CasePrepPlus

February 28, 2018

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COURT OF APPEALS

CIVIL PROCEDURE.

COMPULSORY COUNTERCLAIM IN FEDERAL ACTION WAS NOT RAISED, FEDERAL CLAIM PRECLUSION RULES PROHIBITED A SUBSEQUENT STATE ACTION BASED UPON THE COUNTERCLAIM.

The Court of Appeals, in a full-fledged opinion by Judge Garcia, over a two-judge concurring opinion and a dissenting opinion, determined that the failure to raise a compulsory counterclaim in a federal action precluded a subsequent state action based upon the same counterclaim. In the federal action, investors sued Paramount pictures for securities fraud (federal question), common law fraud (state question) and unjust enrichment (state question). Paramount did not make any counterclaims, relying on a contractual waiver of liability (covenant not to sue). The federal district court found the waiver was binding and dismissed the investors' actions. Then Paramount sued in state court, seeking $8 million in attorney's fees. The opinions, dealing in depth with the underpinnings of claim preclusion and issue preclusion, as well as the applicability of federal law in this context, cannot be fairly summarized here: "Pursuant to federal principles of claim preclusion — the applicable rules of decision in this case (Semtek, 531 US at 507) — Paramount's covenant not to sue claim is transactionally related to the investors' claims in the federal case, amounting to the same 'claim' for purposes of res judicata. As such, Paramount's claim should have been asserted in the parties' prior federal action. Because it was not, it is now barred." ***Paramount Pictures Corp. v. Allianz Risk Transfer AG*, 2018 N.Y. Slip Op. 01150, CtApp 2-20-18**

MUNICIPAL LAW, UTILITIES, IMMUNITY.

COMPLAINTS AGAINST LONG ISLAND ELECTRIC POWER PROVIDERS STATED CAUSES OF ACTION FOR NEGLIGENCE IN FAILING TO SHUT DOWN POWER BEFORE LANDFALL BY HURRICANE SANDY, DEFENDANTS DID NOT DEMONSTRATE THEY WERE ENTITLED TO GOVERNMENTAL IMMUNITY AT THIS PRE-ANSWER STAGE.

The Court of Appeals, in a full-fledged opinion by Judge Stein, over a two-judge concurring opinion, determined that the complaints stated causes of action against the Long Island Power Authority (LIPA), Long Island Lighting Company (LILCO), and National Grid Electric Services LLC based upon defendants' failure to shut down the power in advance of landfall by Hurricane Sandy. Plaintiffs alleged the failure to shut down the power resulted in fires which destroyed their property. The complaints alleged the defendants acted in a proprietary, not governmental, capacity and therefore were not entitled to governmental immunity. The Court of Appeals held that the defendants, at this pre-answer stage, had not met their burden of demonstrating their actions were governmental: "Defendants moved to dismiss the amended complaints pursuant to CPLR 3211 (a) (7) insofar as asserted against them on the ground that LIPA was immune from liability based on the doctrine of governmental function immunity, and that LILCO and National Grid were entitled to the same defense. Specifically, LIPA argued, among other things, that the actions challenged were taken in the exercise of its governmental capacity and were discretionary, and, even if they were not discretionary, plaintiffs' failure to allege a special duty in the complaints amounted to a failure to state viable claims. Plaintiffs opposed the motions on the ground that defendants' actions were proprietary, not governmental, and that special duty rules did not apply. Supreme Court denied the motions to dismiss in three substantially similar orders. * * * ... . [P]laintiffs' allegations concern the provision of electrical power by defendants, a service that traditionally has been provided by private entities in the State of New York. In fact, LIPA itself was created to replace LILCO which, at the time, was an 'investor owned utility' (Public Authorities Law § 1020-a). This takeover was anomalous and, when the legislation creating LIPA was enacted, the New York State Public Service Commission — the agency charged with ensuring safe and reliable utility service throughout the State — observed that, '[i]n New York State we have generally adopted a system of private ownership subject to close regulation' ... . [W]e cannot say, as a matter of law based only on the allegations in the amended complaints, as amplified, that LIPA was acting in a governmental, rather than a proprietary, capacity when engaged in the conduct claimed to have caused plaintiffs' injuries." ***Connolly v. Long Is. Power Auth.*, 2018 N.Y. Slip Op. 01148, CtApp 2-20-18**

SECURITIES, DEBTOR-CREDITOR, CORPORATION LAW.

INDENTURE TRUSTEE STATED CAUSES OF ACTION FOR FRAUDULENT CONVEYANCES UNDER A VEIL-PIERCING THEORY, COMPLAINT ALLEGED FRAUDULENT REDEMPTIONS SIPHONED OFF ASSETS LEAVING CORPORATE OBLIGORS UNABLE TO PAY NOTEHOLDERS.

The Court of Appeals, in a full-fledged opinion by Judge Rivera, affirmed the appellate division's ruling that the complaint by an indenture trustee stated causes of action on behalf of noteholders for fraudulent conveyances under a corporate veil-piercing theory. The court explained the issues before it as follows: "On this appeal we must determine whether an indenture trustee may seek recovery on behalf of noteholders for defendants' alleged fraudulent redemptions intended to siphon off assets, leaving corporate obligors unable to pay the noteholders. The indenture at issue authorizes the trustee to "pursue any available remedy to collect . . . the payment of principal, premium, if any, and interest on the Notes," and thus empowers that trustee to proceed at law and in equity to recover losses incurred by all noteholders from the unpaid notes. As such, the trustee may assert causes of action to recover pro-rata losses caused by defendants' scheme to render the note debtor insolvent. The trustee may also seek to pierce the corporate veil and impose corporate obligations on defendants under an alter ego theory of liability based on properly pleaded factual allegations — here that defendants created, for unlawful purposes, a corporate structure over which they exercised complete control and domination, and which they used to incur corporate debt so they could distribute the loan proceeds to themselves through fraudulent transfers, leaving the corporation unable to pay its creditors. * * * The [appellate division properly] concluded that the relevant language of the indenture 'confers standing on the trustee to pursue . . . the fraudulent conveyance and other . . . claims, which seek recovery solely of the amounts due under the notes, for the benefit of all noteholders on a pro rata basis, as a remedy for an alleged injury suffered ratably by all noteholders by reason of their status as noteholders' ... . The court also [properly] found that the complaint sufficiently states a cause of action against these defendants under a veil-piercing theory ...". ***Cortlandt St. Recovery Corp. v. Bonderman*, 2018 N.Y. Slip Op. 01149, CtApp 2-20-18**

FIRST DEPARTMENT

CRIMINAL LAW.

DEFENSE COUNSEL, DURING VOIR DIRE, RELIED ON THE PEOPLE'S REPRESENTATION THAT THE COMPLAINANT WOULD NOT TESTIFY, BEFORE OPENING STATEMENTS DEFENSE COUNSEL WAS INFORMED THE COMPLAINANT WOULD TESTIFY, NEW TRIAL ORDERED.

The First Department, reversing defendant's conviction, determined defense counsel had relied, during voir dire, on the People's representation that the complainant could not be located and would not testify. After voir dire, but before opening statements, defense counsel was informed the complainant had been found and would testify: "The People had omitted the complainant from their witness list because they were unable to locate him in the two years between the incident and the trial. However, after the jury was selected, and just before opening arguments, they advised the court that they had located the complainant, and the court permitted him to testify the next day. Defense counsel clearly 'relied to her detriment on her expectation that the People would not call this witness,' the sole eyewitness to the incident, and was substantially prejudiced by the change of course... . Defense counsel had used voir dire to question jurors about other issues, including their ability to evaluate videotape evidence, believing that this would be the main evidence in the case, and she had not questioned prospective jurors about their ability to impartially evaluate a victim's testimony. In addition, because the defense had represented to the jury during voir dire that no complainant would appear, the complainant's appearance at trial would undermine the defense's credibility. Thus, as counsel pointed out, her questioning and selection of jurors was geared entirely to a trial without the complainant's testimony, and was totally unsuited to a trial with his testimony." ***People v. Kyser*, 2018 N.Y. Slip Op. 01160, First Dept 2-20-18**

CRIMINAL LAW.

JURY SHOULD HAVE BEEN INSTRUCTED ON THE JUSTIFICATION DEFENSE, THERE WAS EVIDENCE THE DECEDENT WAS ADVANCING TOWARD DEFENDANT, THROWING PUNCHES AND TRYING TO GRAB THE GUN DEFENDANT WAS HOLDING.

The First Department, in a full-fledged opinion by Justice Richter, over a two-justice dissent, determined that the request that the jury be instructed on the justification defense in this manslaughter case should have been granted. There was evidence that the decedent, Cabbagestalk, was aggressively striking the defendant and trying to grab a gun defendant was holding: "... [A] jury could conclude that defendant reasonably believed that Cabbagestalk, who was younger and taller than defendant, and just two feet away, would gain control of defendant's gun ... . A jury could also reasonably conclude that Cabbagestalk's statement to defendant — '[Y]ou going to pull a gun out, you better use it' — constituted a threat that if defendant did not use the gun, Cabbagestalk would take the gun and use it to shoot defendant. This is particularly true in light of the evidence that Cabbagestalk was advancing toward defendant, throwing punches at his face, and grabbing for the gun at the same time he made the threat." ***People v. Brown*, 2018 N.Y. Slip Op. 01173, First Dept 2-20-18**

CRIMINAL LAW, EVIDENCE.

VIOLATION OF PROBATION DETERMINATION CANNOT BE BASED SOLELY ON GRAND JURY MINUTES, WHICH CONSTITUTE HEARSAY, PROBATION REINSTATED.

The First Department, reversing Supreme Court and reinstating defendant's sentence of probation, determined the finding that defendant had violated a condition of probation was improperly based entirely on grand jury minutes, which constituted hearsay: "A finding, by a preponderance of the evidence, that a defendant has violated a condition of probation ... may not be based on hearsay evidence alone ... . Here, on several occasions during the probation revocation hearing, the court indicated that its determination that defendant had violated probation by traveling outside the jurisdiction without permission, and by failing to lead a law abiding life, was based solely on the grand jury minutes related to his 2012 indictment (which was dismissed for lack of jurisdiction and did not result in a conviction) ... . One of these statements, in which the court stated that 'the government prevailed by the properly unsealed and complete [g]rand [j]ury minutes,' occurred directly after defense counsel explicitly argued that the court could not base a finding of a violation solely on the grand jury minutes, which constituted hearsay. Based on this record, regardless of whether there was other evidence in the record that might have satisfied the requirement for 'a residuum of competent legal evidence' ... , we are compelled to find that the court's determination was based on hearsay alone and therefore cannot stand." ***People v. Hubel*, 2018 N.Y. Slip Op. 01154, First Dept 2-20-18**

INSURANCE LAW, PERSONAL INJURY.

RESPONDENT FELL USING A WALKER TO GET OFF A BUS, HER INJURY RESULTED FROM USE OR OPERATION OF A MOTOR VEHICLE, NO-FAULT BENEFITS PROPERLY AWARDED.

The First Department determined no-fault benefits were properly awarded to respondent, who fell using a walker to exit a bus. Although the lift device was used when respondent got on the bus, the driver refused to activate the lift device when respondent got off. Respondent's injury was deemed to stem from the use or operation of a motor vehicle: "Here, the bus driver activated the lift device of the bus to assist Valerie Mathis when she boarded the bus. Subsequently, when she was exiting the bus, the bus driver refused to activate the lift device or to lower the bus. As a result, she was forced to place her walker out in the street, and then fell over while attempting to exit the bus. Thus, the arbitrator and master arbitrator rationally found that the bus was a 'proximate cause' of the injury and that the accident involved the "use or operation" of a motor vehicle within the meaning of Insurance Law § 5104(a)." ***Matter of New York City Tr. Auth. v. Physical Medicine & Rehab of NY PC*, 2018 N.Y. Slip Op. 01260, First Dept 2-22-18**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

UNSECURED, DAMAGED LADDER WOBBLED AND PLAINTIFF FELL, PLAINTIFF'S SUMMARY JUDGMENT MOTION ON HIS LABOR LAW § 240(1) CAUSE OF ACTION PROPERLY GRANTED.

The First Department determined plaintiff's motion for summary judgment on the Labor Law § 240(1) cause of action was properly granted. Plaintiff testified the ladder he was using was unsecured and damaged. The ladder wobbled causing plaintiff to fall: "[Defendant's] submission of an ambiguous affidavit from plaintiff's supervisor was insufficient to rebut plaintiff's prima facie showing. Notably, the supervisor did not address the fact that he was at the scene of the accident shortly after plaintiff fell, and provided only vague references to other available ladders, without addressing plaintiff's testimony that other workers were using those ladders ... . Furthermore, [defendant's] argument that questions of fact exist as to whether plaintiff was the sole proximate cause of his accident is unavailing given that [defendant] failed to make a showing that adequate safety devices were provided to plaintiff ...". ***Pena v. Jane H. Goldman Residuary Trust No. 1*, 2018 N.Y. Slip Op. 01255, First Dept 2-22-18**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

LADDER MOVED FOR NO APPARENT REASON, PLAINTIFF ENTITLED TO SUMMARY JUDGMENT ON HIS LABOR LAW § 240(1) ACTION.

The First Department determined plaintiff's summary judgment motion on his Labor Law § 240(1) action was properly granted. Plaintiff alleged the ladder he was standing on suddenly moved: "Plaintiff established his entitlement to partial summary judgment on the Labor Law § 240(1) claim through his testimony that he was caused to fall to the ground when the unsecured ladder on which he was standing suddenly shifted and kicked out from underneath him ... . Defendants' opposition failed to raise a triable issue of fact. None of coworkers who provided affidavits actually witnessed plaintiff fall from the ladder, and they did not contradict his testimony that the ladder suddenly moved. Although defendants also submitted an unsworn accident report containing a statement from a coworker that plaintiff lost his balance and fell, this did not contradict plaintiff's consistent testimony that he fell because the ladder suddenly moved... .. Furthermore, defendants' reliance on O'Brien v. Port Auth. of N.Y. & N.J. (29 NY3d 27 [2017]) is misplaced because that case, which found an issue of fact about whether a slippery exterior staircase provided adequate protection to the plaintiff, left intact the presumption

that Labor Law § 240(1) is violated where, as here, a ladder collapses or malfunctions for no apparent reason ...". ***Rom v. Eurostruct, Inc.*, 2018 N.Y. Slip Op. 01262, First Dept 2-22-18**

SECOND DEPARTMENT

CONTRACT LAW, CIVIL PROCEDURE.

ALLEGATIONS IN COMPLAINT AND AFFIDAVIT SUBMITTED IN RESPONSE TO A MOTION TO DISMISS MUST BE TREATED AS TRUE, PLAINTIFF RAISED A QUESTION OF FACT WHETHER RELEASE PROCURED BY FRAUD.

The Second Department determined defendants' motion to dismiss the complaint in this personal injury action, based upon a release signed by the plaintiff, was properly denied. Plaintiff submitted an affidavit which, together with the complaint, raised the issue whether the release was procured by fraud: " 'In resolving a motion for dismissal pursuant to CPLR 3211(a)(5), the plaintiff's allegations are to be treated as true, all inferences that reasonably flow therefrom are to be resolved in his or her favor, and where, as here, the plaintiff has submitted an affidavit in opposition to the motion, it is to be construed in the same favorable light' ... . 'A party may move for judgment dismissing one or more causes of action asserted against him on the ground that . . . the cause of action may not be maintained because of . . . [a] release' (CPLR 3211[a][5]). However, a motion pursuant to CPLR 3211(a)(5) to dismiss a complaint on the basis of a release 'should be denied where fraud or duress in the procurement of the release is alleged' ... . Here, in support of their motion to dismiss the complaint, the defendants submitted an affidavit of their insurance carrier's claims representative and a copy of the release signed by the plaintiff, which, by its terms, barred the instant action against them ... . In opposition, however, the plaintiff's allegations were sufficient to raise a question of fact as to whether the defendants procured the release by fraud, whether the release was signed by the plaintiff under circumstances which indicate unfairness, and whether it was 'not fairly and knowingly made' ...". ***Sacchetti-Virga v. Bonilla*, 2018 N.Y. Slip Op. 01210, Second Dept 2-21-18**

CONTRACT LAW, REAL ESTATE.

PLAINTIFF'S SILENCE COUPLED WITH GOING FORWARD TO ENTER THE LEASE CONSTITUTED ACCEPTANCE OF THE REAL ESTATE BROKER'S COUNTEROFFER FOR THE BROKERAGE FEE.

The First Department determined plaintiff's silence after defendant real estate broker's counteroffer for the brokerage fee, coupled with plaintiff's going ahead to enter the lease procured by the broker, constituted acceptance of the counteroffer: "… [T]he plaintiff established, prima facie, its entitlement to a judgment declaring that the brokerage commission due was five percent of the rent for the first five years of the lease agreement by submitting evidence that the defendant did not reject the counteroffer, but instead proceeded to have its client enter into the lease agreement. 'While mere silence, when not misleading, cannot be construed as acceptance, a counteroffer may be accepted by conduct'... . The defendant's conduct of moving forward with the lease agreement upon receiving the plaintiff's counteroffer established that the objective manifestation of the parties' intent was an agreement to the brokerage rate set forth in the counteroffer ...". ***Gator Hillside Vil., LLC v. Schuckman Realty, Inc.*, 2018 N.Y. Slip Op. 01178, Second Dept 2-21-18**

CRIMINAL LAW, ATTORNEYS.

DEFENDANT DEMONSTRATED HE WOULD NOT HAVE PLED GUILTY HAD HIS COUNSEL TOLD HIM DEPORTATION WAS MANDATORY, CONVICTION REVERSED.

The Second Department, reversing defendant's conviction, determined defendant demonstrated a reasonable probability that he would not have pled guilty had he been told by his attorney that deportation was mandatory: "... [W]e agree with the defendant's contention that the legal representation he received at the plea proceeding was deficient inasmuch as the plea minutes show that the defendant's counsel, who was aware that the defendant was a noncitizen, advised him only that pleading guilty to a drug felony '*may* affect his [immigration] status' (emphasis added). Such advice was erroneous given that a felony drug conviction involving cocaine made the defendant's deportation mandatory ... , and where, as here, the deportation consequence is clear, counsel's duty to give correct advice is equally clear ... . In order for the defendant to obtain vacatur of his plea of guilty based on a Padilla violation, he must also establish that 'there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial' ... . The Supreme Court, in its report, expressed the view that the evidence in the record, as supplemented by the defendant's testimony at the hearing conducted upon remittal, evinced a reasonable probability that the defendant would not have pleaded guilty but for counsel's incorrect advice regarding the immigration consequences of his plea, and would have insisted instead on going to trial. We agree, and discern no reason to disturb the credibility determinations made by the court ...". ***People v. Loaiza*, 2018 N.Y. Slip Op. 01201, Second Dept 2-21-18**

FAMILY LAW.

NO CAUSAL CONNECTION BETWEEN FATHER'S MENTAL ILLNESS AND ACTUAL OR POTENTIAL HARM TO THE CHILD, NEGLECT FINDING VACATED.

The Second Department, reversing Family Court, determined that a causal connection between father's mental illness and actual or potential harm to the child (Kyle) had not been demonstrated. The neglect finding was vacated: "While parental neglect may be based on mental illness, proof of a parent's mental illness alone will not support a finding of neglect ... . Rather, the petitioner must adduce evidence sufficient to 'establish a causal connection between the parent's condition, and the actual or potential harm to the [child]'... . In this case, we agree with the father and the attorney for the children that ACS [Administration for Children's Services] failed to establish that there was a causal connection between the father's mental illness and any actual or potential harm to Kyle ... . The evidence did not establish that the father's mental illness, for which he was receiving treatment, precluded him from being able to care for Kyle, or placed Kyle's physical, mental, or emotional condition in imminent danger of becoming impaired ...". ***Matter of Geoffrey D. (Everton D.)*, 2018 N.Y. Slip Op. 01185, Second Dept 2-21-18**

FAMILY LAW.

PATERNITY PETITION SHOULD HAVE BEEN DISMISSED ON EQUITABLE ESTOPPEL GROUNDS IN THIS ARTIFICIAL INSEMINATION CASE.

The Second Department, reversing Family Court, determined the paternity petition should have been dismissed on equitable estoppel grounds. Petitioner provided semen for the artificial insemination of mother, who is married to her same sex partner. The artificial insemination was not done by a doctor in accordance with Domestic Relations Law § 73, so the statutory presumption of legitimacy did not apply. The parties agreed in a "Three-Party Donor Contract" that the petitioner would not have parental rights or responsibilities: "... [I]t is undisputed that all of the parties intended that the petitioner would not be a parent to the child, even if they did contemplate some amount of contact after birth. The petitioner was not present at the child's birth, and was not named on her birth certificate. Despite the fact that he was undeniably aware of the child's birth and his possible claim to paternity, the petitioner waited more than three years to assert his claim of parentage. During that time, the child has lived with and been cared for exclusively by the respondents, each of whom has developed a loving parental relationship with her. Although the petitioner asserts that he has had some contact with the child, he does not claim that he has developed a parental relationship with the child or that she recognizes him as a father. Significantly, the petitioner acknowledges that he does not actually seek a parental role, only that he wants a legal right to visitation with the child. Under these circumstances, we find that a hearing was unnecessary, and it is in the child's best interests to dismiss the paternity petition on the ground of equitable estoppel ... Under the particular circumstances presented here, it would be unjust and inequitable to disrupt the child's close parental relationship with each of the respondents and permit the petitioner take a parental role when he has knowingly acquiesced in the development of a close relationship between the child and another parent figure ...". ***Matter of Joseph O. v. Danielle B.*, 2018 N.Y. Slip Op. 01192, Second Dept 2-21-18**

FORECLOSURE, EVIDENCE.

ALTHOUGH THE BANK'S MOTION FOR SUMMARY JUDGMENT WAS NOT OPPOSED, SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED, THE BANK DID NOT DEMONSTRATE STANDING WITH EVIDENCE ADMISSIBLE UNDER THE BUSINESS RECORDS EXCEPTION TO THE HEARSAY RULE.

The Second Department, reversing Supreme Court, determined plaintiff bank's unopposed motion for summary judgment in this foreclosure action should not have been granted. Defendants raised the issue of plaintiff's standing in their answer to the complaint. The bank's proof of standing was not admissible under the business records exception to the hearsay rule: " 'A plaintiff establishes its standing in a mortgage foreclosure action by demonstrating that it is the holder or assignee of the underlying note at the time the action is commenced' ... . 'Either a written assignment of the underlying note or the physical delivery of the note prior to the commencement of the foreclosure action is sufficient to transfer the obligation' ... . The plaintiff attempted to establish its standing by submitting an affidavit of Jillian Thrasher, a contract management coordinator at Ocwen Loan Servicing, LLC (hereinafter Ocwen), the plaintiff's loan servicer. Thrasher averred, in relevant part, that her affidavit was based upon her review of Ocwen's business records, and that upon review of such records, the note was physically transferred to the plaintiff on December 1, 2006. The plaintiff failed to demonstrate that the records relied upon by Thrasher were admissible under the business records exception to the hearsay rule (see CPLR 4518[a]) because Thrasher, an employee of Ocwen, did not attest that she was personally familiar with the plaintiff's record-keeping practices and procedures ...". ***US Bank N.A. v. Ballin*, 2018 N.Y. Slip Op. 01212, Second Dept 2-21-18**

FORECLOSURE, EVIDENCE, REAL PROPERTY ACTIONS AND PROCEEDINGS LAW.

BANK DID NOT DEMONSTRATE COMPLIANCE WITH THE NOTICE PROVISIONS OF THE REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL), BANK'S MOTION FOR SUMMARY JUDGMENT IN THIS FORECLOSURE ACTION PROPERLY DENIED.

The Second Department determined plaintiff bank's motion for summary judgment in this foreclosure action was properly denied. Although the bank demonstrating standing to bring the action, it did not demonstrate compliance with the notice provisions of Real Property Actions and Proceedings Law (RPAPL) 1304 with admissible evidence: "... [S]ince the defendant raised the issue of compliance with RPAPL 1304 as an affirmative defense in his answer, the plaintiff was required to make a prima facie showing of compliance with RPAPL 1304 ... . The plaintiff failed to make the requisite showing. In support of its motion, the plaintiff submitted the affidavit of Sherry Benight, an officer of Select Portfolio Servicing, Inc. (hereinafter SPS), the loan servicer, along with two copies of a 90-day notice addressed to the defendant and a proof of filing statement pursuant to RPAPL 1306 from the New York State Banking Department. While mailing may be proved by documents meeting the requirements of the business records exception to the hearsay rule, Benight, in her affidavit, did not aver that she 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 ... . Moreover, the plaintiff failed to demonstrate, prima facie, that the notices included a list of five housing counseling agencies, as required by the statute (see RPAPL 1304[2]). Although Benight stated in her affidavit that the notices included such a list, the copies of the notices submitted merely included information about contacting a hotline that would provide 'free personalized advice from housing counseling agencies certified by the U.S. Department of Housing and Urban Development.' " ***Bank of Am., N.A. v. Wheatley*, 2018 N.Y. Slip Op. 01175, Second Dept 2-21-18**

THIRD DEPARTMENT

CIVIL RIGHTS LAW, ENVIRONMENTAL LAW, DEFAMATION.

ACTION BY YARD WASTE BUSINESS WAS A STRATEGIC LAWSUIT AGAINST PUBLIC PARTICIPATION (SLAPP), DEFAMATION AND RELATED CLAIMS AGAINST NEIGHBOR BASED ON STATEMENTS MADE BY THE NEIGHBOR ABOUT THE OPERATION OF THE YARD WASTE BUSINESS SHOULD HAVE BEEN DISMISSED.

The Third Department, modifying Supreme Court, determined that defendants demonstrated the suit against them was a strategic lawsuit against public participation (SLAPP). Therefore plaintiff's motion to dismiss the defendants' anti-SLAPP counterclaim was properly denied. Plaintiff operated a yard-waste-related business. Defendants lived on neighboring properties and had made statements about odors and contamination related to the yard waste. Because the court determined this was a SLAPP suit, the complaint against a defendant based upon statements made by the defendant about plaintiff's yard waste business (alleging defamation, interference with a a business relationship, inter alia) should have been dismissed: "It is undisputed that, in 2007, plaintiffs registered with the Department of Environmental Conservation (hereinafter DEC) as a yard waste composting facility that accepts between 3,000 to 10,000 cubic yards of waste per year ... . Lawful operation of plaintiffs' composting facility requires DEC permission and ongoing compliance with all applicable regulations and is subject to oversight by DEC ... . In light of the fact that operations pursuant to a registration require DEC permission and are subject to continuing DEC oversight, Supreme Court properly concluded that plaintiffs are public permittees, as defined by Civil Rights Law § 76-a (1) (b) ... . We also conclude that the relevant conduct challenged in this action — defendants' statements about plaintiffs and the operations conducted at their property — establishes that the action is materially related to plaintiffs' registered yard composting facility. ... Inasmuch as we have determined that this action involves public petition and participation, to avoid dismissal of the complaint against [defendant] Merced, plaintiffs must demonstrate that any statement they allege she made 'was made with knowledge of its falsity or with reckless disregard of whether it was false' (Civil Rights Law § 76-a [2]...) . Plaintiffs failed to meet this burden." ***Edwards v. Martin*, 2018 N.Y. Slip Op. 01238, Third Dept 2-22-18**

CRIMINAL LAW.

DEFENDANT SHOT ANOTHER HUNTER AND WAS CHARGED WITH AND CONVICTED OF (RECKLESS) ASSAULT SECOND, DEFENSE REQUEST FOR A JURY INSTRUCTION ON (NEGLIGENT) ASSAULT THIRD SHOULD HAVE BEEN GRANTED, NEW TRIAL ORDERED.

The Third Department, reversing defendant's conviction, determined defendant's request for a jury instruction on a lesser included offense should have been granted. Defendant shot another hunter and was charged with assault second. Defendant requested a jury instruction on assault third which was denied: "Defendant argued that the jury could reasonably find from the trial proof that he did not act recklessly so as to commit assault in the second degree (see Penal Law § 120.05 [4]), but did behave negligently so as to commit assault in the third degree ... . Recklessness and criminal negligence are achingly close to one another; a reckless defendant 'perceives the risk, but consciously disregards it,' while a criminally negligent defendant 'negligently fails to perceive the risk' altogether ... . A jury distinguishes between the two by considering 'the

evidence . . . relating to the mental state of the defendant at the time of the crime'... . ... [D]efendant knew that the victim had permission to hunt on the property where the shooting occurred, but also told investigators that he had seen no sign of the victim or anyone else in the three weeks that he had been hunting in the area. The victim confirmed that the area was not frequented by hunters, testifying that he had never seen another person in the 30 years that he had hunted there and saw human tracks for the first time the week before he was shot. There was no proof that defendant recalled the advice given at a hunting safety class, which he took 20 years prior, to be certain of his target before opening fire. Even if he did, however, he told investigators that he opened fire after hearing what he thought were deer horns rubbing against branches and watched what he thought was a deer but was, in reality, the stooped-over victim in a camouflage jacket. Viewing this evidence in the light most favorable to defendant ... , the jury could have reasonably found that defendant did not disregard, but instead failed to perceive, an unjustifiable risk of injury to the victim when he opened fire without sufficient observation... . County Court therefore erred in refusing to charge the lesser included offense of assault in the third degree ...". ***People v. Lavalley*, 2018 N.Y. Slip Op. 01223, Third Dept 2-22-18**

CRIMINAL LAW.

ONCE AN ALCOHOL AND SUBSTANCE ABUSE EVALUATION WAS ORDERED THE CASE SHOULD HAVE BEEN TRANSFERRED TO THE DRUG TREATMENT COURT FOR THE JUDICIAL DIVERSION HEARING, CONVICTION REVERSED.

The Third Department, reversing defendant's conviction, determined that the judicial diversion hearing should have been presided over by a judge in the Drug Treatment Court, not County Court: " … County Court was not designated by the Administrative Judge for the Third Judicial District to preside over the drug treatment court in Sullivan County. ... Accordingly, while County Court had jurisdiction to hear the subject felony case ... , once an alcohol and substance abuse evaluation was ordered for defendant ... — for the express purpose of determining whether he was eligible for judicial diversion — the case should have been referred to the designated Superior Court for drug treatment pursuant to 22 NYCRR part 143. Accordingly, under the circumstances presented, we find that County Court was without authority to preside over defendant's judicial diversion hearing ...". ***People v. Lee*, 2018 N.Y. Slip Op. 01216, Third Dept 2-22-18**

CRIMINAL LAW, APPEALS.

DEFENDANT'S PLEA ALLOCATION NEGATED AN ESSENTIAL ELEMENT OF THE OFFENSE, PRESERVATION OF THE ERROR NOT REQUIRED, GUILTY PLEA VACATED.

The Third Department, reversing defendant's conviction by guilty plea, determined that defendant's plea colloquy negated an essential element of the offense (criminal contempt). An exception to the preservation requirement applied: " '[W]here a pleading defendant's recitation of the facts of his or her offense clearly casts doubt on his or her guilt and the court makes no further inquiry, the defendant does not have to preserve a claim of fatal error in the allocution because . . . 'the court's attention should have been instantly drawn to the problem, and the salutary purpose of the preservation rule is arguably not jeopardized' ... . Here, defendant stated during her plea allocution that she did not intend to violate the underlying order of protection, thus negating an element of criminal contempt in the first degree... . Although County Court promptly responded and afforded defendant an opportunity to again consult with her counsel, further discussion was then held off the record. Thus, we are unable to ascertain from the record whether the court conducted the requisite further inquiry to ensure that defendant understood the elements of the crime to which she was pleading guilty and that the plea was knowing, voluntary and intelligent ...". ***People v. Busch-Scardino*, 2018 N.Y. Slip Op. 01218, Third Dept 2-22-18**

CRIMINAL LAW, APPEALS.

COUNTY COURT DID NOT MAKE THE STATUTORY FINDINGS REQUIRED FOR DETERMINING DEFENDANT'S APPLICATION FOR YOUTHFUL OFFENDER STATUS IN THIS SEXUAL OFFENSE CASE, WAIVER OF APPEAL DID NOT PRECLUDE CHALLENGE ON APPEAL, SENTENCE VACATED AND MATTER REMITTED.

The Third Department, vacating defendant's sentence, determined County Court failed to place on the record the statutory factors to be weighed in determining youthful offender status. The waiver of appeal did not foreclose the challenge on appeal: "... County Court's comments regarding defendant's application for youthful offender status failed to satisfy the statutory mandate of CPL 720.10. An appeal waiver does not foreclose a defendant's challenge that a court failed to make the requisite on-the-record determinations regarding youthful offender treatment ... . Pursuant to CPL 720.10 (3), 'a youth who has been convicted of . . . criminal sexual act in the first degree . . . is an eligible youth if the court determines that one or more of the following factors exist: (i) mitigating circumstances that bear directly upon the manner in which the crime was committed; or (ii) where the defendant was not the sole participant in the crime, the defendant's participation was relatively minor although not so minor as to constitute a defense to the prosecution.' Where, as here, the only barrier to youthful offender status is an enumerated sex offense (see CPL 720.10 [2] [a]), 'the court is required to determine on the record whether the defendant is an eligible youth by considering the presence or absence of the factors set forth in CPL 720.10 (3)'... . This determination is mandatory, without regard to whether it has been requested or purportedly waived .... ***People v. Martz*, 2018 N.Y. Slip Op. 01222, Third Dept 2-22-18**

CRIMINAL LAW, ATTORNEYS.

DEFENSE COUNSEL TOOK A POSITION ADVERSE TO HER CLIENT'S MOTION TO WITHDRAW HIS PLEA, SENTENCE VACATED AND MATTER REMITTED FOR ASSIGNMENT OF A NEW ATTORNEY FOR THE MOTION.

The Third Department, vacating defendant's sentence, determined County Court should have assigned a new attorney after defense counsel took a position adverse to her client's motion to withdraw his plea: "At sentencing, defense counsel appropriately advised County Court that, although she had counseled defendant regarding the potential consequences of withdrawing his guilty plea, and despite her legal advice to the contrary, defendant nevertheless wished to proceed with such a motion. Defendant thereafter set forth various reasons as to why he believed he was entitled to the requested relief. In response to County Court's subsequent inquiries, however, defense counsel made comments that, in our view, could be construed as undermining the very arguments that defendant had raised in support of his motion. Accordingly, once defense counsel took a position that was adverse to defendant, County Court should have assigned a new attorney to represent him on his motion to withdraw his plea ...". ***People v. Oliver*, 2018 N.Y. Slip Op. 01221, Third Dept 2-22-18**

CRIMINAL LAW, EVIDENCE.

DEFENDANT'S PRESENCE IN A METH LAB DID NOT DEMONSTRATE CONSTRUCTIVE POSSESSION OF THE CONTRABAND, METH-RELATED CONVICTIONS REVERSED.

The Third Department, reversing defendant's conviction, determined defendant's presence in a meth lab was not sufficient to demonstrate constructive possession of the contraband in the lab: "A defendant's mere presence in the same location as contraband is insufficient to establish constructive possession ... . Knowledge that the contraband is present is insufficient, standing alone, to show constructive possession... . Some factors that courts may consider in determining whether a defendant constructively possessed contraband are the defendant's proximity to the contraband, whether the defendant had keys to the location where the contraband was found, whether the contraband was in plain view, evidence that the defendant had used some of the drugs (when drugs are the contraband at issue), and whether there is witness testimony that the contraband belonged to the defendant ... . The evidence at trial demonstrated that defendant and [codefendant] Yerian had been in the garage with [codefendant] Alberts for approximately one hour when the officer arrived. There was no evidence that defendant lived in the house or garage, kept any of his personal belongings there or had keys to the property... . When the officer observed defendant in the workshop area, which measured approximately 10 to 12 feet by 20 to 24 feet, defendant was sitting on a stool in front of a bench, not touching anything. No contraband was recovered from defendant himself, nor did the proof establish that he owned or had even touched any of the contraband." ***People v. Maricle*, 2018 N.Y. Slip Op. 01217, Third Dept 2-22-18**

INSURANCE LAW.

ACCEPTING THE ALLEGATIONS AS TRUE FOR PURPOSES OF A MOTION TO DISMISS, THE INSURANCE AGENT AND HIS EMPLOYERS OWED PLAINTIFF, THE BENEFICIARY OF DECEDENT'S LIFE INSURANCE POLICY, A DUTY OF CARE WITH RESPECT TO THE ISSUANCE OF THE POLICY, RELATIONSHIP WAS CLOSE TO PRIVITY.

The Third Department, modifying Supreme Court, in a decision dealing with several substantive insurance and employment issues not summarized here, determined that plaintiff, as the beneficiary of her husband's life insurance policy, had sufficiently alleged facts that she was in a relationship close to privity such that the insurance agent (Pontillo) and his employers owed her a duty of care. Plaintiff's suit stemmed from the insurers' denial of coverage based upon material misrepresentations in the decedent's application (not mentioning substance abuse): "Plaintiff was the intended beneficiary of the ReliaStar policy from the moment when decedent applied for the policy. She further alleged that she was linked to Pontillo by his status as a family member and trusted financial advisor and that Pontillo knew not only that the policy was intended to ensure plaintiff's financial well-being in the event of decedent's death, but that she would rely upon his expertise in preparing a valid application for it. Accepting these allegations as true, they show 'an affirmative assumption of a duty of care to a specific party, [plaintiff,] for a specific purpose, regardless of whether there was a contractual relationship' ... . As Supreme Court correctly determined, this alleged 'reliance by . . . plaintiff that was 'the end and aim of the transaction' ... constituted 'a relationship so close as to approach that of privity' and created a duty of care toward her that permitted a negligence claim against Pontillo and his purported employers ...". ***Vestal v. Pontillo*, 2018 N.Y. Slip Op. 01236, Third Dept 2-22-18**

PERSONAL INJURY.

QUESTIONS OF FACT RAISED ABOUT ADEQUACY OF SNOW REMOVAL AND SALTING, AS WELL AS LIGHTING, IN THIS PARKING LOT SLIP AND FALL CASE, DEFENDANT'S SUMMARY JUDGMENT MOTION SHOULD NOT HAVE BEEN GRANTED.

The Third Department, reversing Supreme Court, determined defendant property owner's cross motion to dismiss the complaint should not have been granted in this slip and fall case. Plaintiff (Torgersen) had raised questions of fact whether defendant's snow removal and salting efforts were sufficient, and whether the lighting in the parking lot was adequate: "Torgersen claimed in an affidavit that his legs kicked out from under him on ice that was covered by snow and obscured

by poor lighting. This account did not directly conflict with his prior deposition testimony — in which he gave a similar account of his fall, said the lighting was not 'very good' and was cut off while trying to answer the only question posed regarding the presence of ice — and the discrepancies between them 'raised a credibility issue' but did not warrant rejecting the affidavit out of hand ... . Plaintiffs further provided the affidavit of another tenant who stated that she observed Torgersen fall as he described. The tenant saw a large patch of ice when she came to assist him and asserted, among other things, that no one salted the parking lot when it was plowed that day and that the poor plowing and salting at the complex had been the subject of complaints. The latter allegation ran counter to proof provided by defendant and Larkin [snow removal contractor], but there is no stated reason why the other tenant would misrepresent what had occurred and, in any event, 'a court may not assess credibility on a summary judgment motion 'unless it clearly appears that the issues are not genuine, but feigned' ... . It is by no means clear here. Considering the foregoing 'in the light most favorable to plaintiffs as the opponents of summary judgment'... , material issues of fact exist regarding the role ice and poor lighting played in Torgersen's fall and whether the ice was due to inadequate salting by Larkin or defendant's employees and should 'reasonably have [been] discovered and remedied' by defendant ...". ***Torgersen v. A&f Black Cr. Realty, LLC*, 2018 N.Y. Slip Op. 01237, Third Dept 2-22-18**

WORKERS' COMPENSATION LAW, EMPLOYMENT LAW, PERSONAL INJURY.

ALTHOUGH THE PEDESTRIAN-CAR ACCIDENT OCCURRED ON A ROAD OWNED BY DEFENDANT'S AND PLAINTIFF'S EMPLOYER AS DEFENDANT WAS LEAVING WORK, THE DEFENDANT WAS NOT ACTING WITHIN THE SCOPE OF HIS EMPLOYMENT WHEN THE ACCIDENT OCCURRED, PLAINTIFF IS NOT RESTRICTED TO A WORKERS' COMPENSATION LAW REMEDY.

The Third Department, reversing Supreme Court, determined that plaintiff was not restricted to a Worker's Compensation Law remedy in this pedestrian-car accident case. Both plaintiff and defendant were employed by the Culinary Institute of America (CIA). The accident occurred on a private CIA road as defendant was leaving work. The Third Department determined the accident was not related to defendant's work: "The parties' submissions reveal that the accident occurred on Campus Drive, which plaintiff described as a ring road encircling the campus — a description consistent with the campus map submitted by defendant. Defendant essentially maintains that because Campus Drive is a private road maintained by the CIA, he necessarily was acting within the scope of his employment when the accident took place. There is support for the premise that going to or from work while on the employer's premises is considered an incident of the employment ... . By comparison, accidents occurring on a public street outside working hours are generally not considered to arise out of the employment absent some nexus between the access route and the employer's premises... . Even accepting that Campus Drive is a private road, the submissions demonstrate that the CIA encourages the public to frequent the restaurants on campus and it opened up Campus Drive for general use by the public. There is nothing in this record indicating that the accident was precipitated by any special hazard or incident related to defendant's employment. To the contrary, the accident allegedly occurred when defendant slowed down but did not stop as plaintiff was in the crosswalk. Such an accident is a common risk shared by the general public traveling on Campus Drive... . We conclude that defendant's workday ended when he left the parking lot to drive home and, thus, as a matter of law, defendant was not acting within the scope of his employment at the time of the accident." ***Siegel v. Garibaldi*, 2018 N.Y. Slip Op. 01239, Third Dept 2-22-18**

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