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CasePrepPlus

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COURT OF APPEALS

CRIMINAL LAW.

DEFENDANT HAS THE RIGHT TO BE PRESENT WHEN, IN RESPONSE TO A MOTION TO VACATE BECAUSE THE PERIOD OF POST-RELEASE SUPERVISION (PRS) WAS NOT MENTIONED AT THE ORIGINAL SENTENCING, THE COURT IMPOSES A SENTENCE WITHOUT A PERIOD OF PRS.

The Court of Appeals, in a full-fledged opinion by Judge Wilson, reversing the appellate division, determined a defendant has a right to be present when, after moving to vacate the sentence because the period of post-release supervision (PRS) was not mentioned, the sentencing court imposes the original sentence without a period of PRS: "There is only one enumerated exception to the statute where the defendant is convicted of a misdemeanor or petty offense, on motion of the defendant the court may sentence the defendant in absentia (CPL 380.40 [2]). We have also previously held that a defendant convicted of a felony may waive the right to be present at sentencing, provided that the waiver is knowing, voluntary and intelligent ... . However, absent such a waiver — or a forfeiture of the right to be present ... — ... '[t]here is no statutory basis for [a] [futility] exception' ... . Here, the Appellate Division concluded that there was no reason to remand the case because [defendant] was not adversely affected by his re-imposed sentence, citing *People v. Covington* (88 AD3d 486, 486 [1st Dept 2011]), and *People v. Mills* (117 AD3d at 1556). The majority in *Mills* cited CPL 470.15 [1] for the proposition that the Appellate Division cannot consider a sentence that did not 'adversely affect[] the appellant.' CPL 470.15 (1) says, 'Upon an appeal to an intermediate appellate court from a judgment, sentence or order of a criminal court, such intermediate appellate court may consider and determine any question of law or issue of fact involving error or defect in the criminal court proceedings which may have adversely affected the appellant.' Here, as there was no voluntary waiver, [defendant's] absence from the sentencing proceeding was in itself, under our precedents, an error as it constitutes a violation of his right under CPL 380.40. Accordingly, the order of the Appellate Division should be reversed and the case remitted to Supreme Court for further proceedings in accordance with this opinion." ***People v. Estremera*, 2017 N.Y. Slip Op. 08036, CtApp 11-16-17**

CRIMINAL LAW, APPEALS.

BECAUSE NO AFFIDAVIT OF ERRORS WAS FILED AFTER A CONVICTION IN TOWN COURT, COUNTY COURT DID NOT HAVE JURISDICTION TO HEAR THE APPEAL.

Defendant was convicted in town court of criminal contempt stemming from anti-drone protests at Hancock Field, an Air National Guard base. The town court proceedings were recorded electronically and no stenographer was present. The defendant filed a notice of appeal, but did not file an affidavit of errors. County Court heard the appeal and reduced defendant's sentence from one year to six months. The Court of Appeals, in a full-fledged opinion by Judge DiFiore, determined County Court did not have jurisdiction to hear the appeal because an affidavit of errors was not filed. However, because defendant had moved for an extension of time to file the affidavit of errors should the transcript of the electronic recording be deemed insufficient (never ruled on by County Court), the matter was sent back to County Court: "Criminal Procedure Law § 460.10 requires an appellant to file an affidavit of errors with the criminal court in order to take an appeal from a judgment of a local criminal court if the underlying proceedings were not recorded by a court stenographer. We have already held that the filing of the affidavit of errors in this circumstance is a jurisdictional prerequisite ... . [W]e conclude that the failure to file the required affidavit of errors renders the intermediate appellate court without jurisdiction to hear the case." ***People v. Flores*, 2017 N.Y. Slip Op. 08037, CtApp 11-16-17**

CRIMINAL LAW, APPEALS.

WHETHER THE PROTECTIVE SEARCH OF A VEHICLE WAS VALID PRESENTED A MIXED QUESTION OF LAW AND FACT AND WAS NOT REVIEWABLE BY THE COURT OF APPEALS.

The majority, over an extensive three-judge dissent, determined whether the search of a vehicle after a street stop was valid presented a mixed question of law and fact that was not reviewable by the Court of Appeals: **From the dissent:** "... [W]here the issue presented is whether the People have demonstrated 'the minimum showing necessary' to establish the legality of police conduct, 'a question of law is presented for [our] review' ... . Accepting the facts as found by the Appellate Division and the suppression court, which are not disputed here, the People failed to adduce the minimum showing required to jus-

tify a protective search of defendant's vehicle — namely, a substantial likelihood of the presence of a weapon and an actual and specific threat to officer safety. I, therefore, disagree with the majority's conclusion that the question of whether the protective search was lawful is a mixed question of law and fact reviewable only for record support, and I would hold that the search of defendant's vehicle was unlawful." ***People v. Hardee*, 2017 N.Y. Slip Op. 08038, CtApp 11-16-17**

FIRST DEPARTMENT

CIVIL PROCEDURE, EMPLOYMENT LAW.

NEW YORK LABOR LAW WORK-PAY REQUIREMENTS DO NOT APPLY TO WORK DONE OUT-OF-STATE.

The First Department determined New York Labor Law worker-pay requirements do not apply to work done outside the state: "Under New York Law, it is a 'settled rule of statutory interpretation, that unless expressly stated otherwise, no legislation is presumed to be intended to operate outside the territorial jurisdiction of the state enacting it' ... . Article 6 of the New York Labor Law, which contains the unlawful deductions, notice, and record keeping provisions which plaintiffs claim were violated, contains no indication that the provisions were intended to apply when the work in question is performed outside the state. Article 19 of the New York Labor Law, which contains the minimum wage, overtime, and spread of hours provisions identified in the complaint, includes a 'Statement of Public Policy' which states, in relevant part: 'There are persons employed in some occupations in the state of New York at wages insufficient to provide adequate maintenance for themselves and their families.... Employment of persons at these insufficient rates of pay threatens the health and well-being of the people of this state and injures the overall economy' (Labor Law § 650). Since these statutes do not expressly apply on an extraterritorial basis, plaintiffs' claims under these provisions, based on labor performed exclusively outside New York, do not state a cause of action under Article 6 or Article 19 of the New York Labor Law ...". ***Rodriguez v. KGA Inc.*, 2017 N.Y. Slip Op. 07948, First Dept 11-14-17**

EMPLOYMENT LAW, LABOR LAW, HUMAN RIGHTS LAW, CIVIL PROCEDURE.

WHISTLEBLOWER CAUSE OF ACTION WAS TIMELY UNDER THE RELATION-BACK DOCTRINE AND DID NOT WAIVE THE HUMAN RIGHTS LAW GENDER DISCRIMINATION CLAIM.

The First Department determined plaintiff's whistleblower (Labor Law § 740) cause of action in the amended complaint was not time-barred because defendant had timely notice of the facts underlying the claim in the original complaint. The relation-back doctrine applied. The court further held that the gender discrimination action under the Human Rights Law was separate and distinct from the whistleblower cause of action: "The court properly applied the relation back doctrine (CPLR 203[f]) to plaintiff's whistleblower claim pursuant to Labor Law § 740, which requires such actions to be commenced within one year of the alleged retaliatory action (Labor Law § 740[4][a]). Although that claim was not asserted until the Second Amended Complaint, filed on October 19, 2015, more than one year after her termination on February 4, 2014, the original complaint, filed on January 31, 2015, alleged that on February 3, 2014, plaintiff reported to the defendants' Business Practices Office defendants' improper practices regarding its procurement of chemicals to manufacture its highest grossing drug, and that those practices did not comply with FDA regulations. It further alleged that she was terminated the next day in retaliation for that conduct. ... The motion court correctly concluded that Labor Law § 740(7), the "election-of-remedies" provision, does not waive plaintiff's claim of discrimination under the New York State Human Rights Law (State HRL) (Executive Law § 296) because, in alleging discrimination on account of plaintiff's gender, national origin, and religion, plaintiff does not seek the same rights and remedies as she does in connection with her whistleblowing claim, notwithstanding that both claims allege that she was wrongfully terminated ...". ***Demir v. Sandoz Inc.*, 2017 N.Y. Slip Op. 07961, First Dept 11-14-17**

FORECLOSURE.

STATUTORY NOTICE REQUIREMENTS NOT MET IN THIS FORECLOSURE ACTION, BANK'S SUMMARY JUDGMENT MOTION SHOULD NOT HAVE BEEN GRANTED.

The First Department, reversing Supreme Court, determined the bank did not demonstrate it had met the statutory notice requirements of the Real Property Actions and Proceeding Law (RPAPL). Therefore the bank's motion for summary judgment should have been denied: "RPAPL 1304 notice 'shall be sent by [the] lender, assignee (including purchasing investor) or mortgage loan servicer to the borrower, by registered or certified mail and also by first-class mail to the last known address of the borrower, and to the residence that is the subject of the mortgage' (RPAPL 1304[2]). Proper service of a RPAPL 1304 notice containing the statutorily-mandated content is a condition precedent to the commencement of a foreclosure action, and plaintiff has the burden of establishing its strict compliance with this condition ... . Plaintiff failed to establish that it strictly complied with RPAPL 1304. Plaintiff submitted an affidavit of its loan servicer, supported by copies of the 90-day notice it alleges was served and a copy of the unsigned, undated return receipt. These documents were insufficient to establish plaintiff's prima facie entitlement to summary judgment. In the affidavit, the loan servicer's vice president of loan documentation fails to demonstrate a familiarity with the servicer's mailing practices and procedures. Therefore, plaintiff

did not establish proof of a standard office practice and procedure ... . Moreover, portions of the receipt in the record are blank, and an undated and unsigned return receipt is not sufficient to establish proof of the actual mailing ...". ***HSBC Bank USA v. Rice*, 2017 N.Y. Slip Op. 07936, First Dept 11-14-17**

PERSONAL INJURY.

ALTHOUGH DEFENDANT'S TRUCK WAS IN THE WRONG LANE, THE POSITION OF THE TRUCK FURNISHED A CONDITION FOR THE ACCIDENT BUT WAS NOT THE PROXIMATE CAUSE OF THE ACCIDENT, PLAINTIFF'S DECEDENT WAS WEAVING IN AND OUT OF TRAFFIC ON HIS MOTORCYCLE AT HIGH SPEED WHEN HE STRUCK A CAR, AND WAS THROWN UNDER THE TRUCK.

The First Department determined defendant trucking company's motion for summary judgment in this traffic accident case was properly granted. Plaintiff's decedent was weaving in and out of traffic at high speed on his motorcycle when he struck the rear of a car, was thrown under and tractor trailer, and run over by the rear wheels. The truck was in a lane where truck traffic was prohibited. The court held the position of the truck furnished the condition for the accident but was not the proximate cause of the accident: "Defendants made a prima facie showing that decedent's negligent operation of the motorcycle caused the accident ... . Further, although defendants acknowledge that the tractor-trailer was unlawfully in the left lane at the time of the accident ... , there is no evidence in the record that would support a finding that the statutory violation was a proximate cause of the accident. The presence of the tractor-trailer in the left lane merely furnished the condition that led to decedent's death, and was not a proximate cause of the accident ... . Nor is there any nonspeculative basis for finding that defendant driver could have avoided the accident. Plaintiffs failed to present evidence raising a triable issue of fact as to whether any negligence on the part of defendants was a substantial factor in causing the accident. Although plaintiffs did not have an opportunity to depose defendant driver, they failed to demonstrate the existence of any testimony by defendant driver relevant to defendant's summary judgment motion." ***Caro v. Chesnick*, 2017 N.Y. Slip Op. 07940, First Dept 11-14-17**

PERSONAL INJURY, EVIDENCE.

DEFENDANTS FAILED TO ELIMINATE QUESTIONS OF FACT RE WHETHER INADEQUATE ILLUMINATION WAS A PROXIMATE CAUSE OF PLAINTIFF'S DECEDENT'S STAIRWAY FALL.

The First Department, in a full-fledged opinion by Justice Renwick, over a dissenting opinion, determined plaintiff properly survived defendants' summary judgment motion in this stairway fall case. Plaintiff's decedent died before he was deposed. There was a video of the fall but it was destroyed after decedent's daughter requested a copy of it. The motion court held plaintiff was entitled to an adverse inference. The complaint alleged the cause of the fall was inadequate illumination and submitted supporting affidavit by an expert: "The dissent contends ... that the issue of proximate cause must be decided as matter of law in favor of defendants because 'none of [the witness to the accident or who reviewed the videotape of the accident] claimed that the decedent misstepped or lost his balance due to inadequate lighting.' The law, however, does not apply such a stringent requirement. To be sure, a plaintiff's inability to identify the cause of a fall is fatal to an action because a finding that the defendant's negligence proximately caused a plaintiff's injuries would be based on speculation ... . However, this simply requires that the evidence identifies the defect or hazard itself and provides sufficient facts and circumstances from which causation may be reasonably inferred ... . The dissent cannot and does not dispute that inadequate lighting itself may constitute a dangerous condition where the inadequacy of lighting renders the appearance of premises deceptive. Such deception occurs by the illusion that two areas of the same premises are on the same level whereas, in fact, there is a change in floor level to which the available lighting does not call sufficient attention. ... [W]e find that the evidence adduced by defendants failed to eliminate all issues of fact as to whether this alleged dangerous condition on the subject stairway contributed to the decedent's fall." ***Haibi v. 790 Riverside Dr. Owners, Inc.*, 2017 N.Y. Slip Op. 08102, First Dept 11-16-17**

PERSONAL INJURY, LANDLORD-TENANT.

LEASE WITH PLAINTIFF'S EMPLOYER DID NOT REQUIRE LANDLORD TO MAINTAIN THE YARD OUTSIDE THE BUILDING, PLAINTIFF WAS INJURED WHEN HE STEPPED INTO A HOLE DUG BY PLAINTIFF'S EMPLOYER IN THE YARD, LANDLORD'S MOTION FOR SUMMARY JUDGMENT PROPERLY GRANTED.

The First Department determined the defendant landlord's motion for summary judgment was properly granted in this personal injury action. The property was leased to plaintiff's employer. Plaintiff's employer was doing construction work in the yard outside the building. Plaintiff fell into a hole dug by his employer in the yard. The lease imposed repair responsibilities on the landlord for the building only, not the yard: "The subject lease provided that defendant 'shall maintain and repair the public portions of the building, both interior and exterior [and that] . . . [t]enant shall, throughout the term of this lease, take good care of the demised premises. . .and at its sole cost and expense, make all non-structural repairs . . . when needed to preserve them in good working order and condition.' Here, testimony established that the accident did not occur in a public portion of the building, but rather in the backyard that was exclusively controlled by plaintiff's employer, thereby not implicating an area that defendant had retained the responsibility to maintain ... . Similarly, the evidence demonstrated that, in actual practice, defendant did nothing to show that it had the authority to maintain or repair the

accident premises ... . Furthermore, although the lease states that defendant had the right to reenter the premises to make repairs, plaintiff has failed to show that defendant violated a specific statutory safety provision, or that the hole in which he stepped was a structural defect ... . Plaintiff's reference to an OSHA provision that was allegedly violated by defendant is unavailing, because defendant was not plaintiff's employer ...". ***Martinez v. 3801 Equity Co., LLC*, 2017 N.Y. Slip Op. 07938, First Dept 11-14-17**

PERSONAL INJURY, LANDLORD-TENANT.

LANDLORD DID NOT HAVE A DUTY TO INSULATE A PIPE BECAUSE IT WAS PART OF THE HEATING SYSTEM, INFANT PLAINTIFF WAS INJURED BY CONTACT WITH THE HOT PIPE.

The First Department determined the landlord was not required to insulate the pipe leading to the radiator because the pipe was part of the heating system (which would have been impeded by insulation). Therefore the personal injury action stemming from infant plaintiff's contact with the hot pipe was properly dismissed: "Dismissal of the complaint was warranted in this action for personal injuries sustained when infant plaintiff slipped off the bed and fell against hot pipes that conveyed steam to the radiators in the apartment. The court properly concluded that defendant did not violate its common-law duty to plaintiffs in failing to insulate the hot pipes ... . Plaintiffs argue that because the pipes were not the primary source of heat to the apartment, insulation would not have interfered with the functionality of the heating system ... . However, even plaintiffs' expert acknowledged that the pipes were part of the heating system and supplied some heat to the room." ***P.R. v. New York City Hous. Auth.*, 2017 N.Y. Slip Op. 07955, First Dept 11-14-17**

REAL ESTATE, CONTRACT LAW.

BUYER OF PROPERTY WAS UNABLE TO RAISE A QUESTION OF FACT WHETHER SELLER WAS AWARE OF UNDERGROUND GAS TANKS ON THE PROPERTY.

The First Department determined the seller of the property demonstrated it could not be held liable for the underground gas tanks found on the property. The purchase and sale contract indicated only that the seller was not aware of any underground fuel tanks: "The court properly found that defendant did not breach the contract by failing to disclose the presence of underground gas tanks on the property. ... [D]efendant guaranteed and warranted only that it had not generated, stored or disposed of hazardous materials and had no knowledge of the previous presence of such materials on the property. Plaintiff failed to present evidence sufficient to raise a triable issue of fact as to whether defendant was responsible for the presence of the gas tanks or had any knowledge of it. The former owner of the property and a managing member of defendant testified that he was unaware of the presence of the gas tanks. In addition, ... defendant disclaimed and [did not make] any warranties or representations concerning environmental conditions. Plaintiff acknowledged that it was relying solely on its own expertise and consultants in this regard, and was purchasing the property 'as is, where is' ...". ***West 17th St. & Tenth Ave. Realty, LLC v. N.E.W. Corp.*, 2017 N.Y. Slip Op. 08088, First Dept 11-16-17**

SECOND DEPARTMENT

CIVIL PROCEDURE.

WHERE ISSUE WAS NEVER JOINED, ACTION CANNOT BE DISMISSED FOR NEGLECT TO PROSECUTE PURSUANT TO CPLR 3216.

The Second Department determined, where issue has never been joined, that action cannot be dismissed for neglect to prosecute pursuant to CPLR 3216: "Courts are prohibited from dismissing an action pursuant to CPLR 3216 based on neglect to prosecute unless the statutory preconditions to dismissal are met... . Specifically, issue must have been joined; at least one year must have elapsed since joinder of issue; the defendant or the court must have served on the plaintiff a written demand to serve and file a note of issue within 90 days; and plaintiff must have failed to serve and file a note of issue within the 90-day period ... . Here, the initial statutory precondition was not met, as none of the defendants served an answer and, therefore, there was no joinder of issue ...". ***Deutsche Bank Natl. Trust Co. v. Augustin*, 2017 N.Y. Slip Op. 07973, Second Dept 11-15-17**

CIVIL PROCEDURE, FORECLOSURE, REAL PROPERTY ACTIONS AND PROCEEDINGS LAW.

PLAINTIFF BANK SHOULD HAVE BEEN ALLOWED TO AMEND THE COMPLAINT BY ADDING PARTIES AND TO EXTEND THE REACH OF THE ACTION TO THE ENTIRE PREMISES WHICH HAD BEEN ACQUIRED BY ADVERSE POSSESSION.

The Second Department, reversing Supreme Court, determined plaintiff bank should have been allowed to amend its complaint in this foreclosure action to add parties and extend the reach of the action to the entire premises. There was evidence a party acquired title to the entire premises by adverse possession: " 'In the absence of prejudice or surprise to the opposing party, leave to amend a pleading should be freely granted 'unless the proposed amendment is palpably insufficient or

patently devoid of merit' ... . Moreover, pursuant to CPLR 1003, '[p]arties may be added at any stage of the action by leave of court' ... . Here, the plaintiff's proposed cause of action was not 'palpably insufficient or patently devoid of merit' ... . RPAPL 1501 provides that any person who "claims an estate or interest in real property' may maintain an action against any other person . . . to compel the determination of any claim adverse to that of the plaintiff which the defendant makes, or which it appears from the public records, . . . the defendant might make'... . Pursuant to RPAPL 1501(5), the interest held by any mortgagee of real property is an 'interest in real property' as that phrase is used in article 15... . Thus, contrary to the Supreme Court's determination, the plaintiff, as mortgagee of the subject premises, asserted a cause of action to quiet title pursuant to RPAPL 1501 based on its claim that the mortgage encumbered the entire premises because the mortgagor acquired title to the entire premises by adverse possession ... . Moreover, the plaintiff properly sought leave to amend the summons and complaint to add as defendants certain persons who might claim interests in the premises that are adverse to its own interest." ***Emigrant Sav. Bank v. Walters*, 2017 N.Y. Slip Op. 07976, Second Dept 11-15-17**

CRIMINAL LAW.

THE KILLING OF ONE PERSON AND WOUNDING OF TWO BY FIRING 13 SHOTS INTO A GROUP OF PEOPLE FROM A ROOFTOP WERE NOT SEPARATE AND DISTINCT OFFENSES, SENTENCES MUST BE CONCURRENT.

The Second Department determined firing 13 shots from a rooftop into a group of people, killing one and wounding two, resulting in a murder and two assault convictions, were not separate events which would support consecutive sentences: "Under the circumstances of this case, the evidence was insufficient to establish that the defendant's acts underlying the crimes were separate and distinct. Accordingly, the imposition of consecutive terms of imprisonment was improper ...". ***People v. Lopez*, 2017 N.Y. Slip Op. 08016, Second Dept 11-15-17**

CRIMINAL LAW.

DEFENDANT PRESENTED EVIDENCE HE WOULD NOT HAVE PLED GUILTY HAD HE KNOWN HIS FEDERAL AND STATE SENTENCES WOULD NOT RUN CONCURRENTLY, MOTION TO VACATE CONVICTION SHOULD NOT HAVE BEEN DENIED WITHOUT A HEARING.

The Second Department determined defendant's motion to vacate his judgment of conviction (by guilty plea) should not have been denied without a hearing. Defendant presented evidence he would not have pled guilty had he known his state and federal sentences would not run concurrently: "A hearing will be appropriate where a defendant comes forward with 'allegations that raise a triable issue of fact sufficient to challenge the presumed validity of a judgment of conviction' ... . Here, as the People concede, the evidence submitted by the defendant was sufficient to raise a triable issue of fact as to whether he believed, prior to pleading guilty, based on the advice of his attorney, that his state sentence would run concurrent with his federal sentence and whether he would have rejected the plea agreement in the absence of concurrent sentences ...". ***People v. Oquendo*, 2017 N.Y. Slip Op. 08018, Second Dept 11-15-17**

DEBTOR-CREDITOR.

GUARANTOR OF A CRIMINALLY USURIOUS LOAN WAS ENTITLED TO SUMMARY JUDGMENT IN AN ACTION SEEKING PAYMENT, THE DOCTRINE OF ESTOPPEL IN PAIS DID NOT APPLY.

The Second Department, reversing Supreme Court, determined defendant Jarvis, who guaranteed payment on a note, was entitled to summary judgment because the loan was criminally usurious. The plaintiff did not raise a question of fact about the applicability of the doctrine of estoppel in pais: "Jarvis established his prima facie entitlement to summary judgment by demonstrating that the interest rate on the loan was criminally usurious; a loan that is criminally usurious is void ... . In opposition to that prima facie showing, the plaintiff failed to raise a triable issue of fact. The doctrine of estoppel in pais provides that 'a borrower may be estopped from interposing a usury defense when, through a special relationship with the lender, the borrower induces reliance on the legality of the transaction. . . . Otherwise, a borrower could void the transaction, keep the principal, and achieve a total windfall, at the expense of an innocent person, through his own subterfuge and inequitable deception' ... . Here, the plaintiff did not submit any evidence of a special relationship ... . Accordingly, the Supreme Court erred in finding that triable issues of fact exist regarding the doctrine of estoppel in pais." ***Kingsize Entertainment, LLC v. Martino*, 2017 N.Y. Slip Op. 07986, Second Dept 11-15-17**

EMPLOYMENT LAW, MUNICIPAL LAW, HUMAN RIGHTS LAW, CONSTITUTIONAL LAW.

PLAINTIFF'S SEX AND AGE DISCRIMINATION CAUSES OF ACTIONS, AS WELL AS A RETALIATION CAUSE OF ACTION, SHOULD NOT HAVE BEEN DISMISSED, FIRST AMENDMENT VIOLATION CAUSE OF ACTION AGAINST CITY REQUIRES A NOTICE OF CLAIM, MOTION TO AMEND COMPLAINT TO ADD A FIRST AMENDMENT VIOLATION UNDER FEDERAL LAW, WHICH DOES NOT REQUIRE A NOTICE OF CLAIM, SHOULD HAVE BEEN GRANTED.

The Second Department, reversing in part Supreme Court, determined plaintiff's complaint stated employment (sex and age) discrimination and retaliation causes of action pursuant to the NYC Human Rights Law, a notice of claim was required for the First Amendment violation cause of action against the city (plaintiff's employer), and plaintiff's motion to amend the complaint to state the First Amendment violation cause of action pursuant to 18 U.S.C. 1983 (which does not require a notice of claim) should have been granted: "Here, the Supreme Court erred in granting those branches of the defendants' motion which were pursuant to CPLR 3211(a)(7) to dismiss the causes of action alleging employment discrimination on the basis of sex and age in violation of the NYCHRL ... . The allegation that a coworker repeatedly demonstrated a sex toy to the plaintiff was sufficient to state a cause of action to recover damages for sexual harassment in violation of the NYCHRL ... . … The court erred in determining that the cause of action must be dismissed because the behavior constituted no more than petty slights or trivial inconveniences. A contention that the behavior was a petty slight or trivial inconvenience constitutes an affirmative defense ... which should be raised in the defendants' answer and does not lend itself to a pre-answer motion to dismiss ... . Further, the allegations of disparate treatment of older employees, including the plaintiff, and that the plaintiff's demotion was based, in part, on age discrimination, sufficiently stated a cause of action to recover damages for age discrimination in violation of the NYCHRL ... . The Supreme Court also erred in granting dismissal of the cause of action alleging unlawful retaliation based on the plaintiff's complaints of sexual harassment. ... The allegations that, following the plaintiff's complaint to a supervisor concerning alleged sexual harassment, the plaintiff was assigned double the normal workload, subjected to increased scrutiny of her work and reprimands for minor errors, and ultimately demoted a few months later, sufficiently stated a cause of action to recover damages for unlawful retaliation for the plaintiff's complaints of sexual harassment in violation of the NYCHRL ... . However, the complaint failed to allege that the plaintiff ever complained about the alleged age discrimination, and thus the court properly granted dismissal of the cause of action alleging unlawful retaliation based on complaints of age discrimination." ***Kassapian v. City of New York*, 2017 N.Y. Slip Op. 07985, Second Dept 11-15-17**

FORECLOSURE, MORTGAGES, CONTRACT LAW.

PARTY IS DEEMED TO HAVE READ A SIGNED DOCUMENT, JUDGMENT OF FORECLOSURE ON THIS CONSTRUCTION MORTGAGE PROPERLY GRANTED, BANKING LAW REQUIREMENTS DO NOT APPLY TO CONSTRUCTION MORTGAGE.

The Second Department determined the judgment of foreclosure and sale was properly granted. Defendant claimed he was tricked into signing the construction mortgage. The Second Department noted that a construction mortgage is not subject to the requirements of Banking Law §§ 6-l and 590. And the Second Department held that a party is deemed to have read a signed document: " 'A party who executes a contract is presumed to know its contents and to assent to them'... .Thus, '[a] party who signs a document without any valid excuse for having failed to read it is conclusively bound by its terms' ... , 'unless there is a showing of fraud, duress, or some other wrongful act on the part of any party to the contract' ... . 'The elements of a cause of action sounding in fraud are a material misrepresentation of an existing fact, made with knowledge of the falsity, an intent to induce reliance thereon, justifiable reliance upon the misrepresentation, and damages' ... . Here, the defendant failed to establish the element of justifiable reliance on alleged misrepresentations ... , since the documents were provided to him, and he and his attorney could have read them. Nor has the defendant established any other valid excuse for his purported failure to read the construction mortgage and related documents before signing them." ***Prompt Mtge. Providers of N. Am., LLC v. Zarour*, 2017 N.Y. Slip Op. 08028, Second Dept 11-15-17**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON PLAINTIFF'S LABOR LAW § 240(1) CAUSE OF ACTION SHOULD NOT HAVE BEEN GRANTED, PLAINTIFF WAS ATTEMPTING TO PUSH A HEAVY DOLLY UP A RAMP WHEN IT ROLLED BACK AND INJURED HIM.

The Second Department, reversing in part Supreme Court, determined defendants were not entitled to summary judgment on plaintiff's Labor Law § 240(1) cause of action. Plaintiff was attempting to push a dolly carrying sheet rock weighing 1000 pounds up a ramp when the dolly rolled back, injuring him. The Second Department also held that the defendants' motions for summary judgment on the Labor Law § 200 and common law negligence causes of action were properly granted because defendants did not have supervisory control over the manner of plaintiff's work: "Contrary to the defendants' contentions, the elevation differential between the worker and the loaded dolly while on a four-to-five-foot-high ramp 'cannot be viewed as de minimis, particularly given the weight of the object and the amount of force it was capable of generating' ... . Indeed,

in opposition to the defendants' original motion, the plaintiff's expert averred that the 16 pieces of sheetrock loaded onto the dolly weighed more than 1000 pounds. Here, given the amount of force generated by the dolly rolling uncontrollably down the temporary ramp, the defendants failed to establish, prima facie, that Labor Law § 240(1) is not applicable on the ground that the injury did not result from a gravity-related or elevation-related hazard ...". ***Kandatyan v. 400 Fifth Realty, LLC*, 2017 N.Y. Slip Op. 07984, Second Dept 11-15-17**

LABOR LAW-CONSTRUCTION LAW, INSURANCE LAW, CONTRACT LAW.

COMPLEX DECISION EXPLAINING BLACK LETTER LAW ON LABOR LAW §§ 240(1), 241(6) AND 200 CAUSES OF ACTION, CONTRACTUAL AND IMPLIED INDEMNIFICATION, AND INSURANCE COVERAGE ISSUES.

The Second Department reversed Supreme Court in a complex action involving Labor Law §§ 240(1), 241(6), 200 and common law negligence causes of action, as well as several contractual and implied indemnification issues, and insurance coverage and duty to defend and indemnify issues. The decision lays out the black letter law on all the issues, illustrates how the appellate courts analyze summary judgment motions, and is well worth reading for an overview of the complexity of a construction accident case involving property owners, several insurance policies, and layers of contractors. Plaintiff fell off a ladder that had been placed on an uneven floor. There are too many substantive issues to fairly summarize them here. With regard to the Labor Law § 240(1) cause of action, the court wrote: "The plaintiff established his prima facie entitlement to judgment as a matter of law on the issue of the defendants' liability on the Labor Law § 240(1) cause of action. ... The plaintiff used the last available ladder in his work area. According to the plaintiff, this ladder was missing two of its rubber feet, and was missing the lowest rung. The plaintiff testified that the floor was 'not finished' and that it was partially covered in concrete and partially covered in rubble. The plaintiff indicated that there were 'all types of things' strewn on the ground and that the floor 'was not level.' The plaintiff stated that, as he was standing on the ladder to perform his work, the ladder 'shook,' and he 'lost [his] balance' and fell." ***Poalacin v. Mall Props., Inc.*, 2017 N.Y. Slip Op. 08027, Second Dept 11-15-17**

MUNICIPAL LAW, REAL PROPERTY LAW, CONSTITUTIONAL LAW.

OWNER OF REGULATED WETLANDS ENTITLED TO AN INCREASED VALUATION IN CONDEMNATION PROCEEDINGS REPRESENTING THE PREMIUM A KNOWLEDGEABLE BUYER MIGHT PAY FOR A POTENTIAL CHANGE TO A MORE VALUABLE USE.

The Second Department, in a full-fledged opinion by Justice Leventhal, determined that the condemnation of regulated wetlands can be subject to an increased valuation (increment) based upon a reasonable probability a knowledgeable buyer could successfully challenge the taking as unconstitutional. The increment represents the premium that a knowledgeable buyer would be willing to pay for a potential change to a more valuable use. Here Supreme Court found the increment to be $382,190.25. The Second Department, using the City's appraisal, reduced the increment to about $157,000.00. The value of the regulated wetlands was deemed to be $75,000.00: "In light of the United States Supreme Court's holding in Palazzolo [v Rhode Island, 533 US at 617], we conclude that a subsequent buyer of the property would not be precluded from bringing a successful regulatory takings claim. As a result, we reject the City's argument that no knowledgeable buyer would be willing to pay a premium for the probability of a successful judicial determination that the regulations were confiscatory. We hold that the reasonable probability incremental increase rule still may be applied in valuing regulated wetlands properties taken in condemnation." ***Matter of New Cr. Bluebelt, Phase 3.*, 2017 N.Y. Slip Op. 07994, Second Dept 11-15-17**

PERSONAL INJURY.

BUILDING OWNERS' MOTION FOR SUMMARY JUDGMENT PROPERLY DENIED IN THIS WET-FLOOR SLIP AND FALL CASE.

The Second Department determined the building owners' (Realty defendants') motion for summary judgment in this slip and fall case was properly denied. The defendants did not eliminate questions of fact whether they had notice of or created the dangerous condition, a wet floor in the area where floor mats had been removed while a tenant was moving in: "According to the Realty defendants' deposition testimony, the floor in the building lobby was scheduled to be wet mopped on the Friday afternoon prior to the plaintiff's accident on Monday, and the Realty defendants' maintenance personnel were instructed, as part of their process, to remove the floor mats in the lobby and put them back in place after the floor was mopped dry. ... 'To impose liability on a defendant for a slip and fall on an alleged dangerous condition on a floor, there must be evidence that the dangerous condition existed, and that the defendant either created the condition or had actual or constructive notice of it and failed to remedy it within a reasonable time' ... . A defendant property owner who moves for summary judgment in a slip-and-fall case has the initial burden of making a prima facie showing that it neither created the alleged hazardous condition nor had actual or constructive notice of it ... . Here, the Realty defendants failed to eliminate all triable issues of fact as to whether the alleged accumulation of water on which the plaintiff slipped and fell was created by its maintenance personnel prior to the accident...". ***Dow v. Hermes Realty, LLC*, 2017 N.Y. Slip Op. 07974, Second Dept 11-15-17**

PERSONAL INJURY, EVIDENCE.

PROOF OF GENERAL CLEANING PRACTICES DID NOT DEMONSTRATE LACK OF NOTICE IN THIS SLIP AND FALL CASE, NEGLIGENT LOSS OF VIDEO WARRANTED AN ADVERSE INFERENCE CHARGE.

The Second Department, reversing Supreme Court, determined defendant store's (Me-Me's) motion for summary judgment in this slip and fall case should not have been granted and plaintiff was entitled to an adverse inference charge because a video of the fall had been negligently lost. Plaintiff alleged she stepped on a grape. Defendant did not demonstrate a lack of notice by submitting evidence of its general cleaning practices: " 'In a premises liability case, a defendant property owner, or a party in possession or control of real property, who moves for summary judgment has the initial burden of making a prima facie showing that it neither created the alleged defective condition nor had actual or constructive notice of its existence'... . To provide constructive notice, 'a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it' ... . 'To meet its initial burden on the issue of lack of constructive notice, the defendant must offer some evidence as to when the area in question was last cleaned or inspected relative to the time when the plaintiff fell' ... . 'Reference to general cleaning practices is insufficient to establish a lack of constructive notice in the absence of evidence regarding specific cleaning or inspection of the area in question' ... . * * * Since Me-Me's loss of the video recording was negligent rather than intentional, and the loss of the recording does not completely deprive the plaintiff of the ability to prove her case, the appropriate sanction is to direct that an adverse inference charge be given at trial with respect to the unavailable recording ...". ***Eksarko v. Associated Supermarket*, 2017 N.Y. Slip Op. 07975, Second Dept 11-15-17**

REAL PROPERTY LAW.

EASEMENT EXTINGUISHED BY MERGER WHEN BOTH AFFECTED PARCELS OWNED BY THE SAME PARTY, COMPLAINT DID NOT STATE A CAUSE OF ACTION FOR EASEMENT BY NECESSITY.

The Second Department determined an easement had been extinguished when the same party became the owner of both affected parcels and plaintiff was not entitled to an easement by necessity: " 'An easement is not a personal right of the landowner but is an appurtenance to the land benefitted by it (the dominant estate). It is inseparable from the land and a grant of the land carries with it the grant of the easement' ... . Here, the subject property and the adjoining property came under common ownership on October 31, 2008 ... [T]he easement that came into existence in 1974 was extinguished by merger. * * * [The] ... cause of action, for a declaration that the plaintiff had an easement by necessity, contained only vague and conclusory allegations and failed to allege that an easement over the adjoining property was absolutely necessary for access to the subject property, which fronts on a public street ...". ***GDG Realty, LLC v. 149 Glen St. Corp.*, 2017 N.Y. Slip Op. 07978, Second Dept 11-15-17**

THIRD DEPARTMENT

FAMILY LAW, CONTRACT LAW.

SEPARATION AGREEMENT REQUIRED BOTH PARENTS TO CONTRIBUTE TO COLLEGE EXPENSES BUT DID NOT INDICATE HOW MUCH EACH PARTY SHOULD CONTRIBUTE, AGREEMENT BREACHED BY WIFE'S FAILURE TO PAY ANYTHING, FAMILY COURT TO DETERMINE EACH PARENT'S APPROPRIATE CONTRIBUTION.

The Third Department determined the separation agreement should not have been interpreted to require that the cost of college tuition be split 50-50. The agreement simply capped each party's contribution at 50%. Family Court must determine the proper contribution based upon resources. The wife's failure to pay anything, however, violated the agreement: "Here, the parties agreed to 'share in the costs of the child's higher education,' with such contribution being capped at 50% of tuition at a state university, plus the cost of reasonable living expenses. By its plain language, the disputed provision unequivocally demonstrates that the parties intended to encourage and facilitate the child's pursuit of a college degree and to make some financial contribution — up to, but not necessarily equaling, 50% of the total cost of tuition at a state university — toward that pursuit. In agreeing to contribute, the parties did not use language such as 'split' or '50-50,' despite such language appearing elsewhere in the separation agreement, including in the sections addressing dependent care expenses and the cost of health insurance coverage. Given the appearance of such language elsewhere in the agreement, its absence in the relevant provision is telling, as it suggests that the parties did not intend, as Family Court found, to equally split the total cost of the child's college tuition — subject to the cap — and living expenses ... .. Furthermore, while the separation agreement provided that each party's financial exposure would not exceed the tuition cap, it stopped short of defining the parties' respective obligations. The absence of language defining their obligations does not render the provision ambiguous. Rather, by its omission, it is apparent that the parties contemplated a later agreement between themselves and, failing that, a subsequent determination by the court as to their respective contributions ... .Thus, while we agree that the mother's failure to contribute anything toward the cost of the child's college education constituted a willful violation of the separation agreement, Family Court erred in concluding that the parties intended to equally share the total cost of the child's college tuition and

living expenses, subject to the tuition cap, and entering a judgment against the mother in the amount of $28,377.50." ***Matter of Dillon v. Dillon*, 2017 N.Y. Slip Op. 08062, Second Dept 11-15-17**

UNEMPLOYMENT INSURANCE.

MEDICAL LAB DRIVERS WERE EMPLOYEES ENTITLED TO UNEMPLOYMENT INSURANCE BENEFITS.
The Third Department determined drivers for a medical lab (Empire City) were employees entitled to unemployment insurance benefits: "Although some of the control exercised by Empire City was occasioned by the regulated nature of the work performed by the drivers, many aspects of control exercised by Empire City went well beyond such regulation ... . Empire City assigned delivery routes based on driver availability, and the drivers were required to make the stops and deliveries along those routes as specified by Empire City. To this end, Empire City provided the drivers with route sheets containing instructions for pickups and, on occasion, imposed pickup times for its clients. Drivers were required to make same-day delivery of any specimens that were picked up and, at the conclusion of each day, drivers were required to submit route sheets to Empire City and confirm that no specimens remained in their vehicles. Empire City also provided the drivers with assistance if they experienced difficulty making a delivery and, if a driver was unable to report to work and find a substitute driver, Empire City asked for advance notice so that it could cover the route by assigning another driver of its choosing to the route. Empire City provided supplies, including ice boxes and ice packs, to facilitate the deliveries and handled client complaints." ***Matter of Raupov (Empire City Labs., Inc.–Commissioner of Labor)*, 2017 N.Y. Slip Op. 08068, Third Dept 11-16-17**

WORKERS' COMPENSATION.

BOARD'S FINDING CLAIMANT WAS CAPABLE OF PERFORMING SEDENTARY EMPLOYMENT NOT SUPPORTED BY SUBSTANTIAL EVIDENCE IN THE RECORD, FINDING OF PERMANENT TOTAL DISABILITY WARRANTED.
The Third Department, reversing the Workers' Compensation Board, over a two-justice dissent, determined claimant should have been found totally disabled: "After injuring her back in October 2007, claimant underwent multiple back surgeries, including a L3-4 and L4-5 spinal fusion in December 2010 and fusions at L4-5 and L5-S1 in August 2012. A spinal cord stimulator was implanted in August 2013. Claimant's physician, Clifford Ameduri, was treating her for postoperative back pain. Ameduri completed a 'Doctor's Report of MMI/Permanent Impairment' form C-4.3 in August 2014 that classified her condition as permanent and assigned a class five severity F rating to her lumbar back injury under the New York State Guidelines for Determining Permanent Impairment and Loss of Wage Earning Capacity (2012). Ameduri also rated her functional capacity at 'less than sedentary work,' a category defined as 'unable to meet the requirement of sedentary work.' ... Nowhere in this record does Ameduri opine that claimant sustained only a permanent partial disability. Guy Corkhill, the physician who conducted an independent medical examination on behalf of the workers' compensation carrier, assigned a class four severity G rating to claimant's back condition. In his testimony, Corkhill agreed with Ameduri that it was 'unlikely [claimant] would ever be able to return to meaningful employment.' Notwithstanding this medical testimony, both the Workers' Compensation Law Judge and a panel of the Workers' Compensation Board determined that claimant was capable of performing sedentary employment. In adopting Ameduri's severity F rating, the Board further discredited Corkhill's opinion as based primarily on claimant's subjective complaint, notwithstanding Corkhill's testimony that her subjective complaints comported with his objective findings. Since the Board's findings as to claimant's ability to perform some type of sedentary work are contrary to the consistent medical proof presented, the Board's finding of a permanent partial disability and a 75% loss of wage-earning capacity is not supported by substantial evidence in the record ... . Claimant maintains, and we agree, that the record actually warrants a finding of a permanent total disability." ***Matter of Wohlfeil v. Sharel Ventures, LLC*, 2017 N.Y. Slip Op. 08060, Third Dept 11-16-17**

FOURTH DEPARTMENT

CIVIL PROCEDURE.

WHERE A NOTE OF ISSUE HAS BEEN FILED BUT IS SUBSEQUENTLY VACATED, THE ACTION IS NOT SUBJECT TO DISMISSAL AS ABANDONED PURSUANT TO CPLR 3404.
The Fourth Department, in a full-fledged opinion by Justice NeMoyer, determined that CPLR 3404, which deems an action abandoned if not restored within a year of being marked off or struck from the calendar, does not apply to cases where a note of issue was filed but subsequently was vacated. The First and Second Department adhere to this view, the Third Department does not: "In accordance with the tenor and spirit of our existing case law, we now explicitly adopt the First and Second Departments' rule, and reject the Third Department's. It is axiomatic that CPLR 3404 has no applicability in the absence of an extant and valid note of issue ... , and we agree with the Second Department that '[t]he vacatur of a note of issue . . . returns the case to pre-note of issue status [and] does not constitute a marking off' or striking the case from the court's calendar within the meaning of CPLR 3404' ... . To state the obvious, a note of issue does not survive its own vacatur,

and it makes no sense to apply CPLR 3404 when the statute's operative premise—i.e., the continuing vitality of the note of issue—no longer exists." ***Bradley v. Konakanchi*, 2017 N.Y. Slip Op. 08125, Fourth Dept 11-17-17**

CIVIL PROCEDURE, APPEALS, PRIVILEGE.

PRIOR APPELLATE DECISION VACATING AN ORDER CONCERNING A COUNTERCLAIM WAS THE LAW OF THE CASE, NOT A PRIOR SUPREME COURT RULING ON THE COUNTERCLAIM, ACCOUNTANT REPORT PREPARED FOR LITIGATION NOT DISCOVERABLE.

The Fourth Department, modifying Supreme Court, determined the decision vacating an order concerning a counterclaim in a prior appeal was the law of the case, despite the "otherwise affirmed" phrase in the decision, and Supreme Court should not have adhered to a prior ruling on the counterclaim in Supreme Court. The Fourth Department further held that Supreme Court properly found a report prepared by an accountant was prepared in anticipation of litigation and was not discoverable as a "mixed file:" " 'An appellate court's resolution of an issue on a prior appeal constitutes the law of the case and is binding on . . . Supreme Court, as well as on the appellate court . . . [T]he 'law of the case' operates to foreclose re-examination of [the] question absent a showing of subsequent evidence or change of law' ... . Nevertheless, 'where a court has vacated an earlier order, the doctrine of . . . law of the case no longer applies . . . Indeed, a vacated judgment has no preclusive force either as a matter of collateral or direct estoppel or as a matter of the law of the case' ... . While this Court may have 'otherwise affirmed' the order insofar as it concerned the issues unrelated to the counterclaim, we dismissed the appeal from that part of the order concerning the counterclaim and vacated the judgment. That necessarily means that any determinations related to the counterclaim were not encompassed by the 'otherwise affirmed' language related to the order ...". ***Micro-Link, LLC v. Town of Amherst*, 2017 N.Y. Slip Op. 08120, Fourth Dept 11-17-17**

CORPORATION LAW, CONTRACT LAW, CIVIL PROCEDURE.

EVEN THOUGH THE WRONG CORPORATION WAS NAMED IN THE CONTRACT DEFENDANT SIGNED AS PRESIDENT, DEFENDANT COULD NOT BE HELD PERSONALLY LIABLE, MOTION TO SET ASIDE THE VERDICT SHOULD HAVE BEEN GRANTED.

The Fourth Department determined defendant's motion to set aside the verdict in this contract dispute should have been granted. Defendant signed the contract as president of a corporation which existed but was misnamed. Defendant could not be held personally liable: " 'According to the well settled general rule, individual officers or directors are not personally liable on contracts entered into on behalf of a corporation if they do not purport to bind themselves individually' . . . However, it is also well established that an agent who acts on behalf of a nonexistent principal may be held personally liable on the contract'... . 'The rule [was] designed to protect a party who enters into a contract where the other signatory represents that he is signing on behalf of a business entity that in fact does not exist, under any name . . . [Thus,] as long as the identity of the corporation can be reasonably established from the evidence[,] . . . [an e]rror in the use of the corporate name will not be permitted to frustrate the intent which the name was meant to convey' . . . In such a situation, . . . there is no need or basis to impose personal liability on the person who signed the contract as agent for the entity'... . 'Accordingly, absent an allegation that, at the time of the contract, a plaintiff was under an actual misapprehension that there was some other, unincorporated group with virtually the same name as that of the actual business entity, the [c]ourt will not permit the [plaintiff] to capitalize on [a] technical naming error in contravention of the parties' evident intentions' ... . Thus, courts have determined that the individual who signed the contract may be liable where there was no existing corporation under any name because, under those circumstances, the plaintiff has "no remedy except against the individuals who acted as agents of those purported corporations"... . Where, as here, there was an existing corporation and merely a misnomer in the name of the corporation, courts have declined to impose liability on the individual who signed the contract because the plaintiff has a remedy against the existing, albeit misnamed, corporation... . Here, we conclude that no one was under an actual misapprehension that there was an entity with the name." ***TBW, INC. J.N.K. Mach. Corp. v. TBW, Ltd.*, 2017 N.Y. Slip Op. 08106, Fourth Dept 11-17-17**

CRIMINAL LAW.

DEFENDANT WAS NOT ADVISED THE SENTENCE TO WHICH HE AGREED WHEN PLEADING GUILTY WAS FIXED REGARDLESS OF THE OUTCOME OF THE SECOND VIOLENT FELONY OFFENDER HEARING, PLEA VACATED.

The Fourth Department determined defendant was not advised of the direct consequences of his guilty plea in that he was not advised that the sentence to which he agreed was fixed without regard to the outcome of the second violent felony offender hearing. The guilty plea was vacated and the matter sent back to County Court: " 'While a trial court has no obligation to explain to defendants who plead guilty the possibility that collateral consequences may attach to their criminal convictions, the court must advise a defendant of the direct consequences of the plea' ... . Defendant failed to preserve for our review his contention that County Court failed to fulfill its obligation to advise him at the time of the plea that the sentence imposed would include a period of postrelease supervision ..., and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice ... . Nevertheless, the record supports defendant's further contention

that he was not advised that the sentence to which he agreed when pleading guilty was fixed without regard to the outcome of the second violent felony offender hearing, and thus that he was not properly advised of the direct consequences of the plea ... ". ***People v. Smith*, 2017 N.Y. Slip Op. 08132, Fourth Dept 11-17-17**

CRIMINAL LAW, APPEALS.

DWI COUNTS WERE LESSER INCLUSORY COUNTS OF VEHICULAR MANSLAUGHTER AND SHOULD HAVE BEEN DISMISSED, ERROR DID NOT REQUIRE PRESERVATION.

The Fourth Department, reversing the Driving While Intoxicated convictions, noted that the DWI counts were lesser inclusory counts of vehicular manslaughter. The error did not require preservation: "The People correctly concede, however, that counts two and three, charging driving while intoxicated, must be dismissed as lesser inclusory counts of count one, charging vehicular manslaughter in the first degree ... , and we therefore modify the judgment accordingly. Defendant's failure to preserve the issue for our review is of no moment because preservation is not required ...". ***People v. Mastowski*, 2017 N.Y. Slip Op. 08113, Fourth Dept 11-17-17**

CRIMINAL LAW, APPEALS, ATTORNEYS.

WHETHER A SUCCESSFUL MOTION TO DISMISS COULD HAVE BEEN MADE ON DOUBLE JEOPARDY GROUNDS PURSUANT TO CPL § 40.20 COULD NOT HAVE BEEN DETERMINED ON DIRECT APPEAL, THEREFORE DEFENDANT'S MOTION TO VACATE HIS CONVICTION ON INEFFECTIVE ASSISTANCE GROUNDS SHOULD NOT HAVE BEEN DISMISSED WITHOUT A HEARING.

The Fourth Department determined defendant could not have raised the ineffective assistance argument on direct appeal and therefore county court should not have denied his motion to vacate his conviction without a hearing. There was a question whether defense counsel could have successfully moved to dismiss three felonies based on the violation of protections against double jeopardy in Criminal Procedure Law (CPL) § 40.20. Defendant was indicted on three felonies and three misdemeanors. But defendant had already pled guilty to the three misdemeanors in town court. When that was discovered the county court judge sent the three misdemeanors back to town court and defendant was convicted of the three felonies in county court: "... [E]ven if separate prosecutions were not permitted under subdivision 40.20 (2) (b), defendant must also establish that separate prosecutions were not permitted under CPL 40.20 (2) (a) in order to establish that a motion to dismiss the felonies under CPL 40.20, if made, would have been successful. Unlike subdivision (2) (b), the determination whether separate prosecutions were permitted under subdivision (2) (a) could not have been made on the direct appeal because the 'lower court paperwork' was not included in the record, and a review of the charging documents for the prior and current prosecutions is necessary to determine if acts establishing the misdemeanor offenses were 'in the main clearly distinguishable from those establishing the [felony offenses]' ... . Inasmuch as the record on the direct appeal lacked the lower court paperwork, the record on direct appeal was insufficient to determine whether a motion to dismiss the felony counts under CPL 40.20, if made, would have been successful." ***People v. Pace*, 2017 N.Y. Slip Op. 08137, Fourth Dept 11-17-17**

CRIMINAL LAW, EVIDENCE.

MOTION TO VACATE CONVICTION BASED UPON RECANTING TESTIMONY PROPERLY DENIED WITHOUT A HEARING, WEAKNESS OF RECANTING TESTIMONY EMPHASIZED.

The Fourth Department determined defendant's motion to vacate his conviction based upon recanting testimony was properly denied without a hearing. The court emphasized the weakness of recanting testimony: " 'There is no form of proof so unreliable as recanting testimony' ... , and such testimony is 'insufficient alone to warrant vacating a judgment of conviction' ... . 'Consideration of recantation evidence involves the following factors: (1) the inherent believability of the substance of the recanting testimony; (2) the witness's demeanor both at trial and at the evidentiary hearing; (3) the existence of evidence corroborating the trial testimony; (4) the reasons offered for both the trial testimony and the recantation; (5) the importance of facts established at trial as reaffirmed in the recantation; and (6) the relationship between the witness and defendant as related to a motive to lie' ... . Here, the victim gave abundant testimony at trial that amply supported his ultimate statement that he had '[n]o doubt' that defendant was the shooter. In contrast, the victim's affidavit was prepared more than 10 years following the shooting, after the victim had become an inmate at the same prison in which defendant is incarcerated, and the victim blamed an individual identified only as 'Marvin,' who was alleged to be deceased since 2008 ... . We therefore conclude that, '[n]otwithstanding the absence of an evidentiary hearing, the totality of the parties' submissions along with the trial record warrant a factual finding that the recantation is totally unreliable' ... , and that the court properly denied defendant's motion." ***People v. Pringle*, 2017 N.Y. Slip Op. 08131, Fourth Dept 11-17-17**

EMPLOYMENT LAW, LABOR LAW, CONTRACT LAW.

LAW FIRM ASSOCIATE WAS ENTITLED TO 5% OF $5 MILLION FEE UNDER A BREACH OF ORAL CONTRACT THEORY, BUT NOT UNDER A LABOR LAW § 190 THEORY.

The Fourth Department determined plaintiff, an associate in defendant law firm, was entitled to 5% of the $5 million fee collected by the law firm in an action on behalf of a client brought in by the associate. The jury found that the plaintiff was

entitled to payment under the Labor Law § 190 cause of action, as well as under the breach of contract cause of action. The Fourth Department determined the verdict on the Labor Law § 190 cause of action should have been set aside because, under the law described in the jury instructions, the jury should have found the payment to be "incentive compensation" which is excluded from the type of pay covered by the Labor Law: "Applying the facts to the law as stated in the jury charge, the evidence establishes that the collections bonus was 'incentive compensation' because it was based on more than just plaintiff's performance. Among other things, the matter took considerable effort from other attorneys, some of whom billed far more hours on the matter than plaintiff, and a partner conducted international arbitration and filed enforcement proceedings to secure a settlement collectible by the client. Contrary to plaintiff's contention, inasmuch as the collections bonus was calculated as a percentage of the fee in the matter and 'the fee collected' by defendant was based on the above-mentioned factors outside of plaintiff's control, the jury could not have rationally concluded that the collections bonus was anything other than 'incentive compensation' excluded from protection under Labor Law § 193 (1). ... ... [T]he evidence adduced by plaintiff established, prima facie, that the parties entered into a binding oral agreement in which at least one of defendant's partners promised to pay plaintiff a bonus consisting of 5% of the fee collections from any client generated by plaintiff if such fees exceeded $100,000, that plaintiff subsequently performed under the agreement by generating the client, and that defendant breached the agreement by failing to pay the collections bonus, thereby causing plaintiff to incur damages ...". ***Doolittle v. Nixon Peabody LLP*, 2017 N.Y. Slip Op. 08126, Fourth Dept 11-17-17**

FAMILY LAW.

RELOCATION AND CUSTODY MODIFICATION ISSUES REQUIRED A HEARING FOCUSING ON THE BEST INTERESTS OF THE CHILD.

The Fourth Department, reversing Supreme Court, determined the relocation/custody modification issues required a hearing focusing on the best interests of the child: "We agree with the father that the court erred in giving him a deadline to relocate within the 15-mile radius provided in the [Separation] Agreement without conducting a hearing, and that the court further erred in denying that part of the father's cross motion seeking modification of the custody and visitation provisions of the Agreement, also without conducting a hearing. ... While '[a] hearing is not automatically required whenever a parent seeks modification of a custody order' ... , here we conclude that the combined effect of the parties' 'relocation[s] was a change of circumstances warranting a reexamination of the existing custody arrangement' at an evidentiary hearing ... . While the parties' Agreement provided that the father must reside within a 15-mile radius of the mother's residence upon her relocation, the overriding consideration in determining whether to enforce such a provision is the child's best interests ... ... It is impossible to determine on this record the effect on the child of enforcing or modifying the Agreement, and we conclude that the parties should be afforded an opportunity to present evidence concerning the child's best interests." ***Shaw v. Shaw*, 2017 N.Y. Slip Op. 08138, Fourth Dept 11-17-17**

FAMILY LAW.

QDRO WAS ENTERED IN VIOLATION OF THE SEPARATION AGREEMENT, SUPREME COURT SHOULD HAVE VACATED THE QDRO, LACHES INAPPLICABLE.

The Fourth Department, reversing Supreme Court, determined the qualified domestic relations order (QDRO) should have been vacated because the separation agreement called for the QDRO to terminate upon the wife's (plaintiff's) remarriage, which took place in 1995. The doctrine of laches was inapplicable: " 'A QDRO obtained pursuant to a separation agreement can convey only those rights . . . which the parties [agreed to] as a basis for the judgment' ... . Thus, it is well established that 'a court errs in granting . . . a QDRO more expansive than an underlying written separation agreement' ... , regardless whether the parties or their attorneys approved the QDRO without objecting to the inconsistency ... . Under such circumstances, the court has the authority to vacate or amend the QDRO as appropriate to reflect the provisions of the separation agreement ... . Here, the QDRO should never have been entered in the first instance because the clear and unambiguous language of the separation agreement provided that plaintiff's rights in defendant's pension benefits had terminated upon her remarriage. We reject plaintiff's contention that defendant is barred by laches from seeking to vacate the QDRO. 'The defense of laches requires both delay in bringing an action and a showing of prejudice to the adverse party' ... . Even assuming, arguendo, that there was a delay in seeking to vacate the QDRO, we conclude that plaintiff has not demonstrated that she was prejudiced by that delay ...". ***Santillo v. Santillo*, 2017 N.Y. Slip Op. 08155, Fourth Dept 11-17-17**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON THE LABOR LAW § 240(1) CAUSE OF ACTION PROPERLY GRANTED, PLAINTIFF'S ACTIONS COULD NOT HAVE BEEN THE SOLE PROXIMATE CAUSE OF THE ACCIDENT.

The Fourth Department determined Supreme Court properly granted plaintiff's motion for summary judgment on his Labor Law § 240(1) cause of action (as well as a Labor § Law 241(6) cause of action). Plaintiff was struck when a bundle of rebar

that was being hoisted fell. Plaintiff's actions in placing chokers on the rebar to allow the rebar to be hoisted were not the sole proximate cause of the accident. Others were involved in preparing the rebar for hoisting: "To recover under section 240 (1) for injuries sustained in a falling object case, a plaintiff must establish 'both (1) that the object was being hoisted or secured, or that it required securing for the purposes of the undertaking, and (2) that the object fell because of the absence or inadequacy of a safety device to guard against a risk involving the application of the force of gravity over a physically significant elevation differential' ... . Here, we conclude that plaintiff established those factors and therefore met his burden on his motion. We note, in particular, that the deposition testimony and two witness affidavits tendered by plaintiff established "that any safety devices in fact used[, i.e., the chokers] failed in [their] core objective of preventing the [rebar] from falling,' " and that such failure was a proximate cause of the accident... . In opposition, defendants failed to raise a material issue of fact inasmuch as the opinions of their expert were conclusory ... . Contrary to defendants' further contention, plaintiff's actions were not the sole proximate cause of his injuries. '[W]here a plaintiff's own actions are the sole proximate cause of the accident, there can be no liability' ... . To establish their 'sole proximate cause' theory, defendants were required to present 'some evidence that the device furnished was adequate and properly placed and that the conduct of the plaintiff [was] the sole proximate cause of his . . . injuries' ... . Here, the record establishes that plaintiff was not alone in rigging the rebar bundle and transporting it to a different area of the construction site, and thus plaintiff's conduct could not be the sole proximate cause of his injuries. We therefore conclude that plaintiff's action in participating in the rigging process raises, at most, an issue concerning his comparative negligence, which is not an available defense under Labor Law § 240 (1) ...". ***Flowers v. Harborcenter Dev., LLC*, 2017 N.Y. Slip Op. 08117, Fourth Dept 11-17-17**

MUNICIPAL LAW, EMPLOYMENT LAW.

DEPUTY SHERIFF WAS COERCED INTO RESIGNING WITHOUT A HEARING, SHERIFF SHOULD HAVE ALLOWED DEPUTY TO WITHDRAW HIS RESIGNATION.

The Fourth Department determined Supreme Court properly found that the sheriff abused his discretion when he refused to allow petitioner, a deputy sheriff, to withdraw his resignation. The deputy resigned after the sheriff told him he would be fired if he didn't resign: "It is well settled that '[a] resignation under coercion or duress is not a voluntary act and may be nullified' ... . Although a threat to terminate an employee does not constitute duress if the person making the threat has the legal right to terminate the employee ... , such a threat does constitute duress if it is wrongful and precludes the exercise of free will ... . It follows that a resignation obtained under the threat of wrongful termination is involuntary and may be withdrawn upon request, and that it is an abuse of discretion for an officer to deny such a request ... . Here, petitioner tendered his resignation under the threat of wrongful termination, and we therefore conclude that the Sheriff abused his discretion in refusing to allow petitioner to withdraw the resignation. Civil Service Law § 75 provides that a public employer may not terminate or otherwise discipline certain public employees 'except for incompetency or misconduct shown after a hearing upon stated charges' ... . A covered employee 'against whom removal or other disciplinary action is proposed shall have written notice thereof and of the reasons therefor, shall be furnished a copy of the charges preferred against him and shall be allowed at least eight days for answering the same in writing' ... . Thereafter, a hearing must be held … . There is no dispute that petitioner was covered by the statute and that he was not provided with the requisite predisciplinary hearing. Thus, the Sheriff had no legal right to terminate him." ***Matter of Ortlieb v. Lewis County Sheriff's Dept.*, 2017 N.Y. Slip Op. 08115, Fourth Dept 11-17-17**

PERSONAL INJURY.

QUESTIONS OF FACT WHETHER PLAINTIFF'S SON'S INVOLVEMENT IN A DRAG RACE PRECLUDED RECOVERY FOR HIS DEATH IN AN ACCIDENT.

The Fourth Department, reversing Supreme Court, determined plaintiff's motion for summary judgment in this traffic accident case should not have been granted. There was evidence plaintiff's son, who was riding in a pickup truck with defendant's son, may have voluntarily participated in a drag race which led to the accident and the death of plaintiff's son: "Defendants cross-moved for summary judgment dismissing the complaint on the ground that the accident occurred during an 'illegal street race' in which plaintiff's son participated, that his death was the direct result of his own serious violation of the law, and that recovery on his behalf was therefore precluded as a matter of public policy under the rule of *Barker v. Kallash* (63 NY2d 19 [1984]) and *Manning v. Brown* (91 NY2d 116 [1997]). In the alternative, defendants sought summary judgment on the issue whether plaintiff's son had been comparatively negligent. Supreme Court granted plaintiff's motion and denied defendants' cross motion, and defendants appeal. We agree with defendants that the Barker/Manning rule may apply to a high-speed street race between motor vehicles, i.e., 'a drag race as that term is commonly understood' ... , even if the participants did not plan a particular race course and the incident thus did not qualify as a 'speed contest' within the meaning of Vehicle and Traffic Law § 1182 (a) (1)... . The record here, however, supports conflicting inferences with respect to whether defendants' son was engaged in a race with other pickup truck drivers ... and, if so, whether plaintiff's son was a

'willing participant' in the race ... . Thus, the applicability of the Barker/Manning rule is an issue of fact ... . In addition, there are issues of fact with respect to the alleged comparative negligence of plaintiff's son in choosing to ride with defendants' son, in view of evidence that defendants' son was under the influence of alcohol and had said that he intended to "chase . . . down" the other trucks ... . We therefore conclude that the court properly denied defendants' cross motion but erred in granting that part of plaintiff's motion with respect to the culpable conduct defense, and we modify the order accordingly." ***Kovach v. McCollum*, 2017 N.Y. Slip Op. 08121, Fourth Dept 11-17-17**

PERSONAL INJURY, MUNICIPAL LAW.

ALTHOUGH THE DRIVER WAS INTOXICATED AND WAS DRIVING AT HIGH SPEED, DEFENDANT MUNICIPALITY DID NOT DEMONSTRATE THE FAILURE TO CLOSE THE PARK GATE AND THE FAILURE TO PROVIDE SPEED LIMIT AND ROAD-CURVE SIGNS DID NOT CONSTITUTE NEGLIGENCE, DEFENDANT'S SUMMARY JUDGMENT MOTION SHOULD NOT HAVE BEEN GRANTED.

The Fourth Department, reversing Supreme Court, over a dissent, determined defendant's motion for summary judgment in this fatal car accident case should not have been granted. Plaintiffs' decedent was killed when the car in which he was a passenger entered a park at night and crashed after failing to negotiate a curve in the road. The driver, Benedict, was intoxicated and there was evidence the car was driven at high speed. Although a sign at the park indicated it was closed at dusk, the gate was open, there were no signs indicating an upcoming curve in the road, and there were no speed limit signs. The driver had never been on the road before: "A municipality has a duty to maintain its roads in a reasonably safe condition 'in order to guard against contemplated and foreseeable risks to motorists,' including risks related to a driver's negligence or misconduct ... . In other words, a municipality is not relieved of liability for failure to keep its roadways in a reasonably safe condition 'whenever [an accident] involves driver error' ... . Defendant's duty to maintain the road was therefore not negated by Benedict's intoxication or the fact that the park was closed when the accident occurred ... , and we conclude that defendant did not establish as a matter of law that Benedict's presence under those circumstances was unforeseeable ... . Inasmuch as defendant presented no evidence that the road was reasonably safe at night in the absence of the safety measures proposed by plaintiffs, we conclude that defendant failed to establish as a matter of law that it was not negligent ... . We further agree with plaintiffs that the court erred in determining as a matter of law that Benedict's actions were the sole proximate cause of the accident. Although defendant presented evidence that Benedict was intoxicated and driving 'at high speed,' we conclude that its submissions did not establish as a matter of law that Benedict's manner of driving 'would have been the same' if the safety measures proposed by plaintiffs had been in place ...". ***Stiggins v. Town of N. Dansville*, 2017 N.Y. Slip Op. 08108, Fourth Dept 11-17-17**

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