testimony warrant an inference that the scar rendered the victim's appearance "distressing or objectionable" to a reasonable observer … . The victim did not testify, so the jury had no opportunity to observe the actual scar and evaluate whether it was seriously disfiguring, nor was any other evidence adduced regarding the scar's effects on the victim's appearance, health, and life … . People v McBride, 2022 NY Slip Op 07034, First Dept 12-13-22

Practice Point: Here defendant was charged with assault first for causing "serious and protracted disfigurement" to the victim. Although two photos of the scar were introduced in evidence and the treating doctor testified, the victim did not testify. It appears that the jury's inability to see the victim at the time of trial rendered the proof legally insufficient.

DECEMBER 13, 2022

CRIMINAL LAW, JUDGES, REQUEST FOR NEW COUNSEL.

THE JUDGE DENIED DEFENDANT'S REQUEST FOR NEW COUNSEL WITHOUT INQUIRING ABOUT THE REASON FOR THE REQUEST; CONVICTION REVERSED (FIRST DEPT).

The First Department, reversing defendant's conviction, determined the judge should have allowed the defendant to explain the reason he was requesting new counsel:

Defendant is entitled to a new trial because the court denied his request for new counsel without making any inquiry, and without giving defendant any opportunity to explain the basis for his request (see People v McCummings, 124 AD3d 502, 502-03 [1st Dept 2015]; People v Rodriguez, 46 AD3d 396 [1st Dept 2007], lv denied 10 NY3d 844 [2007]). People v Resheroop, 2022 NY Slip Op 05606, First Dept 10-6-22

Practice Point: Here the defendant asked for new counsel and the judge denied the request without asking for its basis. The appellate court reversed the conviction and ordered a new trial.

OCTOBER 6, 2022

CRIMINAL LAW, JURY NOTES.

THE JUDGE DID NOT READ THE JURY NOTE IN ITS ENTIRETY TO THE PARTIES AND THE JUDGE'S PARAPHRASE OF THE CONTENTS OMITTED SIGNIFICANT ASPECTS OF IT; THE FACT THAT THE JURY ANNOUNCED IT HAD REACHED A VERDICT BEFORE THE NOTE WAS CALLED TO THE PARTIES' ATTENTION DID NOT MATTER; THE MODE OF PROCEEDINGS ERROR REQUIRED REVERSAL (FIRST DEPT).

The First Department, reversing defendant's conviction and ordering a new trial, determined the judge's failure to read the entire note from the jury to the parties

was a mode of proceedings error. The fact that the jury announced it had reached a verdict before the note was read was not determinative:

The trial court's failure to read to the parties the entirety of a note submitted just before the jury reached a verdict deprived counsel of meaningful notice (see CPL 310.30 …). The note was not shown to counsel, and the court's paraphrase omitted significant aspects of the jury's requests, including a request for reinstruction on the count charging second-degree assault, which was the only count on which defendant was found guilty. The fact that the jury announced that it had reached a verdict before the note was read did not cure this mode of proceedings error … . People v Heyworth, 2022 NY Slip Op 06072, First Dept 10-27-22

Practice Point: Here the jury had announced it had reached a verdict before the jury note was called to the parties attention. The judge did not read the note to the parties in its entirety and the judge's paraphrase of its contents omitted important aspects of it. This was deemed a mode of proceedings error requiring a new trial.

OCTOBER 27, 2022

CRIMINAL LAW, RIGHT TO COUNSEL AT LINEUP.

DEFENSE COUNSEL DID NOT WAIVE HIS CLIENT'S RIGHT TO HAVE HIM ATTEND THE LINEUP IDENTIFICATION BY SENDING HIS PARALEGAL, WHO WAS TURNED AWAY; DEFENSE COUNSEL SHOULD HAVE BEEN TOLD HIS PRESENCE WAS REQUIRED (FIRST DEPT).

The First Department, reversing defendant's conviction, determined defense counsel did not waive his client's right to have his attorney attend the lineup identification procedure by sending his paralegal. The paralegal was turned away:

Defendant was deprived of his right to have counsel present at a … postindictment lineup. It is undisputed that defendant had a right to counsel at this lineup, which was conducted at a time when he already had representation. Although defendant's counsel was notified of the lineup and did not attend, a paralegal employed by counsel attempted to attend the lineup but was turned away by the police.

The attorney did not waive his client's right to counsel at the lineup by failing to appear. The police should have briefly paused this nonexigent, postindictment lineup, conducted long after the crime … , in order to advise the attorney he needed to attend personally, or to have the paralegal so advise counsel. People v Bennett, 2022 NY Slip Op 07007, First Dept 12-8-22

Practice Point; Defense counsel sent his paralegal to attend his client's lineup, but the police sent the paralegal away. The police should have informed counsel his presence was required before going ahead with the lineup. Counsel's failure to attend did not waive his client's right to have his attorney present.

DECEMBER 8, 2022

CRIMINAL LAW, SANDOVAL.

DEFENDANT'S TESTIMONY ABOUT HIS FELONY CONVICTIONS DID NOT OPEN THE DOOR TO A MODIFICATION OF THE COURT'S SANDOVAL RULING TO ALLOW QUESTIONING ABOUT THE FACTS UNDERLYING THE CONVICTIONS; CONVICTION REVERSED (FIRST DEPT).

The First Department, reversing defendant's conviction, determined the court should not have modified its original Sandoval ruling. The initial Sandoval ruling allowed defendant to be questioned about the number of felony conviction on his record but not about any of the underlying facts. When defendant was on the stand the court allowed the prosecutor to ask about the underlying facts:

On direct examination, when asked if he had ever been convicted of a crime in New York, defendant answered, "[y]es." When asked,"[d]o you know how many," he testified, "[a]pproximately maybe two or three felonies. Maybe four or five misdemeanors."

On cross-examination, when the prosecutor asked defendant if he had been convicted of three felonies, defendant replied, "I guess so." In response to the prosecutor's next question, defendant said he was not sure how many felony convictions he had. The court then modified its Sandoval ruling and permitted the

People to exceed the scope of the initial Sandoval ruling by inquiring about the underlying facts of those felony convictions, which included drug and theft-related crimes.

Defendant's trial testimony did not open the door to a prejudicial modification of the court's Sandoval ruling. Defendant was entitled to rely on the trial court's original Sandoval ruling as a matter of "plain fairness" … .

None of defendant's responses on direct or cross-examination were so incorrect or misleading as to permit the court's modification … . People v Henderson, 2022 NY Slip Op 07009, First Dept 12-8-22

Practice Point: The court's initial Sandoval ruling allowed defendant to be about the number of felony convictions on his record. When the defendant was on the stand, the judge modified the Sandoval ruling to allow questioning about the underlying facts. There was nothing about the defendant's testimony which justified the Sandoval modification and defendant's conviction was reversed.

DECEMBER 8, 2022

CRIMINAL LAW, SIDEBAR, DEFENDANT'S RIGHT TO BE PRESENT.

THE JUDGE, PROSECUTOR AND DEFENSE COUNSEL AGREED DEFENDANT SHOULD STEP OUT OF THE COURTROOM WHEN HIS JUSTIFICATION DEFENSE WAS DISCUSSED IN A SIDEBAR CONFERENCE; DEFENSE COUNSEL'S AGREEMENT TO HAVE DEFENDANT STEP OUT OF THE COURTROOM WAS NOT A WAIVER OF DEFENDANT'S RIGHT TO BE PRESENT; CONVICTION REVERSED (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Renwick, reversing Supreme Court, determined defendant should have been present for the sidebar conference about the justification defense in this attempted murder by stabbing case. Defendant claimed he had a heart condition triggered by stress which causes his heart to race until he passes out. Defense counsel argued the condition was relevant to the justification defense because defendant felt he had to stab the victim

before he passed out to protect himself. Before the issue was discussed the judge, prosecutor and defense counsel agreed the defendant should step out of the courtroom. The judge ruled the evidence of the heart condition could not come in unless the defendant's testimony established a connection between the condition and the interaction with the victim:

… [T]he subject of the instant sidebar conference clearly implicated defendant's peculiar factual knowledge such that his participation might have assisted him in advancing his justification defense to the murder and assault counts. The subject of the conference was whether defendant would be permitted to testify as to a medical (heart) condition with regard to his justification defense. During the sidebar conference the court repeatedly implored defense counsel to explain how defendant's serious medical condition impacted his assessment of his physical safety. Defendant's presence at the sidebar conference would have afforded him an opportunity to apprise the court, defense counsel and prosecutor of the exact details of his heart condition in order to demonstrate that it affected his assessment of the circumstances he was confronted with prior to the stabbing incident … . * * *

Although the right to be present at a sidebar conference need not be preserved by an objection … , the right may be waived. Such right may be waived either explicitly or implicitly by defendant … . …

… [D]efendant did not waive the right to be present at the sidebar conference. Contrary to the People's assertion, defendant did not personally waive his right to be present either explicitly or implicitly. At no time did defendant make an affirmative statement on the record that he did not wish to attend the side bar conference. And no one ever asked him directly. … [H]e was commanded to leave the courtroom so that the sidebar conference could take place in his absence. … [A]t no time was defendant made aware that he had the right to be present at the sidebar conference … . …

… [I]n the absence of any record discussion by the court with counsel and the prosecutor regarding defendant's right to be present at the sidebar conference, defense counsel's expression of lack of objection to his client absence from the sidebar conference is not an affirmative statement by counsel confirming that defendant himself was waiving his right to be present at the sidebar conference … . People v Girard, 2022 NY Slip Op 06645, First Dept 11-22-22

Practice Point: Defense counsel agreed to have the defendant step out of the courtroom when the justification defense was discussed in a sidebar conference. Defense counsel's agreement did not constitute a waiver of defendant's right to be present. The conviction was reversed.

NOVEMBER 22, 2022

CRIMINAL LAW, SUPPRESSION, APPEALS.

THE WAIVER OF APPEAL WAS INVALID; THE SUPPRESSION MOTION SHOULD NOT HAVE BEEN DENIED ON A GROUND NOT RAISED BY THE PEOPLE; AND AN APPELLATE COURT CAN NOT CONSIDER ARGUMENTS ON ISSUES NOT RULED ON BELOW (FIRST DEPT).

The First Department, reversing defendant's conviction by guilty plea and the denial of defendant's motion to suppress, over an extensive dissent, determined defendant's waiver of appeal was invalid, the motion to suppress should not have been denied on a ground not raised by the parties, and the appellate court cannot rule on issues not decided below:

… [T]he court conflated defendant's appellate and trial rights by asking the defendant "[i]s that what you wish to do to waive your right to appeal and your other rights . . . by pleading guilty[?]" Instead, the majority of the court's colloquy of defendant's appellate rights focused on sentencing, on which the court itself needed clarification, not in differentiating trial from appellate rights.

… [T]he court made other errors in its oral colloquy that further justify invalidating defendant's waiver of his appellate rights. Specifically, the court failed to advise defendant of the nature of the right to appeal … , erroneously mischaracterized the finality of the waiver … , and failed to discuss the written waiver form with defendant … . The detailed written waiver that defendant executed with counsel cannot save the numerous errors in the court's oral colloquy, as "'a written waiver is not a complete substitute for an on-the-record explanation of the nature of the right to appeal'" … . * * *

… [A]bsent "on-the-record acknowledgements of [defendant's clear] understanding" … of his appellate rights waiver, the presumption of defense counsel's competent representation during the plea negotiations is simply insufficient to overcome the court's deficient colloquy … . * * *

… [T]he People never disputed that defendant had standing to challenge the search warrant. Therefore, the court should not have denied the motion "based on a ground not raised by the People" … . … [T]he People's current arguments on appeal are precluded by People v LaFontaine (92 NY2d 470, 474 [1998]) because the suppression court did not rule upon these issues, and this Court may not affirm on those alternative grounds … . People v Bonilla, 2022 NY Slip Op 07304, First Dept 12-22-22

Practice Point: Here the waiver of appeal was deemed invalid and there was an extensive dissent on that issue. The motion to suppress should not have been denied on a ground not raised by the People. An appellate court cannot consider issues not ruled on below.

DECEMBER 22, 2022

DEFAMATION, ATTORNEYS.

DEFENDANT'S STATEMENT PLAINTIFFS WERE FACING SUSPENSION OF THEIR LICENSE TO PRACTICE LAW WAS NOT PROTECTED AS FAIR AND TRUE LEGAL REPORTING PURSUANT TO CIVIL RIGHTS LAW 74; THE COMPLAINT STATED CAUSES OF ACTION FOR DEFAMATION PER SE, DISPARAGEMENT AND VIOLATIONS OF THE LANHAM ACT AND GENERAL BUSINESS LAW 349 (FIRST DEPT).

The Fist Department, reversing Supreme Court, determined Civil Rights Law 74 did not protect the statements in defendant's online ad claiming that plaintiffs were facing suspension of their license to practice law because the litigation referred to in the ad did not mention anything about plaintiffs' law license. Civil Rights Law 74 protects only "fair and true" reports on judicial proceedings. The complaint

stated causes of action for defamation per se, disparagement and violations of the Lanham Act and General Business Law 349:

Civil Rights Law § 74 did not apply to the challenged statements in defendant's online ads that, in linking to a news article about pending litigation against plaintiffs by a former client in California, asserted that plaintiffs were facing suspension of their license to practice law. The news article did not mention that plaintiffs' law license was at risk nor did the complaint against plaintiffs seek suspension of their law license. Accordingly, this statement was not shielded from liability as defendant failed to demonstrate that it was a "fair and true" report of a judicial proceeding … . …

Based on defendant's allegedly false statement that plaintiffs were facing a suspension of their license, plaintiffs sufficiently pleaded a cause of action for defamation per se … . …

… [T]he factual allegations in the complaint were sufficient to sustain causes of action for disparagement, and violations under the federal Lanham Act and General Business Law § 349, at the pleading stage … . Luo & Assoc. v NYIS Law Firm, A.P.C., 2022 NY Slip Op 07154, First Dept 12-15-22

Practice Point: Civil Rights Law 74 protects only "fair and true" reports on judicial proceedings. Here the statements plaintiffs were facing the suspension of their license to practice law was not mentioned in the article referencing the judicial proceedings, so the statements were actionable as defamation per se, disparagement and violations of the Lanham Act and General Business Law 349.

DECEMBER 15, 2022

DEFAMATION, ONLINE REVIEWS.

AN UNFAVORABLE ANONYMOUS GOOGLE REVIEW OF PLAINTIFF ORTHODONTIST, ALTHOUGH IT INCLUDED BOTH FACT AND OPINION, WOULD BE UNDERSTOOD BY A READER TO BE PURE OPINION; THE REVIEW IS NOT ACTIONABLE DEFAMATION (FIRST DEPT).

The First Department, reversing Supreme Court, determined that an unfavorable Google review of plaintiff orthodontist by a former minor patient did not constitute actionable defamation:

Plaintiffs, an orthodontist and his professional corporation, allege that defendants — a former minor patient and that patient's parents — defamed them in an unfavorable review posted on Google. Contrary to Supreme Court's holding, we find that, although defendants' Google review contains elements of both fact and opinion, it nevertheless is not actionable … , and it was not the motion court's province to "sift[] through [the] communication for the purpose of isolating and identifying assertions of fact" … . Rather, the court should have considered the overall context in which the communication was made, an anonymous online review of plaintiff's services … .

Here, a reasonable reader of defendants' Google review would understand it to be pure opinion based on the context in which it was posted and its arguably "[l]oose, figurative, or hyperbolic" tone … . Furthermore, defendants' Google review was posted anonymously online and, as we have recognized, "'[R]eaders give less credence to allegedly defamatory remarks published on the Internet than to similar remarks made in other contexts'" … . DeRicco v Maidman, 2022 NY Slip Op 05921, First Dept 10-20-22

Practice Point: An unfavorable, anonymous Google review of plaintiff orthodontist, although it included both fact and opinion, would be understood by readers to be pure opinion. The review therefore did not constitute actionable defamation.

OCTOBER 20, 2022

DEFAMATION, EDUCATION-SCHOOL LAW.

THE LETTER CRITICIZING THE FORMER DEAN OF THE FASHION INSTITUTE OF TECHNOLOGY WAS NOT DEFAMATORY ON ITS FACE, BUT THE COMPLAINT STATED A CAUSE OF ACTION FOR DEFAMATION BY IMPLICATION (FIRST DEPT).

The First Department, reversing Supreme Court, determined plaintiff's defamation-by-implication complaint should not have been dismissed:

… [P]laintiff, the former Dean of Graduate Studies at defendant Fashion Institute of Technology (FIT), was placed on leave following criticisms over culturally insensitive accessories presented in an FIT-sponsored alumni fashion show. Plaintiff alleges that a letter published by defendants contained defamatory remarks on its face, implied, or both, and impugned plaintiff's reputation…. .

… [T]he letter implies that plaintiff was responsible for the show and failed to recognize the accessories as insensitive, even though she took no part in managing, directing, or approving the show. The complaint contains references to publications from other sources that interpret the letter as placing the blame on plaintiff and deeming her leadership inexcusable and irresponsible … . On a CPLR 3211 (a)(7) motion to dismiss, denial is warranted if taking the words used both in their ordinary meaning and in context make them susceptible to a defamatory connotation as occurs in this case … . The letter also contains statements of mixed opinion, "While a pure opinion cannot be the subject of a defamation claim, an opinion that 'implies that it is based upon facts which justify the opinion but are unknown to those reading or hearing it, . . . is a 'mixed opinion' and is actionable'" … .

The letter omitted plaintiff's nonparticipation in the production, direction, and management of the fashion show; her unawareness as to the accessories the designers planned to present; the FIT policy precluding academic deans from evaluating, censoring, or approving student and alumni work; and plaintiff's prompt response to student concerns and her proactive approach to address those concerns; and implied that plaintiff was responsible for the show, was aware of the accessories, could approve them, and failed to respond to student concerns. Davis v Brown, 2022 NY Slip Op 07147, First Dept 12-15-22

Practice Point: Here the writing was not defamatory on its face. But the complaint stated a cause of action for defamation by implication. The letter included actionable statements of "mixed opinion" and omitted important facts which relieved plaintiff of responsibility for the claimed misconduct.

DECEMBER 15, 2022

EDUCATION-SCHOOL LAW, COLLEGE MISCONDUCT PROCEEDINGS, EXCULPATORY EVIDENCE.

RESPONDENT STATE COLLEGE WITHHELD EXCULPATORY EVIDENCE IN THIS COLLEGE MISCONDUCT PROCEEDING WHICH RESULTED IN WAS VACATED AND THE STUDENT WAS REINSTATED IN GOOD STANDING (FIRST DEPT).

The First Department, reversing the expulsion of petitioner-student and reinstating the student in good standing, determined the respondent state college had withheld exculpatory evidence which indicated petitioner did not carve a racial epithet on an elevator door. Two students claimed to have seen petitioner carve the epithet, Another student sent an email stating he had seen the epithet on the door before the students arrived for the semester. That email was never disclosed to the petitioner:

Article III of Section 4 of respondent's Code of Conduct enumerates the due process rights of students charged with violations. In addition to the right to a fair hearing, a charged student "has the right to copies of written reports pertinent to the case . . ." Respondent's failure to turn over exculpatory evidence in its possession prior to the hearing violated its own policies and procedures, thereby violating petitioner's due process rights … . Now, in hindsight, it cannot be said that petitioner received a fair hearing where evidence tending to prove his innocence was withheld.

Accordingly, after our independent review of the record as a whole, we now find that this exculpatory evidence, the extensive alibi evidence as well as other objective evidence of petitioner's innocence render the charges unsupportable as a matter of law thus warranting vacatur of the expulsion penalty, expungement of all

references to the underlying charges contained in petitioner's academic record and his reinstatement as a student in good standing … . Matter of Mozdziak v State Univ. of N.Y. Mar. Coll., 2022 NY Slip Op 06759, First Dept 11-29-22

Practice Point: In this misconduct proceeding in a state college, the student was entitled to due process. The college's failure to turn over exculpatory evidence required vacation of the expulsion penalty and reinstatement of the student in good standing.

NOVEMBER 29, 2022

EMPLOYMENT LAW, HUMAN RIGHTS LAW, HOSTILE WORK ENVIRIONMENT.

THE HOSTILE WORK ENVIRONMENT ALLEGATIONS STATED CLAIMS UNDER THE STATE AND CITY HUMAN RIGHTS LAW (HRL); THE SEXUAL HARASSMENT ALLEGATIONS STATED A CLAIM UNDER ONLY THE CITY HRL; THE CONTINUING VIOLATION DOCTRINE DID NOT APPLY TO ISOLATED STATEMENTS MADE OUTSIDE THE STATUTE OF LIMITATIONS (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, determined plaintiff stated a hostile work environment claim under the state and city Human Rights Law (HRL) and sexual harassment claim under the city, but not the state, HRL: The isolated statement made outside the statute of limitations were not subject to the continuing violation doctrine:

Plaintiff's allegations, that several times a week over a period of at least two years, plaintiff's coworker spoke to him in a mock Chinese accent, told plaintiff to "open your eyes," and tormented him about his mandatory drug testing in a sexually and racially charged manner, are sufficient to state a hostile work environment claim based on national origin discrimination under both the State and City HRLs … .

… [T]he allegations that his coworker regularly made statements about plaintiff's penis size when plaintiff took bathroom breaks or reported for drug testing "fall

within the broad range of conduct that falls between 'severe and pervasive' on the one hand and a 'petty slight or trivial inconvenience' on the other," such that they are sufficient under the City HRL but not under the State HRL … . The continuing violation doctrine does not apply to the isolated statements made outside the limitations period because they do not form part of "a single continuing pattern of unlawful conduct extending into the [limitations] period . . . , but rather discrete events, involving different actors, occurring months to years apart" … . Lum v Consolidated Edison Co. of N.Y., Inc., 2022 NY Slip Op 05594, First Dept 10-6-22

Practice Point: The allegations that a coworker spoke using a mock Chinese accent and told plaintiff "open your eyes" stated hostile work environment claims under the state and city Human Rights Law (HRL). The allegations that a coworker made comments about the size of plaintiff's penis stated a sexual harassment claim under the city, but not the state, HRL. Isolated statements made outside the statute of limitations were not subject to the continuing violation doctrine.

OCTOBER 6, 2022

FAMILY LAW, PRENUPTIAL AGREEMENTS.

THE PHRASE "CONSUMMATION OF THE ANTICIPATED MARRIAGE" IN THE PRENUPTIAL AGREEMENT, A CONDITION PRECEDENT, MEANT THE MARRIAGE CEREMONY, NOT SEXUAL RELATIONS; THE WIFE'S ARGUMENT THAT THE PRENUPTIAL AGREEMENT COULD NOT BE ENFORCED BECAUSE THE COUPLE NEVER HAD SEXUAL RELATIONS WAS REJECTED BY THE APPELLATE COURT (FIRST DEPT).

The First Department, reversing Supreme Court, determined the phrase "consummation of the anticipated marriage" in the prenuptial agreement meant the marriage ceremony, not sexual relations. In these divorce proceedings, the wife argued the prenuptial agreement was unenforceable because the couple never had sexual relations and "consummation" of the marriage was a condition precedent to the prenuptial agreement:

While the word "consummation" connotes sexual relations in certain contexts, such as annulment proceedings, that is not the only meaning of the word, which may simply mean achieve or fulfill (see Black's Law Dictionary [11th ed 2019]). The plain meaning of "consummation," in the context of the section titled "Marriage — a Condition Precedent and Effective Date" and defining the effective date of agreement as the date of the parties' marriage, is consummation or fulfillment of the parties' intention to enter into a valid "marriage." Reading the contract as a whole, this interpretation of the section effectuates the parties' expressed intention to fix their respective rights accruing upon marriage and to avoid unnecessary and intrusive litigation in the event of divorce, and sets an ascertainable date for determining the effectiveness and enforceability of the prenuptial agreement.

In contrast, accepting the wife's position would render the parties' respective rights uncertain and require the court to conduct a highly intrusive hearing into the parties' intimate relations, which is both contrary to the parties' stated intention and impractical. Fort v Haar, 2022 NY Slip Op 05660, First Dept 10-11-22

Practice Point: The condition precedent to the prenuptial agreement was the "consummation" of the marriage. The wife argued the agreement was unenforceable because the couple never had sexual relations. The appellate court found that the word "consummation" referred to the marriage ceremony, not sexual relations, and the agreement was therefore enforceable.

OCTOBER 11, 2022

FAMILY LAW, JUDGES, STATUTORY MAINTENANCE CRITERIA.

BECAUSE THE JUDGE DEVIATED FROM THE STATUTORY CRITERIA FOR THE CALCULATION OF TEMPORARY MAINTENANCE, THE JUDGE SHOULD HAVE EXPLAINED THE REASONS FOR THE DEVIATION; THE TEMPORARY MAINTENANCE AND CHILD SUPPORT AWARDS WERE VACATED (FIRST DEPT).

The First Department, vacating the award of pendente lite maintenance and child support, determined, because the temporary maintenance deviated from the statutory presumptive award,, the judge should have explained the reasons for the deviation:

To determine temporary maintenance, the motion court was required to apply Domestic Relations Law § 236(B)(5-a). While the court appears to have followed the calculations provided in that section to arrive at a presumptive award of temporary maintenance, it then deviated from the presumptive amount by directing the continued payment of the wife's rent, cell phone bills, utilities, and other household expenses. This statutory formula is intended to cover all the spouse's basic living expenses, including housing costs … . Where, as here, there is a deviation, the statute requires the court to explain the reasons for any deviation from the result reached by the formula factors … .

Accordingly, we vacate the pendente lite maintenance award and remand the matter for a reconsideration of the award in light of the directives of Domestic Relations Law § 236(B) (5-a), including the articulation of any other factors the court considers in deviating from the presumptive award … As the amount of maintenance affects calculation of child support, we further vacate the child support award for recalculation based on the directives of Domestic Relations Law § 240(1-b)(b)(5) (iii)(I) and (vii)(C), which require, for child support purposes, income adjustments based on the amount of maintenance ordered. Severny v Severny, 2022 NY Slip Op 06094, First Dept 11-1-22

Practice Point: Any deviation from the statutory criteria for the calculation of temporary maintenance must be explained. The failure to explain the deviation required the vacation of the both the temporary maintenance and the child support awards.

NOVEMBER 1, 2022

FAMILY LAW, VISITATION, DELEGATION OF COURT'S AUTHORITY.

THE JUDGE SHOULD NOT HAVE DELEGATED THE COURT'S AUTHORITY TO DECIDE VISITATION ISSUES TO A MENTAL HEALTH PROFESSIONAL; THE PROPER PROCEDURE FOR MODIFYING VISITATION ONCE FATHER HAS GAINED INSIGHT INTO THE CHILD'S NEEDS WAS EXPLAINED (FIRST DEPT).

The First Department, reversing (modifying) Family Court, determined the judge should not have delegated the court's authority to decide visitation issues to a mental health professional:

… [T]he court improperly delegated to a mental health professional its authority to determine issues involving the child's best interests — namely, when visits could resume and whether they should be supervised … . Accordingly, we modify to delete that provision of the order only. Upon an application to resume the father's visits with the child, the applicant shall have the burden to demonstrate changed circumstances and that the modification requested is in the child's best interests … , at which time the court may consider evidence that includes, but is not limited to, the testimony of a mental health expert about whether the father has gained insight into the child's medical and emotional needs and the impact of his behavior on the child. Matter of M.K. v H. M., 2022 NY Slip Op 05663, First Dept 10-11-22

Practice Point: Family Court cannot delegate its authority to decide visitation issues to a mental health professional. The proper procedure for allowing father's visitation to resume was explained, i.e., an application to resume visitation demonstrating a change in circumstances followed by an evidentiary hearing, including the testimony of a mental health expert.

OCTOBER 11, 2022

FORECLOSURE, REFORECLOSURE.

THE PROPERTY OWNER, MCWHITE, HAD BEEN DISMISSED FROM THE ORIGINAL FORECLOSURE ACTION AND HER INTEREST IN THE PROPERTY HAD NOT BEEN EXTINGUISHED BY THE JUDGMENT OF FORECLOSURE WHICH FALSELY NAMED HER AS A DEFENDANT; THE REFEREE'S DEED-HOLDER DID NOT STATE A CAUSE OF ACTION FOR REFORECLOSURE AGAINST MCWHITE AND MCWHITE WAS ENTITLED TO SUMMARY JUDGMENT ON HER QUIET TITLE CAUSE OF ACTION (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the referee's deed-holder's (I & I's) complaint failed to state a cause of action for reforeclosure (RPAPL 1503, 1523) against McWhite, the owner of the subject property. McWhite had been dismissed from the original foreclosure action because plaintiff never moved for a default judgment. The foreclosure plaintiff was aware McWhite was not included in the foreclosure when it filed its judgment, which falsely indicated McWhite's interest in the property had been extinguished. McWhite was entitled to summary judgment on her quiet title action:

Under the circumstances of this case, I & I failed to state a cause of action against McWhite for reforeclosure because the defect in the foreclosure action was due to the willful neglect of the foreclosure plaintiff as a matter of law. The underlying objective of foreclosure actions is "to extinguish the rights of redemption of all those who have a subordinate interest in the property and to vest complete title in the purchaser at the judicial sale" … . The defect in the underlying foreclosure action was that McWhite's interest was not validly extinguished in the judgment of foreclosure and sale due to her effective dismissal from the action. … [T]he foreclosure plaintiff here knew that McWhite had been effectively dismissed from the action and that the judgment of foreclosure and sale could not validly extinguish her interest in the premises. The foreclosure plaintiff nevertheless made a conscious decision to proceed to judgment and sale without validly extinguishing McWhite's known interest … . * * *

Here, the judgment of foreclosure and sale was void as to McWhite and the foreclosure sale did not transfer her interest in the premises to I & I. Moreover, McWhite established, prima facie, that the foreclosure action accelerated the

mortgage debt, that the foreclosure action was dismissed as abandoned pursuant to CPLR 3215(c), and the commencement of a new foreclosure action would be time-barred by the applicable six-year statute of limitations (see CPLR 213[4] …). In opposition, I & I failed to raise a triable issue of fact. Accordingly, the Supreme Court should have granted that branch of McWhite's motion which was for summary judgment on the complaint in the quiet title action. McWhite v I & I Realty Group, LLC, 2022 NY Slip Op 06795, Second Dept 11-30-22

Practice Point: Here the foreclosure plaintiff was aware the owner of the subject property, McWhite, had been dismissed from the original foreclosure action because plaintiff never moved for a default judgment. Yet the foreclosure plaintiff filed the judgment of foreclosure falsely indicating McWhite's interest in the property had been extinguished. The owner of the referee's deed therefore could not bring a reforecloscure action (RPAPL 1503, 1523) against McWhite and McWhite was entitled to summary judgment on her quite title action.

NOVEMBER 30, 2022

FRAUD, OUT-OF-POCKET DAMAGES.

THE COMPLAINT DID NOT STATE A CAUSE OF ACTION FOR FRAUDULENT INDUCEMENT BECAUSE IT DID NOT ADEQUATELY ALLEGE "OUT OF POCKET" DAMAGES (FIRST DEPT).

The First Department, reversing Supreme Court, determined the complaint did not state a cause of action for fraudulent inducement because it did not allege "out of pocket" damages:

… [T]he complaint fails to plead a cause of action for fraudulent inducement because it does not adequately allege that plaintiff suffered any ascertainable out-of-pocket pecuniary damages resulting from the alleged fraud … . Although plaintiff alleges unspecified reputational damages and lost revenue or profits, these allegations are not sufficient to sustain a cause of action based on fraud … . Similarly, plaintiff fails to allege that it paid any particular amount to acquire the G&P law practice or name, alleging only the value of G&P's practice when

plaintiff acquired it; this allegation is insufficient to measure plaintiff's damages … . Furthermore, although plaintiff states that G&P "carried undisclosed liabilities," it does not elaborate on what those might be…. . CKR Law LLP v Dipaolo, 2022 NY Slip Op 05587, First Dept 10-6-22

Practice Point: A complaint alleging fraudulent inducement does not state a cause of action unless it adequately alleges "out of pocket" damages.

OCTOBER 6, 2022

FRAUD, OUT-OF-POCKET DAMAGES.

THE FRAUD CAUSES OF ACTION SHOULD HAVE BEEN DISMISSED BECAUSE "OUT OF POCKET" DAMAGES WERE NOT DEMONSTRATED (FIRST DEPT).

The First Department, reversing Supreme Court, determined the fraud causes of action should have been dismissed because plaintiffs failed to demonstrate "out of pocket" damages:

Defendants are entitled to summary judgment because plaintiffs failed to show the "out of pocket" damages required for a fraud claim (see e.g. Kumiva Group, LLC v Garda USA Inc., 146 AD3d 504, 506 [1st Dept 2017]). Plaintiffs failed to submit evidence of the value of the … stock they received … . Danco Enters., LLC v Livexlive Media, Inc., 2022 NY Slip Op 05589, First Dept 10-5-22

Practice Point: Here the fraud causes of action were dismissed because plaintiffs did not demonstrate "out of pocket" damages. Decisions relied upon by the plaintiffs concerning exceptions to the "out-of-pocket" damages rule were deemed inapplicable.

OCTOBER 6, 2022

HUMAN RIGHTS LAW, EDUCATION-SCHOOL LAW, RELIGION.

YESHIVA UNIVERSITY NO LONGER HAS THE REQUISITE CONNECTION TO RELIGION AND THEREFORE IS NOT EXEMPT FROM THE DISCRIMINATION PROHIBITIONS IN THE NYC HUMAN RIGHTS LAW; THE PRIDE ALLIANCE WAS ENTITLED TO RECOGNITION AS AN OFFICIAL STUDENT ORGANIZATION (FIRST DEPT).

The First Department determined a student group (Pride Alliance) at Yeshiva University was entitled to summary judgment pursuant to the NYC Human Rights Law (City HRL)on its claims asserting gender, sexual orientation, and association discrimination. In addition Pride Alliance was entitled to a permanent injunction requiring Yeshiva to recognize the group as an official student organization. Essentially, Yeshiva argued the university was exempt from the requirements of the City HRL as a religious corporation or institution, but the university no longer had the requisite connection to religion: Yeshiva's constitutional arguments (free exercise of religion, freedom of expression and association) were rejected:

Yeshiva was originally chartered in 1897 under the Membership Corporations Law as the Rabbi Isaac Elchanan Theological Seminary Association (RIETS), with the stated purpose to "promote the study of Talmud" and prepare Orthodox Jewish rabbis for ministry. Over several decades, the charter was amended to allow numerous secular degrees to be awarded and to change the name of the institution, while RIETS remained part of Yeshiva. In 1967, Yeshiva amended its charter to become incorporated under the Education Law. Two years later it amended the charter to drop Hebrew Literature and Religious Education degrees, since RIETS was being spun off as its own corporation offering those degrees, and to "clarify the corporate status of the University as a non-denominational institution of higher learning." While Yeshiva is now comprised of three undergraduate colleges and seven graduate schools, RIETS remains a separate corporate entity housed on one of Yeshiva's campuses. YU Pride Alliance v Yeshiva Univ., 2022 NY Slip Op 07175, First Dept 12-13-22

Practice Point: Yeshiva University was not entitled to exemption from the discrimination prohibitions in the NYC Human Rights Law because the university no longer has the requisite connection to religion. Therefore the "Pride Alliance" was entitled to recognition as an official student group.

DECEMBER 15, 2022

HUMAN RIGHTS LAW, EMPLOYMENT LAW.

THE THREE-YEAR STATUTE OF LIMITATIONS FOR AGE DISCRIMINATION CLAIMS UNDER THE NYS AND NYC HUMAN RIGHTS LAW IS TOLLED BY FILING A CHARGE FOR AGE DISCRIMINATION WITH THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (EEOC) (FIRST DEPT).

The First Department, reversing Supreme Court, determined the age discrimination claims under the NYS and NYC Human Rights Law were timely brought because the three-year statute of limitations was tolled when plaintiff filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC):

Plaintiff's action, asserting claims of age discrimination under the New York State Human Rights Law (Executive Law § 296[1][a]) and the New York City Human Rights Law (Administrative Code § 8-107), was timely commenced, as the three-year statute of limitations was tolled by her filing of a charge of discrimination with the Equal Employment Opportunity Commission (EEOC) … . The filing of an EEOC charge constitutes a simultaneous and automatic filing with the New York State Division of Human Rights (SDHR) due to a work-sharing agreement between the two agencies … .

Moreover, Administrative Code § 8-502(d) provides, "[u]pon the filing of a complaint with the city commission on human rights or the state division of human rights and during the pendency of such complaint and any court proceeding for review of the dismissal of such complaint, such three-year limitations shall be tolled." The interplay between the EEOC/SDHR work-sharing agreement and the tolling provision in § 8-502(d) "indicates that a charge filed with the EEOC would also toll the statute of limitations period for [City HRL] claims" … . Gabin v Greenwich House, Inc., 2022 NY Slip Op 06428, First Dept 11-15-22

Practice Point: Filing an age discrimination charge with the Equal Employment Opportunity Commission (EEOC) tolls the three-year statute of limitation for filing age discrimination claims pursuant the NYS and NYC Human Rights Law.

NOVEMBER 15, 2022

LABOR LAW-CONSTRUCTION LAW, HOIST AS SAFETY DEVICE.

THE HOIST WHICH PLAINTIFF WAS OPERATING WAS A SAFETY DEVICE WITHIN THE MEANING OF LABOR LAW 240(1); WHEN PLAINTIFF OPENED THE EMERGENCY HATCH ON THE HOIST FOR A REPAIRMAN, THE HATCH DOOR SLAMMED BACK DOWN ON HIS HEAD; PLAINTIFF WAS ENTITLED TO SUMMARY JUDGMENT (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Gonzalez, determined plaintiff was entitled to summary judgment on the Labor Law 240(1) cause of action. Plaintiff was attempting to aid in the repair of a hoist when he opened the emergency hatch and the hatch door fell back down, striking plaintiff's head. The court ruled that the hoist was a covered safety device and plaintiff was entitled to some form of protection that would prevent the hatch door from falling back down after it was opened: In the alternative, the court noted that the hatch was a falling object which should have been secured:

Plaintiff was injured when the hatch door slammed onto his head as he stood on a ladder with his head protruding above the hatch aperture. We note that, in isolation, a hatch door is not necessarily a safety device … . Here, however, the hatch door was an essential component of a safety device — the hoist — being employed by plaintiff in an elevation-related capacity. It was foreseeable that the hoist could get stuck; indeed, a purpose of the hatch door was to serve as an emergency egress in such instances. When he was injured, plaintiff was still engaged in an elevation-related activity and attempting to safely remove himself from a height. Under these circumstances, the safety device — the hoist — was inadequate for its purpose of keeping plaintiff safe while engaged in an elevation-related activity. Plaintiff is thus entitled to partial summary judgment on the issue of liability on his claim under Labor Law § 240(1) … . Ladd v Thor 680 Madison Ave LLC, 2022 NY Slip Op 07031, First Dept 12-13-22

Practice Point: Here the hoist plaintiff was operating was deemed a safety device covered by Labor Law 240(1). The door on the hoist's emergency hatch slammed

back down on plaintiffs' head after he opened it to allow access to the hoist by a repairman. Plaintiff was entitled to some sort of protection which would prevent the open hatch door from falling back down. As an alternative, the hatch door was a falling object which should have been secured.

DECEMBER 13, 2022

LABOR LAW-CONSTRUCTION LAW, LADDER-FALL.

THE ALLEGATION THE A-FRAME LADDER SHIFTED FOR NO APPARENT REASON WARRANTED SUMMARY JUDGMENT ON THE LABOR LAW 240(1) CAUSE OF ACTION, NOTWITHSTANDING DEFENDANT'S EXPERT'S OPINION THE ACCIDENT WAS NOT THE PROXIMATE CAUSE OF PLAINTIFF'S INJURIES (FIRST DEPT).

The First Department, reversing Supreme Court in this A-frame ladder-fall case, determined plaintiff was entitled to summary judgment based upon the allegation the ladder shifted for no apparent reason. The facts that plaintiff inspected the ladder before using it, there were no witnesses and defendant's expert opined the accident was not the proximate cause of plaintiff's injuries did not preclude summary judgment on liability:

It is irrelevant that plaintiff inspected the ladder and found it to be in good order before using it, as plaintiff is not required to demonstrate that the ladder was defective in order to make a prima facie showing of entitlement to summary judgment on his Labor Law § 240(1) claim … .

… [P]laintiff is entitled to summary judgment in his favor even though he was the only witness to his accident, as "nothing in the record controverts his account of the accident or calls his credibility into question" … . While the opinions of defendants' expert engineer might relate to the issue of proximate causation of plaintiff's damages, i.e., whether plaintiff's claimed injuries were proximately caused by his accident … , they do not raise material issues … as to liability on the Labor Law § 240(1) claim. Pinzon v Royal Charter Props., Inc., 2022 NY Slip Op 06891, First Dept 12-6-22

Practice Point: Here the allegation the A-frame ladder shifted for no apparent reason warranted summary judgment on liability pursuant to Labor Law 240(1). The facts that there were no witnesses, plaintiff inspected the ladder before use, and defendant's expert opined plaintiff's injuries were not proximately caused by the fall did not preclude summary judgment.

DECEMBER 6, 2022

LABOR LAW-CONSTRUCTION LAW, SLIP AND FALL.

PLAINTIFF SLIPPED AND FELL CARRYING A TANK WHILE WALKING ON THE MUDDY BOTTOM OF AN EXCAVATED HOLE; THE BOTTOM OF THE HOLE WAS NOT A PASSAGEWAY (LABOR LAW 241(6)) AND THERE WAS NO ELEVATION-RELATED RISK (LABOR LAW 240(1); THOSE TWO CAUSES OF ACTION SHOULD HAVE BEEN DISMISSED (FIRST DEPT).

The First Department, reversing Supreme Court, determined defendants' motion for summary judgment dismissing the Labor Law 240(1) and 241(6) causes of action should have been granted. Plaintiff slipped and fell walking in a muddy, excavated hole. The bottom of the hole was not a passageway within the meaning of Labor Law 241(6) and there was relevant elevation-related risk:

Plaintiff is not entitled to relief under Labor Law § 241(6) for the alleged violation of Industrial Code § 23-1.7(d), since the "excavation pit" where he slipped and fell, "which at that time was no more than a big hole in the ground with an unfinished muddy bottom[,] … was not the type of flooring or passageway contemplated by" the Industrial Code … . Contrary to plaintiff's contention, his "accident did not occur on a floor, platform, passageway or similar work area or surface within the purview of [section 23-1.7(d)], but rather on muddy ground in an open area exposed to the elements" … . There was no testimony tending to establish that he was walking along a walkway or path that "workers generally took" … . …

Summary judgment also should have been granted to defendants dismissing plaintiff's Labor Law § 240(1) claim, because there was no elevation-related risk

involved with his carrying a tank on his shoulder while he walked along the ground … . Alvarado v SC 142 W. 24 LLC, 2022 NY Slip Op 05584, First Dept 10-6-22

Practice Point: Plaintiff slipped and fell while walking on the muddy bottom of an excavated hole. He was not walking on a passageway, so the Labor Law 241(6) cause of action should have been dismissed. There was no elevation-related risk, so the Labor Law 240(1) cause of action should have been dismissed.

OCTOBER 6, 2022

LABOR LAW-CONSTRUCTION LAW.

THE FACT THAT PLAINTIFF COULD NOT EXPLAIN HOW THE IMPROPERLY SECURED BEAM WHICH STRUCK HIM FELL DID NOT PRECLUDE PLAINTIFF FROM BEING AWARDED SUMMARY JUDGMENT IN THIS LABOR LAW 240(1) ACTION (FIRST DEPT).

The First Department, reversing Supreme Court, determined plaintiff was entitled to summary judgment in this Labor Law 240(1) action. A beam which was not properly secured fell on plaintiff. The fact that plaintiff could not explain how the beam fell did not preclude the award of summary judgment:

Plaintiff's testimony that a beam fell on him as he was securing a scaffold on which his coworker was standing to strip concrete formwork beams from the ceiling, along with the unrebutted affidavit of his expert concluding that the beam was not properly secured, established his entitlement to summary judgment on liability on the Labor Law § 240(1) claim … . That plaintiff was unable to explain how the beam fell did not preclude summary judgment in his favor … . Fuentes v YJL Broadway Hotel, LLC, 2022 NY Slip Op 06636, First Dept 11-22-22

Practice Point: Plaintiff's expert concluded the beam which struck plaintiff was not properly secured and the expert's conclusion was not rebutted. That plaintiff could not explain how the beam fell did preclude the award of summary judgment in this Labor Law 240(1) action.

NOVEMBER 22, 2022

LABOR LAW-CONSTRUCTION LAW, LANDLORD-TENANT.

ALTHOUGH DEFENDANT PORT AUTHORITY OF NEW YORK AND NEW JERSEY (PANYNJ) WAS THE LESSOR OF THE PROPERTY WHERE PLAINTIFF WAS INJURED IN THIS LABOR LAW 241(6) ACTION, IT WAS AN "OWNER" WITHIN THE MEANING OF THE LABOR LAW AND, THEREFORE, WAS A PROPER DEFENDANT; ALTHOUGH PLAINTIFF WAS NOT AT THE CONSTRUCTION SITE, SHE WAS IN AN AREA USED TO CREATE MATERIALS FOR THE CONSTRUCTION SITE, WHICH IS COVERED BY THE LABOR LAW (FIRST DEPT).

The First Department, reversing Supreme Court, determined Port Authority of New York and New Jersey (PANYNJ), although the lessor of the property where plaintiff was injured in this Labor Law 241 (1) action, was an "owner" within the meaning of the Labor Law and therefore was a proper defendant. Although plaintiff was not injured at the construction site, she was injured where materials were being prepared for use in the construction:

PANYNJ failed to establish its entitlement to summary judgment, as the record presents issues of fact as to whether PANYNJ was liable to plaintiff under Labor Law § 241(6). Although PANYNJ leased control of the property to RHCT and transferred responsibility for the maintenance of the terminal to RHCT, PANYNJ was nevertheless the owner of property for purposes of Labor Law § 241(6). The operating agreement between PANYNJ and RHCT permitted RHCT to use the property, and set out conditions on RHCT's use of the property. The agreement also set forth the scope and manner of the work to be performed and provided that RHCT was required to provide PANYNJ with a monthly profit and loss report. The general manager for PANYNJ testified that RHCT was required to obtain PANYNJ's consent to sublicense any portion of the property. Additionally, under the purchase order between Tutor Perini and TBTA, the owner of the bridge project, PANYNJ was to be paid a port security charge, among other charges.

As a result, the evidence created a sufficient nexus between PANYNJ and the project, and thus between PANYNJ and plaintiff, to support an imposition of

liability under Labor Law § 241(6) … . Plaintiff's task of grinding bevels on the deck panels to be installed on the bridge also falls under the Labor Law because the protections of the statute extend to areas where materials or equipment are being prepared to be used in construction … .Musse v Triborough Bridge & Tunnel Auth., 2022 NY Slip Op 06171, First Dept 11-3-22

Practice Point: Although defendant was a lessor of the property where plaintiff was injured in this Labor Law 241(6) action, it was an "owner" within the meaning of the Labor Law and therefore was a proper defendant. Even though plaintiff was not injured at the construction site, the Labor Law applies because she was injured in an area used to prepare materials for the construction site.

NOVEMBER 3, 2022

LABOR LAW-CONSTRUCTION LAW, LANDLORD-TENANT.

THE LESSEE OF THE PROPERTY, INFOR, CONTRACTED FOR THE WORK BEING DONE AT THE TIME OF PLAINTIFF'S INJURY IN THIS LABOR LAW 240(1) ACTION; THEREFORE INFOR WAS AN "OWNER" WITHIN THE MEANING OF THE LABOR LAW AND WAS A PROPER DEFENDANT (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, determined the lessee of the property (Infor) was a proper party in this Labor Law 240(1) action because it had contracted for the work done at the time of plaintiff's injury:

Plaintiff claims he was drilling metal tracks onto a wall when the Baker scaffold on which he was standing overturned, causing him to fall and sustain injuries. 635 owned the building in which plaintiff was working, and defendant SL Green Realty Corp. (SL Green) was 635's managing agent. Infor leased the premises from 635, and retained JRM as the general contractor to perform construction work. JRM, in turn, retained Montec and nonparty Premier Builders, Inc., plaintiff's employer, as subcontractors to perform various aspects of the work. * * *

The Labor Law § 240(1) claim should be reinstated against Infor, as the court incorrectly concluded that Infor was not a proper Labor Law defendant. Although Infor leased the premises from 635, it may still be held liable as an "owner" under the statute because it contracted for the construction work being performed at the time of plaintiff's accident … . For the same reasons that plaintiff is entitled to partial summary judgment against 635 and JMR, plaintiff's motion for partial summary on the Labor Law § 240(1) claim against Infor should be granted, and Infor's motion for summary judgment dismissing the claim against it should be denied. Otero v 635 Owner LLC, 2022 NY Slip Op 06172, First Dept 11-3-22

Practice Point: A lessee may be considered a property "owner" in a Labor Law 240(1) action when the lessee contracted for the work being done when the plaintiff was injured.

NOVEMBER 3, 2022

LANDLORD-TENANT, MUNICIPAL LAW, RENT CONTROL.

PLAINTIFF-TENANT'S COMPLAINT ALLEGED DEFENDANT-LANDLORD'S STIPULATION WITH THE PRIOR TENANT IN 2000 ILLEGALLY DECONTROLLED THE APARTMENT; THE MAJORITY DISMISSED THE COMPLAINT; TWO-JUSTICE DISSENT (FIRST DEPT).

The First Department, reversing Supreme Court, over a two-justice dissent, determined plaintiff's complaint should have been dismissed. "Plaintiff, the current tenant of the subject apartment, commenced this action seeking a declaration that her tenancy is subject to the Rent Stabilization Law (RSL) and that the premises were illegally decontrolled in 2000 when defendant owner and nonparty Edward McKinney reached a 'private agreement' circumventing initial rent registration procedures for decontrolling the apartment." The decision and the dissent are detailed and fact-specific and cannot be fairly summarized here:

An agreement by a tenant to waive the benefit of any provision of the rent control law is expressly prohibited and void (9 NYCRR 2200.15 …). However, when McKinney and defendant settled their dispute over McKinney's status, McKinney

was not a tenant … . He was not on the lease and had no evident rights, other than being an occupant of the apartment who claimed that he had succession rights when Brown died. … Defendant, on the other hand, denied that McKinney was anything other than a squatter/licensee or possible roommate of the deceased. By entering into the 2000 stipulation, both sides, represented by counsel, resolved their dispute as to whether McKinney had any statutory right to the apartment. By doing so, McKinney and defendant chose the certainty of settlement, rather than the uncertainty of a judicial declaration about McKinney's status … .

From the dissent:

… I would find that plaintiff has sufficiently pleaded that the stipulation that McKinney and defendant executed in 2000 (the 2000 stipulation) was void under applicable statutes, as interpreted by our Court and the Court of Appeals. Accordingly, I would vote to affirm the portion of the motion court's decision that denied defendant's motion to dismiss the first, third and fourth causes of action. Liggett v Lew Realty LLC, 2022 NY Slip Op 07000, First Dept 12-8-22

Practice Point: Plaintiff-tenant alleged defendant-landlord illegally decontrolled the apartment in 2000 by entering an agreement (a stipulation) with the prior tenant. The majority held the complaint did not state a cause of action. The two dissenters disagreed.

DECEMBER 8, 2022

MEDICAL MALPRACTICE, EXPERT AFFIDAVITS.

PLAINTIFF'S EXPERT'S AFFIDAVIT DID NOT ADDRESS OR CONTROVERT THE EXPERT'S OPINION; DEFENDANT'S MOTION FOR SUMMARY JUDGMENT IN THIS MEDICAL MALPRACTICE ACTION SHOULD HAVE BEEN GRANTED (FIRST DEPT).

The First Department, reversing Supreme Court, determined defendant's motion for summary judgment in this medical malpractice action should have been granted. Plaintiff's expert's affidavit did not address or controvert the defendant's

expert's opinion. Plaintiff alleged her "foot drop" was caused by prescribed medication: Defendant's expert opined the foot drop could not have been caused by the medication plaintiff took:

Defendant made a prima facie case of summary judgment through its expert who stated that there was no medical evidence that methotrexate, a drug in use since 1947, causes peripheral neuropathy or a foot drop, either alone or in combination with one of plaintiff's other medications, and opined that foot drop would not have manifested at the single low dose of methotrexate consumed by plaintiff over the course of one day; the short period that elapsed between this consumption of the drug and the emergence of foot drop, was atypical for a drug-induced peripheral neuropathy; if plaintiff's condition were a drug induced peripheral neuropathy, it would have resolved within weeks of the discontinuance of methotrexate and the fact that plaintiff's condition persisted for years and did not resolve upon discontinuing methotrexate, was a presentation atypical for drug-induced peripheral neuropathy; and plaintiff's presumed diagnosis of sarcoidosis, could be an explanation for her condition.

In opposition to defendants' prima facie showing, plaintiff's expert failed to demonstrate the existence of triable issues of fact by demonstrating that defendants' prescription of the drug methotrexate was a "substantial factor" in causing her claimed injury of "foot drop" … . The expert failed to address or controvert many of the points made by defendants' expert. He did not address or controvert defendant's expert's opinion that 5mg of methotrexate taken in one day could not cause foot drop, or, if it did, why the foot drop did not resolve within weeks of discontinuation of the medication. Plaintiff's expert also failed to address defendant's expert's opinion that the more likely culprit for plaintiff's foot drop was her presumed diagnosis of neuro-sarcoidosis, as indicated in the medical records. Camacho v Pintauro, 2022 NY Slip Op 06743, First Dept 11-29-22

Practice Point: Medical malpractice cases are battles between experts. At the summary judgment stage, if supported opinions in the defense expert's affidavit are not addressed or controverted by the plaintiff's expert's affidavit, defendant wins.

NOVEMBER 29, 2022

MEDICAL MALPRACTICE, HEALTHCARE PROXY, LIVING WILL.

FAILURE TO FOLLOW DECEDENT'S DIRECTIVES IN A LIVING WILL OR HEALTHCARE PROXY CAN CONSTITUTE MEDICAL MALPRACTICE; HERE THERE WERE QUESTIONS OF FACT ABOUT WHICH HEALTHCARE PROXY APPLIED, WHETHER A PROXY WAS REVOKED BY DECEDENT, AND WHETHER THE TREATMENT GIVEN TO DECEDENT WAS APPROVED (FIRST DEPT).

The First Department, reversing Supreme Court, determined there were questions of fact concerning which of two contradictory healthcare proxies applied and whether one of the healthcare proxies was revoked by decedent's conversations:

Plaintiff commenced an action against defendants alleging medical malpractice based on the various health proxies and forms. Plaintiff claims that defendants breached their agreement with the decedent by administering antibiotics and IV Hydration from April 15, 2017 onwards that prolonged his life.

Here, there are issues of fact that preclude summary judgment. It is unclear whether the 1993 healthcare proxy (and the living will), the 2016 healthcare proxy or the 2017 FLST [Forgoing Life-Sustaining Treatment Including DNR] governed this dispute and whether the 2016 health care proxy was revoked by decedent through conversations with his agents, pursuant to Public Health Law § 2985(a). Significantly, it is not clear from the record whether the treatment prolonged decedent's life, as neither side submits an expert affidavit. There is also a question as to whether decedent's health care agents approved the very treatment for which they now seek to hold defendants liable. Lanzetta v Montefiore Med. Ctr., 2022 NY Slip Op 06554, First Dept 11-17-22

Practice Point: Failure to follow a decedent's directives in a living will or healthcare proxy can constitute medical malpractice. The directives can be orally revoked.

NOVEMBER 17, 2022

MEDICAL MALPRACTICE, VACCINES.

THE NATIONAL VACCINE INJURY COMPENSATION PROGRAM (PART 2 OF THE NATIONAL CHILDHOOD VACCINE INJURY ACT OF 1986), WHICH LIMITS THE LIABILITY OF A PHYSICIAN WHO ADMINISTERS A VACCINE TO $1000, DOES NOT APPLY TO PHYSICIANS WHO SUBSEQUENTLY TREAT A VACCINATED PERSON FOR A VACCINE-RELATED CONDITION (FIRST DEPT).

The First Department determined the National Vaccine Injury Compensation Program, Part 2 of the National Childhood Vaccine Injury Act of 1986 (VICP or NCVIA) (42 USC § 300aa-10 et seq.), which limits the liability of a physician who administers a vaccine to $1000, applies only to those who actually administer the vaccine and not to those who subsequently treat the vaccinated person for medical problems that may be linked to the vaccine:

On April 14, 2006, defendant Gargi Gandhi, M.D. administered two vaccines to infant plaintiff Diksha Batish, then age 13. Plaintiff's condition subsequently deteriorated. Two weeks after vaccination, plaintiff received care from defendant Drs. Imundo and Pascual. Several months later, in September 2006, plaintiff first sought treatment from Dr. Spiro. There is no dispute that only Dr. Gandhi administered the vaccines. * * *

Here, none of the moving defendants administered the vaccine. Neither … did they treat plaintiff for conditions allegedly exacerbated by subsequent vaccinations. They only provided post-vaccination care. Thus, the moving defendants cannot be considered vaccine administrators under the VICP. Since the moving defendants are not vaccine administrators, the VICP is inapplicable, and any toll authorized by the VICP is also inapplicable (see 42 USC § 300aa-16[c]). Batish v Gandhi 2022 NY Slip Op 07494, First Dept 12-29-22

Practice Point: The National Vaccine Injury Compensation Program, Part 2 of the National Childhood Vaccine Injury Act of 1986 (VICP or NCVIA) (42 USC § 300aa-10 et seq.) limits the liability of a physician who administers a vaccine to $1000.

DECEMBER 29, 2022

MENTAL HYGIENE LAW, INCAPACITATED PERSONS.

THE GUARDIAN OF THE PERSON AND PROPERTY OF THE INCAPACITATED PERSON (IP) AND THE ATTORNEY APPOINTED TO REPRESENT THE IP WERE PROPERLY REMOVED AND DISCHARGED WITHOUT A TESTIMONIAL HEARING, WHICH IS NOT REQUIRED BY THE MENTAL HYGIENE LAW; THE GUARDIAN AND THE ATTORNEY FAILED TO INVESTIGATE THE BONA FIDES OF THE IP'S MARRIAGE AND THE PRENUPTIAL AGREEMENT (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Gische, determined the temporary guardian of the person and property (Mock) and the attorney appointed represent the incapacitated person (IP), Edgar, were properly removed and discharged without a testimonial hearing. The opinion is rich with allegations Edgar was being victimized financially which cannot be fairly summarized here:

On October 2, 2018, Alison Loew, the sister and only sibling of Edgar Valentine Loew, brought a petition for the appointment of an article 81 guardian for her then 74-year-old brother. The petition alleged that Edgar, who is wealthy, but suffers from mental health issues and has some physical limitations, was the victim of systematic financial exploitation by Rachida Naciri. …

A court evaluator (Britt Burner) was appointed on October 2, 2018, appellant Gary Elias was appointed as Edgar's attorney, and appellant Judy S. Mock was appointed as Edgar's temporary guardian of the person and property. * * *

The Mental Hygiene Law does not support appellants' contention that they were entitled to a testimonial hearing in this case before being removed. Mental Hygiene Law § 81.35 provides that a guardian may be removed when she or he "fails to comply with an order, is guilty of misconduct, or for any other cause which to the court shall appear just" … . A motion on notice, served on the persons specified in Mental Hygiene Law § 81.16 I, is required but there is no statutory right to a hearing (see Mental Hygiene Law §§ 81.16[c]; 81.35). This relaxed requirement stands in distinction to Mental Hygiene Law § 81.11 (a), which provides that the

petition for the appointment of a guardian for an alleged IP, whose liberty interests are at stake, "shall be made only after a hearing" … . The reason a guardian has "no due process right to a full hearing," nor is a "full blown" hearing necessary for their removal, is that a guardian has no "property Interest" to protect … .

Although a guardian cannot be summarily removed in the absence of a fully developed record or without any findings, and a hearing may be required where material facts are disputed … , here the parties had not only fully briefed [the] motion, but the salient facts were also known to the court and largely undisputed. A decision to remove a guardian of the person and property of an IP is within the sound discretion of the trial court … . Matter of Loew, 2022 NY Slip Op 06436, First Dept First Dept 11-15-22

Practice Point: The guardian and the attorney appointed to represent the incapacitated person (IP) were properly removed and discharged without a testimonial hearing, which is not required by the Mental Hygiene Law. The guardian and the attorney failed to investigate the bona fides of the IP's marriage and prenuptial agreement.

NOVEMBER 15, 2022

MUNICIPAL LAW, FIREFIGHTERS, ACCIDENTAL DISABILITY RETIREMENT.

PETITIONER NYC FIREFIGHTER WAS DENIED ACCIDENTAL DISABILITY RETIREMENT (ADR) BENEFITS WITHOUT ANY EXPLANATION IN THE MEDICAL BOARD'S FINDINGS; THE MATTER WAS REMITTED FOR A NEW DETERMINATION BASED ON A RECORD ADEQUATE FOR REVIEW (FIRST DEPT).

The First Department, annulling the denial of accidental disability retirement (ADR) benefits in this firefighter-disability case, determined that the Medical Board's failure to explain the reasons for its conclusion there was no accident and the injuries were not debilitating required remittal to the Medical Board and a new determination by the Board of Trustees with a record adequate for review:

… [T]he Medical Board found petitioner to be disabled on account of the left shoulder injuries he sustained on March 22, 2018. However, citing "inconsistencies" and a "lack of witnessed accounts . . . that would suggest . . . an accident," the Board denied petitioner an ADR benefit. When the insufficient explanation was raised before the Board of Trustees, they acknowledged that a witness statement was not necessary, and stated that they did not understand what the Medical Board was referring to with regard to inconsistencies in the manner of petitioner's injuries. Nevertheless, when the Board of Trustees reconsidered the matter, it simply took a vote on petitioner's application without any deliberation or indication as to why he had been denied an ADR benefit, issuing a conclusory denial without any explanation as to why they had adopted the Medical Board's unsupported statements about alleged inconsistencies concerning the nature of petitioner's injuries.

The Medical Board failed to provide any factual basis concerning the alleged inconsistencies and why it did not believe petitioner's injuries to be accidental. Further, the determination of the Medical Board was devoid of any articulated basis for its conclusion that the limitations of petitioner's cervical and lumbar spine were not a debilitating or incapacitating condition for performing the duties of a firefighter. The failure to set forth an adequate statement of the factual basis for the determination forecloses the possibility of fair judicial review … . Matter of Reynolds v New York City Fire Pension Fund, 2022 NY Slip Op 06330, First Dept 11-10-22

Practice Point: Here the injured NYC firefighter was denied accidental disability retirement (ADR) but the Medical Board did not give any reasons for its conclusion. The findings were annulled and the matter remitted for a new determination and the creation of an adequate record for review.

NOVEMBER 10, 2022

NEGLIGENCE, EMPLOYMENT LAW, SCOPE OF EMPLOYMENT. DEFENDANT'S EMPLOYER (TOMS) WAS NOT LIABLE FOR THE ACTS OF DEFENDANT EMPLOYEE (ROSNER) WHICH WERE NOT DONE WITHIN THE SCOPE OF ROSNER'S EMPLOYMENT OR TO FURTHER TOMS' BUSINESS (FIRST DEPT).

The First Department, reversing Supreme Court, determined that defendant Rosner, an employee of defendant TOMS Capital Management, was clearly not acting within the scope of his employment with TOMS when advising plaintiff on investments, allegedly as part of a scheme to deplete plaintiff's assets. Therefore plaintiff's unjust enrichment and negligence causes of action against TOMS based upon respondeat superior should have been dismissed:

In or about June 2020, Rosner allegedly began an affair with plaintiff's wife. They then allegedly conspired to develop a scheme to deplete plaintiff's assets. In furtherance of this scheme, Rosner began to advise plaintiff to invest in high-risk stock options which Rosner knew were not suitable for plaintiff and would not be profitable for him. Plaintiff followed the advice and sustained trading losses in excess of $300,000. Plaintiff alleges that this investment advice was part of a scheme by TOMS and Rosner to "better position the stock options," in which TOMS was also allegedly participating, to benefit TOMS and Rosner and their clients.

The motion court incorrectly determined that the allegations in the complaint sufficiently supported claims for unjust enrichment and negligence against TOMS under a theory of respondeat superior. Even construed in the light most favorable to plaintiff … , the alleged acts by Rosner clearly were not made within the scope of his employment or in furtherance of TOMS's business, but rather, for his own personal gain … . Courtois v TOMS Capital Mgt. LP, 2022 NY Slip Op 06545, First Dept 11-17-22

Practice Point: Here defendant allegedly gave investment advice to plaintiff which was designed to deplete plaintiff's assets. Because defendant's acts were not done within the scope of his employment the unjust enrichment and negligence causes of action against defendant's employer, pursuant to the doctrine of respondeat superior, should have been dismissed.

NOVEMBER 17, 2022

NEGLIGENCE, LANDLORD-TENANT.

DEFENDANT OUT-OF-POSSESSION LANDLORD WAS NOT RESPONSIBLE FOR MAINTENANCE OF THE STAIRWAY WHERE PLAINTIFF ALLEGEDLY SLIPPED AND FELL (FIRST DEPT).

The First Department, reversing Supreme Court, determined defendant in this stairway slip and fall case was an out-of-possession landlord who was not responsible for maintenance of the stairway treads:

Article 7(A)(i) of the lease imposed on Cava [the tenant] the obligation to maintain and repair the nonstructural portions of the demised premises … . The testimonial evidence established that Cava, consistent with its obligations under the lease, assumed responsibility over the subject staircase … . Although the lease granted defendants the right to re-enter to make repairs, the stairway condition was not a significant structural or design defect that was contrary to a specific statutory safety provision … . Kamara v 323 Pas Owner LLC, 2022 NY Slip Op 07296, First Dept 12-22-22

Practice Point: The tenant, pursuant to the lease, had assumed responsibility for maintenance of the stairway where plaintiff fell. The defendant out-of-possession landlord was entitled to summary judgment.

DECEMBER 22, 2022

NEGLIGENCE, MUNICIPAL LAW, SLIP AND FALL.

THE BIG APPLE MAP RAISED A QUESTION OF FACT ABOUT WHETHER THE CITY HAD WRITTEN NOTICE OF THE SIDEWALK DEFECT WHICH ALLEGEDLY CAUSED PLAINTIFF'S SLIP AND FALL; PLAINTIFF'S COMPLAINT WAS AMENDED TO FIX A DEFICIENCY IN PLEADING THAT THE CITY HAD WRITTEN NOTICE OF THE DEFECT (FIRST DEPT).

The First Department, reversing Supreme Court, determined: (1) there was a question of fact whether the Big Apple map provided the city with written notice of the sidewalk defect alleged to have caused plaintiff's slip and fall; (2) the city's evidence to the contrary was improperly first submitted in reply; (3) the plaintiff was entitled to amend the complaint to correct the deficiency in pleading the city had written notice of the sidewalk defect:

In support of its summary judgment motion, the City submitted evidence, including the most recent Big Apple Map received by the City prior to plaintiff's accident, and argued that the Map did not depict the type of sidewalk defect that plaintiff testified caused her accident.

Based on all the evidence submitted, including the Big Apple Map and photographs of the sidewalk defect, plaintiff raised a triable issue of fact as to whether the City had prior written notice of the alleged dangerous condition … . The City's contention that the Big Apple Map had been rendered inapplicable by subsequent sidewalk repairs is unavailing. Aside from the fact that this argument was improperly raised for the first time on reply, the City's submissions indicated that the defect remained unchanged. Further, the issue of whether the Big Apple Map was sufficiently close in time to provide prior written notice, and whether the area had remained unchanged, was a question for the jury … . Bchakjan v City of New York, 2022 NY Slip Op 06543, First Dept 11-17-22

Practice Point: In NYC, a Big Apple map may provide the city with written notice of a sidewalk defect.

NOVEMBER 17, 2022

NEGLIGENCE, MUNICIPAL LAW, PEDESTRIANS.

PLAINTIFF PEDESTRIAN ALLEGED THE NEGLIGENCE OF A TRAFFIC OFFICER IN DIRECTING TRAFFIC CAUSED THE ACCIDENT; PLAINTIFF DID NOT DEMONSTRATE A SPECIAL RELATIONSHIP BETWEEN THE CITY AND PLAINTIFF, A PREREQUISITE FOR MUNICIPAL LIABILITY (FIRST DEPT).

The First Department, reversing Supreme Court, determined plaintiff-pedestrian's complaint against the city in this traffic accident case should have been dismissed. Plaintiff alleged the traffic officer's negligence in directing traffic caused the accident. The First Department found there was no demonstration of a "special relationship" between plaintiff and the city, a prerequisite for municipal liability:

Neither the notice of claim nor the complaint alleges the factual predicate for the special relationship theory between plaintiff and the City, as required to hold the City liable for plaintiff's injuries based on a traffic officer's alleged negligence in directing traffic and pedestrians at an intersection where plaintiff was crossing the street … . Plaintiff also did not sufficiently allege that the officer, in directing traffic, took control of "a known and dangerous safety condition" so as to set forth the existence of a special duty … . Plaintiff alleged only that the traffic officer negligently directed a vehicle at the intersection, causing the vehicle to hit her, thereby creating a dangerous condition; however, the dangerous condition must exist prior to the traffic officer's assumption of any duty … . Plaintiff did not assert that the intersection was inherently dangerous or that the drivers of the cars at the intersection were violating any safety laws before the officer was directing pedestrians. Polito v Escorcia, 2022 NY Slip Op 06447, First Dept 11-15-22

Practice Point: In this pedestrian accident case, the plaintiff alleged the negligence of the traffic officer in directing traffic caused the accident. The plaintiff failed to demonstrate a special relationship between the city and plaintiff, a prerequisite for municipal liability.

NOVEMBER 15, 2022

NEGLIGENCE, PROXIMATE CAUSE, SLIP AND FALL.

IN THIS SIDEWALK SLIP AND FALL CASE, THE SUPPORT POLE FOR THE SIDEWALK TENT FURNISHED THE OCCASION FOR THE SLIP AND FALL BY REQUIRING PLAINTIFF TO CHOOSE WHICH SIDE OF THE POLE TO WALK ON BUT WAS NOT THE PROXIMATE CAUSE OF THE SLIP AND FALL (FIRST DEPT).

The First Department, reversing Supreme Court, determined the support pole for the sidewalk shed furnished a condition for the sidewalk slip and fall but was not the proximate cause of the fall:

The record established as a matter of law that the sidewalk shed was not a proximate cause of plaintiff's injuries. Plaintiff testified that the support pole for the sidewalk shed was placed in the middle of the sidewalk, dividing the area into two paths that were three feet wide on each side, and that she and her husband elected to walk side-by-side on the path to the left nearest the tree well. Plaintiff stated that her husband "nudged" her to the left, and her foot touched the edge of the tree well, which was not level with the sidewalk, causing her to fall. This testimony established that the placement of the sidewalk shed support pole did not compel plaintiff to step into the tree well to proceed forward, but that its placement merely facilitated the accident or furnished the occasion for it … . Kalnit v 141 E. 88th St., LLC, 2022 NY Slip Op 06552, First Dept 11-17-22

Practice Point: A condition can furnish the occasion for an accident without being the proximate cause of the accident. Here a support pole for a sidewalk tent required plaintiff to choose which side of the pole to walk on but did not cause her slip and fall (she stepped in a tree well).

NOVEMBER 17, 2022

NEGLIGENCE, SLIP AND FALL, CONSTRUCTIVE NOTICE.

DEFENDANT DEMONSTRATED IT DID NOT HAVE CONSTRUCTIVE NOTICE OF THE WET CONDITION WHICH ALLEGEDLY CAUSED PLAINTIFF'S SLIP AND FALL (FIRST DEPT).

The First Department, reversing Supreme Court, determined defendant demonstrated it did not have constructive notice of the wet condition which allegedly caused plaintiff's slip and fall:

Defendant demonstrated prima facie that it did not have actual or constructive notice of the dangerous condition by producing evidence of its maintenance activities on the day of the accident, specifically, that the wet condition did not exist when the stairs were cleaned by the porter less than three hours before plaintiff fell … , and that there were no complaints about a wet condition on the stairs in the morning prior to her accident … . Defendant was not required to produce a written schedule or log of its cleaning activities; the unrefuted testimony of its porter was sufficient. The porter's testimony also established that there was a reasonable cleaning schedule in place that addressed the alleged ongoing and recurring condition … .

Plaintiff failed to raise an issue of fact concerning who created the wet condition and when … . Plaintiff presented no evidence that the ongoing and recurring condition was routinely left unaddressed by defendant, nor did she raise a factual issue that defendant's cleaning routine "was manifestly unreasonable so as to require altering it" … . Hartley v Burnside Hous. Dev. Fund Corp., 2022 NY Slip Op 06065, First Dept 10-27-22

Practice Point: The defendant demonstrated it did not have constructive knowledge of the wet condition alleged to have cause plaintiff's slip and fall by showing the stairs were cleaned three hours before the fall and no one had complained about the wet condition in the morning prior to the fall.

OCTOBER 27, 2022

NEGLIGENCE, SLIP AND FALL, ESPINAL.

WHEN THE CONTRACTOR'S EMPLOYEE ARRIVED TO CLEAN THE TANK, THE OPENING WAS COVERED ONLY BY CARDBOARD; AFTER FINISHING THE WORK, THE EMPLOYEE REPLACED THE CARDBOARD COVER; PLAINTIFF SUBSEQUENTLY STEPPED ON THE CARDBOARD AND FELL INTO THE TANK; THE CONTRACTOR'S EMPLOYEE DID NOT LAUNCH AN INSTRUMENT OF HARM WITHIN THE MEANING OF ESPINAL, 98 NY2D 140 (FIRST DEPT).

The First Department, reversing Supreme Court, determined the contractor's (A&L's) employee did not launch an instrument of harm by leaving the accident site as it was when the employee arrived to clean a sewage tank, the opening of which was covered only by cardboard. Plaintiff stepped on the cardboard and fell into the tank:

Supreme Court should have granted A&L summary judgment dismissing the complaint as against it. Plaintiff was not a party to A&L's contract to clean the sewage tank. Plaintiff argues that A&L may nevertheless be liable in tort because it failed to exercise reasonable care in the performance of its contractual duties and thereby launched a force or instrument of harm (see Espinal v Melville Snow Contrs., 98 NY2d 136, 140 [2002]). However, this exception to the general rule that a contractual obligation does not give rise to tort liability to a third party is inapplicable where "the breach of contract consists merely in withholding a benefit . . . where inaction is at most a refusal to become an instrument for good" … . Thus, a defendant who neglects to make the accident site "safer — as opposed to less safe — than it was before" the defendant came upon the site is not liable pursuant to the Espinal exception … . …

By simply replacing the cardboard box cover already in place over the sewage tank after he completed his work, A&L's employee returned the site to the condition in which he originally found it. Thus, he neglected to make the area safer, but did not affirmatively make the area less safe than it was when he first came upon it … . That A&L's employee did not report the cardboard is immaterial because a third-party contractor's awareness of a condition and failure to warn does not amount to

launching an instrument of harm … . Skeete v Greyhound Lines, Inc., 2022 NY Slip Op 05511, First Dept 10-4-22

Practice Point: A contractor will be liable to an injured person who is not a party to the contract if the contractor launches an instrument of harm which causes the injury. Here the contractor's employee left the accident scene as it was before the employee started the job, replacing the cardboard which covered the opening to the tank which the employee cleaned. The contractor's employee did not launch an instrument of harm by replacing the cardboard cover. The contractor was not liable to the plaintiff who stepped on the cardboard and fell into the tank.

OCTOBER 4, 2022

NEGLIGENCE, SLIP AND FALL.

THE ATTEMPT TO HOLD DEFENDANT PLUMBING COMPANY LIABLE FOR THE LEAK WHICH CAUSED PLAINTIFF'S SLIP AND FALL RELIED ON PURE SPECULATION; THE DOCTRINE OF RES IPSA LOQUITUR FAILS BECAUSE DEFENDANT DID NOT HAVE EXCLUSIVE CONTROL OVER THE BUILDING'S PLUMBING (FIRST DEPT).

The First Department, reversing Supreme Court, determined defendant plumbing company's motion for summary judgment in this slip and fall case should have been granted. The First Department held the attempt to connect the pipe-repair to the leak which caused the slip and fall was pure speculation:

Plaintiff slipped and fell on water that spilled out of a garbage bin positioned to catch a leak from a pipe in the ceiling of the basement storeroom in a building owned by plaintiff's employer. About two months before plaintiff's accident, defendant had repaired a sanitary waste line pipe in a basement corridor outside the storeroom in which the accident occurred. Upon these undisputed facts established by the record, defendant should have been granted summary judgment, as there is nothing but speculation to connect defendant's work on the waste pipe in the corridor with the leak from the water pipe in the storeroom that appeared two months later and caused plaintiff's mishap.

We note that plaintiff cannot rely upon the doctrine of res ipsa loquitur, because he has not established that the pipes were within defendant's exclusive control … . Defendant made a showing, which plaintiff failed to rebut, that defendant was part of a rotation of plumbers who made only emergency repairs at the hospital, and that plaintiff's employer employed in-house plumbers. Taitt v Riehm Plumbing Corp., 2022 NY Slip Op 06775, First Dept 11-29-22

Practice Point: Here the leaking pipe which caused plaintiff's slip and fall could not be connected to repairs made by defendant plumbing company two months before. The res ipsa loquitiur doctrine did not apply because defendant did not have exclusive control over the water pipes.

NOVEMBER 29, 2022

NEGLIGENCE, TRAFFIC ACCIDENTS, DRAM SHOP ACT.

THE CLUB'S MOTION FOR SUMMARY JUDGMENT DISMISSING THE DRAM SHOP ACT CAUSE OF ACTION SHOULD NOT HAVE BEEN GRANTED (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, determined the club's (Copacabana") motion for summary judgment dismissing the Dram Shop Act cause of action should not have been granted. Because the subsequent accident did not occur on the club's premises, the common law negligence cause of action was properly dismissed:

Copacabana was not entitled to summary judgment dismissing the claim alleging violation of the Dram Shop Act (General Obligations Law § 11-101; Alcohol Beverage Control Law § 65 [2]), as it did not satisfy its initial burden of negating the possibility that it served alcohol to a visibly intoxicated person … . While Copacabana relied on defendant Anslem Trotman's deposition testimony that he arrived to the establishment after having only one beer, and that he did not recall anyone from Copacabana serving him drinks, Trotman's testimony was insufficient to rule out the possibility that he was served alcohol by Copacabana waitstaff while he was visibly intoxicated. Trotman had also testified that he was

drunk and could not remember large portions of the night, and his testimony was equivocal as to whether Copacabana waitstaff served him drinks or whether he purchased additional alcohol beyond what came with his party package. …

Plaintiff's common-law negligence was properly dismissed, as the accident that resulted in plaintiff's injuries occurred off Copacabana's premises … . The claim for punitive damages was also properly dismissed, as there is no independent cause of action for punitive damages … and plaintiff failed to establish a basis for such damages. Denenberg v 268 W. 47th Rest., Inc., 2022 NY Slip Op 06866, First Dept 12-1-22

Practice Point: Here there were questions of fact whether plaintiff was served alcohol by defendant club when he was visibly intoxication. The Dram Shop Act cause of action should not have been dismissed. Because the accident did not happen on the club's premises, the common law negligence cause of action was properly dismissed.

DECEMBER 1, 2022

NEGLIGENCE, TRAFFIC ACCIDENTS.

DEFENDANT IN THIS REAR-END TRAFFIC ACCIDENT CASE DID NOT RAISE A QUESTION OF FACT ABOUT A NON-NEGLIGENT EXPLANATION FOR DEFENDANT'S ACTIONS OR PLAINTIFF'S COMPARATIVE NEGLIGENCE (FIRST DEPT).

The First Department, reversing Supreme Court in this rear-end traffic accident case, determined defendant's allegation that the plaintiff "stopped short" did not raise a question of fact:

The court should have granted plaintiff for summary judgment on liability. Plaintiff established prima facie that defendant was negligent by submitting his affidavit that defendant's vehicle rear-ended his vehicle as he slowed down or stopped to accommodate another vehicle that was merging in from his right, and defendant failed to provide a nonnegligent explanation for the collision

… Defendant claimed only that defendant [plaintiff?] stopped short, which, by itself, was insufficient to rebut the presumption of negligence … . Contrary to the motion court's finding, plaintiff was not required to establish absence of comparative negligence on his part to be entitled to summary judgment on liability … .

In view of plaintiff's affidavit establishing his own lack of fault and his seatbelt usage, and the absence of any proof to the contrary, the affirmative defenses of comparative negligence and failure to wear a seatbelt, as well as the irrelevant defense of assumption of risk, are also dismissed … . Vasquez v Strickland, 2022 NY Slip Op 06876, First Dept 12-1-22

Practice Point: In a rear-end traffic accident, defendant's allegation plaintiff "stopped short" does not raise a question of fact.

DECEMBER 1, 2022

SECURITIES, REGISTRATION STATEMENT, NONACTIONABLE PUFFERY.

PLAINTIFF ALLEGED DEFENDANT CORPORATION'S REGISTRATION STATEMENT CONTAINED FALSE AND MISLEADING CLAIMS WHICH INDUCED PLAINTIFF TO BUY STOCK IN DEFENDANT'S CORPORATION; THE CLAIMS IN DEFENDANT'S REGISTRATION STATEMENT WERE MERE PUFFERY AND WERE NOT ACTIONABLE VIOLATIONS OF THE SECURITES ACT OF 1933 (FIRST DEPT).

The First Department, reversing Supreme Court, determined the complaint alleging several violations of the Securities Act of 1933 should have been dismissed. The complaint alleged that it was induced to buy stock by defendant's registration statement. The First Department concluded the statements not false or misleading and therefore were not actionable:

The … registration statement … includes the following statements: "We believe we have created a financially strong company built upon a foundation of three thriving, independent brands with significant global growth potential." "New

product development is a key driver of the long-term success of our brands. We believe the development of new products can drive traffic by expanding our customer base." "We face intense competition in our markets, which could negatively impact our business. . . Our ability to compete will depend on the success of our plans to improve existing products, to develop and roll-out new products, [and] to effectively respond to consumer preferences." * * *

… [T]he statements were nonactionable immaterial puffery and/or nonactionable opinion … .

The statements did not become misleading by omission as a result of a failure to disclose a slight decline in "same-store sales" for a single quarter's sales … . City of Warwick Mun. Empls. Pension Fund v Restaurant Brands Intl. Inc., 2022 NY Slip Op 06315, First Dept 11-10-22

Practice Point: Statements which are mere puffery are not actionable violations of the Securities Act of 1933. Here plaintiff alleged false and misleading claims in defendant corporation's registration statement induced plaintiff to buy defendant corporation's stock. Supreme Court should have granted defendant's motion to dismiss the complaint.

NOVEMBER 10, 2022

SECURITIES, REGISTRATION STATEMENT.

PLAINTIFF-INVESTOR'S COMPLAINT ALLEGING THE REGISTRATION STATEMENT FILED BY DEFENDANT PHARMACEUTICAL COMPANY ABOUT THE EFFICACY OF ITS DRUG WAS MISLEADING AND VIOLATED THE FEDERAL SECURITIES ACT SHOULD HAVE BEEN DISMISSED (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Gische, reversing Supreme Court, determined defendant pharmaceutical company's, Genfit's, motion to dismiss the complaint alleging the company misrepresented the efficacy of a drug in violation of the Federal Securities Act should have been granted. The court

noted that the pleading requirements for misrepresentation in this context are not the heightened pleading requirements for fraud:

The gravamen of plaintiff's complaint is that Genfit made misrepresentations and/or omissions in the registration statement and prospectus (collectively offering documents) it filed with the Securities and Exchange Commission in connection with the IPO (initial public offering). Before a company may sell securities in interstate commerce, it must file a registration statement with the SEC. Pursuant to section 11 of the 1933 Securities Act, if … the registration statement contains an untrue statement of material fact or omits a material fact necessary to make the statement therein not misleading, a purchaser of the stock may sue for damages (15 USC § 77 [k] …). * * *

Plaintiff … objects to certain statements in the offering documents, which we characterize as opinions. … Opinions in offering documents are subject to an analysis under the Supreme Court Decision in Omnicare, Inc. v Laborers Dist. Council Constr. Indus. Pension Fund (575 US 175, 184 [2015]). Under Omnicare, an opinion is actionable if (1) the speaker does not actually hold the stated belief … ; or (2) the opinion affirms an underlying fact … a registration statement omits material facts about the issuer's inquiry into or knowledge concerning a statement of opinion, and if those facts conflict with what a reasonable investor would take from the statement itself … .

[The] statements of opinion do not affirm underlying facts. … … Plaintiff claims … [the] statements are misleading because Genfit does not actually believe the opinions stated and that the offering documents omit material facts and knowledge. The complaint, however, alleges no facts supporting these conclusions. Schwartz v Genfit, S.A., 2022 NY Slip Op 06892, First Dept 12-6-22

Practice Point: The allegation that a company's registration statement is misleading in violation of the Federal Securities Act is not subjected to the heightened pleading requirements for fraud. Here the allegations in the complaint did not support even the less stringent pleading requires for misleading statements.

DECEMBER 6, 2022