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# FIRST DEPARTMENT

## CRIMINAL LAW.

DENIAL OF PAROLE MANIFESTED IRRATIONALITY BORDERING ON IMPROPRIETY.

The First Department determined denying petitioner parole was "irrational." The proper remedy is a new parole nearing, not granting parole in a court ruling (as Supreme Court did). Petitioner, now 51, was convicted of felony murder when she was very young. She had driven the car to where her husband was staying. A passenger in the car shot and killed her husband. The jury found petitioner did not intend that her husband be killed. Petitioner has been a model prisoner for decades: "The commissioners failed to appreciate that petitioner's murder conviction was not for intentional murder, but rather for second-degree felony murder. The felony murder rule, of course, provides that a person is guilty of second-degree murder when, 'a]cting either alone or with one or more other persons, [she] commits or attempts to commit [violent crimes including] burglary, . . . and, in the course of and in furtherance of such crime or of immediate flight therefrom, [she], or another participant, . . . causes the death of a person other than one of the participants' ... . In essence, and particularly in the context of a burglary conviction, the felony murder rule imposes strict and vicarious liability for a killing that one did not intend, provided that it was the result of an enumerated felony that one did intentionally commit. Intent to kill plays no role in a finding of felony murder ... . At the parole hearing, petitioner nonetheless accepted responsibility for her 'choices and decisions that led to a chain of events that led to the death of [her] husband.' Far from showing any lack of insight into her crime, petitioner's testimony at the parole hearing was truthful, accurate, and consistent with what the jury found happened in 1991. Accordingly, respondent's determination denying petitioner parole manifested 'irrationality bordering on impropriety,' warranting granting the petition to vacate the denial of parole ...". ***Matter of Kellogg v. New York State Bd. of Parole*, 2018 N.Y. Slip Op. 01425, First Dept 3-6-18**

## CRIMINAL LAW.

MOTION FOR RESENTENCING PROPERLY DENIED BECAUSE IT WAS MADE WITHIN THREE YEARS OF DEFENDANT'S PAROLE ELIGIBILITY DATE.

The First Department determined defendant's motion for resentencing under the Drug Law Reform Act of 2005 was properly denied because the motion was made within three years of defendant's parole eligibility date: "Defendant argues that the 2005 Act should be reinterpreted in light of recent developments, including those relating to the resentencing of persons convicted of other types of drug felonies. However, no decision finding eligibility with regard to any other Drug Law Reform Act has vitiated the 2005 Act's clear eligibility requirement that the applicant's parole eligibility date be at least three years in the future. To accept defendant's argument, we would have to rewrite the statute to treat persons convicted of class A-II felonies the same as persons convicted of other drug felonies ...". ***People v. Moore*, 2018 N.Y. Slip Op. 01428, First Dept 3-6-18**

## LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

PLAINTIFF DID NOT ATTACH HIMSELF TO AN AVAILABLE LIFELINE, QUESTIONS OF FACT PRECLUDED SUMMARY JUDGMENT ON PLAINTIFF'S LABOR LAW § 240 (1) CAUSE OF ACTION.

The First Department determined plaintiff's motion for summary judgment on his Labor Law § 240(1) cause of action was properly denied. Plaintiff fell from a platform. He was wearing a vest and lanyard but did not attach himself to an available lifeline: "Plaintiff Luis Colon was injured when he fell from a makeshift platform while torquing bolts on the Henry Hudson Bridge restoration project. At the time of his fall, plaintiff was wearing a vest and lanyard; however, he did not attach himself to the available lifeline. There are questions of fact on this record concerning whether it was feasible or even practical for Colon to have attached himself to the lifeline or whether another safety device was required and whether it was provided ...". ***Colon v. Metropolitan Transp. Auth.*, 2018 N.Y. Slip Op. 01436, First Dept 3-6-18**

## LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

CRITERIA FOR DETERMINING WHETHER A PARTY IS A STATUTORY AGENT OF THE OWNER IN LABOR LAW §§ 240(1) AND 241(6) ACTIONS EXPLAINED, PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON HIS LABOR LAW § 240(1) CAUSE OF ACTION, STEMMING FROM A FALL FROM A LADDER, SHOULD NOT HAVE BEEN DENIED.

The First Department determined Supreme Court should not have determined defendant (Rose Associates) was not a statutory agent of the owner in this Labor Law §§ 240(1) and 241(6) action, explaining the correct criteria. In addition Supreme Court should not have denied plaintiff's motion for summary judgment on his Labor Law § 240 (1) cause of action, which was based upon the allegation the ladder plaintiff was on moved: "The motion court erred in determining that Rose Associates is not an agent of defendant owner Continental Towers Condominium. Labor Law §§ 240(1) and 241(6) impose absolute liability on owners, contractors, and their agents for a statutory violation resulting in injury, regardless of whether they directed or controlled the work … . Thus... the test of whether a defendant is a statutory agent subject to liability under those sections is not whether it actually supervised the work, but whether it had the authority to do so ... . ... ... [T]he court should have granted plaintiff's cross motion, as the evidence establishes that plaintiff slipped or fell from an unsecured ladder upon which he was working because it moved ... . The testimony of plaintiff's coworker that plaintiff stated he slipped was "not inconsistent with plaintiff's version that he slipped after the ladder moved" ... . Moreover, defendants' expert affidavits asserting that no force acted upon the ladder that could have caused it to move were speculative." ***Merino v. Continental Towers Condominium*, 2018 N.Y. Slip Op. 01549, First Dept 3-8-18**

## LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY, EVIDENCE.

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON HIS LABOR LAW 240 (1) CAUSE OF ACTION, BASED UPON A FALL FROM A SCAFFOLD, PROPERLY GRANTED, DEFENDANT'S ATTEMPTS TO RELY ON AN ALLEGED HEARSAY STATEMENT BY THE PLAINTIFF TO THE EFFECT THAT HE FELL WHEN CLIMBING UP TO THE SCAFFOLD, REJECTED, NO APPLICABLE EXCEPTION TO THE HEARSAY RULE.

The First Department determined plaintiff's motion for summary judgment in this Labor Law § 240(1) action was properly granted. Plaintiff alleged he fell from a scaffold which did not have railings. Defendant's attempts (for the first time on appeal) to introduce plaintiff's alleged hearsay statement that he fell when climbing up to the scaffold were rejected: "It is undisputed that the subject scaffold did not have railings, toe boards, or cross-bracing, and there was no place for plaintiff to tie off his safety harness. As such, plaintiff established a violation of the statute. Moreover, plaintiff testified that the accident occurred when he was on the scaffold, tripped on a block, and fell backward, off the scaffold to the ground, and his worker's compensation claim also provides that he slipped and fell while on the scaffold. This is sufficient to establish that the violation was a proximate cause of the injury ... . ... [Re: plaintiff's alleged statement:] The business record exception is inapplicable, since defendants have not submitted the incident report for the ... accident. The present sense impression exception is also inapplicable, since the out-of-court statement from plaintiff to the foreman that he fell while climbing up the scaffold is not corroborated by independent evidence ... . The excited utterance exception does not apply, since defendants have not provided sufficient evidence of plaintiff's mental state or established that he made the hearsay statement to the foreman under the stress of excitement ... . Furthermore, plaintiff's statement to the foreman does not fall within the declaration against interest exception because plaintiff was available to, and did, testify as a witness; there is no evidence that plaintiff knew the statement was adverse to his interests when it was made; and the supporting circumstances do not attest to its trustworthiness or reliability ...". ***Gomes v. Pearson Capital Partners LLC*, 2018 N.Y. Slip Op. 01560, First Dept 3-8-18**

## PERSONAL INJURY.

QUESTION OF FACT RAISED BY CIRCUMSTANTIAL EVIDENCE, PLAINTIFF STRUCK ON HER HEAD BY A FALLING OBJECT IN AN ELEVATOR WHEN DEFENDANT WAS WORKING ON AN ADJACENT SHAFT, NO NEED TO PLEAD RES IPSA LOQUITUR TO ASSERT IT, RECORD INSUFFICIENT TO CONSIDER APPLICABILITY OF RES IPSA LOQUITUR.

The First Department, modifying Supreme Court, determined that the cause of action against the elevator company (Nouveau) alleging negligence should not have been dismissed in this personal injury action. Plaintiff alleged she was struck on her head by a hot object when she was in the elevator. A washer was found in the elevator. Nouveau was working in an adjacent elevator shaft at the time. The court noted it was not necessary for plaintiff to plead the doctrine of res ipsa loquitur in order to assert it, however, the record was not sufficient for the court to consider it: "... [P]laintiff raised triable issues of fact, as circumstantial evidence showed that a prompt investigation of the incident indicated that Nouveau's workers were installing equipment in an adjacent elevator shaft several floors above where plaintiff's elevator cab had come to a stop, and that no other construction crews were in the vicinity of the elevator bank in question. Contrary to the motion court's finding, the evidence could be sufficient to support an inference that it was more likely that the injury was caused by negligence on the part of Nouveau rather than by some other actor ... . Contrary to the motion court's finding, 'neither plaintiff's failure to specifically plead res ipsa loquitur nor the allegation of specific acts of negligence . . . constitutes a bar to the invocation of res ipsa loquitur where the facts warrant its application'... . However, we are unable to determine on this record whether,

as plaintiff contends, the doctrine of res ipsa loquitur is applicable to Nouveau." ***Ocasio v. Dormitory Auth. of the State of N.Y.*, 2018 N.Y. Slip Op. 01424, Frist Dept 3-6-18**

## PERSONAL INJURY.

EVEN THOUGH PLAINTIFF BICYCLIST HAD THE RIGHT OF WAY AND DEFENDANT'S TRUCK CROSSED INTO HIS PATH, THERE WAS A QUESTION OF FACT WHETHER PLAINTIFF COULD HAVE AVOIDED THE ACCIDENT.

The First Department, reversing Supreme Court, determined plaintiff's motion for summary judgment in this truck-bicycle accident case should not have been granted. Although plaintiff had the right of way and defendant crossed into plaintiff's path, there was a question of fact whether plaintiff could have avoided the accident: "Plaintiff, while traveling south on a bicycle, collided with the passenger side of defendants' northbound truck as it turned left across his path. While the record establishes that plaintiff had the right of way, an issue of fact exists as to whether plaintiff was negligent in that he could have avoided the collision through the exercise of reasonable care but failed to do so. Accordingly, plaintiff was not entitled to summary judgment on the issue of liability." ***Bermeo v. Time Warner Entertainment Co., L.P.*, 2018 N.Y. Slip Op. 01433, First Dept 3-6-18**

## PERSONAL INJURY.

CONSTRUCTIVE NOTICE OF RUSTED CONDITION OF STAIRCASE WHICH COLLAPSED DEMONSTRATED WITH PHOTOGRAPHS, PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT PROPERLY GRANTED.

The First Department determined plaintiff's motion for summary judgment in this staircase collapse case was properly granted. Plaintiff demonstrated the defendant had constructive notice of the rusted condition of the staircase: "Plaintiff, a handyman employed by defendant's managing agent, was injured when the landing of a metal staircase in the sub-basement of defendant's building collapsed under him, causing him to fall about 20 feet to the cement floor below. Plaintiff established prima facie that defendant had constructive notice of the defective condition of the stairs by submitting photographs showing the staircase covered in rust, and evidence that defendant had no program of inspection for the staircase and had never inspected it in the 27 years preceding the accident ...". ***Conklin v. 500-512 Seventh Ave., LP, LLC*, 2018 N.Y. Slip Op. 01437, First Dept 3-6-18**

## PERSONAL INJURY, CIVIL PROCEDURE, EVIDENCE.

DEFENDANT DEMONSTRATED IT DID NOT HAVE NOTICE OF THE WET CONDITION OF THE STAIRS IN THIS SLIP AND FALL CASE, UNSIGNED DEPOSITION CONSTITUTED PLAINTIFF'S ADMISSION, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED.

The First Department, reversing Supreme Court, determined defendant's motion for summary judgment in this staircase slip and fall case should not have been granted. Defendant demonstrated it did not have notice of the wet condition of the stairs. Plaintiff's opposing affidavit contradicted her deposition testimony. Although the deposition was unsigned, defendant demonstrated the certified transcript was provided to plaintiff's attorneys but it was never returned. Therefore the deposition served as plaintiff's admission: "Defendant met its prima facie burden on the motion of establishing that it neither created the alleged wet condition nor had prior actual or constructive notice of it. By plaintiff's own admission, the wet condition, which she never saw but assumes was there, could only have been created moments earlier, having not been present when she walked up the steps ... . Based upon plaintiff's testimony that she was using both hands to carry her daughter down the steps when she fell, without any indication that she reached for a handrail, defendant established that the lack of a handrail did not proximately cause or contribute to the accident ... . Plaintiff's affidavit in opposition, wherein she claimed that she tried to reach for a handrail when she fell, raised only feigned issues of fact, as it directly contradicted, and appears to have been tailored to avoid the consequence of, her earlier testimony ... . Pursuant to CPLR 3116(a), plaintiff's unsigned deposition transcript may be used as though fully signed, as defendant submitted proof that the certified transcript was provided to her attorneys for execution and not returned. Moreover, an unsigned but certified transcript may be used as an admission... , especially where, as here, there is no dispute as to the accuracy of the transcript ...". ***Luna v. CEC Entertainment, Inc.*, 2018 N.Y. Slip Op. 01429, First Dept 3-6-18**

## TRUSTS AND ESTATES.

DESPITE PROBATE OF WILL IN FLORIDA, DECEDENT WAS A DOMICILIARY OF NEW YORK, ANCILLARY PROCEEDINGS IN NEW YORK INAPPROPRIATE, NONANCILLARY LETTERS GRANTED.

The First Department, reversing Surrogate's Court, determined decedent was a domiciliary of New York, despite the probate of the will in Florida: "Even if the Florida court had decided that decedent was a domiciliary of that state, 'the decree of the State of original probate is not conclusive on the question of domicile or residence' ... . Accordingly, this Court may make an independent inquiry into domicile ... . [Petitioner] failed to meet her burden of showing, by clear and convincing evidence, that decedent had changed her domicile from New York to Florida ... . The documentation submitted by petitioner in support of her motion to renew, showed that decedent voted in New York, her driver's license was from New

York, and her passport application used her New York address... . She filed New York State tax returns ... , and her will and death certificate said she was from New York ... . Moreover, when decedent left New York for Florida in July 2009, she said she intended to return, but never did because of medical complications ... . Since decedent was a New York domiciliary, ancillary probate in this state is inappropriate, even though her will has already been probated in Florida ... . Therefore, the grant of ancillary letters to [petitioner] is revoked, and nonancillary letters are granted to the Public Administrator." ***Matter of Assimakopoulos*, 2018 N.Y. Slip Op. 01440, First Dept 3-6-18**

# SECOND DEPARTMENT

## CONTRACT LAW, CIVIL PROCEDURE.

PLAINTIFF, IN THE FACE OF WRITTEN CONTRACTS TO THE CONTRARY, DID NOT DEMONSTRATE AT TRIAL THAT A PARTNERSHIP, AS OPPOSED TO AN INDEPENDENT CONTRACTOR, RELATIONSHIP EXISTED BETWEEN PLAINTIFF AND DEFENDANT, DEFENDANT'S MOTION FOR A JUDGMENT AS A MATTER OF LAW SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined defendant's (Kaufman's) motion for judgment as a matter of law pursuant to CPLR 4401 should have been granted. There were written contracts between plaintiff and Kaufman indicating plaintiff was an independent contractor. Plaintiff alleged he was a partner with Kaufman, entitled to 50% of the income. The proof submitted by plaintiff, a vague email and testimony by an accountant that plaintiff and Kaufman often received equal pay, was deemed insufficient: " 'A motion for judgment as a matter of law pursuant to CPLR 4401 or 4404 may be granted only when the trial court determines that, upon the evidence presented, there is no valid line of reasoning and permissible inferences which could possibly lead rational persons to the conclusion reached by the jury upon the evidence presented at trial, and no rational process by which the jury could find in favor of the nonmoving party'... . In considering such a motion, 'the trial court must afford the party opposing the motion every inference which may properly be drawn from the facts presented, and the facts must be considered in a light most favorable to the nonmovant' ... . The Supreme Court erred in denying the defendants' motion, made at the close of trial, in effect, pursuant to CPLR 4401 for judgment as a matter of law dismissing the complaint. The existence of a partnership agreement between Kaufman and the plaintiffs with respect to Kaufman's businesses cannot be inferred from the evidence presented at the trial. The parties' relationship was governed by written agreements. The 2005 email which makes reference to splitting income is not sufficient to draw such an inference. Although an email message can constitute a binding contract if it sets forth the material terms of the agreement, and contains an expression of mutual assent ... , the email in question fails to set forth the material terms of a partnership agreement. There was no valid line of reasoning and permissible inferences from which the jury could have concluded that there was such a partnership agreement in this case. ***Weg v. Kaufman*, 2018 N.Y. Slip Op. 01567, Second Dept 3-7-18**

## CRIMINAL LAW, EVIDENCE.

OFFICER DID NOT HAVE A REASONABLE SUSPICION OF CRIMINAL ACTIVITY WHEN HE ASKED DEFENDANT 'WHAT DO YOU HAVE,' SEIZED WEAPON SHOULD HAVE BEEN SUPPRESSED,

The Second Department, over an extensive dissent, in a comprehensive street stop (DeBour) analysis too detailed to fairly summarize here, determined the police officer did not have a reasonable suspicion that criminal activity was afoot when he asked defendant, a passenger in a car, "what do you have." Defendant replied that he had a "piece" and he was convicted of possession of a weapon: "There was nothing improper about the police officers' direction that the defendant and the two other occupants exit the vehicle. 'In light of the heightened dangers faced by investigating police officers during traffic stops, a police officer may, as a precautionary measure and without particularized suspicion, direct the occupants of a lawfully stopped vehicle to step out of the car' ... . However, the scope of that authority is limited to guarding against 'the unique danger of a partially concealed automobile occupant by allowing the officer to order occupants out of a car and readily observe their movements' ... . ... In the context of a traffic stop, the Court of Appeals has made clear that 'a police officer who asks a private citizen if he or she is in possession of a weapon must have founded suspicion that criminality is afoot' ..., thereby squarely placing this type of inquiry within De Bour level two. Moreover, mere nervousness does not provide the requisite indication of criminality ... . Here, the circumstances described by Officer Weibert at the suppression hearing did not establish 'a founded suspicion that criminality [was] afoot' ... . Significantly, there was no testimony of a bulge at the defendant's waistband ... , or any indication that the defendant was reaching for, grabbing at, or adjusting his waistband ... . To the contrary, Officer Weibert denied that the defendant made any furtive gesture or reached for anything; he testified only that the defendant was acting nervous, shaking his knees and legs up and down, and leaning forward in his seat with his hands in his lap and his arms tightly at his side." ***People v. White*, 2018 N.Y. Slip Op. 01492, Second Dept 3-7-18**

## CRIMINAL LAW, EVIDENCE, APPEALS.

ALTHOUGH DEFENDANT RECORDED THE CODEFENDANT DOUSING THE HOMELESS MAN WITH LIGHTER FLUID AND SETTING HIM ON FIRE, THE EVIDENCE DID NOT SUPPORT THE CONCLUSION DEFENDANT ACTED AS AN ACCOMPLICE, CONVICTION REVERSED UPON A WEIGHT OF THE EVIDENCE ANALYSIS.

The Second Department, reversing defendant's conviction after a weight of the evidence analysis, determined the evidence did not support the conclusion defendant acted as an accomplice in the assault of a homeless man. The codefendant doused the homeless man with lighter fluid and set him on fire. The defendant said "Do that shit man" and recorded the incident on his phone for one minute before attempting put out the fire: "For the defendant to be held criminally liable for the conduct of the codefendant, the People had to prove beyond a reasonable doubt that the defendant solicited, requested, commanded, importuned, or intentionally aided the codefendant to engage in that conduct, and that the defendant did so with the state of mind required for the commission of the offense (see Penal Law § 20.00). A defendant's mere presence at the scene of a crime, even with knowledge that the crime is taking place, or mere association with the perpetrator of a crime, is not enough for accessorial liability ... . It is undisputed that the defendant did not assist the codefendant in dousing the victim with lighter fluid or setting fire to the victim, and did not supply any of the materials to the codefendant to commit the criminal act. The defendant's actions, in uttering, 'Do that shit, man,' as the codefendant doused the victim with lighter fluid, and in filming this incident for approximately one minute before rendering any aid to this particularly vulnerable and helpless victim, were deplorable. However, his actions did not support the jury's finding beyond a reasonable doubt that he solicited, requested, commanded, importuned, or intentionally aided the codefendant to assault the victim, and that he did so sharing the codefendant's state of mind." ***People v. Fonerin*, 2018 N.Y. Slip Op. 01480, Second Dept 3-7-18**

## CRIMINAL LAW, EVIDENCE, APPEALS.

UNDER A WEIGHT OF THE EVIDENCE ANALYSIS, DEFENDANT PROVED THE AFFIRMATIVE DEFENSE OF MENTAL DISEASE OR DEFECT, MURDER CONVICTION REVERSED.

The Second Department, reversing defendant's murder conviction after a weight of the evidence analysis, over a dissent, determined that defendant had proved the affirmative defense of mental disease or defect by the preponderance of the evidence: "... [W]e conclude that the jury was not justified in finding that the preponderance of the evidence failed to establish that the defendant lacked the substantial capacity to know or appreciate that his conduct was wrong at the time that he possessed the loaded firearm and shot Wright. The undisputed trial evidence established that at the relevant time, the defendant was suffering from auditory hallucinations, paranoia, and "incorrect perceptions" of reality. The opinion of the People's expert psychologist that the defendant did not suffer a schizoaffective disorder, notwithstanding such a diagnosis by the defendant's treating psychiatrists over the past three years, was conclusory. Moreover, the psychologist's alternative theory that the defendant's hallucinations were due to his use of PCP were purely speculative and without adequate evidentiary support. The psychologist's conclusion that the defendant was motivated by revenge against a person he mistakenly perceived to have stolen his shorts was also speculative and contrary to the credible evidence presented. We accord great deference to the jury's opportunity to view the witnesses, hear the testimony, and observe demeanor ... , and weigh conflicting expert evidence ... . However, on this record, the rational inferences which can be drawn from the evidence presented at trial do not support the conviction." ***People v. Spratley*, 2018 N.Y. Slip Op. 01488, Second Dept 3-7-18**

## CRIMINAL LAW, EVIDENCE, ATTORNEYS, APPEALS.

DEFENDANT MADE TWO UNEQUIVOCAL REQUESTS FOR COUNSEL, HIS STATEMENT AND A BUCCAL SWAB SHOULD HAVE BEEN SUPPRESSED, ERROR NEED NOT BE PRESERVED FOR APPEAL, ERROR HARMLESS HOWEVER.

The Second Department, over a dissent, determined defendant's motion to suppress his statement and a buccal swab should have granted but the error was harmless. The dissent argued the error was not harmless. The court noted that a violation of the right to counsel can be raised on appeal even when the error was not preserved: "... [A] recording of the defendant's custodial statement to the police, which was entered into evidence at the hearing, shows that during the interview the defendant twice stated, 'I think I need a lawyer.' The defendant's statements constituted an unequivocal invocation of the right to counsel, and after those statements, the police continued their questioning of the defendant and took no steps to comply with the defendant's unequivocal request for counsel. Therefore, the remainder of the defendant's statement after that point, as well as the buccal swab that he provided to the police after that point, should have been suppressed from evidence ...". ***People v. Bethea*, 2018 N.Y. Slip Op. 01474, Second Dept 3-7-18**

## ELECTION LAW.

THE 2014 EXECUTIVE COMMITTEE OF THE SUFFOLK 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 the Executive Committee of the Suffolk County Committee of the Conservative Party did not have the authority to fill vacancies in the county committee. The 2014 Executive Committee could not fill vacancies in the 2016 County Committee: "Election Law § 6-148 does not confer upon the Executive Committee of the Suffolk County Committee of the Conservative Party of New York State the authority to fill vacancies in the county committee. Rather, that statute relates to filling vacancies in designations and nominations of candidates, not members of a political party's county committee. 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 county committee that was elected in 2014 had no further official authority, and no rule of that 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 Auerbach v. Suffolk County Comm. of the Conservative Party of N.Y. State*, 2018 N.Y. Slip Op. 01463, Second Dept 3-7-18**

## FAMILY LAW.

PLACEMENT OF THE CHILD WITH THE MATERNAL GRANDMOTHER RATHER THAN WITH HER FOSTER HOME WAS NOT SUPPORTED BY THE RECORD.

The Second Department, reversing Family Court, determined the child, Tabitha, should not have been removed from her foster home and placed with her maternal grandmother: "... T]he determination of the Family Court that it was in Tabitha's best interests to be removed from her foster home, where she had resided for over four years, and to be placed in the kinship foster home of the maternal grandmother lacks the requisite sound and substantial basis in the record ... . In determining the best interests of the child, '[t]here is no presumption that the children's best interests will be better served by a return to a family member' ... . Indeed, ' Social Services Law § 383(3) gives preference for adoption to a foster parent who has cared for a child continuously for a period of 12 months or more, while members of the child's extended biological family are given no special preference with regard to custody'... . 'Moreover, while the law expresses a preference for keeping siblings together, the rule is not absolute and may be overcome where the best interests of each child lie in residing apart' ... . Here, the court gave inappropriate weight to this preference, as Tabitha and her brother only shared a household with the maternal grandmother for the first five months of Tabitha's life (see id.). Moreover, the record reveals that Tabitha has closely bonded with her foster family and remains healthy, happy, and well-provided for ... . Therefore, the court erred in determining that it was in Tabitha's best interests to be moved to the kinship foster home of the maternal grandmother rather than remain with her foster mother for the purpose of adoption, which the record shows is the intent of the foster mother ... ". ***Matter of Tabitha T. S. M. (Tracee L. M.--Candace E.)*, 2018 N.Y. Slip Op. 01468, Second Dept 3-7-18**

## FORECLOSURE, CIVIL PROCEDURE, TRUSTS AND ESTATES.

FORECLOSURE ACTION SHOULD HAVE BEEN DISMISSED AS TIME-BARRED, ALTHOUGH CPLR 210 (b) TOLLS THE STATUTE OF LIMITATIONS FOR AN ACTION AGAINST AN ESTATE, THE BANK DID NOT DEMONSTRATE DEFENDANT HUSBAND REPRESENTED HIS WIFE'S ESTATE.

The Second Department, reversing Supreme Court, determined that plaintiff's foreclosure action was time-barred. Although the action would have been timely against the estate of defendant's (Kess's) wife because of the 18-month post-death statute of limitations toll in CPLR 210 (b), plaintiff did not demonstrate Kess was representing his wife's estate: "...Kess demonstrated that the six-year statute of limitations (see CPLR 213[4]) began to run on May 6, 2008, when the plaintiff accelerated the mortgage debt and commenced the 2008 foreclosure action ... . Since the plaintiff did not commence the instant foreclosure action until more than six years later, Kess sustained his initial burden of demonstrating, prima facie, that this action was untimely ... . ... CPLR 210(b) provides that '[t]he period of eighteen months after the death . . . of a person against whom a cause of action exists is not a part of the time within which the action must be commenced against his [or her] executor or administrator.' The statute plainly is limited in scope to the executor or administrator of the decedent's estate and does not extend to other defendants in the same action ... . Consequently, CPLR 210(b) could not extend the statute of limitations period as to Kess individually. Furthermore, the plaintiff failed to establish that Kess was the administrator or executor of his deceased wife's estate, a point which Kess denied in reply to the plaintiff's opposition." ***U.S. Bank, N.A. v. Kess*, 2018 N.Y. Slip Op. 01498, Second Dept 3-7-18**

## INSURANCE LAW, CIVIL PROCEDURE, EDUCATION-SCHOOL LAW.

INSURER'S ACTION FOR A DECLARATORY JUDGMENT THAT IT WAS NOT OBLIGATED TO INDEMNIFY THE DEFENDANT SCHOOL DISTRICT FOR A SETTLEMENT REACHED IN AN UNDERLYING ACTION (WHICH ALLEGED THE SCHOOL DISTRICT DID NOT PROTECT AGAINST ANTI-SEMITIC HARASSMENT) SHOULD NOT HAVE BEEN DISMISSED.

The Second Department, reversing Supreme Court, determined the insurer's action against the defendant school district, seeking a declaratory judgment that the insurer is not obligated to indemnify the defendants for a settlement reached in mediation, should not have been dismissed. The underlying action alleged the school district did not protect the plaintiffs from anti-Semitic harassment and discrimination. The insurer defended the action but reserved the right to disclaim coverage. A $3,000,000 (plus $1,480,000 attorney's fees) settlement was reached. The Second Department determined the documentary evidence submitted by the school district, i.e., the insurance policies, did not conclusively establish a defense as a matter of law. Therefore the motion to dismiss the insurer's declaratory judgment action pursuant to CPLR 3211(a)(1) and (7) should not have been granted: "The plaintiffs in the underlying action ... alleged that repeated and frequent incidents of anti-Semitic harassment and discrimination against them by other students, which were reported to school officials on numerous occasions and directly observed on other occasions by school personnel, gave rise to an inference that the defendants 'intended for the harassment to occur' based upon the defendants' practices, policies, and customs in dealing with reports and observations of anti-Semitic harassment and discrimination, that the defendants 'intentionally discriminated' against the plaintiffs, that the defendants' conduct 'aided and incited' unlawful discrimination, and that the defendants' acts and omissions were 'undertaken recklessly and with the intent to engage in wrongful conduct.' While 'it is not legally impossible to find accidental results flowing from intentional causes, i.e., that the resulting damage was unintended although the original act or acts leading to the damage were intentional'... , the insurance policies do not conclusively establish that the plaintiff is obligated to indemnify the defendants in the underlying action, and the other evidence submitted by the defendants did not utterly refute the factual allegations set forth in the plaintiff's complaint. Whether the incidents set forth in the amended complaint in the underlying action were accidents present questions of fact which cannot be determined on a motion to dismiss pursuant to CPLR 3211(a)(1) and (7) ...". ***Graphic Arts Mut. Ins. Co. v. Pine Bush Cent. Sch. Dist.*, 2018 N.Y. Slip Op. 01565, Second Dept 3-7-18**

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

NEW YORK TRANSIT AUTHORITY WAS NOT ENTITLED TO DISMISSAL OF THE LABOR LAW § 200 AND COMMON LAW NEGLIGENCE CAUSES OF ACTION ON COLLATERAL ESTOPPEL, GOVERNMENTAL IMMUNITY OR FACTUAL GROUNDS, RELEVANT LAW SUCCINCTLY EXPLAINED.

The Second Department, modifying Supreme Court, determined that the defendant New York State Transit Authority (NYSTA) was not entitled to dismissal of the Labor Law § 200 and common law negligence claims on collateral estoppel, governmental immunity, or factual grounds. The decision includes good explanations of all the legal principles involved. Claimants lost summary judgment motions in a lawsuit against other defendants in state court, and then brought this action against the NYSTA in the Court of Claims. The Second Department held that the standards for liability of the NYSTA as the owner of the construction site were not the same as the standards of liability for the defendants in the state action. Therefore the collateral estoppel doctrine did not apply. The court also held that the NYSTA was acting in a proprietary, not a governmental, capacity. Therefore governmental immunity was not invoked: "Regarding whether NYSTA had the authority to exercise supervision or control over the performance of the claimants' work, we find that it met its prima facie burden of demonstrating that it had no such authority ... . In opposition, however, the claimants raised a triable issue of fact regarding NYSTA's involvement at the work site ... . Regarding the alleged dangerous condition of the work site itself, NYSTA, in support of its motion, argued only that it could not be held liable for failing to remediate soil containing chemicals because the claimants' job was to remedy that very condition. We find that NYSTA failed to demonstrate, prima facie, that the claimants were injured from defective or hazardous conditions that were part of or inherent in the work they were performing... , or from conditions that were readily observable... . In addition, the claimants raised a triable issue of fact as to whether their injuries were caused by a hazardous condition that they were not specifically hired to remediate ... . Indeed, whether a dangerous condition is within the scope of the work an employee or contractor is hired to perform is a fact-specific inquiry ...". ***Grasso v. New York State Thruway Auth.*, 2018 N.Y. Slip Op. 01453, Second Dept 3-7-18**

## PERSONAL INJURY.

TRANSIT AUTHORITY'S MOTION FOR SUMMARY JUDGMENT IN THIS BUS PASSENGER'S SUDDEN STOP INJURY CASE PROPERLY DENIED.

The Second Department determined the New York City Transit Authority (NYCTA) defendants' motion for summary judgment in this action brought by a bus passenger alleging injury from a sudden stop was properly denied: "To prevail on a cause of action alleging that a common carrier was negligent in stopping a bus, a plaintiff must prove that the stop was unusual and violent, rather than merely one of the sort of 'jerks and jolts commonly experienced in city bus travel' ... . More-

over, a plaintiff may not satisfy that burden of proof merely by characterizing the stop as unusual and violent ... . However, in seeking summary judgment dismissing such a cause of action, common carriers have the burden of establishing, prima facie, that the stop was not unusual and violent. That burden may be satisfied by the plaintiff's deposition testimony as to how the accident occurred ... . Here, the plaintiff testified at her deposition that she was propelled to the floor and from the front to the middle of the bus. This testimony raised a triable issue of fact as to whether the stop at issue was unusual and violent, as opposed to whether the stop involved only the normal jerks and jolts commonly associated with city bus travel... . Since the NYCTA defendants did not meet their prima facie burden of establishing their entitlement to judgment as a matter of law, it is unnecessary to determine whether the papers submitted by the plaintiff in opposition thereto were sufficient to raise a triable issue of fact ...". ***Gani v. New York City Tr. Auth.*, 2018 N.Y. Slip Op. 01452, Second Dept 3-7-18**

### PERSONAL INJURY.

ALTHOUGH DEFENDANT PULLED OUT IN FRONT OF PLAINTIFF, PLAINTIFF DID NOT DEMONSTRATE FREEDOM FROM COMPARATIVE FAULT, PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined plaintiff's motion for summary judgment in this traffic accident case should not have been granted. Although defendant apparently pulled out in front of plaintiff, plaintiff did not demonstrate freedom from comparative fault: "... [T]he defendant failed to establish, prima facie, that the injured plaintiff's negligence in pulling out of a curbside parking spot was the sole proximate cause of the accident and that the defendant was free from comparative fault ... . In particular, the defendant failed to eliminate triable issues of fact as to whether she failed to see what was there to be seen through the proper use of her senses and to use reasonable care to avoid a collision ...". ***Inesta v. Florio*, 2018 N.Y. Slip Op. 01455, Second Dept 3-7-18**

## THIRD DEPARTMENT

### CRIMINAL LAW, EVIDENCE, ATTORNEYS.

NO EVIDENCE OF THREATENED USE OF A DANGEROUS INSTRUMENT, ROBBERY FIRST CONVICTION NOT SUPPORTED; COUNTY COURT DID NOT CONDUCT AN ADEQUATE INQUIRY INTO DEFENSE COUNSEL'S REQUEST TO WITHDRAW, CONVICTION REVERSED.

The Third Department, reversing defendant's conviction, over a dissent, determined the evidence was insufficient to support the robbery first degree charge (no evidence of threat with a dangerous instrument) and the trial court should have conducted an inquiry into defense counsel's request to withdraw: "Indisputably, the 'gun' was plastic and did not work, and there was no evidence that it could potentially harm someone... . Similarly, while there was testimony that one of the men entering the motel room was holding the tire checker, there was no evidence that any individual brandished the tire checker in a threatening manner... . ... [T]here is no question that one of the individuals possessed a dangerous instrument. What was missing was any evidence that there was any verbal threat of immediate use of the instrument or that it was 'employ[ed]' in any way ... . * * * ... [D]efendant's right to counsel was not adequately protected. County Court's determination focused on the inconveniences that would result if counsel were substituted and the trial were delayed one month, as well as defendant's propensity to complain. But it was trial counsel, not defendant, complaining that the relationship had broken down, and the request was not made on the eve of trial. While we are not suggesting that a request made by counsel warrants heightened inquiry, 'a conflict of interest or other irreconcilable conflict with counsel' may constitute good cause for substitution... , and there was no inquiry here to assess the gravity of counsel's concerns in this regard. The motion raised specific examples to support trial counsel's claim that there was 'an irretrievable breakdown' in the relationship with defendant. As such, the court should have first questioned both defendant and trial counsel about 'the nature of the disagreement or its potential for resolution' prior to denying the motion ... . Absent such a 'minimal inquiry,' we are compelled to reverse the judgment of conviction ...". ***People v. Matthews*, 2018 N.Y. Slip Op. 01499, Second Dept 3-8-18**

### DISCIPLINARY HEARINGS (INMATES).

EVIDENCE PETITIONER HAD ACCESS TO THE AREA WHERE THE CONTRABAND WAS FOUND WAS NOT SUFFICIENT TO DEMONSTRATE PETITIONER'S POSSESSION OF THE CONTRABAND.

The Third Department, annulling the misbehavior determination, found that the evidence petitioner possessed contraband was insufficient. The fact that petitioner had access to the area where the contraband was found was not enough. A lock pick had been found in a door mechanism: "The correction officer who served as the facility's locksmith testified that the lock pick did not belong to him and that, because the lock pick was observed to be dirty, the lock pick had probably been in the tracking of the cell door for a while prior to its discovery. The Hearing Officer accepted as true petitioner's testimony that he had initially complained that the cell door would not close and that the door had been opened and closed numerous times without a problem on the day in question. We find significant petitioner's testimony that he alerted facility staff to the malfunctioning door and the locksmith's testimony suggesting that the lock pick had most likely been hidden in the tracking of the cell door for an extended period of time and prior to petitioner's occupation of the cell ... . In our view, these

circumstances do not permit a reasonable inference that petitioner possessed the contraband simply because he might have had access to the area where the contraband was found and that it, to some extent, was under his control ...". ***Matter of Perez v. Annucci*, 2018 N.Y. Slip Op. 01521, Third Dept 3-8-18**

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