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Editor: **Bruce Freeman**

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FIRST DEPARTMENT

CIVIL PROCEDURE.

MOTION IN LIMINE CANNOT BE USED TO DETERMINE AN ISSUE OF MATERIAL FACT, THE MOTION WAS ACTUALLY AN UNTIMELY MOTION FOR SUMMARY JUDGMENT AND SHOULD NOT HAVE BEEN GRANTED.

The First Department, reversing Supreme Court, determined the motion in limine was actually a motion for summary judgment and was therefore untimely and should not have been granted. Plaintiff was injured when he slipped on debris at a construction site and sued under Labor Law § 241(6) and negligence. Summary judgment motions had been adjudicated. Four years later before starting a bench trial the defendants purported to make a motion in limine and the court dismissed the action with prejudice: "The trial court found that the motion court's [prior] order held that [defendant] '(1) did not have sufficient notice of; and (2) did not cause or create the debris condition that resulted in plaintiff['s] ... accident' and dismissed the complaint because 'plaintiffs place the alleged violation of the Industrial Code squarely only on and with defendant ... .' The trial court erred in granting defendants' motion in limine because, as defendants' acknowledge in their brief, it was one for summary judgment. As such, it was untimely as it was brought more than 120 days from the filing of the note of issue (CPLR 3212[a]). Further, an issue of material fact cannot form the basis for granting a motion in limine because it is an 'inappropriate device to obtain [summary] relief' ...". ***Casalini v. Alexander Wolf & Son*, 2018 N.Y. Slip Op. 00246, First Dept 1-16-18**

CIVIL PROCEDURE, APPEALS.

STRIKING THE ANSWER WAS AN APPROPRIATE REMEDY FOR FAILURE TO COMPLY WITH MULTIPLE DISCOVERY ORDERS OVER A PERIOD OF THREE YEARS, PURELY LEGAL ISSUE RAISED FOR THE FIRST TIME ON APPEAL CAN BE CONSIDERED IF THE RECORD IS SUFFICIENT.

The First Department, over an extensive two-justice dissent, determined the city's answer in this malicious prosecution/false arrest action was properly struck because of the city's failure to comply with multiple discovery orders. The First Department also noted that a purely legal issue raised for the first time on appeal can be addressed provided the record is sufficient. (The issue raised for the first time on appeal was Supreme Court's erroneous grant of a default judgment with respect to one of the defendants before the defendant's time to answer the complaint had expired.) Essentially the initial discovery order was issued in May 2011 and the response was not filed until the return date of the plaintiff's motion to strike in July 2014. The dissenting justices argued that some sanction short of striking the answer was warranted: "Pursuant to CPLR 3126, '[i]f any party . . . refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed, pursuant to this article, the court may make such orders with regard to the failure or refusal as are just.' This Court has long held that 'the drastic remedy of striking a party's pleading pursuant to CPLR 3126 for failure to comply with a discovery order . . . is appropriate only where the moving party conclusively demonstrates that the non-disclosure was willful, contumacious or due to bad faith' ... 'Willful and contumacious behavior can be inferred by a failure to comply with court orders, in the absence of adequate excuses' ... . Although actions should be resolved on the merits whenever possible, the efficient disposition of cases 'is not promoted by permitting a party . . . to impose an undue burden on judicial resources to the detriment of . . . other litigants. Nor is the efficient disposition of the business before the courts advanced by undermining the authority of the trial court to supervise the parties who appear before it' ... . '[I]t generally is within the discretion of the motion court to determine the appropriate penalty to be imposed against an offending party' and '[i]t would not be appropriate . . . for this Court to substitute its discretion for that of the Justice sitting in the IAS Court'...". ***Watson v. City of New York*, 2018 N.Y. Slip Op. 00245, First Dept 1-16-18**

CRIMINAL LAW, EVIDENCE, CONSTITUTIONAL LAW.

DEFENDANT SHOULD HAVE BEEN ALLOWED TO PRESENT REVERSE MOLINEUX THIRD PARTY CULPABILITY EVIDENCE, EVIDENCE THAT DEFENDANT DID NOT COMMIT OTHER UNCHARGED ROBBERIES WHICH HAD THE SAME MODUS OPERANDI AS THE CHARGED ROBBERIES, AS WELL AS AN EXCULPATORY FINGERPRINT CARD, CONVICTION REVERSED.

The First Department, in a full-fledged opinion by Justice Acosta, reversing defendant's conviction, determined defendant should have been allowed to present reverse Molineux evidence (evidence that defendant did not commit other robberies committed close in time to the charged robberies with a similar modus operandi) as well as a fingerprint card which would show the absence of a blemish on defendant's palm which was described by one of the robbery victims. Defendant was denied his right to present a defense. With regard to the reverse Molineux evidence, the court wrote: "Given defendant's right to use reverse Molineux evidence, defense counsel sought to introduce two categories of evidence. First, counsel wanted to introduce the surveillance videos from the three robberies for which defendant was not on trial to show that he was not depicted in them: the jury was entitled to make its own assessment that the person sitting before them in the courtroom did not match the person shown in the three videos. There was no evidentiary rule that would have excluded the surveillance videos. Second, defense counsel sought to introduce evidence that three witnesses from uncharged robberies had viewed lineups in which defendant participated, but had not identified him as the man who had robbed them. Had defense counsel presented the failure-to-identify testimony directly through each eyewitness, no evidentiary bar could have been raised: each eyewitness would have been qualified to say that he or she had viewed defendant in a lineup and that defendant was not the man who had robbed him or her. Had defense counsel been unable to find each of the eyewitnesses, or been otherwise unavailable to testify, and had instead sought only to introduce one or more of the failures to identify through the detective who had supervised the lineup, the detective's testimony would have been hearsay. Counsel could have overcome the hearsay objection by showing that the identifications were admissible on constitutional grounds because they were reliable ...". ***People v. Montgomery*, 2018 N.Y. Slip Op. 00351, First Dept 1-18-18**

DEFAMATION.

PUBLICATION OF CLAIMANT'S IMAGE IN THE STATE'S PUBLIC SERVICE AD ABOUT THE RIGHTS OF HIV POSITIVE PERSONS CONSTITUTED DEFAMATION PER SE, STATE DID NOT USE THE IMAGE FOR COMMERCIAL PURPOSES THEREFORE THE CIVIL RIGHTS LAW DID NOT APPLY.

The First Department, modifying Supreme Court, in a full-fledged opinion by Justice Mazzarelli, determined that the state's use of claimant's image in a public service ad informing HIV positive people of their rights constituted defamation per se, but not standard defamation. The First Department further determined the Civil Rights Law (privacy violation) causes of action did not apply to the state, which did not use the image for commercial purposes. Claimant alleged she suffered "mental anguish" as a result of the publication of her image and argued HIV constitutes a "loathsome disease" because of the way the condition is perceived by portions of the public: "... '[P]laintiff must prove damage to (his, her) reputation or standing in the community, or damages such as personal humiliation, mental anguish and suffering' (PJI 3:29B). The use of the word 'or' clearly indicates that the state of the law in New York is such that mental anguish is an alternative to reputational injury in establishing damages in a defamation case. * * ... [B]ecause claimant alleges that she was the victim of defamation per se, we must decide whether she is indeed entitled to recover under that theory. A defamation plaintiff must plead special damages unless the defamation falls into any one of four per se categories: (1) statements charging the plaintiff with a serious crime; (2) statements that tend to injure the plaintiff in her trade, business or profession; (3) statements that impute to the plaintiff a "loathsome disease"; and (4) statements that impute unchastity to a woman... . Claimant purports to qualify under the 'loathsome disease' category. ... Claimant, ... while taking issue with the archaic term 'loathsome,' argues that it is legally operative and historically applicable in the case of medical conditions such as HIV that are communicable and can still, in claimant's opinion, result in societal ostracism." ***Nolan v. State of New York*, 2018 N.Y. Slip Op. 00269, First Dept 1-16-18**

FALSE ARREST, FALSE IMPRISONMENT, MALICIOUS PROSECUTION, MUNICIPAL LAW.

THERE WAS PROBABLE CAUSE TO ARREST PLAINTIFF FOR CONSTRUCTIVE POSSESSION OF DRUGS, FALSE ARREST, FALSE IMPRISONMENT AND MALICIOUS PROSECUTION CAUSES OF ACTION SHOULD HAVE BEEN DISMISSED.

The First Department, reversing Supreme Court, determined plaintiff's false arrest, false imprisonment and malicious prosecution causes of action should have been dismissed. Drugs were found in her apartment when a search warrant was executed in her absence. Her children's father pleaded guilt to possession of the drugs. The First Department determined there was probable cause for her arrest under the theory of constructive possession of the drugs: "The evidence shows that plaintiff resided in and was the leaseholder of an apartment where contraband was discovered pursuant to a search warrant. Plaintiff's residence and tenancy established her dominion and control over the apartment, and thus placed her in constructive possession of the contraband found therein ... . This is so despite the fact that her children's father had access

to the apartment and also admitted and was charged with possession of the same contraband, since '[p]ossession if joint is no less possession' ... . This is also true despite the fact that plaintiff was not in the apartment when the search warrant was executed and the contraband discovered ... . Plaintiff's possession of the contraband, in turn, gave rise to probable cause for her arrest. Nor does the record show that there were any material changes in fact to undermine the probable cause between her arrest and the filing of charges against her ... . There is no evidence in the record sufficient to overcome the presumption of validity in the search warrant which led to the discovery of the contraband ... . The existence of probable cause constitutes a complete defense to plaintiff's state claims ... and federal claims for false arrest, false imprisonment, and malicious prosecution ...". ***Phin v. City of New York*, 2018 N.Y. Slip Op. 00333, First Dept 1-18-18**

INSURANCE LAW, BANKRUPTCY.

CLAIM AGAINST THE BANKRUPT'S INSURER IS NOT BARRED BY THE INSURED'S DISCHARGE IN BANKRUPTCY.
The First Department determined that a claim against the bankrupt's (Daffy's) insurer is not barred by the insured's (Daffy's) discharge in bankruptcy: "The court correctly determined that this third-party action against Daffy's Inc. is not barred by the 'Stipulated Order' in Daffy's bankruptcy proceeding, in which third-party plaintiff [property owner] , waived and released any claims or causes of action relating to or arising under its lease with Daffy's, and the lease was 'rejected and terminated.' The motion papers make it clear that [the property owner] seeks to establish Daffy's liability in the underlying personal injury action for the sole purpose of recovering under Daffy's insurance policy in effect at the time of the accident. Because the policy would not inure to Daffy's pecuniary benefit, it was not part of the bankruptcy estate, and thus it is not covered by the Stipulated Order ... . Moreover, this Court has recognized that 'a claim asserted for the sole purpose of establishing the liability of a party's insurer is not barred by that party's discharge in bankruptcy' ...". ***Calleja v. AI 229 W. 42nd St. Prop. Owner, LLC*, 2018 N.Y. Slip Op. 00338, First Dept 1-18-18**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

PLANKS AND CRIBBING COVERING AN OPENING WERE SAFETY DEVICES WITHIN THE MEANING OF LABOR LAW § 240(1), FAILURE TO SECURE THE CRIBBING WAS A PROXIMATE CAUSE OF THE ACCIDENT.
The First Department determined defendants' motion for summary judgment in this Labor Law § 240(1) action was properly denied. Plaintiff was attempting to remove planks covering an opening over an elevator shaft. His foot slipped on oil and he was injured trying to maintain control of a blank. Cribbing under the planks should have been secured but was not. The court held that the planks and cribbing were safety devices within the meaning of the Labor Law. And even if slipping on the oil was a proximate cause of the injury, there can be more than one proximate cause: "... [T]he cribbing and planking together constituted a safety device designed to protect the workers on the project from falling into the opening in the construction floor ... . Further, it is undisputed that the cribbing was not secured at the time of plaintiff's accident, which allowed the plank plaintiff was holding to fall into the opening, dragging plaintiff toward the opening, causing his injuries. To the extent defendants assert that they cannot be held liable under Labor Law § 240(1), on the ground that plaintiff's accident was not caused by the inadequacy of a safety device but rather by him slipping on an oily substance, this does not support granting summary judgment to the defendants. Although plaintiff testified that he slipped due to the oily substance on the floor, the safety device comprised of the cribbing and planking, which was installed to prevent workers from falling into the opening in the floor, could be found by a trier of fact to be a proximate cause of plaintiff's injuries. Even if the oily substance on the floor was a proximate cause of plaintiff's accident, '[t]here may be more than one proximate cause of a workplace accident' ...". ***Wiscovitch v. Lend Lease (U.S.) Constr. LMB Inc.*, 2018 N.Y. Slip Op. 00350, First Dept 1-18-18**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY, LANDLORD-TENANT.

PLAINTIFF SHOULD HAVE BEEN GRANTED SUMMARY JUDGMENT ON HIS LABOR LAW § 240(1) CAUSE OF ACTION, DEFENDANTS GENERAL CONTRACTOR AND LESSEE SHOULD NOT HAVE BEEN GRANTED SUMMARY JUDGMENT, DEFENDANT OUT OF POSSESSION LANDLORD SHOULD HAVE BEEN GRANTED SUMMARY JUDGMENT, CRITERIA EXPLAINED.
The First Department, reversing Supreme Court, determined plaintiff should have been granted summary judgment on his Labor Law § 240(1) cause of action, the general contractor's (PWI's) and lessee's (St. John's) motions for summary judgment should have been denied, and the out-of-possession landlord's (Rolex's) motion for summary judgment should have been granted. Plaintiff was injured moving a 600 pound I-beam down some stairs and alleged there was debris on the steps, there was no handrail, and the lighting was dim: "The Labor Law § 200 and common-law negligence claims were incorrectly dismissed as against PWI and St. John. To the extent plaintiff's claim is based on allegations that his fall was due to the defective condition of the premises (including the presence of debris on the staircase, inadequate lighting, and the lack of a handrail), defendants can be held liable for plaintiff's injuries only if they created or had notice of the dangerous conditions on the premises ... . [P]laintiff raised an issue of fact through his testimony that there was debris in the form of chopped concrete, pieces of wire, and trim studs on the steps, that there was no handrail, and that the lighting was dim. ... The record demonstrates that Rolex, an out-of-possession landlord with a right of re-entry to maintain and repair, was not involved with the project and was not on site and thus that it had no actual notice of the dangerous conditions ... . The

record demonstrates further that Rolex cannot be held liable under a theory of constructive notice because the dangerous conditions did not constitute significant structural or design defects that violated specific safety statutes ... . Finally, defendants were not entitled to summary judgment dismissing the claim under Labor Law § 240(1), and plaintiff was entitled to summary judgment as to liability on that claim. The record establishes a failure to provide plaintiff and his coworker with devices offering adequate protection against the gravity-related risks of moving an extremely heavy object down a staircase, leading to the workers' loss of control over the object's descent and plaintiff's injuries ...". ***Dirschneider v. Rolex Realty Co. LLC*, 2018 N.Y. Slip Op. 00253, First Dept 1-16-18**

MEDICAL MALPRACTICE, PERSONAL INJURY, CIVIL PROCEDURE.

THE COMPLAINT, STEMMING FROM A FALL OFF A STRETCHER WHILE BEING POSITIONED FOR AN X-RAY, SOUNDED IN MEDICAL MALPRACTICE, NOT NEGLIGENCE, AND WAS THEREFORE UNTIMELY, PROPOSED NEGLIGENT HIRING CAUSE OF ACTION COULD NOT BE ADDED UNDER THE RELATION BACK DOCTRINE.

The First Department determined the complaint sounded in medical malpractice, not common law negligence, and was therefore untimely. Plaintiff alleged she fell off a stretcher as she was being positioned for a chest X-ray. The attempt to amend the complaint to allege a negligent hiring cause of action failed because the facts underlying negligent hiring were not the same as the facts underlying the original complaint. Therefore the relation-back doctrine did not apply: "As described by plaintiff in her affidavit, the technician's conduct in placing plaintiff's body in a certain position, so as to obtain accurate imaging in an Xray directed by a physician at defendant hospital, bore a 'substantial relationship to the rendition of medical treatment by a licensed physician' ... . Accordingly, plaintiff's complaint sounds in medical malpractice and was correctly dismissed as untimely (see CPLR 214-a). … CPLR 203(f) provides, 'A claim asserted in an amended pleading is deemed to have been interposed at the time the claims in the original pleading were interposed, unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading' ... . The original complaint asserts one cause of action that arose from plaintiff's Xray on July 5, 2012. The proposed negligent hiring and failure to promulgate regulations claims arise from different facts and implicate different duties based on conduct preceding, and separate and different from, the alleged negligence of the Xray technician on that date. Thus, the relation back doctrine is inapplicable because the facts alleged in the original complaint failed to give notice of the facts necessary to support the amended pleading ...". ***Lang-Salgado v. Mount Sinai Med. Ctr., Inc.*, 2018 N.Y. Slip Op. 00248, First Dept 1-16-18**

MUNICIPAL LAW (NYC), LANDLORD-TENANT, REAL PROPERTY TAX LAW.

APARTMENTS RECEIVING TAX BENEFITS PURSUANT TO RPTL § 421-g ARE SUBJECT TO THE LUXURY VACANCY DECONTROL PROVISIONS OF THE NYC RENT STABILIZATION LAW AND WERE PROPERLY DEREGULATED.

The First Department, reversing Supreme Court, determined plaintiffs' apartments, which received tax benefits pursuant to Real Property Tax Law § 421-g are subject to the luxury vacancy decontrol provisions of the NYC Rent Stabilization Law. Therefore plaintiffs' apartments were properly deregulated and were not subject to rent stabilization: "Except for condominiums and cooperatives, dwellings in buildings that receive tax benefits pursuant to Real Property Tax Law § 421-g are subject to rent stabilization for the entire period the building is receiving 421-g benefits (Real Property Tax Law § 421-g[6]). However, 421-g buildings are subject to the luxury vacancy decontrol provisions of Rent Stabilization Law of 1969 [Administrative Code of City of NY] § 26-504.2(a), unlike buildings that receive tax benefits pursuant to Real Property Tax Law §§ 421-a and 489. Real Property Tax Law § 421-g does not create another exemption to Rent Stabilization Law § 26-504.2(a). Supreme Court essentially interpreted Real Property Tax Law § 421-g(6)'s prefatory phrase 'Notwithstanding the provisions of any local law for [rent stabilization]' to mean 'Notwithstanding [the luxury decontrol] provisions of any local law.' However, '[a] statute or legislative act is to be construed as a whole, and all parts of an act are to be read and construed together to determine the legislative intent'... . Accordingly, the prefatory phrase, which also appears identically in RPTL 421-a(2)(f), must be read in tandem with the coverage clause of that section. The prefatory phrase and the coverage clause were both necessary to extend rent stabilization to certain dwellings in buildings receiving 421-g benefits." ***Kuzmich v. 50 Murray St. Acquisition LLC*, 2018 N.Y. Slip Op. 00336, First Dept 1-18-18**

PERSONAL INJURY.

ABUTTING LANDOWNER DEMONSTRATED IT DID NOT CREATE THE SIGN POST STUMP OVER WHICH PLAINTIFF TRIPPED ON THE PUBLIC SIDEWALK AND DID NOT HAVE NOTICE OF THE CONDITION OF THE SIDEWALK, NO COMPLAINTS OR VIOLATIONS, LANDOWNER'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED.

The First Department, reversing Supreme Court, determine defendant, owner of a building abutting the sidewalk where plaintiff fell, was entitled to summary judgment. Plaintiff alleged she tripped on a metal protrusion or sign post stump on the public sidewalk: "... [W]e find that defendant established that its employees did not create the alleged defect by submitting the deposition testimony of its part-owner that defendant performed no work to the subject section of the sidewalk

before the accident ... . The part-owner's testimony also established that defendant lacked actual or constructive notice of the alleged condition, because he testified that prior to plaintiff's accident, he was unaware of any complaints or accidents on the sidewalk, and had received no violations concerning the sidewalk ...". ***Schulman v. City of New York*, 2018 N.Y. Slip Op. 00266, First Dept 1-16-18**

PERSONAL INJURY, CONTRACT LAW.

QUESTION OF FACT WHETHER OPENING IN FLOOR OF WHICH PLAINTIFF WAS AWARE WAS OPEN AND OBVIOUS IN THIS SLIP AND FALL CASE, AND QUESTION OF FACT WHETHER THE CONTRACTOR WHICH REMOVED A TANK EXPOSING THE OPENING LAUNCHED AN INSTRUMENT OF HARM.

The First Department, over an extensive, substantive, two-justice partial dissent, determined there were questions of fact whether an opening in the floor constituted an open and obvious condition and whether the contractor (Harbour) which removed an obsolete tank, exposing the opening, was liable to plaintiff for "launching an instrument of harm." Plaintiff was working near the opening, facing away from it, when he stepped back into the opening and fell. Plaintiff had taken a picture of the opening months before and shown it to the property owner's manager. The dissenting justices argued that the contract between Harbour and the property owner did not obligate it to repair the opening which was revealed when the tank was removed and, therefore, Harbour did not breach a duty of care owed to plaintiff: "Even if Harbour's contract did not require that it cover, remediate, fill in or repair any of the floor openings resulting from its work, Harbour did not take even minimal corrective measures to protect the exposed opening in the floor after it removed the obsolete oil tank. Thus, while its removal of the tank was in fulfillment of its contractual obligation, a reasonable jury could find that Harbour's leaving an exposed and unprotected opening in the floor exposed, caused or created a dangerous condition even if previously the metal plate containing the opening was not unsafe. The dissent's view relies on cases where the defendant did not owe a duty of care because the condition the plaintiff complained of was precisely what was called for in the defendant's contract ... . There is a view of the facts that Harbour, by leaving the exposed opening without any kind of warning or minimal protection, created or caused an unsafe condition, or made the previously obscured opening in the metal plate 'less safe' than before Harbour did its work ... . Thus the issue is not whether Harbour had a contractual obligation to protect the opening, but whether by leaving the opening in the metal plate exposed it created an unreasonable risk of harm to the plaintiff." ***Farrugia v. 1440 Broadway Assoc.*, 2018 N.Y. Slip Op. 00347, First Dept 1-18-18**

SECOND DEPARTMENT

CIVIL PROCEDURE, REAL PROPERTY TAX LAW.

SUPREME COURT PROPERLY DENIED PETITIONER'S MOTION TO DISCONTINUE THE PROPERTY TAX CERTIORARI PROCEEDING WITH RESPECT TO ONE OF THE TAX PARCELS BECAUSE THE TOWN'S DEFENSE COULD BE PREJUDICED, HOWEVER SUPREME COURT SHOULD NOT HAVE ORDERED THE MERGER OF TWO TAX PARCELS BECAUSE NEITHER PARTY REQUESTED THAT RELIEF.

The Second Department, modifying Supreme Court, determined petitioner's motion for leave to discontinue its tax certiorari proceeding (seeking lower property tax assessments) with respect to one of its properties was properly denied because respondent town's ability to defend would be prejudiced. However, Supreme Court should not have order the merger of two of the tax lots because neither party had requested that relief: "A motion for leave to discontinue an action is addressed to the sound discretion of the court ... , and generally should be granted unless the discontinuance would prejudice a substantial right of another party, circumvent an order of the court, avoid the consequences of a potentially adverse determination, or produce other improper results ... . Here, the Supreme Court providently exercised its discretion in denying the petitioner's motion, since the record supports the conclusion that the requested discontinuance would prejudice the respondents' ability to defend the assessment on the remaining parcel. However, the Supreme Court improvidently exercised its discretion by, sua sponte, directing the parties to merge two of the subject tax lots. 'Generally, a court may, in its discretion, grant relief that is warranted by the facts plainly appearing on the papers on both sides, if the relief granted is not too dramatically unlike the relief sought, the proof offered supports it, and there is no prejudice to any party' ... . Here, neither party sought merger of the subject lots or similar relief, and merger of those lots could potentially be prejudicial to the petitioner." ***Matter of Catherine Commons, LLC v. Town of Orangetown*, 2018 N.Y. Slip Op. 00287, Second Dept 1-17-18**

CRIMINAL LAW, ATTORNEYS, APPEALS.

COUNTY COURT SHOULD NOT HAVE THREATENED DEFENDANT WITH THE MAXIMUM SENTENCE SHOULD SHE GO TO TRIAL, PLEA VACATED, APPELLATE COUNSEL INEFFECTIVE FOR FAILING TO RAISE ISSUE ON APPEAL, APPLICATION FOR WRIT OF CORAM NOBIS GRANTED.

The Second Department, vacating defendant's guilty plea on a writ of coram nobis, determined County Court should not have threatened defendant with the maximum sentence should she go to trial and defendant's former appellate counsel

was ineffective for failing to bring that issue up on appeal: "During discussions regarding the People's plea offer, the court initially advised the defendant that she faced a 'total maximum [of] 60 years in state prison.' Although the court acknowledged that a 'cumulative sentencing statute . . . would reduce that to probably between 30 and 40,' it later advised the defendant that '[i]f you are facing 60 years in state prison with all these counts of assault on a seven month old child then you need to discuss that offer very carefully with [defense counsel] and follow his advice.' After defense counsel advised the court that the defendant did not accept the People's plea offer, the court told the defendant, '[t]hat's fine. That's what we do here. We do trials. A case like this I would almost rather have a trial than have a plea bargaining. If this is all true there is no [sentence] short of the maximum that's appropriate that's the problem with the case. If it isn't true then the jury will so decide. That's not up to me.' Later that afternoon, the defendant accepted the People's plea offer ... .. 'In order to be valid, a plea of guilty must be entered voluntarily, knowingly, and intelligently'... . Although a court may properly comment during plea negotiations regarding a defendant's sentencing exposure upon conviction after trial, it may not explicitly threaten to sentence a defendant to the maximum term upon conviction after trial ... . Under the circumstances of this case, former appellate counsel was ineffective in failing to raise the issue that the defendant's plea of guilty was coerced by the County Court's comments ... . Since the court's remarks were impermissibly coercive, the defendant was entitled to vacatur of her plea of guilty." ***People v. Sanabria*, 2018 N.Y. Slip Op. 00316, Second Dept 1-17-18**

CRIMINAL LAW, EVIDENCE, APPEALS.

UNDER A WEIGHT OF THE EVIDENCE ANALYSIS, THE SECOND DEPARTMENT DETERMINED DEFENDANT PROVED HE WAS NOT RESPONSIBLE BY REASON OF MENTAL DISEASE OR DEFECT, CONVICTION REVERSED.

The Second Department, reversing Supreme Court, applying a weight of the evidence analysis, determined the defendant had demonstrated he was not responsible for the criminal acts by reason mental disease or defect. Both the defense and the prosecution presented expert opinion evidence on the "not responsible by reason of mental disease or defect" affirmative defense. The Second Department found that the defense expert, who was experienced in forensic examinations (the prosecution expert was not) proved the affirmative defense by a preponderance of the evidence: "In conducting our weight of the evidence review where a defendant relies solely upon the affirmative defense of mental disease or defect, we first determine whether a finding of not responsible by reason of mental disease or defect would have been reasonable. If we answer that question in the affirmative, then we must weigh conflicting testimony, review any rational inferences that may be drawn from the evidence, and evaluate the strength of such conclusions in order to decide whether the defendant met his burden of proving the affirmative defense of mental disease or defect by the preponderance of evidence ... . Given the conflicting expert opinions, as well as the witness testimony and psychiatric records, a finding of not responsible by reason of mental disease or defect would have been reasonable. Weighing the opinion of the defense expert, who was an experienced forensic psychiatrist, against the opinion of the prosecution expert, a clinical neuropsychologist with limited experience in forensics, the defense expert's opinion was more convincing, and entitled to more weight. The defense expert's opinion better accounted for the witnesses' testimony regarding their observations of the defendant's increasingly bizarre behavior and onset of mental illness which began to exhibit itself just weeks before the incident, and continued during and after the incident until the defendant was hospitalized for psychiatric treatment. The defense expert's opinion was further corroborated by the defendant's subsequent psychiatric diagnosis and history." ***People v. Hernandez-Beltre*, 2018 N.Y. Slip Op. 00307, Second Dept 1-17-18**

CRIMINAL LAW, EVIDENCE, CONSTITUTIONAL LAW.

ENTIRE JURY PANEL SHOULD NOT HAVE BEEN DISMISSED BASED UPON AN INTERACTION BETWEEN ONE POTENTIAL JUROR AND DEFENDANT'S BROTHER, DNA EVIDENCE SHOULD NOT HAVE BEEN ADMITTED THROUGH A WITNESS THAT HAD NO CONNECTION WITH THE TESTING.

The Second Department, reversing defendant's conviction, determined the entire first jury panel should not have been dismissed because of an interaction between one of the potential jurors and defendant's brother. The decision dealt substantively with several other issues: (1) affirming the denial of defendant's speedy trial motion; (2) finding the prosecution's failure to produce the Miranda card was not a Rosario violation and an adverse inference jury charge was an appropriate sanction; and (3) finding that the DNA evidence introduced by a witness who did not participate in the testing procedures violated defendant's right to confront the witnesses against him: "The Supreme Court granted the prosecutor's application to dismiss the entire jury panel, concluding that the defendant's brother had potentially tainted the entire panel. Significantly, the court did not first conduct an inquiry of the potential jurors as to what they had seen and as to whether they could remain impartial. Where, as here, a jury panel is 'properly drawn and sworn to answer questions truthfully, there must be legal cause or a peremptory challenge to exclude a [prospective] juror' ... . By dismissing the entire jury panel without questioning the ability of the individual prospective jurors to be fair and impartial ... , the court deprived the defendant of a jury chosen 'at random from a fair cross-section of the community' ... . [T]he DNA profiles and reports produced from the testing of evidence recovered from the decedent's home, including the defendant's clothing, are testimonial, because such profiles and reports 'were generated in aid of a police investigation of a particular defendant charged by an accusatory instrument and created for the purpose of substantively proving the guilt of [that] defendant,' and because all of the docu-

ments in the file of the Office of the Chief Medical Examiner refer to the defendant by name and label him a 'suspect' ... . [T]he admission of such evidence violated the defendant's confrontation right, because it was admitted upon the testimony of an analyst who did not perform, witness, or supervise the generation of the defendant's DNA profile, or perform an independent analysis on the raw data ...". ***People v. Metellus*, 2018 N.Y. Slip Op. 00312, Second Dept 1-17-18**

ELECTION LAW.

2014 COUNTY COMMITTEE OF THE CONSERVATIVE PARTY DID NOT HAVE THE AUTHORITY TO FILL VACANCIES IN THE 2016 COUNTY COMMITTEE.

The Second Department, reversing Supreme Court, determined that the 2014 County Committee (of the Conservative Party) did not have the authority to fill vacancies in the 2016 County Committee. Only the 2016 County Committee had that authority: "The filling of vacancies in a political party's county committee is governed by Election Law § 2-118, which provides, in pertinent part, that, in the case of a failure to elect a member of the committee, the vacancy created thereby shall be filled by the remaining members of the committee. Therefore, only the 2016 County Committee had the authority to fill the subject vacancies. With the election of the 2016 County Committee in the primary election, the 2014 County Committee had no further official authority, and no rule of the 2014 County Committee could extend the authority of its executive committee to continue to exercise functions in substantial matters after the members of the 2016 County Committee had been elected ... . The filling of vacancies for the 2016 County Committee was a 'substantial matter,' and therefore the actions of the 2014 Executive Committee in filling vacancies in the 2016 County Committee were improper ...". ***Matter of Brocato v. Tinari*, 2018 N.Y. Slip Op. 00286, Second Dept 1-17-18**

EMPLOYMENT LAW, HUMAN RIGHTS LAW, ADMINISTRATIVE LAW.

STATE DIVISION OF HUMAN RIGHTS' FINDING THAT PETITIONER WAS NOT SUBJECT TO A HOSTILE WORK ENVIRONMENT AND WAS NOT CONSTRUCTIVELY DISCHARGED BECAUSE OF HER SEX SUPPORTED BY THE RECORD, LIMITED COURT REVIEW POWERS EXPLAINED.

The Second Department determined the findings of the NYS Division of Human Rights (SDHR) in this sex discrimination action should not be disturbed. The SDHR found that petitioner was not subjected to a hostile work environment and was not constructively discharged because of her sex. The Second Department explained the court's limited review power in this context: "The scope of judicial review under the Human Rights Law is extremely narrow and is confined to the consideration of whether the determination of the SDHR is supported by substantial evidence in the record... . Substantial evidence 'means such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact . . . More than seeming or imaginary, it is less than a preponderance of the evidence, overwhelming evidence or evidence beyond a reasonable doubt' ... .. 'Courts may not weigh the evidence or reject [the SDHR's] determination where the evidence is conflicting and room for choice exists' ... . Here, there is substantial evidence in the record to support the Commissioner's determination that the petitioner was not subjected to a hostile work environment or constructively discharged because of her sex ...". ***Matter of Leippe v. Gerald J. Wilkoff, Inc.*, 2018 N.Y. Slip Op. 00294, Second Dept 1-17-18**

FAMILY LAW.

RECORD DID NOT SUPPORT TERMINATION OF MOTHER'S PARENTAL RIGHTS DESPITE HER VIOLATION OF TERMS OF SUSPENDED JUDGMENT.

The Second Department, reversing (modifying) Family Court, determined the record did not support the termination of mother's parental rights based on a violation of the terms of a suspended judgment: "Here, a preponderance of the evidence supported a finding that the mother failed to comply with certain conditions set forth in the suspended judgment. However, the evidence did not support the Family Court's conclusion that it was in the best interests of the children to terminate the mother's parental rights ... . ,,, [T]he testimony elicited at the hearing demonstrated that the children emphatically wanted to be with the mother, that the mother regularly visited with the children until the court suspended all contact, and that there is a strong bond between the children and their mother. Further, the mother had not used illegal substances for a substantial period of time, was committed to her recovery, regularly attended AA meetings, completed programs related to issues of anger and domestic violence, obtained an order of protection against her abuser, and engaged in mental health treatment. In addition, while the court determined that the mother violated the terms of the suspended judgment, in large part, based on a finding that she failed to comply with a provision mandating ongoing involvement in a specified parenting class, the mother completed that class prior to the conclusion of the hearing. Under these facts, we find that termination of the mother's parental rights was not in the best interests of the children ...". ***Matter of Skyler G. (Heather G.)*, 2018 N.Y. Slip Op. 00288, Second Dept 1-17-18**

FAMILY LAW, CRIMINAL LAW.

JUVENILE DELINQUENCY PETITION JURISDICTIONALLY DEFECTIVE, PETITION ALLEGING UNLAWFUL POSSESSION OF A WEAPON DISMISSED.

The Second Department, reversing Family Court, determined the juvenile delinquency petition was jurisdictionally defective and dismissed it: "For the petition, or a count thereof, to be sufficient on its face, the factual part of the petition or of any supporting depositions must set forth sworn, nonhearsay allegations sufficient to establish, if true, every element of each crime charged and the alleged delinquent's commission thereof ... . Such allegations must be set forth in the petition and/or the supporting depositions ... . The failure to comply with this requirement constitutes a nonwaivable jurisdictional defect that deprives the court of subject matter jurisdiction to entertain the petition or count ... . Here, neither the petition nor the supporting deposition provided sworn, nonhearsay allegations as to the appellant's age, which is an element of the crime of unlawful possession of weapons by persons under 16 ...". ***Matter of Ricki I.*, 2018 N.Y. Slip Op. 00291, Second Dept 1-17-18**

FAMILY LAW, IMMIGRATION LAW.

FAMILY COURT SHOULD HAVE MADE THE FINDINGS NECESSARY TO ENABLE THE CHILD TO PETITION FOR SPECIAL IMMIGRANT JUVENILE STATUS (SIJS).

The Second Department, reversing Family Court, determined Family Court should have made the findings to enable a child to petition for special immigrant juvenile status: "... [T]he record supports a finding that reunification of the child with one or both of his parents is not viable due to parental neglect and abandonment ... . The child testified that, while in El Salvador, although he was approached by gang members to join their gang during his walk to school, his parents did not make any arrangements for his transportation to and from school to ensure his safety or do anything to deter such recruitment activities although aware of such activities and the fact that a neighborhood boy, who resisted the gang's efforts, was killed while traveling to another village ... . Moreover, the child testified that his parents strongly encouraged him to leave the family home in El Salvador but did not provide alternate living arrangements and have not supported him since his arrival in New York. Accordingly, the Family Court should have granted the petitioner's motion for the issuance of an order, inter alia, making specific findings so as to enable the child to petition for SIJS. Since the record is sufficient for this Court to make its own findings of fact and conclusions of law, we find that reunification of the child with one or both of his parents is not viable due to parental neglect and abandonment." ***Matter of Nelson A. G.-L. (Maria Y. G. S.)*, 2018 N.Y. Slip Op. 00289, Second Dept 1-17-18**

FORECLOSURE.

BANK DID NOT DEMONSTRATE COMPLIANCE WITH THE NOTICE PROVISIONS OF REAL PROPERTY ACTIONS AND PROCEEDINGS LAW 1304, SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined the bank did not demonstrate compliance with the notice provisions of the Real Property Actions and Proceedings Law (RPAPL). Therefore the bank's summary judgment motion should not have been granted: "... [T]he plaintiff failed to establish, prima facie, that it complied with the requirements of RPAPL 1304 ... .. In moving for summary judgment, the plaintiff submitted the affidavit of Jason Ussery, a representative of its loan servicer, who stated that '[a]t least 90 days prior to the commencement of the action, notice was sent to Defendant by certified mail and first class mail to the last known address of the Defendant and, if different, to the residence that is the subject of the mortgage.' Ussery annexed copies of the 90-day notices mailed to the defendant, all of which contained a bar code with a 20-digit number below it, but no language indicating that a mailing was done by first-class or certified mail, or even that a mailing was done by the U.S. Postal Service ... . Moreover, Ussery did not make the requisite showing 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' ...". ***Bank of N.Y. Mellon v. Zavolunov*, 2018 N.Y. Slip Op. 00271, Second Dept 1-17-18**

FORECLOSURE.

BANK DID NOT DEMONSTRATE COMPLIANCE WITH THE NOTICE PROVISIONS OF RPAPL 1304 IN THIS FORECLOSURE ACTION, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined the bank did not demonstrate compliance with the notice provisions of Real Property Actions and Proceedings Law (RPAPL) in this foreclosure action. Therefore defendant's motion for summary judgment should have been granted: "The plaintiff failed to submit an affidavit of service or any proof of mailing by the post office demonstrating that it properly served the defendant pursuant to the terms of the statute ... . Contrary to the plaintiff's contention, the affidavit of a vice president for loan documentation of the loan servicer was insufficient to establish that the notice was sent to the defendant in the manner required by RPAPL 1304, as the loan servicer did not provide proof of a standard office mailing procedure and provided no independent proof of the actual mailing ... . The Supreme Court erred in denying the defendant's cross motion for summary judgment dismissing the complaint insofar as asserted against him based upon the plaintiff's failure to comply with RPAPL 1304. The defendant established his prima facie entitlement to judgment as a matter of law dismissing the complaint insofar as asserted against him, submitting, inter

alia, his own affidavit attesting that he did not receive any notice pursuant to RPAPL 1304 ...". ***U.S. Bank N.A. v. Henry*, 2018 N.Y. Slip Op. 00326, Second Dept 1-17-18**

FORECLOSURE, CIVIL PROCEDURE.

AFFIDAVIT OF MERIT DID NOT DEMONSTRATE THE AFFIANT HAD THE AUTHORITY TO ACT ON BEHALF OF THE BANK IN THIS FORECLOSURE ACTION, DEFAULT JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined the affidavit of merit submitted by the bank did not demonstrate the affiant had the authority to act on the bank's behalf: " 'Where, as here, a foreclosure complaint is not verified, CPLR 3215(f) states, among other things, that upon any application for a judgment by default, proof of the facts constituting the claim, the default, and the amount due are to be set forth in an affidavit made by the party' ... . Here, the plaintiff submitted an affidavit of merit executed by the Vice President of Loan Documentation for the plaintiff's purported 'servicer.' However, there is no evidence in the record demonstrating that the Vice President of Loan Documentation had the authority to act on behalf of the plaintiff. Under such circumstances, the Supreme Court should have denied those branches of the plaintiff's motion which were for leave to enter a default judgment ... and for an order of reference, with leave to renew upon proper papers ...". ***HSBC Bank USA, N.A.. v. Cooper*, 2018 N.Y. Slip Op. 00280, Second Dept 1-17-18**

FORECLOSURE, CIVIL PROCEDURE.

BANK'S MOTION FOR LEAVE TO RENEW AND REARGUE SHOULD NOT HAVE BEEN GRANTED IN THIS FORECLOSURE ACTION, CRITERIA EXPLAINED.

The Second Department, reversing Supreme Court, determined plaintiff bank's motion to renew and reargue in this foreclosure action should not have been granted: "A motion for leave to renew must be based upon new facts not offered on the prior motion that would change the prior determination and must contain reasonable justification for the failure to present such facts on the prior motion (see CPLR 2221[e][2]). While a court has discretion to entertain renewal based on facts known to the movant at the time of the original motion, the movant must set forth a reasonable justification for the failure to submit the information in the first instance ... . Renewal 'is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation' ... . A motion for leave to reargue is similarly directed to the trial court's discretion and, to warrant reargument, the moving party must demonstrate that the court overlooked or misapprehended the relevant facts or misapplied law (see CPLR 2221[d] ...). Here, ... the court, in its initial determination, did not overlook or misapprehend relevant facts or misapply the law in deciding that [the bank] had failed to meet its prima facie burden on the issue of standing, thus requiring denial of its motion ...". ***JPMorgan Chase Bank, N.A. v. Jeffrey Novis*, 2018 N.Y. Slip Op. 00281, Second Dept 1-17-18**

MEDICAL MALPRACTICE, PERSONAL INJURY, EVIDENCE, DAMAGES.

PUNITIVE DAMAGES PROPERLY SENT TO THE JURY IN THIS MEDICAL MALPRACTICE ACTION, DEFENDANT DOCTOR DESTROYED HAND WRITTEN NOTES MADE WHEN SEEING PLAINTIFF'S DECEDENT, A CHILD, WHO DIED BECAUSE OF THE DOCTOR'S FAILURE TO DIAGNOSE DIABETES.

The Second Department, in a comprehensive full-fledged opinion by Justice Leventhal, determined that plaintiff was entitled to punitive damages in a medical malpractice action stemming from the defendant doctor's (Mercado's) destruction of handwritten notes made at the time plaintiff's decedent was seen by the doctor. Plaintiff's decedent, a child, Claudialee, died as a result of Mercado's failure to diagnose diabetes: "... [W]e now hold that where, as here, a plaintiff recovers compensatory damages for a medical professional's malpractice, a plaintiff may also recover punitive damages for that medical professional's act of altering or destroying medical records in an effort to evade potential medical malpractice liability. Allowing an award of punitive damages for a medical professional's act of altering or destroying medical records in an effort to evade potential medical malpractice liability will serve to deter medical professionals from engaging in such wrongful conduct, punish medical professionals who engage in such conduct, and express public condemnation of such conduct. Thus, the Supreme Court did not err in submitting the issue of punitive damages to the jury ...". ***Gomez v. Cabatic*, 2018 N.Y. Slip Op. 00278, Second Dept 1-17-18**

REAL PROPERTY LAW, RELIGION.

DEFENDANT CHURCH DID NOT HAVE ANY INTEREST THE CONTESTED REAL PROPERTY UNDER THE PROVISIONS OF A CORRECTED DEED AND THE CANONS OF THE EPISCOPAL CHURCH.

The Second Department, interpreting both real estate law and the canons of the Protestant Episcopal Church, determined a corrected deed superseded the deed which indicated the property was held in trust for defendant church, St. Matthias. St. Matthias had separated from the Episcopal Church and both the corrected deed and the applicable canons eliminated St. Matthias's property rights: "The 1905 corrected deed removed any language indicating that the property was being held in trust for the congregation of St. Matthias. Where a deed of correction has been obtained, the corrective deed will control and the title of the grantee will be determined by the new grant ... . The 1905 deed superseded the 1904 deed and was controlling. Even if the 1905 deed did not supersede the 1904 deed, the Supreme Court was correct in holding that the ownership of the

property vested in the [plaintiff] upon the separation of St. Matthias ... from the Episcopal Church pursuant to the applicable canons of the ... National Church ... and the plaintiff Episcopal Diocese of Long Island ... . By accepting the principles of the National Church and the Diocese for approximately 100 years, the defendants were subject to their canons, rules, and practices ...". ***Episcopal Diocese of Long Is. v. St. Matthias Nondenominational Ministries, Inc.*, 2018 N.Y. Slip Op. 00276, Second Dept 1-17-18**

REAL PROPERTY TAX, MUNICIPAL LAW, CONSTITUTIONAL LAW (NY).

IN A COMPREHENSIVE AND METICULOUS DECISION, THE SECOND DEPARTMENT, AFTER ANALYZING THE LAYERS OF APPLICABLE CONSTITUTIONAL AND STATUTORY AUTHORITY, DETERMINED NASSAU COUNTY WAS AUTHORIZED TO BASE REAL PROPERTY TAX ASSESSMENTS ON THE INCOME GENERATED BY THE PROPERTY.

The Second Department, in a comprehensive and meticulous decision, determined Nassau County had the authority to enact a Local Law which required income-property owners to disclose the income generated by the property to the county for real property tax assessments. The decision, which is too detailed to summarize here, goes through all the conceivable layers of constitutional (including the Municipal Home Rule Law) and statutory authority which authorized the income-based property tax assessments: "... [The] provisions of the Nassau County Charter constitute an express and unambiguous delegation of the authority to make and prepare real property tax assessments from the State Legislature to Nassau County in accordance with the NY Constitution ... . Since Local Law 8-2013 unquestionably relates to the authority to make and prepare tax assessments, and since the County Legislature has the authority to enact local laws related to that purpose, the Supreme Court properly declared that the defendants were authorized to enact and enforce Local Law 8-2013." ***Boening v. Nassau County Dept. of Assessment*, 2018 N.Y. Slip Op. 00272, Second Dept 1-17-18**

THIRD DEPARTMENT

CRIMINAL LAW, APPEALS.

FEDERAL DRUG CONSPIRACY CONVICTION CANNOT BE USED AS A PREDICATE FELONY FOR SECOND FELONY OFFENDER ADJUDICATION, ILLEGAL SENTENCE NEED NOT BE PRESERVED FOR APPEAL BY OBJECTION.

The Third Department noted that a federal drug conspiracy conviction cannot be used as a predicate felony for a second felony offender adjudication and remitted for resentencing. The defendant had pled guilty to attempted criminal sale of a controlled substance and was sentenced to probation. When he violated the terms of probation he was sentenced to prison as a second felony offender. The Third Department noted that an illegal sentence issue need not be preserved for appeal by objection: "Defendant … contends that his federal drug conspiracy conviction does not qualify as a predicate New York felony and, therefore, it cannot serve as a basis for his second felony drug offender adjudication. Although this claim is being raised for the first time on appeal, we find that the claim 'falls within the narrow exception to our preservation rule permitting appellate review when a sentence's illegality is readily discernible from the . . . record'... . In the special information charging a predicate offense, the People alleged that defendant was previously convicted in the US District Court for the Northern District of New York of conspiracy to distribute marihuana (21 USC §§ 841, 846). However, the Court of Appeals has determined that, 'under New York's 'strict equivalency' standard for convictions rendered in other jurisdictions, a federal conviction for conspiracy to commit a drug crime may not serve as a predicate felony for sentencing purposes' ... . We therefore vacate the sentence and remit the matter to County Court for resentencing ...". ***People v. Sumter*, 2018 N.Y. Slip Op. 00354, Third Dept 1-18-17**

FAMILY LAW, IMMIGRATION LAW.

FAMILY COURT SHOULD HAVE MADE FINDINGS ENABLING THE CHILD TO APPLY FOR SPECIAL IMMIGRANT JUVENILE STATUS (SIJS), STATUTORY PROCESS LEADING TO IMMIGRATION DETERMINATION BY DEPARTMENT OF HOMELAND SECURITY EXPLAINED.

The Third Department, reversing Family Court, in a full-fledged opinion by Justice Lynch, determined the child was entitled to findings which would enable him to apply for special immigrant juvenile status. The court explained the relevant steps in the immigration process: "In November 2015, Family Court granted the petition of Ericza K. and appointed her as the permanent guardian of her brother, Jose YY., born in 2000 (hereinafter the child). In April 2016, the child moved for a threshold order that would enable him to petition the United States Citizenship and Immigration Services (hereinafter USCIS) for special immigrant juvenile status (hereinafter SIJS) which, in turn, would enable him to obtain lawful permanent residency in the United States ... . A child seeking SIJS from USCIS must first obtain a special findings order from a state court with jurisdiction over the juvenile, which must determine that (1) the child is under 21 years of age, (2) the child is unmarried, (3) the child is dependent upon a juvenile court or legally committed to an individual appointed by that court, (4) reunification with one or both parents is not viable due to abuse, neglect, abandonment or a similar basis under state law,

and (5) it would not be in the child's best interests to be returned to his or her native country ... . Upon such an application, the role of Family Court is to render specific findings as to the above criteria, with the ultimate determination as to whether to grant SIJS to a child to be made by USCIS and its parent agency, the Department of Homeland Security ... . Correspondingly, it is not Family Court's role to render an immigration determination ... . * * * .. . [W]e conclude, upon our independent review of the record, that returning the child to Honduras would not be in his best interests ... . The child testified that his father died in 2003 and his mother in 2012, and their death certificates are consistent with such testimony. After his mother's death, he lived with an older sister who operated a billiards business, where the child was fearful and exposed to people smoking, drinking and using cocaine in his presence. That sister has since relocated to Virginia, and the child no longer has family residing in Honduras. In sharp contrast, his guardian has provided a stable home for the child where he feels safe and is attending school ... ". ***Matter of Jose YY. (Ericza K.)*, 2018 N.Y. Slip Op. 00375, Third Dept 1-18-18**

WORKERS' COMPENSATION LAW.

ALTHOUGH CLAIMANT RETURNED TO WORK AT FULL PAY, SHOULD SHE STOP WORK IN THE FUTURE SHE WAS ENTITLED TO 375 WEEKS OF BENEFITS FOR PERMANENT PARTIAL DISABILITY WHICH RESULTED IN A 70% LOSS OF WAGE-EARNING CAPACITY.

The Third Department determined claimant was entitled to 375 weeks of benefits for a permanent partial disability which resulted in a 70% loss of wage-earning capacity (should she stop working), even though she returned to work at full pay: "Following a hearing, a Workers' Compensation Law Judge (hereinafter WCLJ) classified claimant with a permanent partial disability and found that she had a 70% loss of wage-earning capacity and would be entitled to wage loss benefits for 375 weeks should she stop working ... . The employer appealed from the decision and argued that claimant could not be found to have a loss of wage-earning capacity given that she had returned to work and was earning her preaccident wages. The Workers' Compensation Board disagreed and affirmed, prompting this appeal. We affirm. Loss of wage-earning capacity is set at the time of classification and refers to 'the maximum number of weeks over which a claimant with a permanent partial disability is entitled to receive benefits' ... .. As such, 'despite the fact that [a] claimant [is] working at full wages, the Board [is] entitled to establish . . . loss of wage-earning capacity, which sets a fixed durational limit on potential benefits in the event that [a] claimant incurs a subsequent reduction of wages as the result of his [or her] work-related injuries' ... . The Board's decision falls squarely within this rule, and the employer's argument that this Court has left any ambiguity on the issue is without merit ...". ***Matter of Oyola v. New York City Dept. of Sch. Food & Nutrition Servs.*, 2018 N.Y. Slip Op. 00368, Third Dept 1-18-18**

WORKERS' COMPENSATION LAW.

EVEN THOUGH THE INJURED EMPLOYEE WORKED ONLY SPORADICALLY AND AS NEEDED AND WORKED ONLY 16 DAYS IN THE RELEVANT 52 WEEK PERIOD, HIS BENEFITS MUST STILL BE CALCULATED BY MULTIPLYING HIS DAILY WAGE BY 200.

The Third Department determined the mandated technique for computing lost wages applied even though the employee worked only sporadically as needed. The employee had worked only 16 days during the 52-week period but was entitled to benefits calculated at 200 times his daily wage: "Where, as here, Workers' Compensation Law § 14 (3) applies, an employee's annual average earnings must be computed based on 'such sum as . . . shall reasonably represent the annual earning capacity of the injured [claimant] in the employment in which he [or she] was working at the time of [his or her] accident [and] consist of not less than two hundred times the average daily wage or salary which he [or she] shall have earned in such employment during the days when so employed.' That total is then divided by 52 weeks to reach the average weekly wage ... . 'However, the 200 multiple method is properly used to compute the average weekly wage of a part-time or intermittent [claimant] only where there has been a finding that the [claimant] was fully available for the employment at issue, and should not be applied if a claimant has voluntarily limited his or her availability for work'... . Here, the record establishes that claimant worked for the employer sporadically and on an as-needed basis in the 52-week period before the accident. Although the employer submitted checks that related to additional earnings by claimant during the 52-week period, no evidence was presented to demonstrate that claimant voluntarily limited his availability for work with the employer. Absent such evidence, the Board's use of the 200 multiplier in determining claimant's average weekly wage is supported by substantial evidence and will not be disturbed ... . 'While the result [herein] appears to be contrary to [Workers' Compensation Law § 15 (6) (a),] which provides that compensation when combined with decreased earnings or earning capacity shall not exceed the wages the employee was receiving at the time of the accident, it is the result reached by using the formula set forth in [Workers' Compensation Law § 14 (3)] which has been considered a legislative mandate' ...". ***Matter of Bain v. New Caps*, LLC, 2018 N.Y. Slip Op. 00369, Third Dept 1-18-18**

WORKERS' COMPENSATION LAW.

THE BOARD'S CONCLUSION, BASED UPON EXPERT TESTIMONY, THAT CLAIMANT'S STROKE WAS CAUSED BY PRE-EXISTING MEDICAL CONDITIONS AND NOT THE WORK CONDITIONS AT THE TIME OF THE STROKE WAS SUPPORTED BY SUBSTANTIAL EVIDENCE AND THEREFORE CANNOT BE DISTURBED ON APPEAL.

The Third Department determined there was substantial evidence, in the form of expert testimony, that claimant's stroke was caused by pre-existing medical conditions and not the particular conditions of work on the day the stroke happened. Because there existed substantial evidence to support the Workers' Compensation Board's ruling, the court cannot disturb it: "Claimant's medical expert, Lester Ploss, opined that claimant's stroke was causally-related to his employment given that, on the day of his stroke, claimant had a prolonged lack of sleep, was under time constraints to drive to Pennsylvania and performed very arduous labor while teaching a class. The record, however, establishes that on a regular work day, claimant awoke around 2:00 a.m., drove to work in the Bronx and worked from approximately 4:00 a.m. until 1:30 p.m. cutting meat. Although claimant drove to Pennsylvania on the day in question, the record establishes that he worked substantially the same hours as a normal work day. In addition, the general manager testified that the drive to Pennsylvania was divided and included stops along the way. Furthermore, although claimant did not typically teach, the manner of cutting meat was substantially similar to his regular duties in the Bronx, where he did assist others in their technique of cutting meat. Naunihal Singh, a neurologist who reviewed claimant's medical records, opined that claimant's stroke was not related to any aspect of employment but was a direct result of claimant's preexisting medical conditions, including hypertension, cognitive heart failure, cardiomegaly and an irregular heart. The Board's decision was based upon the credibility, or lack thereof, of the medical testimony with regard to the events leading to claimant's stroke. Inasmuch as this Court defers to the credibility determinations of the Board with regard to medical evidence and witness testimony, we find that there is substantial evidence in the record to support the Board's decision that claimant's stroke did not arise out of or in the course of his employment ...". ***Matter of Devis v. Mountain States Rosen LLC*, 2018 N.Y. Slip Op. 00370, Third Dept 1-18-18**

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