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ARBITRATION, CONTRACT LAW, NEGLIGENCE.

THE DEFENDANT HOTEL BOOKING SERVICE, AGODA, COULD NOT BE COMPELLED TO ARBITRATE IN PLAINTIFF'S SLIP AND FALL ACTION AGAINST THE HOTEL; AGODA'S TERMS OF USE LIMITED LIABILITY TO THE BOOKING SERVICES AND EXPRESSLY EXCLUDED LIABILITY FOR PERSONAL INJURY AT THE HOTEL (FIRST DEPT).

The First Department, reversing Supreme Court, determined the defendant hotel booking service, Agoda, could not be compelled to arbitrate in this slip and fall action against the hotel booked through Agoda. The terms of use confined Agoda's potential liability to the booking services and expressly excluded liability for personal injury:

A "party cannot be compelled to submit to arbitration unless the agreement to arbitrate expressly and unequivocally encompasses the subject matter of the particular dispute" … . Where arbitration provisions do not clearly and unequivocally provide that questions about the scope of the arbitration provisions are for the arbitration panel to determine, the threshold question whether the dispute is encompassed within an agreement to arbitrate is for the courts (CPLR 7503[b] …).

The arbitration clause in the terms of use covers "all disputes or claims arising out of or relating to your relationship with Agoda." The terms of use also define Agoda's role as providing a platform for individuals to browse information about accommodations and make reservations at accommodations. Furthermore, the terms of use make clear that "Agoda does not in any way . . . own, manage, operate or control" the accommodations and that Agoda will not be liable in damages for any "(PERSONAL) INJURY . . ., OR OTHER DAMAGES, ATTRIBUTABLE TO THE ACCOMMODATION." Because plaintiff's claim is one to recover damages for a personal injury caused by the resort's negligence, it does not arise from or relate to the relationship between plaintiff and Agoda, which was limited to plaintiff's booking a reservation at the resort, and therefore is not arbitrable … .

As for Agoda's motion to dismiss, the terms of use constitute documentary evidence under CPLR 3211(a)(1), and the limitation of liability clause in the terms of use definitively disposes of plaintiff's claim to recover damages from Agoda for personal injury caused by the resort's alleged negligence … . McWashington v Hyatt Corp., 2025 NY Slip Op 00050, First Dept 1-7-25

Practice Point: Here the hotel booking service's terms of use expressly excluded liability for plaintiff's personal injury at the hotel. Therefore the booking service could not be compelled to arbitrate in plaintiff's slip and fall case.

January 7, 2025

COLLATERAL ESTOPPEL, WORKERS' COMPENSATION, NEGLIGENCE.

THE JUSTICE FOR INJURED WORKERS ACT (JIWA), WHICH TOOK EFFECT DECEMBER 30, 2022, AMENDED THE WORKERS' COMPENSATION LAW SUCH THAT A WORKERS' COMPENSATION BOARD RULING CANNOT BE GIVEN COLLATERAL ESTOPPEL EFFECT IN A SUBSEQUENT PERSONAL INJURY ACTION; THE FIRST DEPARTMENT HELD THE JIWA APPLIES RETROACTIVELY (FIRST DEPT).

The First Department, reversing Supreme Court, in a full-fledged opinion by Justice Moulton, determined the amendment to the Workers' Compensation Law (the Justice for Injured Workers Act [JIWA]), which precludes giving a Workers' Compensation Board's ruling collateral estoppel effect in a subsequent personal

injury action, applies retroactively. Therefore the defendants' motion for leave to amend their answer to add the collateral estoppel defense should have been denied:

Plaintiff alleges that he sustained neck and back injuries in a construction site accident that occurred on August 6, 2020. He commenced this action on September 28, 2020, and separately applied for workers' compensation benefits. In a decision filed October 19, 2021, a three-judge panel of the Workers' Compensation Board held that plaintiff's claimed injuries were not causally related to his accident. … [D]efendants moved, in effect, for summary judgment dismissing plaintiff's neck and back claims, based on the Workers' Compensation Board's decision to which, they argued, the court should give collateral estoppel effect. * * *

JIWA's legislative sponsor explained that its purpose was to correct what the Legislature perceived to be an injustice to injured workers caused by Second Department precedent (see Langdon v WEN Mgt. Co. (147 AD2d 450 [2d Dept 1989]) and left unresolved by the Court of Appeals' decision in Auqui v Seven Thirty One Ltd. Partnership (22 NY3d 246 [2013]) … . Thus, JIWA was intended to return to what the Legislature perceived to have been the rule "for almost 80 years" — namely that courts, in third-party actions, would "reject[ ] attempts by defendants to apply collateral estoppel" to decisions reached in the "swift[ ]" and "cursory" workers' compensation context — and that workers would not be prevented "from exercising their constitutional right to a jury trial" … . Accordingly, the Legislature clearly intended JIWA to be remedial in nature, to correct an unintended judicial interpretation, and to reaffirm what the Legislature believed the law should be. Garcia v Monadnock Constr., Inc., 2025 NY Slip Op 00154, First Dept 1-9-25

Practice Point: The December 30, 2022, amendment to the Workers' Compensation Law which precludes giving Workers' Compensation Board rulings collateral estoppel effect in subsequent personal injury actions applies retroactively.

January 9, 2025

DUE PROCESS, REMOVAL OF CHILDREN, FAMILY LAW, EVIDENCE, JUDGES.

REMOVAL OF THE CHILDREN FROM MOTHER'S CARE WITHOUT NOTICE DEPRIVED MOTHER OF HER RIGHT TO DUE PROCESS; THE EVIDENCE DID NOT SUPPORT REMOVAL OF THE CHILDREN (FIRST DEPT).

The First Department, reversing Family Court, determined the removal of the children from mother's care without notice violated mother's due process rights. In addition, the evidence did not support the removal:

… [P]ursuant to a dispositional order, the children were released to their mother's care with ACS [Commissioner of the Administration for Children's Services] supervision. ACS moved pursuant to Family Court Act § 1061 to extend the period of supervision. Family Court violated the mother's due process rights when, on the return date of the motion, it sua sponte removed the children without giving the mother notice or an opportunity to be heard and, at a later hearing, effectively imposed upon the mother the burden of showing that the removal was unwarranted … . There was nothing in the language of the agency's motion to put the mother on notice that the children might be removed from her care on the return date, and the record demonstrates that the mother was not given a meaningful opportunity to be heard on the issue … . Moreover, the agency maintained that it was in the children's best interests to remain with the mother, and the children's attorney supported the agency's position.

Furthermore, Family Court's decision to continue the children's placement in the agency's care until the next placement hearing was not supported by a sound and substantial basis in the record … Contrary to the court's conclusion, neither the initial neglect petition nor the order to show cause alleged that the mother used illicit substances or was impaired while taking care of the children. Moreover, during the 10-month period of supervision in 2023—2024, the mother submitted to at least three random drug screenings and tested negative for all illicit substances. When the mother underwent an evaluation by a credentialed alcohol and substance abuse counselor on February 1, 2024, she was not found to need any drug treatment services. Matter of E.I. (Eboniqua M.), 2025 NY Slip Op 00022, First Dept 1-2-25

Practice Point: Here removal of the children from mother's care without prior notice to mother violated her due process rights. Removal was not supported by the evidence.

January 2, 2025

JURISDICTION, WORKERS' COMPENSATION, NEGLGIENCE, ADMINISTRATIVE LAW.

HERE THE ADMINISTRATOR OF PLAINTIFF'S DECEDENT'S ESTATE BROUGHT A WRONGFUL DEATH ACTION IN SUPREME COURT AND DEFENDANTS MOVED FOR SUMMARY JUDGMENT ARGUING PLANTIFF'S EXCLUSIVE REMEDY WAS WORKERS' COMPENSATION; RATHER THAN DECIDE THE MOTION, SUPREME COURT SHOULD HAVE REFERRED THE MATTER TO THE WORKERS' COMPENSATION BOARD WHICH HAS PRIMARY JURISDICTION RE: THE APPLICABILITY OF THE WORKERS' COMPENSATION LAW (SECOND DEPT).

The Second Department reversed Supreme Court's denial of defendants' summary judgment motion in this wrongful death action and referred the matter to the Workers' Compensation Board. Whether, as defendants argued in their motion, plaintiff's decedent's exclusive remedy is Workers' Compensation must be determined by the Workers' Compensation Board before a court can consider the issue:

"The Workers' Compensation Law 'is designed to insure that an employee injured in course of employment will be made whole and to protect a coemployee who, acting within the scope of his [or her] employment caused the injury'" … . "[P]rimary jurisdiction" for determinations as to the applicability of the Workers' Compensation Law has been vested in the Workers' Compensation Board (hereinafter the Board) … , and it is therefore inappropriate for the courts to express views with respect thereto in the absence of a determination by the Board … . "Where the issue of the applicability of the Workers' Compensation Law is in dispute, and a plaintiff fails to litigate that issue before the Board, a court should not express an opinion as to the availability of compensation, but should refer the matter to the Board because the Board's disposition of the plaintiff's compensation

claim is a jurisdictional predicate to the civil action … . Guang Qi Lin v Xiaoping Lu, 2025 NY Slip Op 00309, Second Dept 1-22-25

Practice Point: Here in this wrongful death action defendants argued plaintiff's exclusive remedy was Workers' Compensation. Because that issue had not been determined by the Workers' Compensation Board, Supreme Court could not rule on it and should have referred the matter to the Board which has primary jurisdiction on the applicability of the Workers' Compensation Law.

January 22, 2025

LAW OFFICE FAILURE, DEFAULT, CONTRACT LAW, FRAUD.

DEFENDANTS MOTION TO VACATE THE DEFAULT BASED UPON LAW OFFICE FAILURE AND PROOF OF A MERITORIOUS DEFENSE SHOULD HAVE BEEN GRANTED (THIRD DEPT).

The Third Department, reversing Supreme Court, determined defendants motion to vacate the default judgment based upon law office failure should have been granted:

In support of the motion to vacate, defendants affirmed that they had retained former counsel and that he had informed them that he would file an answer, but his office failed to do so. However, they did not become aware of this failure until they were served with the default. Although defendants could have provided stronger support by way of an affirmation from former counsel to better substantiate their claim of law office failure, this is not required. Markedly, plaintiff's submissions in support of his application for costs — included in the record before this Court — establish that his counsel's office was aware that defendants were represented. In fact, plaintiff's counsel's billing records specifically name former counsel and set forth that he was "attorney for defendant[s]." These billing records further demonstrate that plaintiff's counsel had conversed with former counsel and been informed that an answer was being prepared. These facts, in conjunction with the short duration between entry of default in July 2023 and the subsequent motion to vacate in September 2023, establish that plaintiff was not prejudiced by the delay, and that defendants' failure to file an answer was the result of law office failure and not willfulness on the part of defendants … . * * *

"To establish the existence of a potentially meritorious defense, defendants needed only to make a prima facie showing of legal merit, as the quantum of proof needed to prevail on a CPLR 5015 (a) (1) motion is less than that required when opposing a summary judgment motion" … . In consideration of this minimal standard of proof, defendants' sworn assertions that plaintiff fraudulently induced them to enter the contract and then breached the contract before any breach on their part establishes a potentially meritorious defense … . Darling v Fernette, 2025 NY Slip Op 00507, Third Dept 1-30-25

Practice Point: Consult this decision for the criteria for vacating a default judgment based upon law officer failure, and for demonstrating a meritorious defense to a breach of contract action.

January 30, 2025

NECESSARY PARTIES, JUDGES, ZONING.

RATHER THAN DISMISSING THE PETITION FOR FAILURE TO INCLUDE NECESSARY PARTIES, SUPREME COURT SHOULD HAVE DIRECTED THAT THE NECESSARY PARTIES BE SUMMONED; THE COURT'S POWER TO SUMMON NECESSARY PARTIES IS NOT AFFECTED BY THE RUNNING OF THE STATUTE OF LIMITATIONS; ONLY THE SUMMONED NECESSARY PARTIES THEMSELVES HAVE STANDING TO RAISE THE STATUTE OF LIMITATIONS DEFENSE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined dismissing the complaint was not the appropriate remedy for petitioners' failure to include necessary parties, the property owners,, in this Article 78 proceeding challenging zoning variances. Supreme Court should have directed the necessary parties be summoned. The courts power to summon necessary parties is not affected by the running of the statute of limitations. Only the necessary parties themselves have standing to raise the statute of limitations defense:

When a necessary party has not been made a party and is "subject to the jurisdiction" of the court, the proper remedy is not dismissal of the complaint or the petition, but rather for the court to direct that the necessary party be summoned ([CPLR]. § 1001[b] …). Contrary to the respondents' contention, the Supreme

Court's ability to direct joinder of the property owners at this juncture is not affected by the purported running of the statute of limitations … . Moreover, the respondents lack standing to assert a statute of limitations defense on behalf of the property owners, who have not yet appeared in this proceeding … . Thus, the respondents failed to demonstrate that the petitioners' failure to join the property owners as respondents warranted dismissal of the petition. Matter of Supinsky v Town of Huntington, 2025 NY Slip Op 00323, Second Dept 1-22-25

Practice Point: Here the dismissal of the petition for failure to include necessary parties was not appropriate. The court should have directed that the necessary parties be summoned.

Practice Point: A court's power to direct that necessary parties be summoned is not affected by the running of the statute of limitations.

Practice Point: Here only the necessary parties themselves have standing to raise the stature of limitations defense.

January 22, 2025

PRIVATE RIGHT OF ACTION, PUBLIC HEALTH LAW.

THE PUBLIC HEALTH LAW DOES NOT CREATE A PRIVATE RIGHT OF ACTION AGAINST "ASSISTED LIVING" AS OPPOSED TO "RESIDENTIAL HEALTH CARE" FACILITIES; COMPLAINT PROPERLY DISMSSED (THIRD DEPT).

The Third Department, affirming Supreme Court, in a full-fledged opinion by Justice Egan, determined the Public Health Law does not create a right of private action against an "assisted living facility" as opposed to a "residential health care facility." Here the plaintiff attempted to sue the defendant assisted living facility for alleged deficiencies and the complaint was properly dismissed:

Public Health Law § 2801-d creates a private right of action distinct from traditional claims for medical malpractice and negligence, and it provides, in relevant part, that "[a]ny residential health care facility that deprives any patient of said facility of any right or benefit, as hereinafter defined [in Public Health Law article 28], shall be liable to [the] patient for injuries suffered as a result of said deprivation" (Public Health Law § 2801-d [1] …). A residential health care facility

is defined, in turn, as "a nursing home or a facility providing health-related service" (Public Health Law § 2801 [3]; see Public Health Law § 2801 [4] [b]).

An assisted living facility, in contrast, is governed by Public Health Law article 46-B instead of Public Health Law article 28, being defined as a facility that "provides or arranges for housing, on-site monitoring, and personal care services and/or home care services (either directly or indirectly), in a home-like setting to five or more adult residents unrelated to the assisted living provider" (Public Health Law § 4651 [1]). DeRusso v Church Aid of the Prot. Episcopal Church in the Town of Saratoga Springs, Inc., 2025 NY Slip Op 00008, Third Dept 1-2-25

Practice Point: The statutory private right of action created by the Public Health Law for suits against "residential health care facilities" does not apply to "assisted living facilities."

January 2, 2025

RENEW, MOTION TO, LABOR LAW-CONSTRUCTION LAW, EVIDENCE.

PLAINTIFF'S MOTION TO RENEW HIS SUMMARY JUDGMENT MOTION SHOULD NOT HAVE BEEN GRANTED; NO "NEW FACTS" WERE DEMONSTRATED (THIRD DEPT).

The Third Department, reversing (modifying) Supreme Court in this Labor Law 240(1) action, determined plaintiff's motion to renew his summary judgment motion should not have been granted. Plaintiff was attempting to disassemble a freezer when the freezer roof collapsed and he fell to the floor:

Pursuant to CPLR 2221, a motion for leave to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination" and "shall contain reasonable justification for the failure to present such facts on the prior motion" … . In his motion for leave to renew and reargue, plaintiff sought to admit a supplemental expert affidavit in which plaintiff's expert sought to clarify that accessing the freezer's ceiling was an essential task of disassembly. Plaintiff averred that this information was not proffered before because he was not on notice that he needed to address the different tasks required for disassembly. However, our review of the original motion papers reveals that, not only did the expert's original affidavit briefly address the need for plaintiff to climb on top of the freezer, but also that [defendant's] affirmations in opposition were sufficient to put

plaintiff on notice that the necessity of plaintiff's work on the ceiling would be at issue … . Additionally, as plaintiff had already retained an expert, there was nothing preventing plaintiff from submitting additional evidence in reply to [defendant's] affirmations in opposition, prior to the court's original determination … .Therefore, Supreme Court improperly granted plaintiff's motion to renew, and plaintiff's supplemental expert affidavit should not be considered on summary judgment … . Burgos v Darden Rests., Inc., 2025 NY Slip Op 00009, Third Dept 1-2-25

Practice Point: A motion to renew a summary judgment motion must be based upon new facts which could not have been addressed in the initial motion, not the case here.

January 2, 2025

STANDING, FORECLOSURE, EVIDENCE.

PROOF THE MORTGAGE WAS ASSIGNED TO PLAINTIFF WITHOUT PROOF THE NOTE WAS ALSO ASSIGNED BEFORE THE ACTION WAS COMMENCED IS NOT SUFFICIENT TO DEMONSTRATE STANDING TO FORECLOSE (FIRST DEPT).

The First Department, reversing Supreme Court, determined plaintiff did not demonstrate it had standing to foreclosure. Plaintiff proved the assignment of the mortgage to it, but did not prove the assignment of the note. In addition, plaintiff did not prove it physically possessed the note which had been indorsed to it:

While plaintiff's papers established that the original noteholder, nonparty Realty Closing Solution LLC, assigned the note to nonparty 1Sharpe Opportunity Intermediate Trust (1Sharpe) on June 24, 2019, plaintiff did not establish that 1Sharpe assigned the note to plaintiff before this action was commenced. Instead, plaintiff established that 1Sharpe assigned the mortgage to plaintiff. Without also assigning the note, the assignment of the mortgage, by itself, is of no incident because "a transfer of the mortgage without the debt is a nullity" … . …

… [P]laintiff did not establish that it physically possessed the note indorsed to it. Plaintiff relies on an allonge from 1Sharpe included with the note in the complaint. However, plaintiff furnished no evidence, either by producing the physical note or

through the attestations of its affiant … that this allonge, which was indorsed in blank, was "firmly affixed" to the note (UCC 3-202[2]…). 1S REO Opportunity 1, LLC v Harlem Premier Residence, LLC, 2025 NY Slip Op 00016, First Dept 1-2-25

Practice Point: Here the plaintiff demonstrate the mortgage was assigned to it but did not demonstrate the note was assigned to it before the action was commenced. Therefore the plaintiff did not prove it had standing to foreclose.

January 2, 2025

STATUTE OF LIMITATIONS, "INSANITY TOLL," FALSE ARREST, MUNICIPAL LAW.

THERE IS A QUESTION OF FACT WHETHER THE "INSANITY" TOLL OF THE STATUTE OF LIMITATIONS APPLIES TO THIS ASSAULT AND FALSE ARREST ACTION AGAINST THE CITY AND POLICE OFFICERS; THE TOLL APPLIES WHEN PERSONS ARE UNABLE TO PROTECT THEIR LEGAL RIGHTS BECAUSE OF AN INABILITY TO FUNCTION IN SOCIETY (SECOND DEPT).

The Second Department remitted the matter for a determination whether the statute of limitations was tolled because of petitioner's "insanity" in this assault and false arrest action against the city and police officers:

Pursuant to CPLR 208(a) "[i]f a person entitled to commence an action is under a disability because of . . . insanity at the time the cause of action accrues, and . . . the time otherwise limited [for commencing the action] is less than three years, the time shall be extended by the period of disability." A toll pursuant to CPLR 208(a) does not toll the necessity of filing a timely notice of claim; rather, it tolls only the time in which to apply for leave to serve a late notice of claim … .

CPLR 208(a) provides no definition of the term "insanity" … . However, the Court of Appeals has concluded that the insanity tolling provision should be narrowly construed and is available "only [to] those individuals who are unable to protect their legal rights because of an over-all inability to function in society" … . "[T]he condition of an individual's mental capabilities is largely a factual question" … . "The task of determining whether the tolling provision [of CPLR 208] applies 'is a

pragmatic one, which necessarily involves consideration of all surrounding facts and circumstances relevant to the claimant's ability to safeguard his or her legal rights'" … .

Here, the record before us presents a question of fact as to whether the petitioner was "unable to protect [his] legal rights because of an over-all inability to function in society" during the relevant period, as well as the duration of the alleged insanity … . Matter of Sinclair v City of New York, 2025 NY Slip Op 00453, Second Dept 1-29-25

Practice Point: CPLR 208(a) provides an "insanity toll" of the statute of limitations for persons unable to protect their legal rights because of an inability to function in society.

January 29, 2025

STATUTE OF LIMITATIONS, CONTRACT LAW, LANDLORD-TENANT. THE SIX-YEAR STATUTE OF LIMITATIONS BEGAN TO RUN WHEN THE LANDLORD COULD HAVE DEMANDED PAYMENT PURSUANT TO THE LEASE, NOT WHEN THE DEMAND WAS ACTUALLY MADE YEARS LATER (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, determined the six-year statute of limitations for breach of contract (here, a lease) started running when a demand for payment could have been made, not when the demand was actually made:

… [A]lthough the motion court awarded the entirety of the amounts of unpaid additional rent going back to 2006, the landlord's inexplicable delay in asserting these counterclaims until September 13, 2019 rendered the amounts that accrued before September 13, 2013 time-barred (CPLR 213[2]). The law is well settled that the statute of limitations on breach of contract claims begin to run "when the party that was owed money had the right to demand payment, not when it actually made the demand" … . Because the limitations period cannot be extended "by simply failing to make a demand" … , the judgment must be reduced to include only those amounts that accrued on or after September 13, 2013, and we remand for the calculation of the proper award and commensurate reduction in statutory

interest. Abarrotes Mixteca Corp., Inc. v Brisk, 2025 NY Slip Op 00034, First Dept 1-7-25

Practice Point: For a breach of contract, the statute of limitations begins to run when the party can demand payment pursuant to the contract, not when the demand is actually made. The statute of limitations cannot be extended by failing to make a demand.

January 7, 2025

SUMMARY JUDGMENT MOTIONS, JUDGES.

A MOTION FOR SUMMARY JUDGMENT MAY BE MADE ANYTIME AFTER ISSUE IS JOINED; A JUDGE CANNOT REQUIRE THE FILING OF A NOTE OF ISSUE BEFORE A SUMMARY JUDGMENT MOTION CAN BE MADE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the judge should have have denied plaintiff's motion for summary judgment in this rear-end collision case on the ground a note of issue had not been filed:

"CPLR 3212(a) provides that any party may move for summary judgment once issue has been joined. The court may 'set a date after which no such motion may be made' which must be at least 30 days after the filing of a note of issue (CPLR 3212[a]). The court has no authority to require the filing of a note of issue as a prerequisite to a motion for summary judgment, since CPLR 3212(a) clearly states that a motion for summary judgment may be made once issue has been joined" … . Accordingly, the Supreme Court should not have denied Karen Jackson's motion on that ground. Jackson v Islam, 2025 NY Slip Op 00438, Second Dept 1-29-25

Practice Point: A motion fore summary judgment can be made anytime after issue is joined. A judge cannot require that a note of issue be filed first.

January 29, 2025

WRITTEN NOTICE REQUIREMENT, FAILURE TO TIMELY RAISE EXCEPTION, MUNICIPAL LAW, NEGLIGENCE.

THE CITY DEMONSTRATED IT DID NOT HAVE WRITTEN NOTICE OF THE OPEN MANHOLE PLAINTIFF DROVE OVER; PLAINTIFF UNSUCCESSFULLY TRIED TO RAISE, FOR THE FIRST TIME, AN EXCEPTION TO THE WRITTEN NOTICE REQUIREMENT IN RESPONSE TO THE CITY'S MOTION FOR SUMMARY JUDGMENT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the municipality proved it did not have written notice of the road defect and plaintiff's attempt to raise for the first time an exception to the written notice requirement in response to the summary judgment motion was improper:

The plaintiff allegedly was injured when she drove her vehicle over an uncovered manhole … .

"A municipality that has enacted a prior written notification law may avoid liability for a defect or hazardous condition that falls within the scope of the law if it can establish that it has not been notified in writing of the existence of the defect or hazard at a specific location" … . "Such [prior written] notice is obviated where the plaintiff demonstrates that the municipality 'created the defect or hazard through an affirmative act of negligence' or that a 'special use' conferred a benefit on the municipality" … .

Here, the plaintiff did not dispute that the defendants established, prima facie, that they had no prior written notice of the alleged roadway defect. In opposition, the plaintiff instead argued that the special use exception applied. The plaintiff, however, failed to allege that exception in either the notice of claim or the complaint … . Therefore, that new theory of liability was improperly raised in opposition to the defendants' motion for summary judgment dismissing the complaint … . Anderson v City of New York, 2025 NY Slip Op 00414, Second Dept 1-29-25

Practice Point: Here plaintiff raised an exception to the written-notice prerequisite to municipal liability for road defects for the first time in response to the municipality's motion for summary judgment. That is too late. The exception should be raised in the notice of claim and/or the complaint.

January 29, 2025