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COURT OF APPEALS

CIVIL RIGHTS LAW.

IMAGE IN VIDEO GAME NOT RECOGNIZABLE AS PLAINTIFF, CIVIL RIGHTS LAW (RIGHT TO PRIVACY) CAUSES OF ACTION PROPERLY DISMISSED.

The Court of Appeals, in a full-fledged opinion by Judge Fahey, determined that, although the image of a person (an avatar) in a video game can constitute a portrait within the meaning of the Civil Rights Law, the image in this case was not recognizable as the plaintiff, Lindsay Lohan: "Inasmuch as she did not provide written consent for the use of what she characterizes as her portrait and her voice in GTAV [Grand Theft Auto V], plaintiff commenced this action seeking, among other things, compensatory and punitive damages for invasion of privacy in violation of Civil Rights Law §§ 50 and 51. The primary questions on this appeal are whether an avatar (that is, a graphical representation of a person, in a video game or like media) may constitute a 'portrait' within the meaning of Civil Rights Law §§ 50 and 51 and, if so, whether the images in question in the video game central to this matter are recognizable as plaintiff. We conclude a computer generated image may constitute a portrait within the meaning of that law. We also conclude, however, that the subject images are not recognizable as plaintiff, and that the amended complaint, which contains four causes of action for violation of privacy pursuant to Civil Rights Law §§ 50 and 51, was properly dismissed." ***Lohan v. Take-Two Interactive Software, Inc.*, 2018 N.Y. Slip Op. 02208, CtApp 3-29-18**

CONTRACT LAW, EMPLOYMENT LAW, CIVIL PROCEDURE.

DOCUMENTARY EVIDENCE DID NOT UTTERLY REFUTE PLAINTIFF'S CORRESPONDENCE-EVIDENCE THAT AN EMPLOYMENT CONTRACT HAD BEEN ENTERED AND BREACHED BY THE DEFENDANT, DEFENDANT'S MOTION TO DISMISS PROPERLY DENIED.

The Court of Appeals, in a full-fledged opinion by Judge Stein, determined that an exchange of correspondence supported plaintiff's allegation of the existence of an employment contract and a breach of that contract. The documentary evidence submitted by the defendant did not utterly refute the allegations in the complaint. Therefore the defendant's motion to dismiss was properly denied: "... [W]e conclude that, based on all the documentary evidence proffered by defendant, a reasonable fact-finder could determine that a binding contract was formed. Ertel's [the CEO'S] initial email to plaintiff stated that '[t]he terms of our offer are the same [as the] terms of your existing contract' — apart from 'a clarification' concerning an issue that plaintiff characterizes as minor — and outlined the core terms that were included in the 2009 Agreement. He added that, if plaintiff had '[a]ny further questions' he should consult his 'existing contract.' Inasmuch as this email explained that 'the terms of the offer' were to be nearly identical to the terms of plaintiff's existing contract, a reasonable fact-finder could interpret it as evincing an objective manifestation of defendant's intent to enter into a bargain, such that plaintiff was justified 'in understanding that his assent to that bargain [was] invited and [would] conclude it'... . Put differently, it could reasonably be inferred that Ertel's email constituted a valid offer by defendant. In response to that email, plaintiff wrote 'I accept. pls [sic] send contract,' to which Ertel replied, 'Mazel. Looking forward to another great run.'... Affording plaintiff the benefit of every favorable inference, this exchange — in essence, we 'offer' and 'I accept,' followed by an arguably congratulatory exclamation, coupled with a forward-looking statement about the next stage of the parties' continuing relationship — sufficiently evinces an objective manifestation of an intent to be bound for purposes of surviving a motion to dismiss ... . Although Ertel's email referenced one outstanding 'clarification,' the parties' further communications indicate that such clarification was incorporated into the first draft of the new agreement sent by Zeliger [general counsel] to plaintiff, and no evidence was offered to suggest that plaintiff resisted that change to the terms of the 2009 Agreement. We reject defendant's argument that plaintiff's contract claim should have been dismissed because the additional correspondence defendant proffered in support of its motion to dismiss reflects a lack of mutual assent to material terms — such as plaintiff's minimum guaranteed compensation and the length of the non-compete term — and that this indefiniteness renders the purported contract invalid as a matter of law. As the Appellate Division concluded, that correspondence does not conclusively refute contract formation ... ". ***Kolchins v. Evolution Mkts., Inc.*, 2018 N.Y. Slip Op. 02209, CtApp 3-29-18**

CRIMINAL LAW.

MAJORITY DEEMED THE DISMISSAL OF THE BB GUN POSSESSION CHARGE PRIOR TO SUBMITTING THE HANDGUN POSSESSION CHARGE TO THE JURY PROPER, STRONG DISSENT ARGUED THE DEFENDANT'S ADMISSION OF POSSESSION OF THE BB GUN TAINTED THE JURY'S CONSIDERATION OF THE MORE SERIOUS CHARGE.

The Court of Appeals, in a brief memorandum decision, over a comprehensive two-judge dissenting opinion by Judge Rivera, affirmed defendant's conviction for unlawful possession of a weapon. Defendant was charged with possession of a BB gun and a handgun (Taurus). The judge dismissed the BB gun charge prior to submission of the handgun charge to the jury: "The trial court did not abuse its discretion by dismissing the non-inclusory charge of unlawful possession of an air pistol or rifle which related to the BB gun ... . The jury was free to credit defendant's theory that he possessed the BB gun but not the Taurus firearm that was also recovered in his vicinity — which was the subject of separate weapon possession counts. Contrary to defendant's contention, his defense that he never possessed the Taurus firearm was not removed from consideration when the trial court dismissed the charge related to the BB gun, nor did defendant argue in the trial court that the dismissal of the BB gun count impaired his constitutional right to present a defense. **From the dissent:** The trial court abused its discretion when it did not submit the unlawful possession of an air pistol count to the jury and submitted instead only the more serious counts relating to the possession of a handgun. This error allowed the jury to consider highly prejudicial testimony completely irrelevant to the counts submitted, including defendant's admission of guilt to the possession of the air pistol. So doing, the trial court encouraged reverse jury nullification and provoked confusion in the jury's deliberative process." ***People v. Boyd*, 2018 N.Y. Slip Op. 02120, CtApp 3-27-18**

CRIMINAL LAW.

TEN-YEAR, AS OPPOSED TO A FIVE-YEAR, PROBATION SENTENCE FOR A YOUTHFUL OFFENDER SEXUAL ABUSE ADJUDICATION IS SUPPORTED BY THE STATUTORY LANGUAGE.

The Court of Appeals, in a full-fledged opinion by Judge Wilson, determined that the statutory language supported a ten-year, as opposed to a five-year, probation sentence for a youthful offender's (Teri W's) sexual abuse adjudication: "The version of [the] statute in effect when Teri W. committed her offense provided that 'For a felony, other than a class A-II felony defined in article two hundred twenty of this chapter or the class B felony defined in section 220.48 of this chapter, or any other class B felony defined in article two hundred twenty of this chapter committed by a second felony drug offender, or a sexual assault, the period of probation shall be five years' ... . Pursuant to the exception above, '[f]or a felony sexual assault, the period of probation shall be ten years' ... . * * * Because [the relevant] definition includes sex offenses that are class E felonies, a probation period of 10 years for a felony sexual assault is a sentence 'authorized to be imposed upon a person convicted of a class E felony' ... . Concordantly, Penal Law § 65.00 (3) (a) (i) exempts 'sexual assaults' from the shorter probationary period applicable to non-sexual assault class E felonies." ***People v. Teri W.*, 2018 N.Y. Slip Op. 02210, CtApp 3-29-18**

CRIMINAL LAW, APPEALS.

THERE WAS SUPPORT IN THE RECORD FOR THE LOWER COURTS' FINDING THE ARRESTING OFFICERS COMPLIED WITH THE *DEBOUR* STREET STOP REQUIREMENTS, A MIXED QUESTION OF LAW AND FACT, EXTENSIVE DISSENTING OPINION.

The Court of Appeals, in a short memorandum decision, over an extensive two-judge dissenting opinion by Judge Rivera, determined the record supported the trial court's finding that the stop and search of the defendant, in an apartment building, met the *DeBour* street stop criteria: "Police were conducting a vertical patrol of a New York City Housing Authority building in a high crime area and interviewing tenants in search of a robbery suspect in an investigation unrelated to this case. Defendant got off the elevator, observed the police officers — who were approximately eight feet away with shields displayed — and immediately retreated into the elevator. Defendant ignored an officer's request that he hold the door and instead 'kept pushing the button' and the elevator doors closed. In light of this behavior, as well as the building's history of narcotics and trespass activity, the police followed defendant to determine whether he lived in the building. Rather than respond to the officer's questions, defendant turned away from the police to face the wall, held his head down with the hood of his sweatshirt over his head, and kept his hands hidden inside his sweatshirt. The officer immediately noticed a large bulge in defendant's right arm, which defendant held stiffly and straight down from his body in an unnatural position. ... When the officer touched the defendant's wrist, he felt a metal object, lifted the sleeve of the defendant's shirt, saw the point of a blade, and ordered him to 'drop it.' Defendant did not comply and officers had to pull the weapon — a two-foot-long machete — from defendant's shirt. Minutes later, the officer learned of a recent robbery in the area involving a machete-wielding suspect wearing clothing matching that worn by defendant. The issue on appeal to this Court, whether the police conduct conformed to De Bour, presents a mixed question of law and fact ... Accordingly, 'our review is limited to whether there is evidence in the record supporting the lower courts' determinations' ...". ***People v. Perez*, 2018 N.Y. Slip Op. 02118, CtApp 3-27-18**

FREEDOM OF INFORMATION LAW (FOIL).

NEW YORK CITY POLICE DEPARTMENT, IN RESPONSE TO A FREEDOM OF INFORMATION LAW (FOIL) REQUEST, PROPERLY REFUSED TO CONFIRM OR DENY THE EXISTENCE OF SURVEILLANCE RECORDS ON COUNTERTERRORISM GROUNDS.

The Court of Appeals, in a full-fledged opinion by Judge DiFiore, over a partial dissenting opinion and a two-judge dissenting opinion, determined that the New York City Police Department, pursuant to a request for records of surveillance of Talib Abdur-Rashid, Samir Hahsmi, a mosque and a university student association, properly refused to confirm or deny such records existed: "The agency denied the requests, stating in each case that the information, 'if possessed by the NYPD', would be protected from disclosure under various statutory exemptions, including the law enforcement, public safety and personal privacy provisions. After the NYPD adhered to those decisions on administrative appeal, petitioners commenced separate CPLR article 78 proceedings challenging the determinations. Petitioners asserted that the NYPD was engaged in an ongoing domestic surveillance program in which, as alleged in press articles, it had targeted Muslim individuals, places of worship, businesses, schools, student groups and the like. It was in this context that petitioners attempted to ascertain whether they were subjects of surveillance or investigation, noting that they had supplied certifications of identity waiving their personal privacy interests and authorizing the NYPD to release responsive records to their attorneys. ... The NYPD's response, although styled as a motion to dismiss the petition in each case, did not assert a procedural objection but defended the FOIL responses on the merits. The agency explained the basis for its denial of the FOIL requests and its refusal to disclose whether it possessed responsive documents in a 22-page affidavit of its Chief of Intelligence, Thomas Galati. Without offering any specific information relating to petitioners, Chief Galati described the NYPD's ongoing and wide-ranging counterterrorism efforts, acknowledging that the agency was actively engaged in covert surveillance and other intelligence gathering in its effort to preempt acts of terrorism in New York City, which remains a prime target in the wake of the World Trade Center attacks. The Galati affidavit averred that disclosure of whether the NYPD possesses records responsive to the FOIL requests would necessarily reveal whether petitioners had been the subjects of its investigation, information which — particularly if aggregated — would provide unprecedented and invaluable information concerning NYPD counterterrorism strategies, operations, tactics and techniques to those planning future terrorist attacks. The Galati affidavit also averred that the NYPD intelligence strategies are monitored by individuals and organizations with the goal of developing counterintelligence measures, and the greatest vulnerability to the NYPD Intelligence Bureau is the release of even 'seemingly innocuous information' which would inexorably reveal sources from which information is gathered by the NYPD." ***Matter of Abdur-Rashid v. New York City Police Dept.*, 2018 N.Y. Slip Op. 02206, CtApp 3-29-18**

INSURANCE LAW.

UNAMBIGUOUS POLICY LANGUAGE REQUIRED A WRITTEN CONTRACT WITH ANY ADDITIONAL INSURED, BECAUSE THERE WAS NO WRITTEN CONTRACT, THERE WAS NO COVERAGE.

The Court of Appeals, in a full-fledged opinion by Judge Stein, over an extensive two-judge dissent, determined that the language of the policy which required a written contract with an additional insured (Gilbane JV) was unambiguous and precluded coverage: "The relevant portion of the Liberty policy is the 'Additional Insured-By Written Contract' provision, which reads: 'WHO IS AN INSURED (Section II) is amended to include as an insured any person or organization with whom you have agreed to add as an additional insured by written contract but only with respect to liability arising out of your operations or premises owned by or rented to you.' … . ... [T]he endorsement would have the meaning Gilbane JV desires if the word 'with' had been omitted. Omitting 'with,' the phrase would read: '. . . any person or organization whom you have agreed by written contract to add . . .', and Gilbane JV's position would have merit. But [the general contractor] and Liberty included that preposition in the contract between them, and we must give it its ordinary meaning. Here, the 'with' can only mean that the written contract must be 'with' the additional insured." ***Gilbane Bldg. Co./TDX Constr. Corp. v. St. Paul Fire & Mar. Ins. Co.*, 2018 N.Y. Slip Op. 02117, CtApp 3-27-18**

INSURANCE LAW, ENVIRONMENTAL LAW.

IN THIS LONG TERM (LONG TAIL) ENVIRONMENTAL CONTAMINATION CASE, THE INSURER IS NOT LIABLE TO THE INSURED FOR LOSSES ATTRIBUTABLE TO TIME PERIODS WHEN LIABILITY INSURANCE WAS UNAVAILABLE.

The Court of Appeals, affirming the Appellate Division, in a full-fledged opinion by Judge Stein, determined the insured, Keyspan Gas, not the insurer, Century, bore the risk of damages from environmental contamination during the years that coverage for such damage was not available: "The liability underlying this insurance dispute emanates from environmental contamination caused by manufactured gas plants (MGPs) owned and operated by KeySpan's predecessor ... . Gas production at the sites began in the late 1880s and early 1900s. After operations ceased decades later, the New York Department of Environmental Conservation (DEC) determined that there had been long-term, gradual environmental damage at both sites due to contaminants, such as tar, seeping into the ground and leeching into groundwater. The DEC required KeySpan to undertake costly remediation efforts ... . … [Environmental contamination] coverage was not available to utilities until

approximately 1925, and ... a 'sudden and accidental pollution exclusion' was later generally adopted by the insurance industry sometime in or after October 1970. Thus, KeySpan argued, the allocation should not take into account any years prior to the availability, or after the unavailability, of the applicable coverage. * * * .. . T]he Appellate Division ... [held] that 'under the insurance policies at issue, Century does not have to indemnify KeySpan for losses that are attributable to time periods when liability insurance was otherwise unavailable in the marketplace' ... . * * * 'The policyholder is the one who allegedly caused the injury and, therefore, who ultimately will be financially responsible should insurance prove insufficient' ... . '[T]he very essence of pro rata allocation is that the insurance policy language limits indemnification to losses and occurrences during the policy period' ...". ***Keyspan Gas E. Corp. v. Munich Reins. Am., Inc.*, 2018 N.Y. Slip Op. 02116, CtApp 3-27-18**

PARTNERSHIP LAW, ATTORNEYS.

PURPORTED DISSOLUTION OF THE PARTNERSHIP VIOLATED THE PARTNERSHIP AGREEMENT, PLAINTIFFS NOT ENTITLED TO ATTORNEY'S FEES, GOODWILL REDUCTION SUPPORTED BY THE RECORD, MINORITY DISCOUNT APPLIED.

The Court of Appeals, in a comprehensive opinion by Judge Fahey, over a two-judge partial dissenting opinion, determined that the defendant's attempt to dissolve a partnership violated the partnership agreement, the plaintiffs were not entitled to attorney's fees, the reduction for goodwill was supported by the record, the lack-of-marketability discount issue was not preserved, and the minority discount was applicable. The dissent agreed with everything except the applicability of the minority discount: "... [Parties to a partnership agreement generally have the right to contract around a provision of the Partnership Law, provided of course they do so in language that is 'clear, unequivocal and unambiguous'... . No particular magic words need be recited, provided that the parties' intent is clear. * * * Here, the Agreement stated that the Partnership 'shall continue until it is terminated as hereinafter provided,' and, in a subsequent provision, stated that the Partnership would dissolve upon '[t]he election by the Partners to dissolve the Partnership' or '[t]he happening of any event which makes it unlawful for the business of the Partnership to be carried on or for the Partners to carry it on in Partnership.' The partners clearly intended that the methods provided in the Agreement for dissolution were the only methods whereby the partnership would dissolve in accordance with the Agreement, and by implication that unilateral dissolution would breach the Agreement. In other words, the Agreement contemplated dissolution only in two instances, leaving no room for other means of dissolution that would be in accordance with its terms. * * * We conclude ... that to award fees to plaintiffs would be to contradict New York's well-established adoption of the American Rule that 'the prevailing litigant ordinarily cannot collect . . . attorneys' fees from its unsuccessful opponents' ... . Contrary to Supreme Court, the standard is not which party was 'more responsible for the litigation. Attorneys' fees are treated as 'incidents of litigation' ... rather than damages. * * * A minority discount is a standard tool in valuation of a financial interest, designed to reflect the fact that the price an investor is willing to pay for a minority ownership interest in a business, whether a corporation or a partnership, is less because the owner of a minority interest lacks control of the business." ***Congel v. Malfitano*, 2018 N.Y. Slip Op. 02119, CtApp 3-27-18**

FIRST DEPARTMENT

ADMINISTRATIVE LAW, VEHICLE AND TRAFFIC LAW, EVIDENCE.

APPLYING THE CLEAR AND CONVINCING EVIDENTIARY STANDARD, THE DEPARTMENT OF MOTOR VEHICLES' (DMV'S) SUSPENSION OF PETITIONER BUS DRIVER'S LICENSE BASED UPON STRIKING A PEDESTRIAN WAS NOT SUPPORTED BY EVIDENCE OF THE EXTENT OF THE INJURY OR ANY CONNECTION BETWEEN THE INJURY AND THE PEDESTRIAN'S DEATH A MONTH LATER, DETERMINATION ANNULLED AND LICENSE REINSTATED.

The First Department, annulling the determination of the Department of Motor Vehicles (DMV), over a two-justice dissenting opinion, determined the record did not support the suspension of petitioner-bus-driver's license for a violation of Vehicle and Traffic Law § 1146. The court noted that the standard of proof in the DMV hearing is "clear and convincing" and the standard of proof in the instant Article 78 proceeding is "substantial evidence." Effectively, therefore, the "clear and convincing" standard applies to the Article 78. Here, on a dark and rainy night, an 88-year-old pedestrian apparently came into contact with the bus in the crosswalk when the bus was turning. The man died a month later. In the opinion of the majority, the hearing evidence did not demonstrate how seriously the man was injured by the bus, or a connection between any injury and the man's death a month later: "Here, DMV was required to establish that petitioner violated Vehicle and Traffic Law § 1146(c)(1), which imposes liability on '[a] driver of a motor vehicle who causes serious physical injury as defined in article ten of the penal law to a pedestrian or bicyclist while failing to exercise due care.' The referenced definition of 'serious physical injury' includes 'physical injury . . . which causes death,' ... which is presumably the basis for the charge against petitioner since he was not issued a summons until after the pedestrian died in the hospital. Thus, DMV was required to present clear and convincing evidence of both failure to exercise care and that such failure led to the pedestrian's demise. * * * To be sure, one could speculate, as does the dissent, that the pedestrian suffered a 'serious physical injury.' But to engage

in speculation would be to ignore the underlying standard of clear and convincing evidence, which even the dissent agrees applied in the administrative proceeding and is relevant to our review. 'Clear and convincing evidence is evidence that satisfies the factfinder that it is highly probable that what is claimed actually happened . . . and it is evidence that is neither equivocal nor open to opposing presumptions'... . Given that standard, and the remarkable lack of compelling evidence before us, we would be abdicating our role were we simply to defer to the conclusions drawn by the Administrative Law Judge, and raising a serious question as to the very purpose of having any appellate review in this matter." ***Matter of Seon v. New York State Dept. of Motor Vehs.*, 2018 N.Y. Slip Op. 02240, First Dept 3-29-18**

CONTRACT LAW.

THE PROMISE TO REPAY THE LOAN WAS NOT UNCONDITIONAL BUT RATHER THE DEFENDANT'S HAVING AVAILABLE CASH TO REPAY THE LOAN WAS A CONDITION PRECEDENT, BECAUSE PLAINTIFF DID NOT DEMONSTRATE THE DEFENDANT HAD AVAILABLE CASH, ITS MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The First Department, reversing Supreme Court, determined that summary judgment should not have been awarded to the plaintiff (Related) in this breach of contract action. The agreement provided that loan payments be made to plaintiff by the defendant (Tesla) from available cash. The existence of available cash was deemed a condition precedent. Because plaintiff could not show defendant had available case, summary judgment was not an available remedy: "A condition precedent is 'an act or event, other than a lapse of time, which, unless the condition is excused, must occur before a duty to perform a promise in the agreement arises' ... . The term sheet does not contain an unconditional promise by Tesla to repay the cash advances, distinguishing the transactions from the typical loan arrangement, which involves an unconditional promise to repay the amount advanced. Rather, pursuant to the waterfall provision, Tesla was to repay the cash advances from cash that was available for distribution after the payment of taxes. Related failed to establish that this condition precedent was satisfied, and its motion for summary judgment should have therefore been denied once the court determined that Tesla presently had no 'available cash' to repay Related ...". ***Related Cos., L.P. v. Tesla Wall Sys., LLC*, 2018 N.Y. Slip Op. 02122, First Dept 3-27-18**

CONTRACT LAW.

THE TERMS 'EVENT OF DEFAULT' AND 'DEFAULT,' WHICH APPEARED IN TWO DIFFERENT SECTIONS OF THE CONTRACT, WERE DEEMED TO MEAN THE SAME THING; BECAUSE THE TERMS WERE DEEMED SYNONYMOUS PLAINTIFF DID NOT MEET ALL THE CONDITIONS PRECEDENT FOR STANDING TO SUE, COMPLAINT PROPERLY DISMISSED.

The First Department determined the derivative action for breach of an Amended and Restated Pooling and Servicing Agreement (PSA) was properly dismissed because plaintiffs did not fulfill all of the conditions precedent for bringing the suit, which alleged the defendants' failure to determine the fair value of a loan. Whether the contractual conditions precedent were met turned on whether the term "event of default" in one provision was synonymous with the term "default" in another provision. Because the two terms were deemed to mean the same thing, a condition precedent for the suit was not met: "Because the uncontroverted and unambiguous documentary evidence demonstrates that plaintiff failed to satisfy the terms of section 7.01(a)(iii) defining the Event of Default here at issue, plaintiff's compliance with the conditions precedent of section 12.03(c) does not suffice to afford it standing to sue, as it has failed to demonstrate an actionable Event of Default under the PSA. Thus, KeyBank and Berkadia have conclusively established a defense to plaintiff's asserted claims as a matter of law ... and the motion court correctly granted both defendants' CPLR 3211(a)(1) motions to dismiss." ***Alden Global Value Recovery Master Fund, L.P. v. KeyBank N.A.*, 2018 N.Y. Slip Op. 02241, First Dept 3-29-18**

CRIMINAL LAW.

PLACING DEFENDANT IN HANDCUFFS ELEVATED THE INVESTIGATORY STOP TO AN ILLEGAL ARREST, MOTION TO SUPPRESS SHOULD HAVE BEEN GRANTED.

The First Department, reversing defendant's conviction, determined placing the defendant in handcuffs improperly elevated an investigatory detention to an illegal arrest and the suppression motion should have been granted. The court noted that Supreme Court explicitly found that the detective did not have probable cause to arrest at the time of the handcuffing so the appellate court could not consider the People's argument to the contrary: "During a buy and bust operation, the police made what the suppression court found to be an investigatory stop of defendant, based on reasonable suspicion, followed by a confirmatory identification that provided probable cause to arrest defendant for selling drugs. However, during the stop, but before the identification, the police handcuffed defendant because defendant was 'a little irate' and the officer wanted to 'make sure nothing escalated.' 'Although the use of handcuffs is not dispositive of whether an investigatory detention on reasonable suspicion has been elevated to an arrest, handcuffing is permissible in such a detention only when justified by the circumstances'... . Here, defendant was not suspected of anything more than a street-level drug sale, the police had no reason to believe that he was armed, dangerous or likely to flee, and there was no indication on the

record that defendant offered any resistance before he was handcuffed. That defendant was 'a little irate' does not establish dangerousness or resistance that would justify the use of handcuffs during an investigatory stop ...". ***People v. Steinbergin*, 2018 N.Y. Slip Op. 02123, First Dept 3-27-18**

CRIMINAL LAW, ATTORNEYS, EVIDENCE.

ALLOWING IN EVIDENCE DEFENDANT'S TEXT THAT HE MAY NEED MONEY FOR AN ATTORNEY WAS (HARMLESS) ERROR BECAUSE IT WAS AN INFRINGEMENT ON THE RIGHT TO COUNSEL.

The First Department noted that a text message from defendant indicating he needed money "just in case for a lawyer" should not have been admitted in evidence in this homicide case. The error was deemed harmless however: "The People should not have been permitted to introduce, as evidence of defendant's consciousness of guilt, a text exchange the day after the crime in which defendant indicated that he needed money 'just in case for a lawyer.' This evidence was an improper infringement of defendant's right to counsel ... . However, under all the circumstances, including the overwhelming evidence of defendant's guilt, which included the testimony of one of the victims, any error in the admission of the text exchange and related summation comment on it was harmless beyond a reasonable doubt ... . The circumstantial evidence was compelling, and it led to an inescapable inference that the deceased and surviving victims were shot by defendant, the only other occupant of the car in which the shootings took place." ***People v. Suero*, 2018 N.Y. Slip Op. 02269, First Dept 3-29-18**

CRIMINAL LAW, MENTAL HYGIENE LAW, ATTORNEYS.

BY CONCEDING DEFENDANT SUFFERED FROM A DANGEROUS MENTAL CONDITION DEFENSE COUNSEL EFFECTIVELY WAIVED AN INITIAL 'TRACK' HEARING PURSUANT TO CPL § 330.20, A 'CRITICAL STAGE' OF THE PROCEEDINGS AFTER A NOT RESPONSIBLE BY REASON OF MENTAL DISEASE OR DEFECT PLEA, DEFENSE COUNSEL WAS INEFFECTIVE, CPL 330.20 HEARING ORDERED.

The First Department, in a full-fledged opinion by Justice Tom, determined defendant did not receive effective assistance of counsel because counsel, after defendant pled not responsible by reason of mental disease or defect, conceded defendant suffered from a dangerous mental disorder and thereby waived the required "track" hearing pursuant to Criminal Procedure Law (CPL) § 330.20 (a "critical stage" of the proceedings): "... [A]fter a court accepts a not responsible plea, it must issue an examination order for the defendant to be examined by two qualified psychiatric examiners ... , who must submit to the court a report of their findings and evaluation regarding defendant's mental condition ... . Critical to this procedure is the requirement that the court conduct an initial hearing within 10 days after receipt of the psychiatric examination reports, in order to classify the defendant as 'track one,' 'track two,' or 'track three' based on the defendant's mental condition ... . 'The track designation places more dangerous acquittees under the purview of the Criminal Procedure Law, while less dangerous, though still mentally ill, acquittees are committed to the custody of the Commissioner of Mental Health and come under the supervision of the Mental Hygiene Law' ... . At the initial hearing, the People bear the burden of proving 'to the satisfaction of the court,' i.e., by a fair preponderance of the credible evidence, that the defendant has a dangerous mental disorder or is mentally ill ... . The initial hearing under CPL 330.20(6) is 'a critical stage' of proceedings at which the defendant is entitled to the effective assistance of counsel ... . … [C]ounsel rendered ineffective assistance when he conceded at the plea proceeding that defendant was a danger to himself and society, and waived defendant's right to an initial hearing before reviewing the psychiatric examination reports which had not yet been prepared for the court. Further, at the proceeding that followed the issuance of the reports, counsel simply relied on the psychiatrists' reports and deferred to the court's discretion. He did not call any witnesses or seek to cross-examine the psychiatrists who prepared the reports. Nor did counsel consult an expert on defendant's behalf who might have offered a contrasting opinion." ***People v. Darryl T.*, 2018 N.Y. Slip Op. 02280, First Dept 3-29-18**

INSURANCE LAW.

PROPERTY OWNER, AS AN ADDITIONAL INSURED UNDER THE SECURITY COMPANY'S POLICY, WAS NOT ENTITLED TO COVERAGE FOR A SECURITY GUARD'S SLIP AND FALL ON A RECENTLY MOPPED FLOOR, THE ADDITIONAL INSURED WAS THE SOLE PROXIMATE CAUSE OF THE INJURY.

The First Department, reversing Supreme Court, determined coverage for a slip and fall of a security company (Protection Plus) employer was not available to the property owner (Manhattan School) as an additional insured on the security company's policy. the security guard slipped and fell on a recently mopped floor at the school: "Plaintiff Manhattan School is an additional named insured under a policy issued by defendant to nonparty Protection Plus Security Corporation. In an additional insured endorsement, the policy provides that the Manhattan School is an additional named insured 'only with respect to liability for bodily injury'. . . caused, in whole or in part, by' the acts or omissions of Protection Plus in the performance of its operations for the Manhattan School. When 'an insurance policy is restricted to liability for any bodily injury caused, in whole or in part,' by the acts or omissions' of the named insured, the coverage applies to injury proximately caused by the named insured' ... . Such language in a policy does not equate to 'but for' causation and is not the same as policies containing the phrase, 'arising out of' ... . Fundamentally, 'arising out of' is not the functional equivalent

of proximately caused by'... . Thus, it is not enough to merely establish a causal link to the injury. Notably, the language in the endorsement was 'intended to provide coverage for an additional insured's vicarious or contributory negligence, and to prevent coverage for the additional insured's sole negligence' ... . Accordingly, when a policy limits coverage to an injury 'caused, in whole or part' by the 'acts or omissions' of the named insured, coverage is extended to an additional insured only when the damages are the result of the named insured's negligence or some other act or omission ... . Here, the acts or omissions of Protection Plus were not a proximate cause of the security guard's injury. Rather, the sole proximate cause of the injury was the additional insured, and thus coverage is not available to the Manhattan School under defendant's policy ...". ***Hanover Ins. Co. v. Philadelphia Indem. Ins. Co.*, 2018 N.Y. Slip Op. 02121, First Dept 3-27-18**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

PLAINTIFF, WHO TRIPPED ON AN EXTENSION CORD AND FELL DOWN A STAIRWELL, WAS ENTITLED TO SUMMARY JUDGMENT ON HIS LABOR LAW § 240(1) CAUSE OF ACTION.

The First Department determined plaintiff was entitled summary judgment on his Labor Law § 240(1) cause of action. He was working in a stairwell and tripped over an extension cord: "Because the stairway was an elevated surface on which plaintiff was required to work, and also the sole means of access to his work area, it constituted a safety device within the meaning of the statute ... , as well as an elevated work platform that required provision of an adequate safety device ... . Under either theory, it is clear that plaintiff's fall was the direct result of absence of an adequate safety device, and thus, plaintiffs are entitled to partial summary judgment on the section 240(1) cause of action. That plaintiff tripped on an extension cord does not take the case out of the ambit of Labor Law § 240(1)... , and the fact that the staircase from which plaintiff fell was a permanent structure of the building does not remove this case from the coverage of Labor Law § 240(1) ...". ***Conlon v. Carnegie Hall Socy., Inc.*, 2018 N.Y. Slip Op. 02268, First Dept 3-29-18**

LANDLORD-TENANT.

ALTHOUGH RESPONDENT WAS NOT MARRIED TO THE TENANT OF RECORD, THEIR RELATIONSHIP EXHIBITED THE CARE AND SELF-SACRIFICE OF A FAMILY RELATIONSHIP, HOUSING COURT SHOULD HAVE FOUND THAT RESPONDENT WAS A FAMILY MEMBER ENTITLED TO SUCCESSION RIGHTS IN THE RENT-STABILIZED APARTMENT.

The First Department, in a full-fledged opinion by Justice Moulton, reversing Housing Court, determined that the relationship between the tenant of record (Montgomery) in a rent-stabilized apartment and respondent (Zenker) justified the finding that Zenker was a "family member" entitled to succession rights. Although Zenker and Montgomery were not married, their relationship exhibited the care and sacrifice sufficient to meet the definition of a "family member" in this context: "The fact that Zenker moved back into the apartment in 2003 because of her own housing problems, and the couple's lack of sexual intimacy, does not diminish their relationship to that of roommates. The unrefuted evidence establishes that this couple shared decades of dedication, caring and self-sacrifice. Consideration of the factual record in light of the factors listed in the Rent Stabilization Code demonstrates that Zenker was family to Montgomery." ***Matter of 530 Second Ave. Co., LLC v. Zenker*, 2018 N.Y. Slip Op. 02143, First Dept 3-27-18**

PERSONAL INJURY.

EGREGIOUS CIRCUMSTANCES JUSTIFIED SUMMARY JUDGMENT IN FAVOR OF DEFENDANT DRIVER PURSUANT TO THE EMERGENCY DOCTRINE.

The First Department determined defendant Dominguez's motion for summary judgment pursuant to the emergency doctrine was properly granted. The court noted that the emergency doctrine usually presents a question of fact but the egregious circumstances warranted summary judgment here. Plaintiff was a passenger in Chuquillanqui's vehicle which was struck by a car driven by Dominguez: "Dominguez submitted evidence showing that the accident occurred when Chuquillanqui attempted an illegal U-turn from the far-right lane of a two-way road that had two lanes traveling in each direction. Dominguez was operating a vehicle traveling in the same direction as Chuquillanqui's vehicle, but in the left lane at some distance back from Chuquillanqui's vehicle. Dominguez testified that he had only had a couple of seconds to react when Chuquillanqui abruptly began the U-turn across his right of way in the left lane, and that he unsuccessfully attempted to avoid the collision by turning his vehicle to the left ... . Plaintiff's opposition was insufficient to raise factual issues as to whether an emergency situation existed prior to the collision, and as to whether Dominguez's actions before the accident were reasonable under the circumstances. While the 'reasonableness of a defendant driver's reaction to an emergency is normally left to the trier of fact,' in 'egregious circumstances,' as here, the issue may be resolved on summary judgment ...". ***Morales v. Chuquillanqui*, 2018 N.Y. Slip Op. 02139, First Dept 3-27-18**

SECOND DEPARTMENT

CIVIL PROCEDURE.

NO EVIDENTIARY SHOWING OF MERIT REQUIRED TO AMEND ANSWER, MOTION TO AMEND SHOULD HAVE BEEN GRANTED IN THE ABSENCE OF PREJUDICE.

The Second Department, modifying Supreme Court, determined defendant's motion to amend its answer should have been granted. No evidentiary showing of merit is required: "In the absence of 'prejudice or surprise resulting directly from the delay in seeking leave' to amend a pleading, such applications 'are to be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit' ... . Here, the court denied leave to amend the answer based upon its determination that the defendant had failed to lay a proper foundation, under the business records exception to the hearsay rule, for the admission of a document which allegedly demonstrated that the defendant had paid real estate taxes on the subject property. However, '[n]o evidentiary showing of merit is required under CPLR 3025(b)' ... . Since the defendant's proposed counterclaim was not palpably insufficient or patently devoid of merit, and since no prejudice or surprise would result from granting leave to amend the answer, the branch of the defendant's cross motion seeking that relief should have been granted." ***1259 Lincoln Place Corp. v. Bank of N.Y.*, 2018 N.Y. Slip Op. 02177, Second Dept 3-28-18**

EDUCATION-SCHOOL LAW, (NY) CONSTITUTIONAL LAW.

LAWSUITS ALLEGING STATUTES CONCERNING THE HIRING AND FIRING OF TEACHERS HAVE LED TO THE RETENTION OF INEFFECTIVE TEACHERS AND THE CONSEQUENT VIOLATION OF THE RIGHT TO A SOUND BASIC EDUCATION PROPERLY SURVIVED MOTIONS TO DISMISS.

The Second Department determined two lawsuits (the Davids plaintiffs and the Wright plaintiffs) brought on behalf of New York public school students, alleging that certain statutes and policies concerning the hiring and firing of teachers leads to the retention of ineffective teachers, properly survived motions to dismiss. The statutes were alleged to violate the right to a sound basic education guaranteed by the NY Constitution: "... [T]he Davids plaintiffs' allegations are sufficient to state a cause of action for a judgment declaring that the [teacher] Dismissal Statutes and the LIFO [last in first out] Statute separately and together violate the right to a sound basic education protected by the Education Article of the NY Constitution. In addition, the Wright plaintiffs' allegations are sufficient to state a cause of action for a judgment declaring that the Challenged Statutes violate the NY Constitution. Accordingly, the defendants were not entitled to dismissal under CPLR 3211(a)(7)." ***Davids v. State of New York*, 2018 N.Y. Slip Op. 02168, Second Dept 3-28-18**

EMPLOYMENT LAW, (NYC) HUMAN RIGHTS LAW, CIVIL RIGHTS LAW (18 U.S.C. § 1983), MUNICIPAL LAW.

PLAINTIFF STATED A CAUSE OF ACTION FOR AGE DISCRIMINATION UNDER THE NYC HUMAN RIGHTS LAW, CAUSE OF ACTION ALLEGING A VIOLATION OF FREE SPEECH RIGHTS UNDER THE STATE CONSTITUTION REQUIRED A NOTICE OF CLAIM, AMENDMENT OF THE COMPLAINT TO ALLEGE A FIRST AMENDMENT RETALIATION CAUSE OF ACTION UNDER 18 U.S.C. § 1983, WHICH DOES NOT REQUIRE A NOTICE OF CLAIM, SHOULD HAVE BEEN ALLOWED.

The Second Department, modifying Supreme Court, determined (1) plaintiff, an administrative law judge for the New York City Department of Consumer Affairs, stated a cause of action for age discrimination under the NYC Human Rights Law (NYCHRL), (2) plaintiff's failure to file a Notice of Claim required dismissal of the cause of action alleging a free speech violation of the State Constitution, and (3) plaintiff's motion for leave to amend the complaint to assert a First Amendment retaliation cause of action pursuant to 18 U.S.C. § 1983, should have been granted: "The allegations that there was disparate treatment of older employees, including the plaintiff, and that the plaintiff's disciplinary charges were based, in part, on age discrimination, sufficiently stated a cause of action to recover for age discrimination pursuant to the NYCHRL ... . … The plaintiff's failure to serve a notice of claim requires dismissal of the cause of action alleging violations of the State Constitution ... . Contrary to the plaintiff's contention, the action does not fall within the public interest exception to the notice of claim requirement, since the complaint seeks to vindicate the private rights of the plaintiff, and the disposition of the claim will not directly affect or vindicate the rights of others ... . Further, although the complaint named the individual defendants in their individual capacities, it alleged retaliation by them as part of their employment, and, thus, the notice of claim requirement applied ... . The Supreme Court improvidently exercised its discretion in denying the plaintiff's cross motion pursuant to CPLR 3025(b) for leave to amend the complaint to assert an alternative First Amendment retaliation cause of action pursuant to 42 USC § 1983, for which a notice of claim is not required... . In the absence of prejudice or surprise to the opposing party, leave to amend a pleading should be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit ...". ***Mirro v. City of New York*, 2018 N.Y. Slip Op. 02154, Second Dept 3-28-18**

FORECLOSURE, BANKRUPTCY, CIVIL PROCEDURE.

ALTHOUGH THE STATUTE OF LIMITATIONS FOR THE FORECLOSURE ACTION WAS TOLLED WHEN THE BANKRUPTCY PROCEEDINGS WERE ACTIVE, IT WAS NOT TOLLED WHEN A TEMPORARY RESTRAINING ORDER PROHIBITING SALE OF THE PROPERTY WAS IN EFFECT, FORECLOSURE ACTION WAS THEREFORE TIME-BARRED.

The Second Department, reversing Supreme Court, determined that the statute of limitations for bringing a foreclosure action, although tolled when bankruptcy proceedings were active, was not tolled when a temporary restraining order prohibiting the sale of the property was in effect. Therefore the foreclosure action was time-barred: "Under CPLR 204(a), '[w]here the commencement of an action has been stayed by a court or by statutory prohibition, the duration of the stay is not a part of the time within which the action must be commenced' ... . The bankruptcy stay of 11 USC § 362(c) operates under CPLR 204(a) to stay the commencement, or continuation, of a foreclosure action ... . Thus, the periods during which bankruptcy stays were in effect were not part of the time counted in the calculation of the running of the statute of limitations ... . Contrary to the plaintiff's contention, however, the time during which the temporary restraining order was in effect when the [borrowers] moved to dismiss the first foreclosure action did not toll the running of the statute of limitations. That order prevented the plaintiff from selling the property at auction, but only in the context of the first foreclosure action. The temporary restraining order did not prevent the plaintiff from discontinuing the first foreclosure action and commencing a new action... . Thus, the plaintiff was not entitled under CPLR 204(a) to have the time during which the temporary restraining order was in effect excluded from the statute of limitations, and the total time elapsed from the acceleration of the mortgage debt until the second foreclosure action was commenced exceeded six years, even when the periods attributable to the bankruptcy stays are excluded." ***U.S. Bank N.A. v. Joseph*, 2018 N.Y. Slip Op. 02155, Second Dept 3-28-18**

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

PLAINTIFF'S TWICE FILING FOR BANKRUPTCY TOLLED THE STATUTE OF LIMITATIONS FOR OVER FOUR YEARS, FORECLOSURE ACTION WAS THEREFORE TIMELY.

The Second Department determined plaintiff's twice filing for bankruptcy tolled the statute of limitations for the foreclosure action, making the foreclosure action timely. Therefore, the bank's motion to dismiss plaintiff's Real Property Actions and Proceedings Law (RPAPL) 1501 action to cancel and discharge the mortgage was properly granted: "Section 362 of the 1978 Bankruptcy Code (11 USC) provides that the filing of a petition in bankruptcy 'operates as a stay, applicable to all entities, of . . . the commencement or continuation . . . of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title' ... . The filing of a petition for protection under the Bankruptcy Code imposes 'an automatic stay of any mortgage foreclosure actions' ... . CPLR 204(a) provides that '[w]here the commencement of an action has been stayed . . . by statutory prohibition, the duration of the stay is not a part of the time within which the action must be commenced.' Pursuant to CPLR 204(a), the Bankruptcy Code's automatic stay tolls the limitations period for foreclosure actions ... . Here, in support of its motion to dismiss pursuant to CPLR 3211(a)(7), U.S. Bank submitted copies of the plaintiff's petitions filed in the Bankruptcy Court, together with copies of the orders dismissing the first bankruptcy proceeding and releasing the subject property from the bankruptcy estate in the second bankruptcy proceeding, thereby establishing that, pursuant to CPLR 204(a), the statute of limitations had been tolled for over 4½ years." ***Lubonty v. U.S. Bank N.A.*, 2018 N.Y. Slip Op. 02153, Second Dept 3-28-18**

FORECLOSURE, CIVIL PROCEDURE, JUDGES.

HOMEOWNER WAIVED THE DEFENSE OF LACK OF PERSONAL JURISDICTION, JUDGE SHOULD NOT HAVE, SUA SPONTE, DISMISSED THE FORECLOSURE ACTION ON THAT GROUND.

The Second Department, reversing Supreme Court in this foreclosure proceeding, determined the homeowner had waived the defense of lack of personal jurisdiction and therefore the judge erred by, sua sponte, dismissing the complaint on that ground: "The Supreme Court erred in sua sponte raising and considering the defense of lack of personal jurisdiction. The homeowner waived this defense by failing to move to dismiss the complaint on this ground within 60 days of serving his answer ... . As the homeowner waived this defense, it was error for the court, sua sponte, to direct dismissal of the complaint on this basis ... . Since, in the order appealed from, the plaintiff's motion, inter alia, for summary judgment on the complaint and for an order of reference was, in effect, denied as academic in light of the Supreme Court's directing dismissal of the complaint, we remit the matter to the Supreme Court, Queens County, for a determination of the plaintiff's motion on the merits ...". ***Wells Fargo Bank, N.A. v. Cajas*, 2018 N.Y. Slip Op. 02159, Second Dept 3-28-18**

LABOR LAW-CONSTRUCTION LAW.

PLAINTIFF WAS INJURED WHILE ON THE GROUND CUTTING A TREE; BECAUSE GRAVITY WAS NOT INVOLVED LABOR LAW § 240(1) DID NOT APPLY; BUT BECAUSE CUTTING THE TREE WAS ANCILLARY TO WORK ON A STRUCTURE, LABOR LAW § 241(6) DID APPLY.

The Second Department, modifying Supreme Court, determined defendant's motion for summary judgment on plaintiff's Labor Law § 240(1) cause of action was properly granted, but defendant's motion for summary judgment on plaintiff's Labor Law § 241(6) cause of action should have been denied. Plaintiff was on the ground cutting a fallen tree when the tree sprang up, split and struck plaintiff's leg. The tree had to be removed to get to the catenary wires near a railroad line. The wires are considered a "structure" within the meaning of the Labor Law. Because the accident was not the result of gravity Labor Law § 240 (1) did not apply. But because removal of the tree was ancillary to work on the wires, Labor Law 241(6) applied: "... [Defendant] did establish, prima facie, that the plaintiff's injuries were 'not the direct consequence of the application of the force of gravity to an object or person' ... . Rather, the plaintiff's injuries resulted when the tree was first propelled upward by the sudden release in tension of the catenary wires and then split in two, striking the plaintiff's leg ... . 'Labor Law § 241(6) imposes a nondelegable duty of reasonable care upon owners and contractors to provide reasonable and adequate protection and safety to persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed' ... . ' [T]he courts have generally held that the scope of Labor Law § 241(6) is governed by 12 NYCRR 23-1.4(b)(13), which defines construction work expansively'... . Under that regulation, construction work consists of '[a]ll work of the types performed in the construction, erection, alteration, repair, maintenance, painting or moving of buildings or other structures' ... . Since the plaintiff was engaged in activities ancillary to the repair of the catenary wires, the provisions of Labor Law § 241(6) are also applicable to this case. Accordingly, Metro-North failed to establish, prima facie, that Labor Law § 241(6) was inapplicable to the plaintiff's activities, and that branch of the cross motion which was for summary judgment dismissing the cause of action alleging a violation of Labor Law § 241(6) insofar as asserted against Metro-North should have been denied, regardless of the sufficiency of the plaintiff's opposition papers ...". ***De Jesus v. Metro-N. Commuter R.R.*, 2018 N.Y. Slip Op. 02150, Second Dept 3-28-18**

MENTAL HYGIENE LAW, ATTORNEYS.

ATTORNEYS WHO HAD ACCEPTED A RETAINER TO CONTEST THE REMOVAL OF A GUARDIAN WERE NOT REQUIRED TO RETURN THE RETAINER BECAUSE IT WAS PAID FROM THE INCAPACITATED PERSON'S FUNDS, NO PROOF THE ATTORNEYS WERE AWARE OF THE SOURCE OF THE FUNDS, SUPREME COURT REVERSED.

The Second Department, reversing Supreme Court, over a two-justice dissent, determined that the attorneys (the appellants), who had accepted a retainer to contest the removal of a guardian (the daughter) for an incapacitated person (Domenica P.), were not required to return the retainer which had been paid from the incapacitated person's funds. The Second Department determined there was no evidence the attorneys were aware of the source of the funds: "This particular proceeding is substantially different from a Mental Hygiene Law § 81.43 proceeding brought directly against the incapacitated person's attorney-in-fact ... , or directly against someone having a different type of fiduciary and confidential relationship with the incapacitated person ... . This turnover proceeding was brought against the law firm retained by the daughter to challenge the Supreme Court's decision to remove her as guardian of the person of her incapacitated mother, with whom she had been living for some time. In the absence of any indicia that the appellants colluded with the daughter in converting her mother's funds, or had substantial knowledge that the money used for the retainer was derived from funds belonging to Domenica P., no judgment against them is warranted. Contrary to the Supreme Court's determination, the inquiry by the appellants was sufficient. The appellants accepted a check from the daughter's individual checking account. After the appellants asked the daughter if this was her own money or if it belonged to Domenica P., she told them that the $20,000 came from her own savings. Under these circumstances, the appellants had no reasonable obligation to further investigate, or assess the truthfulness of, their prospective client. What is most revealing is that the appellant law firm rightfully rejected a subsequent check from the daughter drawn on an account held jointly in names of the daughter and Domenica P." ***Matter of Domenica P.*, 2018 N.Y. Slip Op. 02151, Second Dept 3-28-18**

MUNICIPAL LAW, CORPORATION LAW.

SOLID WASTE AUTHORITY IS SUBJECT TO THE PUBLIC AUTHORITIES LAW, NOT THE GENERAL MUNICIPAL LAW; THE AUTHORITY THEREFORE WAS NOT REQUIRED TO ACCEPT THE LOWEST BID FOR RECYCLING SERVICES.

The Second Department determined the Rockland County Solid Waste Authority (Authority) was a public benefit corporation which was subject to the Public Authorities Law, not the Municipal Law. Therefore the Authority properly accepted a bid for recycling services which was not the lowest bid: "General Municipal Law § 103(1) provides that all contracts for public work involving expenditures in excess of $35,000 must be awarded to 'the lowest responsible bidder.' However, that provision applies only to contracts to which 'political subdivision[s] or . . . any district therein' are parties ... . Contrary to the petitioner's contention, public benefit corporations such as the Authority are ' legal entities separate from the State, enjoying

an existence separate and apart from the State, its agencies and political subdivisions' ... . As such, any limitations placed on the Authority's power to contract must come from the Authority's enabling statute, not the General Municipal Law. The Authority's enabling statute broadly permits it '[t]o contract with . . . persons within or without the county, for the purpose of receiving, treating and disposing of solid waste or for any other purpose authorized hereunder, including, without limitation, the power to contract with . . . persons for the delivery of all solid waste generated within a stated area to a specific solid waste management facility' ... . Unlike General Municipal Law § 103, the Authority's enabling statute does not require contracts such as the one at issue here to be awarded to the 'lowest responsible bidder.' Thus, the petitioner's contention that the Authority acted beyond its grant of power is without merit." ***Matter of AAA Carting & Rubbish Removal, Inc. v. Town of Stony Point, N.Y.*, 2018 N.Y. Slip Op. 02203, Second Dept 3-28-18**

PERSONAL INJURY.

BOTH PLAINTIFF PASSENGER AND DEFENDANT DRIVER HAD CONSUMED ALCOHOL BEFORE THE ACCIDENT, QUESTION OF FACT WHETHER PLAINTIFF PASSENGER WAS COMPARATIVELY NEGLIGENT, SUMMARY JUDGMENT IN FAVOR OF PLAINTIFF SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing (modifying) Supreme Court, determined that summary judgment should not have been granted in favor of plaintiff in this traffic accident case. Both the defendant driver (Abbott) and the plaintiff passenger (Crystal) had consumed alcohol before the accident. The action was brought by Crystal's mother on behalf of Crystal. Abbott had attempted a u-turn and was struck by the car behind her (driven by another defendant, Diederich): "Contrary to the plaintiff's contention, she failed to establish, prima facie, that Crystal was free from culpable conduct with regard to the causation of her injuries. In support of her motion, the plaintiff relied upon, inter alia, the deposition transcripts of Abbott and Crystal. The testimony of Abbott and Crystal that they had consumed alcohol at a fraternity party prior to the subject accident raised questions of fact as to whether Crystal had knowledge that Abbott may have been intoxicated, which raised triable issues of fact regarding her comparative negligence ... . Since triable issues of fact existed as to the comparative negligence of Crystal, the plaintiff failed to establish her prima facie entitlement to judgment as a matter of law on the issue of liability against the appellants ... . Accordingly, the Supreme Court should have denied that branch of the plaintiff's motion." ***Vuksanaj v. Abbott*, 2018 N.Y. Slip Op. 02199, Second Dept 3-28-18**

PERSONAL INJURY, EMPLOYMENT LAW.

PLAINTIFF'S JOB ENTAILED CLEANING UP GARBAGE, SLIPPING ON A PIECE OF CARDBOARD WAS INHERENT IN HER WORK, PROPERTY OWNER'S MOTION FOR SUMMARY JUDGMENT IN THIS SLIP AND FALL CASE SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined defendant property owner's motion for summary judgment in this slip and fall case should have been granted. The risk to plaintiff was inherent in her work: "... [T]he plaintiff testified that at the time of the accident she was employed by a nonparty to clean the subject building. Her duties included the weekly removal of garbage and material to be recycled from the basement of the building. The plaintiff was engaged in the performance of that task when the accident occurred. When asked what caused her to fall, she explained that "there was a lot of garbage" in the basement, including 'cardboard all around.' Where, as here, the plaintiff is a worker whose claim is based upon premises liability, the landowner's duty is to provide the worker with a safe place to work. A landowner 'need not guard against hazards inherent in the worker's work, hazards caused by the condition the worker is engaged to repair, or hazards which are readily observed by someone of the worker's age, intelligence, and experience' ... . Under the circumstances here, the defendant established its prima facie entitlement to judgment as a matter of law by showing that the risk of slipping on a piece of cardboard in the building's basement was inherent in the plaintiff's work ...". ***Rojas v. 1000 42nd St., LLC*, 2018 N.Y. Slip Op. 02194, Second Dept 3-28-18**

THIRD DEPARTMENT

ELECTION LAW

QUORUM REQUIREMENT NOT MET, CERTIFICATES OF NOMINATION INVALID.

The Third Department determined the certificates of nomination authorized by the Independence Party of Westchester County were invalid because the quorum requirement was not met: "Turning to the merits, Election Law § 6-114 provides that '[p]arty nominations for an office to be filled at a special election shall be made in the manner prescribed by the rules of the party.' Petitioners alleged several violations of the rules of the County Independence Party, some of which are compelling. Our discussion focuses, however, upon rules defining the Executive Committee, following an initial meeting, as having seven members ... and needing 'four members present . . . in person or by proxy' to form a quorum ... . The affidavit of ... the secretary of the County Independence Party ... reflected that the nomination process fatally deviated from those rules. Vazquez averred that she and two other individuals attended the meeting ... . [F]our members were needed for a quorum. The quorum requirement in the rules leaves no room for interpretation and, contrary to respondents' contention, the fact

that some seats on the Executive Committee were unfilled does not affect the requirement's applicability ... . Accordingly, 'a duly constituted quorum of the [E]xecutive [C]ommittee was not present when [respondent] was nominated,' and those committee members present had no authority to designate [respondent] as the County Independence Party nominee ...". ***Matter of Loftus-Doran v. Mayer*, 2018 N.Y. Slip Op. 02284, Third Dept 3-30-18**

ELECTION LAW, LIMITED LIABILITY COMPANY LAW.

ATTEMPT TO CONTEST THE NYS BOARD OF ELECTIONS' FAILURE TO PLUG THE LLC LOOPHOLE, WHICH ALLOWS HIGHER CAMPAIGN CONTRIBUTIONS FOR LLC'S THAN FOR CORPORATIONS AND PARTNERSHIPS, PROPERLY DISMISSED FOR LACK OF STANDING AND LACK OF A JUSTICIABLE CONTROVERSY.

The Third Department, over a concurring opinion and an extensive dissenting opinion, determined that the petitioners' attempt to contest the NYS Board of Elections' failure to plug the LLC loophole was properly dismissed because the petitioners did not have standing and because the petition did not present a justiciable controversy. The LLC loophole treats limited liability companies as individuals for campaign contribution purposes. LLC's therefore can contribute more than corporations and partnerships: "Essentially, petitioners ask this Court to direct respondent to rescind its 1996 opinion on the LLC Loophole and replace it with one that would provide what they assert to be a superior application of public policy. We may not grant this request without violating the vital principle of the separation of powers. That principle dictates that each branch of government 'should be free from interference, in the lawful discharge of duties expressly conferred, by either of the other branches' ... . Here, the Legislature has conferred the authority to make directions pertaining to campaign financing practices upon respondent ... . This Court cannot disturb respondent's lawful directions with regard to LLCs without interfering with 'policy-making and discretionary decisions that are reserved to the legislative and executive branches' ... . The important issues raised here involve matters of discretion and policy that have been expressly entrusted to another branch of government and are 'beyond the scope of judicial correction' ... . The nonjusticiable nature of this controversy is closely interconnected with the question of petitioners' standing to pursue this matter — 'an aspect of justiciability which, when challenged, must be considered at the outset of any litigation' ... . To establish standing, petitioners must show that they have suffered an injury-in-fact and that the injury is within the zone of interests protected by the statute at issue .. Here, the dispute focuses upon the injury-in-fact element, which requires petitioners to establish that they have suffered or will suffer concrete harm that is 'distinct from that of the general public' ...". ***Matter of Brennan Ctr. for Justice At NYU Sch. of Law v. New York State Bd. of Elections*, 2018 N.Y. Slip Op. 02228, Second Dept 3-29-18**

FAMILY LAW, CONTRACT LAW.

WIFE RAISED A QUESTION OF FACT WHETHER PRENUPTIAL AGREEMENT WAS THE PRODUCT OF OVERREACHING.

The Third Department, over a concurring opinion, determined the wife in this divorce proceeding raised a question of fact about the validity of the prenuptial agreement: "Viewing the evidence in a light most favorable to the wife, we find that the wife carried her burden of raising a material issue of fact. In opposition to the husband's motion, the wife submitted an affidavit in which she provided a contrasting version of events surrounding the execution of the prenuptial agreement. She stated therein that shortly before the wedding day, the husband presented her with a prenuptial agreement. The wife, on the advice of her counsel, told the husband that she could not sign it or marry him unless he made some changes — namely, that she would get half the value of the land and house where they resided and 50% of everything they acquired during the marriage. The wife further averred that, on 'the very day before the wedding' and as she was making final preparations for the wedding, the husband presented her with a revised prenuptial agreement, told her that he had made the requested changes and assured her that she would be taken care of for the rest of her life. Moreover, the wife stated that she was given this new prenuptial agreement while standing outside the County Clerk's office and that the husband 'didn't really give [her] time to even read the document, let alone take it back to the lawyer to look at it again.' She stated that she was feeling stressed and pressured with the wedding planning and 'just signed the document.' These facts, if credited, give rise to the inference of overreaching ...". ***Carter v. Fairchild-Carter*, 2018 N.Y. Slip Op. 02230, Third Dept 3-29-18**

FAMILY LAW, IMMIGRATION LAW.

THIRD DEPARTMENT OFFERS IN DEPTH EXPLANATION OF THE SPECIAL IMMIGRANT JUVENILE STATUS (SIJS) CRITERIA AND, REVERSING FAMILY COURT, FINDS THE CHILD MET THE FIVE CRITERIA.

The Third Department, reversing Family Court, in a comprehensive decision explaining in depth the relevant law, made findings allowing the child to apply for special immigrant juvenile status (SIJS): "Before a child may seek SIJS from USCIS, a state court with jurisdiction over the juvenile must first issue a special findings order determining that (1) the child is under the age of 21, (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 return to his or her native country ... . By issuing a special findings order, Family Court is not rendering an immigration determination ... ; such order is merely a step in the process to assist USCIS and its parent agency, the Department of Homeland Security, in making the ultimate immigration determination ...". ***Matter of Keilyn GG. (Marlene HH.)*, 2018 N.Y. Slip Op. 02226, Third Dept 3-29-18**

UNEMPLOYMENT INSURANCE.

CLAIMANT, WHO DISTRIBUTED BAKED GOODS UNDER A DISTRIBUTION CONTRACT, WAS AN EMPLOYEE ENTITLED TO UNEMPLOYMENT INSURANCE BENEFITS.

The Third Department determined claimant, who delivered baked goods for the employer under a distribution contract, was an employee entitled to unemployment insurance benefits: "Initially, we are unpersuaded by the company's contention that the Board erred in determining that claimant was an employee as a matter of law pursuant to Labor Law § 511(1)(b). Labor Law § 511(1)(b) defines '[e]mployment" for unemployment insurance purposes to include "any service by a person for an employer . . . as an agent-driver or commission-driver engaged in distributing . . . bakery products.' According to the company, claimant did not earn a commission but earned revenue upon selling the bakery products that he purchased at prices set by him. The record, however, supports the Board's finding that the actual relationship between the parties did not constitute that of a buyer and seller. ... Additionally, we find that substantial evidence supports the Board's finding that the company exercised sufficient supervision, direction and control over claimant to establish an employer-employee relationship under common-law principles. The company retained numerous rights under the distribution agreement, including the right to set the price of the products sold to claimant and the right to negotiate with chain outlets to determine price and terms of sale, and it retained the authority to sell distribution rights purchased by claimant or perform his delivery obligations under certain circumstances. Claimant was further required to deliver fresh products and remove stale products in a defined area, sell any additional products provided by the company, cooperate with its marketing programs, remit settlement information to it each week, maintain certain chain outlet customers even if not profitable to him and not engage in any business activity that directly competed with the company or interfered with his obligations under the distribution agreement. In addition, claimant was interviewed by the company, relied on certain equipment and supplies provided by it, was paid on a weekly basis and was trained, instructed, supervised and monitored by a company manager regarding his deliveries." ***Matter of Cowan (Bimbo Foods Bakeries Distrib., Inc.--Commissioner of Labor)*, 2018 N.Y. Slip Op. 02229, Third Dept 3-29-18**

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