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COURT OF APPEALS

CIVIL PROCEDURE, IMMUNITY, PERSONAL INJURY.

CPLR 1601 DOES NOT ALLOW DAMAGES TO BE APPORTIONED AGAINST THE NON-PARTY STATE IN A NEGLIGENCE ACTION IN SUPREME COURT.

The Court of Appeals, reversing the Appellate Division, in a full-fledged opinion by Judge Stein, over a two-judge dissent, determined damages could not be apportioned against the (non-party) state in a negligence action in Supreme Court. The plaintiffs alleged a tree branch fell on plaintiffs' car as plaintiffs were driving on a public street. The plaintiffs sued the property owner, but also filed a claim against the state alleging the state was negligent. The state can only be sued in the Court of Claims. Although, by statute (CPLR 1601), damages can be apportioned against a non-party defendant in the Court of Claims, the Court of Appeals held the statute does not allow damages to be apportioned against the non-party state in Supreme Court: "The statutory language permitting the State to seek apportionment in the Court of Claims against a private defendant if the claimant could have sued that defendant in any court of this State was specifically requested by the office of the Attorney General ... . Pursuant to that language, as long as a claimant in the Court of Claims could have commenced an action against a private tortfeasor in any court in the State of New York, then the tortfeasor's culpable conduct can be considered by the Court of Claims in determining the State's equitable share of the total liability ... . The statute does not, however, contain similar, express enabling language to allow apportionment against the state in a Supreme Court action ... ". ***Artibee v. Home Place Corp.*, 2017 N.Y. Slip Op. 01145, CtApp 2-14-17**

CRIMINAL LAW.

PLEA TO HINDERING PROSECUTION FOR PROVIDING AND HIDING WEAPON STANDS, DESPITE ACQUITTAL OF THE SHOOTER.

The Court of Appeals, in a full-fledged opinion by Judge Rivera, determined the defendant's plea to hindering prosecution should stand, in spite of the acquittal in the murder prosecution of the codefendant whose weapon defendant provided and subsequently hid: "Defendant ... challenges the denial of his motion to withdraw his guilty plea to one count of hindering prosecution in the second degree ... . The courts below properly rejected defendant's claims that his plea is constitutionally infirm and that his codefendant's acquittal of the underlying felony renders defendant innocent. Neither claim is supported by existing precedent, and his innocence theory is counter to this Court's holdings in *People v. Chico* (90 NY2d 585 [1997]), *People v. O'Toole* (22 NY3d 335 [2013]), and *People v. Berkowitz* (50 NY2d 333 [1980]). * * * The logical basis for rejecting defendant's proposed rule — an assisted person's acquittal forecloses any finding of a defendant's criminal liability for hindering prosecution — is rooted in the nature of the crime itself. The intended goal of hindering prosecution is the assisted person's evasion of criminal liability for the underlying felony. The more effective a defendant's attempts to obstruct law enforcement, the more likely the assisted person will escape prosecution or be acquitted. Defendant's rule would have the perverse result of treating as innocent a defendant who stymies an investigation, hides evidence — as in this case — or otherwise sabotages the prosecution, because those efforts lead to the assisted person's acquittal." ***People v. Fisher*, 2017 N.Y. Slip Op. 01143, CtApp 2-14-17**

CRIMINAL LAW, APPEALS.

CRUEL AND UNUSUAL PUNISHMENT ARGUMENT NOT PRESERVED FOR REVIEW.

The Court of Appeals, in a full-fledged opinion by Judge Abdus-Salaam, determined defendant's argument that three consecutive 25-year sentences arising from the same incident constituted cruel and unusual punishment was not preserved for review: "Defendant failed to preserve for review his claim that the sentence imposed by the court was ;cruel and unusual.' Although defendant generally objected to the length of the sentence before the sentencing court, arguing that the sentence was draconian, he did not alert the court to his constitutional argument. Thus, the sentencing court was never given an opportunity to address any of the constitutional challenges that defendant now lodges with this Court. Accordingly, defendant's 'claim [ ] that his sentence constituted cruel and inhuman punishment [ ] is not properly before us' ... " ***People v. Pena*, 2017 N.Y. Slip Op. 01142, CtApp 2-14-17**

CRIMINAL LAW, ATTORNEYS.

DEFENDANT DID NOT RECEIVE EFFECTIVE ASSISTANCE OF COUNSEL, CONVICTIION REVERSED.

The Court of Appeals, in a memorandum decision that does not explain the relevant facts, reversing defendant's conviction, determined defendant did not receive effective assistance of counsel. ***People v. Maldonado*, 2017 N.Y. Slip Op. 01254, CtApp 2-16-17**

CRIMINAL LAW, EVIDENCE.

OKAY FOR THE JURY TO CONSIDER WHETHER DEFENDANT'S SILENCE AND EVASIVENESS DURING A PHONE CALL WITH THE VICTIM RECORDED BY THE JAIL WAS AN ADOPTIVE ADMISSION.

The Court of Appeals, in a full-fledged opinion by Judge Abdus-Salaam, over a two-judge dissent, determined the trial court did not abuse its discretion when it allowed in evidence as a potential adoptive admission a recorded phone call between the defendant and the victim. The phone call was recorded by the jail when defendant was incarcerated. Defendant's silence and evasiveness when the victim told him he had broken her ribs was the essence of the potential adoptive admission. The jury was instructed that defendant's silence and evasiveness could be considered by them, but it was up to them to determine whether the silence and evasiveness was an admission: "Here, it is clear that the trial court did not abuse its discretion as a matter of law when it made the threshold determination that defendant heard and understood the victim's accusations against him. The court properly concluded that the content of the conversation, itself, demonstrates that defendant both heard and understood what she was saying, but chose to give evasive and manipulative responses. This view is supported by the context of the call, where, in a domestic violence case, defendant voluntarily contacted the victim in violation of an order of protection in an attempt to influence her to drop the charges against him. Once this foundation was established, it was proper for the call 'to be placed before the jury so that the jury might weigh the import, along with its other instructions and responsibilities' ... ." ***People v. Vining*, 2017 N.Y. Slip Op. 01144, CtApp 2-14-17**

CRIMINAL LAW, EVIDENCE.

TESTIMONY BY OFFICER WHO WAS PRESENT BUT DID NOT ADMINISTER THE DWI BREATHALYZER TEST DID NOT VIOLATE THE CONFRONTATION CLAUSE.

The Court of Appeals determined the testimony of an officer (Mercado) who was present throughout the DWI breathalyzer test process administered by another officer (Harriman) did not violate the Confrontation Clause. Harriman had retired and moved out of state by the time of defendant's trial: "The only step in the testing process that the Appellate Term found Mercado did not personally perform or observe, and the sole stated basis for that court finding a Confrontation Clause violation, was verification of the simulator solution temperature as displayed on the machine. Inasmuch as the written 13-step checklist completed by Harriman was not admitted into evidence, no testimonial statement by a nontestifying witness concerning the temperature — or any aspect of the testing procedure — was used against defendant. Thus, any argument as to Mercado's failure to observe the temperature reading would merely relate to whether there was a proper foundation for his testimony, which would not implicate a Confrontation Clause violation ... . However, to the extent that the Appellate Term based its decision on the failure of an "essential" step in the testing procedure, the trial record contradicts that court's conclusion that there was an absence of evidence that the machine will shut itself down and fail to perform the test if the temperature is outside the proper range ... . * * * Mercado observed Harriman perform all of the steps on the checklist and saw the breathalyzer machine print out the results. Based upon his personal observations, Mercado — as a trained and certified operator who was present for the entire testing protocol — was a suitable witness to testify about the testing procedure and results in defendant's test. Inasmuch as Mercado testified as to his own observations, not as a surrogate for Harriman, there was no Confrontation Clause violation. Any alleged irregularities concerning the testing procedure would relate to the weight of Mercado's testimony, not its admissibility ...". ***People v. Hao Lin*, 2017 N.Y. Slip Op. 01253, CtApp 2-16-17**

INSURANCE LAW, CONTRACT LAW.

HUGE CONSTRUCTION CRANE DESTROYED IN SUPERSTORM SANDY NOT COVERED BY INSURANCE, CONTRACTOR'S TOOLS EXCLUSION APPLIED.

The Court of Appeals, in a full-fledged opinion by Judge Fahey, determined a huge construction crane destroyed during Superstorm Sandy was subject to the "contractor's tools exclusion" in the applicable policy: "... [W]e conclude that there is no coverage for that loss under the policy because any coverage afforded by that contract in the first instance is defeated by the contractor's tools exclusion. That exclusion provides that '[t]h[e] Policy does not insure against loss or damage to . . . Contractor's tools, machinery, plant and equipment including spare parts and accessories, whether owned, loaned, borrowed, hired or leased, and property of a similar nature not destined to become a permanent part of the INSURED PROJECT*, unless specifically endorsed to the Policy.' '[B]efore an insurance company is permitted to avoid policy coverage, it must satisfy the burden which it bears of establishing that the exclusions or exemptions apply in the particular case, and that they are subject to no other reasonable interpretation' . [Plaintiff] Extell, in particular, contends that defendants cannot have met that burden here because the crane is not a 'tool' or 'equipment' within the meaning of the contractor's tools exclusion. The

subject exclusion, however, also defeats coverage for 'machinery,' and the crane falls squarely within this definition of that term. 'Machinery' means, among other things, 'machines in general or as a functioning unit,' and 'machine' is defined as 'a mechanically, electrically, or electronically operated device for performing a task' ...". ***Lend Lease (US) Constr. LMB Inc. v. Zurich Am. Ins. Co.*, 2017 N.Y. Slip Op. 01141, CtApp 2-14-17**

MUNICIPAL LAW, IMMUNITY.

COUNTY IMMUNE FROM SUIT BY STUDENT ASSAULTED BY A WORKER, A LEVEL THREE SEX OFFENDER, WHO WAS REFERRED BY THE COUNTY AS PART OF A WELFARE TO WORK PROGRAM.

The Court of Appeals, in a full-fledged opinion by Judge DiFiore, determined the county was immune from suit by a student who was assaulted by a worker at a county-owned facility. The worker was referred to the lessee of the premises, the North Amityville Community Economic Council (NACEC), as part of a welfare to work program. NACEC only accepted referrals for persons with no criminal record. The Suffolk County Department of Labor (SWEP) referred the worker despite knowledge of his status as a level three sex offender. The court determined the county was acting in its governmental, not proprietary, capacity when it referred the worker and there was no special relationship between the county and the victim of the assault: "In this case, the specific act or omission that caused plaintiff's injury was the County's referral of Smith to NACEC through the County's SWEP program, a referral made in spite of NACEC's caveat that it would not accept candidates with a criminal record. The administration of SWEP ... was quintessentially a governmental role. The County's conduct in referring Smith was undertaken solely in connection with its administration of that program and was part of the County's fundamental governmental activity. Therefore, we hold that the County was acting in its governmental capacity when it referred Smith to NACEC. * * * There is no view of the evidence that could allow one to conclude that the County voluntarily assumed a special duty to plaintiff. Even if the County promised that it would not refer anyone with a criminal background, that promise would have been made only to NACEC and there is no evidence that plaintiff ever had any knowledge of NACEC's request. In addition, ... it is undisputed that there was no direct contact between plaintiff and the County." ***Tara N.P. v. Western Suffolk Bd. of Coop. Educ. Servs.*, 2017 N.Y. Slip Op. 01255, CtApp 2-16-17**

PERSONAL INJURY.

SUBSTANCE ABUSE TREATMENT FACILITY OWED NO DUTY TO PLAINTIFF WHO WAS ASSAULTED BY A RESIDENT SHORTLY AFTER THE RESIDENT WAS DISMISSED FROM THE TREATMENT PROGRAM.

The Court of Appeals, in a full-fledged opinion by Judge Abdus-Salaam, reversing the Appellate Division, determined a mental health and substance abuse treatment facility, JCAP, owed no duty of care to plaintiff who was assaulted by Velentzas, who had just been dismissed from the treatment program for violation of the program's rules. The facility's motion for summary judgment, therefore, should have been granted: "JCAP had some control or authority over its residents while they remained participants of the program. But, JCAP residents could leave the facility and terminate their participation in the program against medical advice. Although voluntary departure from the program would trigger adverse legal consequences — namely, dismissal from the TASC program and potential prosecution in criminal court for the charges against them — residents could leave at any time. In short, facilities like JCAP cannot force a participant to remain on the premises. These facilities are not prisons; JCAP's control over Velentzas was, 'in fact entirely dependent upon [his] willingness to comply with and carry out' its directives ... . In the absence of the authority to prevent a participant from leaving, it follows that, when a participant is discharged from JCAP for violating facility rules, or withdraws from the program, he or she is no longer under the facility's control." ***Oddo v. Queens Vil. Comm. for Mental Health for Jamaica Community Adolescent Program, Inc.*, 2017 N.Y. Slip Op. 01256, CtApp 2-16-17**

FIRST DEPARTMENT

CIVIL PROCEDURE, DEBTOR-CREDITOR.

PAYMENT GUARANTEES NOT ENTITLED TO EXPEDITED TREATMENT PURSUANT TO CPLR 3213 AS INSTRUMENTS FOR THE PAYMENT OF MONEY ONLY, REFERENCE TO OTHER DOCUMENTS WAS NEEDED.

The First Department held determination of the meaning of the payment guarantees at issue required reference to other documents. Therefore the guarantees were not entitled to expedited treatment pursuant to CPLR 3213 as instruments for the payment of money only: " 'The prototypical example of an instrument within the ambit of [CPLR 3213] is of course a negotiable instrument for the payment of money—an unconditional promise to pay a sum certain, signed by the maker and due on demand or at a definite time' ... . CPLR 3213 is generally used to enforce 'some variety of commercial paper in which the party to be charged has formally and explicitly acknowledged an indebtedness,' so that 'a prima facie case would be made out by the instrument and a failure to make the payments called for by its terms' ... . A document does not qualify for CPLR 3213 treatment if the court must consult other materials besides the bare document and proof of nonpayment, or if it must make a more than de minimis deviation from the face of the document ...". ***PDL Biopharma, Inc. v. Wohlstadter*, 2017 N.Y. Slip Op. 01151, 1st Dept 2-14-17**

CIVIL PROCEDURE, EVIDENCE, PERSONAL INJURY.

STRIKING DEFENDANTS' ANSWERS WAS AN APPROPRIATE REMEDY FOR SPOLIATION OF EVIDENCE.

The First Department determined the striking of defendants' answers was the proper remedy for spoliation of evidence. Plaintiff was injured on a staircase. The staircase was removed and destroyed days before a scheduled inspection: "Plaintiffs' pre-action service of preservation letters on the daycare, the initiation of this action, and the issuance of the preliminary conference order, placed defendants on notice of the need to preserve the staircase. The staircase was removed and destroyed in November 2013, days before the scheduled court-ordered inspection. As found by the motion court, '[I]t is clear that the individual defendants destroyed the stairs in question in violation of the order of th[e] court, knowing that plaintiff's inspection was to take place a few days later.' The intentional destruction of the staircase, key physical evidence, severely prejudices plaintiffs' ability to prove their case, and warrants the extreme sanction of striking defendants' answers ... . The record contains no evidence that photographs depicting the staircase exist. Nor is this a case where plaintiffs sat on their rights ...". ***Rookwood v. Busy B's Child Care Daycare Inc.*, 2017 N.Y. Slip Op. 01281, 1st Dept 2-16-17**

CRIMINAL LAW, EVIDENCE.

VICTIM'S IDENTIFICATION TESTIMONY WAS SUFFICIENT TO SUPPORT CONVICTION, DESPITE LOSS OF CONSCIOUSNESS, DIZZINESS AND INCONSISTENCIES.

The First Department, over an extensive dissent, determined the identification testimony by the assault victim was credible, despite a period of unconsciousness, dizziness and inconsistencies: "[The] grounds for undercutting one-witness identifications [in other cases] are not comparable to the dizziness and loss of consciousness caused by the subject assault, and the limited nature of the complainant's two opportunities to look directly at his attacker. Our system of criminal justice relies on victims of violence identifying their attackers when they are able to do so. It would be ironic indeed if the severity of an attack and the resulting injuries were to prompt courts to treat the subsequent identification as unworthy of belief, despite the complainant's certainty. Of course, the defense is entitled to question an identification based on the complainant's compromised condition caused by the attack. However, that argument did not sway the jury here, and upon our review of the evidence at trial, it does not appear that the complainant was unable to make an identification. Any inconsistencies in the complainant's testimony were minor, possibly due to limitations in his English skills, and did not undermine his overall credibility." ***People v. Kahson B.*, 2017 N.Y. Slip Op. 01265, 1st Dept 2-16-17**

CRIMINAL LAW, EVIDENCE.

THREATENING TO CALL SOMEONE TO HAVE VICTIM BEATEN UP MET THE THREAT OF IMMEDIATE USE OF PHYSICAL FORCE ELEMENT OF ROBBERY.

The First Department, in a full-fledged opinion by Justice Acosta, determined the evidence was sufficient to support defendant's robbery second and grand larceny fourth convictions. Defendant told the victim (Diaz) she would have him beaten up if he didn't give her $20. The court held the victim had been threatened with immediate use of force within the meaning of the statute: "With respect to defendant's robbery conviction, the evidence demonstrates that defendant threatened Diaz with the immediate use of physical force. Pursuant to Penal Law § 160.00(1), a person is guilty of robbery 'when, in the course of committing a larceny, he uses or threatens the immediate use of physical force upon another person for the purpose of . . . [p]reventing or overcoming resistance to the taking of the property or to the retention thereof immediately after the taking.' However, '[t]he statute does not require the use of any words whatsoever, but merely that there be a threat, whatever its nature, of the immediate use of physical force' ... . There is also no requirement that a weapon be displayed or that the victim be physically injured to demonstrate that there was a threat of immediate physical force ... . Further, the threat of the immediate use of force may be demonstrated by 'a chain of actions on the part of [the] defendant' ... . Diaz testified that he gave defendant the $20 because he was 'scared' after defendant ... prevented him from leaving and defendant explicitly threatened him that if he did not comply, her boyfriend would beat him up. Defendant then went to speak to a man who gestured that he was going to call someone ...". ***People v. Villanueva*, 2017 N.Y. Slip Op. 01299, 1st Dept 2-16-17**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

ALTHOUGH PLAINTIFF WAS NOT AT THE CONSTRUCTION SITE, HE WAS INJURED IN A TEMPORARY FACILITY DOING WORK FOR THE CONSTRUCTION SITE, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The First Department, reversing Supreme Court, over a dissent, determined defendants' motion for summary judgment in this Labor Law 241(6) action should not have been granted on the ground plaintiff was not injured on a construction site. Plaintiff was not where the construction was being done, but was on a "temporary facility" (Bronx Yard) preparing rebar for the construction site: "Collavino [superstructure concrete contractor], subcontracted by Lend Lease [property owner], which was hired by 56 Leonard [construction manager], was responsible for furnishing '[a]ll temporary Project site facilities' and agreed 'to place its Temporary Facilities in locations designated by Owner or Construction Manager.' Additionally,

the Temporary License for the Bronx Yard was secured solely by Collavino, and for the purpose of completing work to be 'forwarded directly to a construction site in Manhattan.' " ***Gerrish v. 56 Leonard LLC*, 2017 N.Y. Slip Op. 01262, 1st Dept 2-16-17**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

UNCONTESTED TESTIMONY A WHEEL ON A HAND-PROPELLED DEBRIS CONTAINER STOPPED TURNING FREELY AS PLAINTIFF WAS MOVING IT (CAUSING INJURY) REQUIRED DENIAL OF DEFENDANT'S SUMMARY JUDGMENT MOTION IN THIS LABOR LAW 241(6) ACTION.

The First Department, reversing Supreme Court, determined defendant's motion for summary judgment in this Labor Law 241(6) action should not have been granted. Plaintiff was using a hand propelled wheeled container containing 500 to 800 pounds of construction debris when, it is alleged, one of the wheels allegedly stopped turning intermittently. When plaintiff pulled hard the container came to rest on his foot. The Industrial Code requires such containers to have "free-running" wheels: "Plaintiff testified that immediately before the alleged accident, he struggled to move the mini-container after the wheel apparently became stuck, and that as a result, he was injured when the mini-container rolled onto his foot when he forcefully pulled it in an attempt to move it. This uncontradicted testimony presents a question of fact on whether the wheels on the mini-container were 'free-running' as required by 12 NYCRR 23-1.28(b) ...". ***Ahern v. NYU Langone Med. Ctr.*, 2017 N.Y. Slip Op. 01264, 1st Dept 2-16-17**

MUNICIPAL LAW (NYC).

NYC WATER BOARD'S ONE-TIME CREDIT TO CLASS 1 PROPERTY OWNERS COUPLED WITH A 2.1% RATE INCREASE DID NOT HAVE A RATIONAL BASIS AND WAS PROPERLY ANNULLED AND VACATED.

The First Department, over an extensive dissent, determined the NYC Water Board's issuance of a one-time credit of $183 to Class 1 property owners coupled with a 2.1% increase in NYC water rates was not supported by a rational basis. Class 1 property owners are owners of one, two and three family residences: "Although the Water Board claims that the credit would be more financially meaningful for class one property owners, the credit is not in any way tied to financial need. There is no rational basis for the conclusion that class one ratepayers have traditionally borne a disproportionate burden of water and sewage fees. While the Water Board argues that some members of class one rate payers experience financial hardship in paying for water, the application of the credit does not in any manner take into consideration an owner's ability to pay or customers' need for this benefit, solely relying on the classification of the property for tax purposes, which bears little relation to the stated objective. ... The Water Board's justification for the increase as necessary to ensure funding for the costs of repairing or replacing existing portions of the City's water and sewer system, while consistent with its mission statement and statutory mandate, is irreconcilable with the Water Board's implementation of a credit if, the Water Board still needed funds to balance its books for the year. The action seems inconsistent with the Water Board's statutory mandate to make the water system self sustaining." ***Matter of Prometheus Realty Corp. v. New York City Water Bd.*, 2017 N.Y. Slip Op. 01263, 1st Dept 2-16-17**

TRUSTS AND ESTATES.

SURROGATE'S COURT HAD JURISDICTION TO ISSUE ANCILLARY LETTERS ALLOWING THE NONDOMICILIARY HEIR OF THE OWNER OF A $25 MILLION PAINTING CONFISCATED BY THE NAZIS TO SUE TO RECOVER THE PAINTING.

The First Department, in a full-fledged opinion by Justice Tom, determined Surrogate's Court had jurisdiction to issue ancillary letters allowing the heir of the owner of a painting confiscated by the Nazis to sue to recover the painting. The International Art Center (IAC), which allegedly has possession of the painting in Switzerland, did not have standing to challenge the ancillary letters. The painting, "Seated Man with a Cane" by Modigliani, may be worth $25 million: "... [A]lthough the authority of the Surrogate's Court over a nondomiciliary's estate in an ancillary proceeding is generally limited to estate assets within New York ... , property includes a 'chose in action,' e.g. a cause of action in New York … . Accordingly, contrary to IAC's contention, SCPA 206(1) does not require the physical presence of the subject property in New York at the time the proceeding for ancillary letters was commenced. It is sufficient that the Estate had a valid 'chose in action; against two New York domiciliaries (the Nahmads), a New York corporation (the Gallery), and IAC, a foreign entity alleged to be owned and controlled by New York residents and doing business in New York. In this case, personal jurisdiction [over IAC] was acquired based on IAC's admitted agreement with Sotheby's to act as its agent to sell the painting in New York in 2008. Further, personal jurisdiction over IAC may be based on respondents' allegations that IAC transacted business in New York through the Nahmads at the Gallery's office in Manhattan." ***Matter of Stettiner*, 2017 N.Y. Slip Op. 01168, 1st Dept 2-14-17**

SECOND DEPARTMENT

CIVIL PROCEDURE, PERSONAL INJURY.

PROTECTIVE ORDER PROHIBITING ANY NON-LAWYER FROM ATTENDING PLAINTIFF'S PHYSICAL EXAMINATION SHOULD NOT HAVE BEEN ISSUED.

The Second Department, reversing Supreme Court, determined a protective order prohibiting any non-attorney from accompanying plaintiff to a physical examination should not have been issued: "A plaintiff 'is entitled to be examined in the presence of [his or] her attorney or other legal representative, as well as an interpreter, if necessary, so long as they do not interfere with the conduct of the examination[ ]' ... . Here, the defendant failed to meet his burden of establishing that the plaintiffs' representative would improperly interfere with the conduct of the injured plaintiff's physical examination ... . Accordingly, the Supreme Court should have denied that branch of the defendant's motion which was for a protective order precluding any non-attorney from accompanying the injured plaintiff in the examination room during his physical examination." ***Henderson v. Ross*, 2017 N.Y. Slip Op. 01186, 2nd Dept 2-15-17**

CIVIL PROCEDURE, PERSONAL INJURY, ATTORNEYS, MEDICAL MALPRACTICE.

FAILURE TO RESPOND TO DISCOVERY DEMANDS AND OBEY COURT ORDERS WARRANTED STRIKING DEFENDANTS' ANSWERS IN THIS MEDICAL MALPRACTICE ACTION.

The Second Department, reversing Supreme Court, over a partial dissent, determined defendants' answers in this medical malpractice action should have been struck because of the failure to turn over the names of defendants' employees and failure to obey court orders during discovery: "The Supreme Court properly inferred the willful and contumacious character of the defendants' conduct from their repeated failures over an extended period of time, without an adequate excuse, to comply with the plaintiff's discovery demands and the court's discovery orders ... . This conduct included: (1) misrepresenting that the surgical booker Marcia Barnaby was no longer employed by the Hospital; (2) failing to disclose Anthony Pastor as a surgical booker; and (3) failing to timely and fully comply with the court's order to produce an affidavit from Schiff in the form required by the court. '[P]arties, where necessary, will be held responsible for the failure of their lawyers to meet court-ordered deadlines and provide meaningful responses to discovery demands' ... . * * * Here, contrary to the Supreme Court's determination, we find that the imposition of monetary sanctions was insufficient to punish the defendants and their counsel for their willful and contumacious conduct in failing to timely and fully respond to discovery demands and court orders." ***Lucas v. Stam*, 2017 N.Y. Slip Op. 01190, 2nd Dept 2-15-17**

CRIMINAL LAW.

FAILURE TO CHARGE THE JURY ON LESSER INCLUDED OFFENSES REQUIRED REVERSAL

The Second Department, reversing defendant's conviction, determined the facts elicited at this murder trial, viewed in the light most favorable to the defendant, warranted charges to the jury on manslaughter second and criminally negligent homicide. Because the possession of a weapon charge was directly related to the homicide charge, a new trial on the criminal possession of a weapon count was also necessary: "Under the facts adduced at the trial, the Supreme Court erred in failing to charge manslaughter in the second degree ... and criminally negligent homicide ... when requested by the defendant. Although a witness testified that, in the course of a physical altercation, the defendant pulled a gun from his back waist area and shot the decedent, the defendant testified that the decedent brandished the gun, that the two men struggled over the weapon, and that the gun accidentally went off during the struggle. Viewed in the light most favorable to the defendant, there was a reasonable view of the evidence that the defendant may have been guilty of the lesser crimes and not the greater ... . Therefore, the failure to charge manslaughter in the second degree and criminally negligent homicide compromised the defendant's right to a fair trial. In addition, the failure to charge manslaughter in the second degree, which is defined as 'recklessly' causing the death of another person ..., had a prejudicial effect with respect to the defendant's conviction of criminal possession of a weapon in the second degree, which is defined as possession of 'any loaded firearm' ... . The defendant's possession of the weapon is factually related to the shooting and, thus, given the underlying factual relationship between the crimes, the defendant is entitled to a new trial on the count of criminal possession of a weapon in the second degree ...". ***People v. Davis*, 2017 N.Y. Slip Op. 01223, 2nd Dept 2-15-17**

CRIMINAL LAW.

DEFENDANT GIVEN OPPORTUNITY TO MOVE TO VACATE GUILTY PLEA ON GROUND HE WAS NOT INFORMED OF THE DEPORTATION CONSEQUENCES.

The Second Department determined defendant should be given the opportunity to move to vacate his guilty plea on the ground he was not informed of the deportation consequences: "The defendant contends that his plea of guilty was not knowing, voluntary, and intelligent because the record demonstrates that the Supreme Court never advised him of the possibility that he would be deported as a consequence of his plea. In *People v. Peque* (22 NY3d 168), the Court of Appeals held that, as a matter of fundamental fairness, due process requires that a court apprise a noncitizen pleading guilty to a felony

of the possibility of deportation as a consequence of the plea of guilty ... . A defendant seeking to vacate a plea based on this defect must demonstrate that there is a reasonable probability that he or she would not have pleaded guilty and would instead have gone to trial had the court warned of the possibility of deportation ... . Here, the record does not demonstrate that the Supreme Court mentioned the possibility of deportation as a consequence of the defendant's plea." ***People v. Singh*, 2017 N.Y. Slip Op. 01235, 2nd Dept 2-15-17**

FAMILY LAW.

WIFE ENTITLED TO SHARE OF HUSBAND'S SEPARATE PROPERTY WHICH WAS COMMINGLED WITH MARITAL FUNDS; WIFE ALSO ENTITLED TO SHARE OF APPRECIATION OF HUSBAND'S SEPARATE PROPERTY.

The Second Department determined plaintiff wife was entitled to a share of husband's separate property that was commingled with marital funds, as well as a share of the appreciation of husband's separate property. Husband, a firefighter, received an award from the September 11th Victim Compensation Fund, which was placed in a joint checking account and then used to buy investment property: "... [S]eparate property that is commingled, for example, in a joint bank account, loses its character of separateness and a presumption arises that each party is entitled to a share of the funds ... . 'That presumption, however, may be overcome by clear and convincing evidence, either direct or circumstantial, that the account was created only as a matter of convenience' ... . The presumption may also be overcome by evidence that the account, although joint, is managed solely by one party ... , or that the funds were deposited into the joint account only briefly ... . In this case, the Supreme Court correctly determined that by depositing the proceeds of the award into the parties' joint account, the defendant's separate property lost its character of separateness and a presumption arose that each party was entitled to a share of the funds, which was not rebutted. ... The record supports the Supreme Court's determination that the direct and indirect contributions of the plaintiff, as the nontitled spouse, contributed to the appreciation in the value of the defendant's separate properties. Therefore, the plaintiff was entitled to a share of that appreciation ...". ***Brown v. Brown*, 2017 N.Y. Slip Op. 01175, 2nd Dept 2-15-17**

FAMILY LAW.

FATHER SHOULD NOT HAVE BEEN AWARDED SOLE CUSTODY IN THE ABSENCE OF A HEARING.

The Second Department, reversing Supreme Court, determined father should not have been awarded sole custody without a hearing: "The Supreme Court erred in awarding the father sole custody of the child in the absence of a hearing to determine the best interests of the child. '[A] court opting to forgo a plenary hearing must take care to clearly articulate which factors were—or were not—material to its determination, and the evidence supporting its decision' ... . The court failed to do so here. Furthermore, the issue of custody was not discussed at the ... court appearances that resulted in the issuance of the final order of custody and visitation. Under these circumstances, the mother's motion to vacate the final order of custody and visitation ... , should have been granted." ***Matter of Fraser v. Fleary*, 2017 N.Y. Slip Op. 01197, 2nd Dept 2-15-17**

FAMILY LAW.

FAMILY COURT COULD NOT ALLOW VISITATION WHILE A CRIMINAL ORDER OF PROTECTION IS IN PLACE.

The Second Department determined that Family Court properly denied mother's motion for kinship visitation because a criminal court order of protection was in place: "As a general rule, the 'Family Court does not have jurisdiction to countermand the provisions of a criminal court order of protection' ... . Thus, where a criminal court order of protection bars contact between a parent and child, the parent may not obtain visitation until the order of protection is vacated or modified by the criminal court ... . However, the criminal court has authority to determine whether its order of protection is 'subject to' subsequent Family Court orders, and where the criminal court order of protection 'expressly contemplates future amendment of its terms by a subsequent Family Court order pertaining to custody and visitation,' the Family Court is not precluded from granting custody or visitation by the terms of the order of protection ... . Here, since the Supreme Court's temporary order of protection dated April 1, 2016, did not state that it was 'subject to' subsequent Family Court orders, the Family Court had no basis to permit 'kinship visitation' supervised by the maternal grandmother." ***Matter of Rihana J.H. (Quianna J.)*, 2017 N.Y. Slip Op. 01202, 2nd Dept 2-15-17**

FAMILY LAW, APPEALS.

CHILD SHOULD NOT HAVE BEEN REMOVED FROM FATHER'S CARE; EVEN THOUGH CHILD HAS BEEN RETURNED, APPEAL NOT MOOT BECAUSE OF THE STIGMA OF REMOVAL.

The Second Department, reversing Family Court, determined the removal application should not have been granted and father's appeal of the removal was not moot, even though the child had been returned to the father: "Although it is undisputed that the child has been returned to the father's care, the father's appeals are not academic. The child's removal created a permanent and significant stigma ... . , In determining a removal application pursuant to Family Court Act § 1027, the court must engage in a balancing test of the imminent risk with the best interests of the child and, where appropriate, the reasonable efforts made to avoid removal or continuing removal' ... . Here, the petitioner failed to establish that the child would be subjected to imminent risk if she were not placed in the custody of the petitioner pending the outcome of the ne-

glect proceeding. Under the circumstances of this case, concerns about, inter alia, the adequacy of the father's plan to care for the child did not amount to an imminent risk to the child's life or health that could not be mitigated by reasonable efforts to avoid removal." ***Matter of Emmanuela B. (Jean E.B.)*, 2017 N.Y. Slip Op. 01195, 2nd Dept 2-15-17**

FAMILY LAW, IMMIGRATION LAW.

FAMILY COURT SHOULD HAVE MADE FINDINGS TO ALLOW JUVENILE TO PETITION FOR SPECIAL IMMIGRANT JUVENILE STATUS.

The Second Department determined Family Court should have granted the motion for findings to allow a juvenile to petition for special immigrant juvenile state (SIJS): "Based upon our independent factual review, we find that the record fully supports the petitioner's contention that, because the child's mother neglected him, reunification with the mother is not a viable option ... . Contrary to the Family Court's determination, the record demonstrated that the physical, mental, or emotional condition of the child had been impaired or was in imminent danger of becoming impaired as a result of the failure of the mother to exercise a minimum degree of care 'in supplying the child with adequate food, clothing, shelter or education . . . though financially able to do so or offered financial or other reasonable means to do so' ... . Indeed, the petitioner's testimony at the hearing demonstrated that although the mother received financial assistance to provide for the child's clothing and education, the mother failed to use such assistance for the child's benefit. The child's testimony corroborated the petitioner's testimony in this respect. Accordingly, the Family Court should have granted the petitioner's motion for the issuance of an order making the requisite declaration and specific findings so as to enable the child to petition for SIJS." ***Matter of Wilson A.T.Z. (Jose M.T.G.--Manuela Z.M.)*, 2017 N.Y. Slip Op. 01215, 2nd Dept 2-15-17**

FORECLOSURE, EVIDENCE.

BANK EMPLOYEE'S AFFIDAVIT DID NOT DEMONSTRATE 90-DAY NOTICE WAS PROPERLY SERVED.

The Second Department determined plaintiff bank did not demonstrate compliance with Real Property Actions and Proceedings Law (RPAPL) 1304 in serving the 90-day notice. The documents submitted by plaintiff's employee (Gantner) did not meet the requirements of the business records exception to the hearsay rule: "Here, the plaintiff failed to submit an affidavit of service ... or proof of mailing by the post office, evincing that it properly served the defendant pursuant to RPAPL 1304. Contrary to the plaintiff's contention, Gantner's affidavit and attached business records were not sufficient to establish that the notices were sent to the defendant in the manner required by RPAPL 1304. While mailing may be proven by documents meeting the requirements of the business records exception to the rule against hearsay under CPLR 4518 ... , here, Gantner did not aver that he was familiar with the plaintiff's mailing practices and procedures, and therefore did not establish proof of a standard office practice and procedure designed to ensure that items are properly addressed and mailed ... . Therefore, Gantner's unsubstantiated and conclusory statements were insufficient to establish that the 90-day notice required by RPAPL 1304 was mailed to the defendant by first-class and certified mail ...". ***CitiMortgage, Inc. v. Pappas*, 2017 N.Y. Slip Op. 01177. 2nd Dept 2-15-17**

INSURANCE LAW.

INSURER DID NOT DEMONSTRATE REQUIREMENTS FOR DISCLAIMER BASED UPON THE INSURED'S NONCOOPERATION.

The Second Department determined the insurer (Global) did not demonstrate it was entitled to disclaim coverage based upon the noncooperation of the insured: " 'An insurer who seeks to disclaim coverage on the ground of noncooperation is required to demonstrate that (1) it acted diligently in seeking to bring about the insured's cooperation, (2) its efforts were reasonably calculated to obtain the insured's cooperation, and (3) the attitude of the insured, after its cooperation was sought, was one of willful and avowed obstruction' ... . '[M]ere efforts by the insurer and mere inaction on the part of the insured, without more, are insufficient to establish non-cooperation as the inference of non-cooperation must be practically compelling' ... . Here, Global established that it made diligent efforts that were reasonably calculated to obtain the cooperation of BMC and Abduahadov ... . However, Global failed to demonstrate that the conduct of BMC and Abduahadov constituted 'willful and avowed obstruction' ...". ***Matter of Government Empls. Ins. Co. v. Fletcher*, 2017 N.Y. Slip Op. 01199, 2nd Dept 2-15-17**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

HOMEOWNER'S EXCEPTION APPLIED TO HOMEOWNER BUT NOT TO AGENT OF HOMEOWNER WHO SUPERVISED THE WORK.

The Second Department, reversing Supreme Court, determined the homeowner's exception to Labor Law liability applied to the owner of the home (Kathleen) but not to the agent of the owner who supervised the work (Mervyn). Plaintiff fell from a scaffold: "… 'Labor Law §§ 240(1) and 241(6) apply to owners, contractors, and their agents' ... . 'A party is deemed to be an agent of an owner or general contractor under the Labor Law when it has supervisory control and authority over the work being done where a plaintiff is injured' ... . 'It is not a defendant's title that is determinative, but the amount of control or supervision exercised' ... . Here, the defendants failed to establish Mervyn's prima facie entitlement to judgment

as a matter of law on the Labor Law §§ 240(1) and 241(6) causes of action by demonstrating that he lacked the authority to supervise or control the plaintiff's work ... . Specifically, the defendants submitted transcripts of the plaintiff's two depositions, at which he testified that, in addition to visiting the site daily and telling the plaintiff what work to do, Mervyn provided and instructed him to use the allegedly defective scaffold and a safety belt to complete the work that led to his injury. Moreover, the plaintiff testified that his boss told him to follow Mervyn's instructions, and there is no dispute on this record that Mervyn was listed as an insured on the plaintiff's employer's policy. ... To be held liable pursuant to Labor Law § 200 or the common law in a case such as this, where the claim arises out of the methods or means of the work, a defendant must have authority to supervise or control the work ... . Here, the defendants established Kathleen's prima facie entitlement to judgment as a matter of law dismissing the Labor Law § 200 and common-law negligence causes of action against her, and the plaintiffs failed to raise a triable issue of fact in opposition ... . For the same reasons as those articulated above, however, the defendants failed to satisfy their prima facie burden with respect to the plaintiff's Labor Law § 200 and common-law negligence causes of action against Mervyn ...". ***Abdou v. Rampaul*, 2017 N.Y. Slip Op. 01169, 2nd Dept 2-15-17**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

SIDEWALK REPAIR TOO FAR REMOVED FROM WORK ON A STRUCTURE, I.E., A GAS MAIN, INJURY NOT WITHIN PURVIEW OF LABOR LAW 240 (1).

The Second Department determined the repair of a sidewalk damaged when a gas main was replaced did not fall within the reach of the Labor Law. Plaintiff was injured when a piece of the sidewalk fell from a backhoe. The court held that the sidewalk repair work was too far removed from the gas main replacement to trigger the Labor Law protections: "Supreme Court properly determined that, at the time of the accident, the injured plaintiff was not engaged in an enumerated activity under Labor Law § 240(1). That statute applies only to 'the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure' ... . Significantly, the statute does not cover an injury occurring after an enumerated activity is complete ... . While the plaintiffs urge that the injured plaintiff's work was part of a larger project involving the replacement of the gas main, the record reflects that the gas main replacement work was performed by a completely different entity and had been completed well before the injured plaintiff commenced any work at the location. Neither the injured plaintiff nor his employer played any role in the replacement of the gas main, and the work performed by the injured plaintiff and his coworkers constituted a separate and distinct phase of the overall project that involved only the demolition and restoration of a sidewalk ... . Accordingly, under these circumstances, the plaintiff's work did not fall within the purview of Labor Law § 240(1) ...". ***Davis v. City of New York*, 2017 N.Y. Slip Op. 01179, 2nd Dept 2-15-17**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

QUESTION OF FACT WHETHER DEFENDANTS HAD NOTICE OF CRACKED CONCRETE SLAB WHICH COLLAPSED; PLAINTIFF DID NOT IDENTIFY ANY INDUSTRIAL CODE VIOLATION, LABOR LAW 241(6) CAUSE OF ACTION SHOULD HAVE BEEN DISMISSED.

The Second Department determined, re: plaintiff's common law negligence cause of action, there was a question of fact whether defendants had constructive notice of a cracking concrete slap which collapsed. However plaintiff's Labor Law 241(6) cause of action should have been dismissed because no applicable provision of the Industrial Code was identified by the plaintiff: "... [T]he defendants submitted, inter alia, the deposition testimony of the plaintiff, in which he stated that for up to 10 days prior to the accident, he observed that the place where the concrete eventually collapsed had 'lines . . . indicating the breaking points.' Thus, by their own submissions, the defendants raised an issue of fact as to whether the allegedly dangerous condition was visible and apparent and existed for a sufficient length of time prior to the plaintiff's fall to permit them to discover and remedy it ... . In order to establish a Labor Law § 241(6) claim, a plaintiff must allege a violation of a specific and applicable provision of the Industrial Code ... . Here, although the plaintiff's bill of particulars alleged a violation of Labor Law § 241(6), it failed to identify any specific provision of the Industrial Code that the defendants allegedly violated ... . Furthermore, in opposition to summary judgment, the plaintiff failed to allege a violation of any specific provision of the Industrial Code, and did not address the issue ...". ***Grabowski v. Board of Mgrs. of Avonova Condominium*, 2017 N.Y. Slip Op. 01185, 2nd Dept 2-15-17**

LABOR LAW-CONSTRUCTION LAW.

ALLEGATIONS NOT SUFFICIENT TO SUPPORT SUMMARY JUDGMENT MOTION ON PLAINTIFF'S LABOR LAW 240(1) CAUSE OF ACTION STEMMING FROM A FALL FROM A LADDER.

The Second Department determined Supreme Court erred in granting plaintiff's summary judgment motion on his Labor Law 240(1) cause of action stemming from a fall from a ladder. Plaintiff did not demonstrate the ladder was defective or unsecured. [The decision explains in detail the criteria for Labor Law 200 liability and several substantive indemnification issues which are not summarized here.]: " 'To establish liability pursuant to Labor Law § 240(1), a plaintiff must demonstrate a violation of the statute and that such violation was a proximate cause of his or her injuries' ... . 'A fall from a ladder, by itself, is not sufficient to impose liability under Labor Law § 240(1). There must be evidence that the subject ladder was defective or inadequately secured and that the defect, or the failure to secure the ladder, was a substantial factor in causing

the plaintiff's injuries' ... . Here, the plaintiff's own submissions demonstrated the existence of triable issues of fact, inter alia, as to how the accident occurred, whether the ladder was inadequately secured, and whether the plaintiff's actions were the sole proximate cause of the accident ...". ***Shaughnessy v. Huntington Hosp. Assn.*, 2017 N.Y. Slip Op. 01245, 2nd Dept 2-15-17**

LABOR LAW-CONSTRUCTION LAW.

PLAINTIFF FELL WHILE DOING ROUTINE REPAIR ON AN AIR CONDITIONER, NOT COVERED BY LABOR LAW 240(1).

The Second Department determined defendants' summary judgment motion dismissing plaintiff's Labor Law 240(1) cause of action was properly granted. Plaintiff was engaged in routine repair work: "The plaintiff allegedly was injured while performing work on the air conditioning system in a building ... . He allegedly fell while climbing over an "I-beam" that was used to support the air conditioning system. He commenced this action to recover damages for personal injuries, alleging, inter alia, a violation of Labor Law § 240(1). The defendants established, prima facie, that they were entitled to summary judgment dismissing the cause of action alleging a violation of Labor Law § 240(1) by showing that the plaintiff's work did not constitute erection, demolition, repairing, altering, painting, cleaning, or pointing of a building or structure within the meaning of Labor Law § 240(1) ... . The defendants established that the work constituted merely routine maintenance of the air conditioning system ...". ***Tserpelis v. Tamares Real Estate Holdings, Inc.*, 2017 N.Y. Slip Op. 01247, 2nd Dept 2-15-17**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY, CIVIL PROCEDURE.

PLAINTIFFS' MOTION FOR JUDGMENT AS A MATTER OF LAW PURSUANT TO CPLR 4401 PROPERLY GRANTED ON THE LABOR LAW 240(1) CAUSE OF ACTION; JURY HAD FOUND THE LABOR LAW 240(1) VIOLATION WAS NOT THE PROXIMATE CAUSE OF THE ACCIDENT.

The Second Department determined Supreme Court properly granted plaintiffs' motion for a judgment as a matter of law (CPLR 4401) on the Labor Law 240(1) cause of action. Plaintiff fell from the top of a boiler when a co-worker accidentally caused hot water and steam to escape from a valve. The jury found that the Labor Law 240(1) violation was not the proximate cause of the accident: "Here, the evidence adduced at trial, viewed in the light most favorable to the defendant, demonstrated that the defendant failed to provide an adequate safety device to the plaintiff, and that this failure proximately caused the plaintiff's fall. The fact that the plaintiff's coworker bumped into the valves, which caused hot water and steam to pour onto the plaintiff and precipitated his fall, was not of such an extraordinary nature or so attenuated from the defendant's conduct that responsibility for the injury should not reasonably be attributed to it ... . Moreover, in light of the statutory violation, even if the plaintiff were negligent in some respect, his comparative negligence would not bar liability under Labor Law § 240(1) ...". ***Raia v. Berkeley Coop. Towers Section II Corp.*, 2017 N.Y. Slip Op. 01243, 2nd Dept 2-15-17**

MENTAL HYGIENE LAW.

SUPREME COURT SHOULD NOT HAVE DISMISSED PETITION FOR CIVIL MANAGEMENT OF A SEX OFFENDER FOR FAILURE TO STATE A CAUSE OF ACTION.

The Second Department determined Supreme Court should not have dismissed a petition for civil management of a sex offender (Ezikiel R.) for failure to state a cause of action: "The Supreme Court, relying on *Matter of State of New York v. Donald DD.* (24 NY3d 174), dismissed the State of New York's petition for the civil management of Ezikiel R. on the ground that it failed to state a cause of action. This was error. It is true that a diagnosis of antisocial personality disorder does not, by itself, 'distinguish the sex offender whose mental abnormality subjects him to civil commitment from the typical recidivist convicted in an ordinary criminal case' ... . Here, however, the petition alleges a mental abnormality based on a composite diagnosis of antisocial personality disorder and psychopathy, and is supported by expert evidence containing an additional diagnosis of conduct disorder, a provisional diagnosis of sexual sadism disorder, and a determination that Ezikiel R.'s actions were suggestive of his potential for deviant sexual behavior and/or sexual preoccupation. Under these circumstances, the petition was facially valid and not subject to dismissal prior to a probable cause hearing ... . Although the court at a probable cause hearing or the factfinder at trial may or may not be convinced by the expert evidence, the evidence was not so deficient as to warrant dismissal of the petition at this early juncture ...". ***Matter of State of New York v. Ezikiel R.*, 2017 N.Y. Slip Op. 01213, 2nd Dept 2-15-17**

MUNICIPAL LAW, PERSONAL INJURY.

MOTION TO AMEND NOTICE OF CLAIM TO CHANGE THE DATE OF THE ACCIDENT, RENDERING THE NOTICE OF CLAIM TIMELY, PROPERLY GRANTED.

The Second Department determined plaintiff's motion to amend the notice of claim was properly granted. The slip and fall allegedly occurred around midnight on March 2/3. The notice of claim was one day late if the incident occurred on March 2 and was timely if it occurred on March 3. The amendment changed the date of the accident stated in the notice from March 2 to March 3: "Here, mere minutes constituted the difference between whether the plaintiff's fall occurred on March 2,

2012, or March 3, 2012. Under these circumstances, the Supreme Court providently exercised its discretion in granting the plaintiff's cross motion for leave to amend the notice of claim and the pleadings to reflect March 3, 2012, as the correct date of the accident. There is no indication that the date originally set forth in the notice of claim as the accident date, March 2, 2012, was set forth in bad faith, the Transit Authority did not demonstrate any actual prejudice as a result of the discrepancy, and the record discloses no basis to presume the existence of prejudice ...". ***Bowers v. City of New York*, 2017 N.Y. Slip Op. 01174, 2nd Dept 2-15-17**

PERSONAL INJURY.

TREE ROOT OVER WHICH PLAINTIFF TRIPPED WAS A NON-ACTIONABLE OPEN AND OBVIOUS DEFECT.

The Second Department determined the tree root over which plaintiff tripped and fell was open obvious and not actionable: " 'A landowner has a duty to exercise reasonable care in maintaining [its] property in a safe condition under all of the circumstances, including the likelihood of injury to others, the seriousness of the potential injuries, the burden of avoiding the risk, and the foreseeability of a potential plaintiff's presence on the property' ... . However, a landowner has no duty to protect or warn against an open and obvious condition that is inherent or incidental to the nature of the property, and that could be reasonably anticipated by those using it ... . Here, the defendant established its prima facie entitlement to judgment as a matter of law dismissing the complaint by demonstrating that the tree root was an open and obvious condition and inherent or incidental to the nature of the property, and was known to the plaintiff ...". ***Dottavio v. Aspen Knolls Estates Home Owners Assn.*, 2017 N.Y. Slip Op. 01182, 2nd Dept 2-15-17**

PERSONAL INJURY.

BUILDING OWNER'S AND ELEVATOR COMPANY'S MOTIONS FOR SUMMARY JUDGMENT IN THIS ELEVATOR-INJURY CASE PROPERLY DENIED.

The building owner's (Boston Properties') and elevator company's (Otis') motions for summary judgment in the elevator-injury case were properly denied: " 'An elevator company which agrees to maintain an elevator in safe operating condition may be liable to a passenger for failure to correct conditions of which it has knowledge or failure to use reasonable care to discover and correct a condition which it ought to have found' ... . Similarly, a building owner that hires an elevator maintenance company to maintain the elevator may be found liable if the owner received notice of a defect and failed to notify the elevator company about it ... Here, both Otis and the Boston Properties defendants failed to establish their respective prima facie entitlement to judgment as a matter of law. The evidence offered in support of their respective motions, which included a transcript of the injured plaintiff's deposition testimony and the bill of particulars describing the accident, failed to demonstrate, prima facie, that the elevator operated properly and was not defective, or that they had no actual or constructive notice of any alleged defective condition ...". ***Orahovac v. CF Lex Assoc.*, 2017 N.Y. Slip Op. 01219, 2nd Dept 2-15-17**

PERSONAL INJURY.

NO LIABILITY WHERE DRIVER SUFFERED AN UNFORESEEABLE MEDICAL EMERGENCY.

The Second Department determined defendant, who suffered a stroke while driving, could not be held liable for the accident: " 'The operator of a vehicle who becomes involved in an accident as the result of suffering a sudden medical emergency will not be chargeable with negligence as long as the emergency was unforeseen' ... . Here, the defendants established their prima facie entitlement to judgment as a matter of law by demonstrating through deposition testimony, the defendant driver's medical records, and expert medical evidence that the accident was caused by the defendant driver experiencing an acute stroke at the time of the accident, which was unforeseeable ...". ***Van De Merlen v. Karpf*, 2017 N.Y. Slip Op. 01251, 2nd Dept 2-15-17**

PERSONAL INJURY, LANDLORD-TENANT.

QUESTION OF FACT WHETHER ASSAILANT WAS AN INTRUDER WHO ENTERED BUILDING THROUGH A BROKEN DOOR.

The Second Department determined questions of fact precluded summary judgment in favor of the landlord (New York City Housing Authority, NYCHA) in this assault liability case. Plaintiff-tenant alleged she was assaulted by an intruder who entered the apartment building through a broken door: " 'Landlords have a common-law duty to take minimal precautions to protect tenants from foreseeable harm, including foreseeable criminal conduct by a third person' ... . Recovery against a landlord for an assault committed by a third party requires a showing that the landlord's negligent failure to provide adequate security was a proximate cause of the injury ... . 'In premises security cases particularly, the necessary causal link between a landlord's culpable failure to provide adequate security and a tenant's injuries resulting from a criminal attack in the building can be established only if the assailant gained access to the premises through a negligently maintained entrance. Since even a fully secured entrance would not keep out another tenant, or someone allowed into the building by another tenant, plaintiff can recover only if the assailant was an intruder' ... . Here, in support of its motion for summary judgment dismissing the complaint, NYCHA failed to demonstrate its prima facie entitlement to judgment as a matter of

law. The deposition testimony of the plaintiff submitted in support of the motion raised issues of fact regarding whether the door was operating properly prior to, and on the day of, the incident, and whether [the assailant] was an intruder who gained access to the premises through a negligently maintained entrance ...". ***Ramos v. New York City Hous. Auth.*, 2017 N.Y. Slip Op. 01244, 2nd Dept 2-15-17**

PERSONAL INJURY, MUNICIPAL LAW (NYC).

BASEMENT OFFICE DID NOT DEPRIVE DEFENDANT HOMEOWNERS OF RESIDENTIAL EXEMPTION FROM LIABILITY FOR A DEFECTIVE SIDEWALK.

The Second Department, reversing Supreme Court, determine a basement business office did not deprive defendants of the residential exemption (for one, two and three family residences) from liability for a defective sidewalk: "In 2003, the New York City Council enacted section 7-210 of the Administrative Code of the City of New York to shift tort liability for injuries resulting from defective sidewalks from the City to abutting property owners ... . This liability shifting provision does not, however, apply to 'one-, two- or three-family residential real property that is (i) in whole or in part, owner occupied, and (ii) used exclusively for residential purposes'... . 'The purpose of the exception in the Code is to recognize the inappropriateness of exposing small-property owners in residence, who have limited resources, to exclusive liability with respect to sidewalk maintenance and repair' ... . Here, the defendants established, prima facie, that they were exempt from liability pursuant to the subject code exception. Contrary to the plaintiff's contention, the defendants' partial use of the basement as an office space was merely incidental to their residential use of the property ... . [Defendant] Alexander Dembitzer was the director of a summer camp located in upstate New York, and during the off-season, he used the basement to conduct the camp's business. The defendants did not claim the home office as a tax deduction, their home address was only used to receive the camp's mail during the off-season, and they did not use the office space with any regularity." ***Koronkevich v. Dembitzer*, 2017 N.Y. Slip Op. 01187, 2nd Dept 2-15-17**

PERSONAL INJURY, MUNICIPAL LAW (NYC).

ALTHOUGH DEFENDANTS WERE ENTITLED TO EXEMPTION FROM SNOW-ICE SIDEWALK-FALL LIABILITY UNDER THE NYC ADMINISTRATIVE LAW, THEY DID NOT DEMONSTRATE THE HAZARD WAS NOT CREATED BY THEIR SNOW REMOVAL EFFORTS, SUMMARY JUDGMENT PROPERLY DENIED.

The Second Department determined defendants' summary judgment motion in this ice/snow sidewalk slip and fall action was properly denied. Although the defendants demonstrated they were entitled to NYC's exemption from liability for owners of one, two and three family residences, they did not demonstrate they did not create the dangerous condition by their snow removal efforts: "Here, the defendants established, prima facie, that as owners of a two-family residential property which was owner occupied, they were exempt from liability pursuant to section 7-210(b) of the Administrative Code ... . The defendants failed, however, to establish, prima facie, that they did not engage in snow and ice removal work prior to the accident or that their snow and ice removal work did not create or exacerbate the hazardous condition which allegedly caused the plaintiff to fall ...". ***Ming Hsia v. Valle*, 2017 N.Y. Slip Op. 01193, 2nd Dept 2-15-17**

PERSONAL INJURY, MUNICIPAL LAW.

CITY DID NOT DEMONSTRATE IT DID NOT CREATE THE ROADWAY DEPRESSION WHICH CAUSED PLAINTIFF'S BICYCLE ACCIDENT, SUMMARY JUDGMENT PROPERLY DENIED.

The Second Department determined the city's motion for summary judgment in this bicycle accident case was properly denied. Although the city demonstrated it did not receive written notice of the alleged defective condition (a depression in the road), the city did not demonstrate it did not create the defective condition when street work was done: "Where, as here, the plaintiff has alleged that the affirmative negligence exception applies, the City was required to show, prima facie, that the exception does not apply ... . Although the City established that it did not receive prior written notice of the alleged defect, it failed to establish, prima facie, that it did not create the alleged defect when its Sewer Maintenance Department opened up the street in the area of the plaintiff's fall prior to the accident ... . Since the City did not establish its prima facie entitlement to judgment as a matter of law, the burden never shifted to the plaintiff to submit evidence sufficient to raise a triable issue of fact." ***Lewak v. Town of Hempstead*, 2017 N.Y. Slip Op. 01189, 2nd Dept 2-15-17**

THIRD DEPARTMENT

INSURANCE LAW.

EVIDENCE WAS SUFFICIENT TO SUPPORT THE JURY'S FINDING PLAINTIFF'S HEAD INJURY WAS A SERIOUS INJURY WITHIN THE MEANING OF INSURANCE LAW 5102, SUPREME COURT REVERSED.

The Third Department, in a full-fledged opinion by Justice Clark, over a dissent, reversing Supreme Court, determined plaintiff had proved at trial that he suffered a serious injury within the meaning of Insurance Law 5102 (d) and was therefore entitled to the jury's damages award. Plaintiff was unloading his car when defendant's car struck plaintiff's, which then struck plaintiff. Plaintiff came out of his shoes and was thrown to the sidewalk. He was knocked unconscious, suffered a gash on the back of his head, and suffered a concussion. Plaintiff presented evidence at trial of traumatic brain injury with cognitive loss. The trial judge had granted defendant's motion to set aside the verdict and dismissed the complaint, finding the evidence of serious injury insufficient: "Notwithstanding the negative scans, the absence of neurological testing and the subjectivity of plaintiff's complaints, many of plaintiff's reported symptoms, including his impaired concentration and balance and difficulty with problem solving and word retrieval, were objectively and personally observed by plaintiff's primary care physician, who had the necessary historical knowledge and ability to compare his clinical, postaccident observations of plaintiff's condition to his prior observations of plaintiff's preaccident condition ... . * * * In our view, the comparative determination of plaintiff's primary care physician, taken together with plaintiff's defined head wound and subjective complaints immediately after the accident and continuing four years later, provided the jury with a valid line of reasoning and permissible inferences that could lead it to the rational conclusion that plaintiff suffered a permanent consequential limitation of use of a body organ or member and a significant limitation of use of a body function or system ...". ***Rodman v. Deangeles*, 2017 N.Y. Slip Op. 01260, 3rd Dept 2-16-17**

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