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CasePrepPlus

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COURT OF APPEALS

CRIMINAL LAW, ATTORNEYS, EVIDENCE.

DEFENDANT'S REQUEST TO QUESTION WITNESSES WITH THE AID OF STANDBY COUNSEL WAS NOT AN UNEQUIVOCAL REQUEST TO REPRESENT HIMSELF REQUIRING A SEARCHING INQUIRY; DEFENDANT'S WISH TO PRESENT PSYCHIATRIC TESTIMONY TO QUESTION THE VOLUNTARINESS OF HIS CONFESSION WAS PROPERLY DENIED BECAUSE CPL 250.10 NOTICE WAS NOT PROVIDED.

The Court of Appeals, in a full-fledged opinion by Judge DiFiore, over two dissenting opinions, determined (1) defendant, who wanted to question witnesses with the aid of standby counsel, did not make an unequivocal request to represent himself requiring a searching inquiry by the court, and (2) the defendant, who did not notify the People of his wish to present psychiatric testimony (required by CPL 250.10), was properly precluded from presenting psychiatric testimony for the purpose of calling into question the voluntariness of his confession: "Defendant urges that a court presented with a request to proceed pro se with 'standby counsel' should make an in-depth inquiry whether defendant still desires to represent himself, once defendant is informed that dual representation will not be provided. We hold that further colloquy by the trial court is not constitutionally required when a defendant remains equivocal, despite having been informed by the court on more than one occasion that his right to self-representation includes a waiver of the right to an attorney, as here. When a defendant asks to proceed 'pro se with standby counsel' and the trial court explains the scope of the right to proceed pro se, and specifically denies the defendant's request for hybrid representation, the better practice would be to again ask the defendant if he or she still wants to proceed without counsel. Nevertheless, '[w]hile such inquiries may be the better practice, we will not compel courts to engage in any particular catechism' before denying an equivocal request to proceed pro se because '[n]either our Constitution nor our precedent requires it' ... . * * * Defendant narrowly construes the phrase 'any other defense' in CPL 250.10 (1) (c) to be limited to psychiatric evidence offered in support of a complete defense to an element of the crime, such as mens rea; he does not interpret the statute to include a defense strategy to offer evidence that allows the jury to negate the prosecution's evidence of guilt. … [T]his argument ignores the legislative intent, our precedent espousing the very purpose of notice, and the fact that, if a defendant's confession was the primary evidence of guilt and the defendant raises the issue of voluntariness at trial, then voluntariness could be a complete defense to the crime ... . Notably, our Court has previously labeled a defendant's challenge to the voluntariness of his statement pursuant to CPL 710.70 a 'defense' ...".

***People v. Silburn*, 2018 N.Y. Slip Op. 02286, CtApp 4-3-18**

LABOR LAW-CONSTRUCTION LAW, CIVIL PROCEDURE, EVIDENCE.

INSUFFICIENT EVIDENCE OF HOW THE ACCIDENT OCCURRED IN THIS LABOR LAW § 240(1) ACTION, DISCOVERY MAY AID THE INQUIRY, SUMMARY JUDGMENT AWARD WAS PREMATURE.

The Court of Appeals, in a memorandum which did not describe the facts, reversing the appellate division, determined the award of summary judgment to the plaintiff in this Labor Law § 240(1) action was premature. There was insufficient evidence of how the accident occurred and discovery might aid in that regard: "Here, where there is insufficient evidence concerning how the accident occurred, the requested discovery could aid in establishing what happened, and the note of issue was not due to be filed for another six months, summary judgment was prematurely granted ...". ***Somereve v. Plaza Constr. Corp.*, 2018 N.Y. Slip Op. 02288, CtApp 4-3-18**

PERSONAL INJURY, CIVIL PROCEDURE.

IN A DECISION POTENTIALLY AFFECTING HUNDREDS OF RECENT SUMMARY JUDGMENT RULINGS, THE COURT OF APPEALS HELD THAT A PLAINTIFF NEED NOT DEMONSTRATE FREEDOM FROM COMPARATIVE FAULT TO BE ENTITLED TO PARTIAL SUMMARY JUDGMENT ON LIABILITY IN NEGLIGENCE CASES, COMPARATIVE NEGLIGENCE IS PURELY A DAMAGES ISSUE.

The Court of Appeals, in a full-fledged opinion by Judge Feinman, over a three-judge dissenting opinion, reversing the appellate division (and potentially affecting hundreds of recent rulings on summary judgment motions in negligence cases), determined that a plaintiff need not demonstrate the absence of comparative fault to be entitled to partial summary judgment on liability. Whether the plaintiff was comparatively negligent is, under the controlling statutes, is a damages issue:

"CPLR 3212, which governs summary judgment motions, provides that '[t]he motion shall be granted if . . . the cause of action . . . [is] established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party' ... . The motion for summary judgment must also 'show that there is no defense to the cause of action' ... . Further, subsection [c] of the same section sets forth the procedure for obtaining partial summary judgment and states that '[i]f it appears that the only triable issues of fact arising on a motion for summary judgment relate to the amount or extent of damages . . . the court may, when appropriate for the expeditious disposition of the controversy, order an immediate trial of such issues of fact raised by the motion' ... . Article 14-A of the CPLR contains our State's codified comparative negligence principles. CPLR 1411 provides that: 'In any action to recover damages for personal injury, injury to property, or wrongful death, the culpable conduct attributable to the claimant or to the decedent, including contributory negligence or assumption of risk shall not bar recovery, but the amount of damages otherwise recoverable shall be diminished in the proportion which the culpable conduct attributable to the claimant or decedent bears to the culpable conduct which caused the damages.' ... . CPLR 1412 further states that '[c]ulpable conduct claimed in diminution of damages, in accordance with [CPLR 1411], shall be an affirmative defense to be pleaded and proved by the party asserting the defense.' Placing the burden on the plaintiff to show an absence of comparative fault is inconsistent with the plain language of CPLR 1412." ***Rodriguez v. City of New York*, 2018 N.Y. Slip Op. 02287, CtApp 4-3-18**

FIRST DEPARTMENT

CIVIL PROCEDURE, MUNICIPAL LAW.

PLAINTIFF'S MOTION TO AMEND HER COMPLAINT TO ADD NAMES OF POLICE OFFICERS SUED AS JOHN DOES SHOULD NOT HAVE BEEN GRANTED, THE OFFICERS ARE NOT UNITED IN INTEREST WITH THE CITY DEFENDANT, FAILURE TO NAME THE OFFICERS WAS NOT A MISTAKE, AND PLAINTIFF FAILED TO MAKE A DILIGENT EFFORT TO LEARN THE OFFICERS' NAMES BEFORE THE STATUTE OF LIMITATIONS EXPIRED.

The First Department, reversing Supreme Court, determined plaintiff's motion to amend her complaint to add the names of police officers originally sued a John Does should not have been granted: "The motion court erred in granting plaintiff leave to amend her complaint and substitute the officers' names under the relation back doctrine, because the officers are not 'united in interest' with the City of New York, the original defendant ... . Moreover, plaintiff failed to show that the failure to name defendants was a mistake... . Further, as for those claims where plaintiff was unaware of the officers' identities prior to the statute of limitations running, she failed to show that she conducted a diligent inquiry into the actual identities of the intended defendants before the expiration of the statutory period ...". ***Diaz v. City of New York*, 2018 N.Y. Slip Op. 02419, First Dept 4-5-18**

CIVIL PROCEDURE, PHYSICAL INJURY.

PLAINTIFF CAN BE ACCOMPANIED BY A NONLEGAL REPRESENTATIVE TO A DEFENSE PHYSICAL EXAM.

The First Department, reversing Supreme Court, determined plaintiff can be accompanied by a nonlegal representative at a defense physical examination: "Defendants concede that, under this Court's recent decision in Santana v. Johnson (154 AD3d 452 [1st Dept 2017]), they can no longer argue that plaintiff was required to show 'special and unusual circumstances' to be permitted to have a nonlegal representative present at a physical examination conducted on their behalf pursuant to CPLR 3121." ***Martinez v. Pinard*, 2018 N.Y. Slip Op. 02402, First Dept 4-5-18**

CONTRACT LAW, EMPLOYMENT LAW, ATTORNEYS.

THE FACT THAT PLAINTIFF ATTORNEY (1) WAS AN AT-WILL EMPLOYEE AND (2) MAY NOT BE PAID WITHIN ONE YEAR DID NOT RENDER THE ORAL CONTRACT ENTITLING PLAINTIFF TO LEGAL FEES VOID UNDER THE STATUTE OF FRAUDS; BREACH OF IMPLIED CONTRACT AND UNJUST ENRICHMENT CAUSES WERE PROPERLY PLED IN THE ALTERNATIVE.

The First Department determined plaintiff's breach of an oral contract cause of action properly survived a motion to dismiss. Plaintiff was an at-will employee of a law firm and sought to enforce an oral agreement entitling him to 50% of the fees generated by work he brought in. In addition the court noted that the breach of an implied contract and unjust enrichment were properly pled in the alternative: "The statute of frauds (General Obligations Law § 5-701[a][1]) does not bar the alleged oral agreement between plaintiff and defendant law firm, pursuant to which the firm agreed to pay plaintiff 50% of the legal fees it earned on cases that he procured or originated and performed work on. In pertinent part, the statute renders void an agreement that '[b]y its terms is not to be performed within one year from the making thereof.' The fact that plaintiff was an at-will employee, i.e., he could be terminated at any time ... , made the oral agreement capable of completion within the one-year period ... . The fact that legal fees earned during the one-year period would not be paid until after the period had ended did not make the agreement incapable of completion within the period ... . Plaintiff's allegations, supplemented by email and affidavits by other associates at the firm attesting to a course of dealing, state a cause of action against the law

firm for breach of implied contract... and unjust enrichment... . These causes of action are properly pleaded in the alternative ...". ***Goldfarb v. Romano*, 2018 N.Y. Slip Op. 02411, First Dept 4-5-18**

CRIMINAL LAW, EVIDENCE, APPEALS, ATTORNEYS.

FAILURE TO INSTRUCT THE JURY THAT WITNESSES WERE ACCOMPLICES AS A MATTER OF LAW REQUIRING CORROBORATION OF THEIR TESTIMONY WAS REVERSIBLE ERROR, DEFENSE COUNSEL'S FAILURE TO REQUEST THE INSTRUCTION CONSTITUTED INEFFECTIVE ASSISTANCE, ISSUE REACHED ON APPEAL IN THE INTEREST OF JUSTICE.

The First Department, reversing defendant's conviction in the interest of justice, determined the failure to instruct the jury witnesses were accomplices as a matter of law requiring corroboration of their testimony was reversible error, and defense counsel's failure to request the instruction constituted ineffective assistance: "We conclude that the lack of an accomplice corroboration charge (see CPL 60.22) warrants a new trial, and we reach this unpreserved issue in the interest of justice. The People's case against defendant was based almost entirely on the testimony of three witnesses, each of whom was either an accomplice as a matter of law or a person who could reasonably be viewed by the jury as an accomplice as a matter of fact... . While there was some nonaccomplice evidence, it was far from extensive ... . In fact, one of the only other witnesses undermined the accomplice testimony by establishing that defendant was not initially identified as a perpetrator of the underlying assault. Moreover, we conclude that counsel's admittedly nonstrategic failure to request the instruction constituted ineffective assistance under all the circumstances of the case ...". ***People v. Douglas*, 2018 N.Y. Slip Op. 02397, First Dept 4-5-18**

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA).

YOUTHFUL OFFENDER RECORDS PROPERLY CONSIDERED BY THE BOARD AND THE SORA COURT.

The First Department noted that in a risk assessment procedure pursuant to the Sex Offender Registration Act (SORA) the State Board of Examiners (and, therefore, the court) may consider youthful-offender-related documents: "New York's Sex Offender Registration Act (SORA) requires the State Board of Examiners of Sex Offenders to assess an offender's risk of reoffense. In making this determination, the Board has access to an offender's full criminal background, including defendant's YO-related records. SORA 'thereby grants the Board access to the documents, which are available under the CPL if specifically required or permitted by statute' ... . Additionally, members of the Board have 'access to YO-related records for the purpose of carrying out duties specifically authorized by law' ... . Therefore, 'SORA's directives both provide the statutory require[ment] or permi[ssion]' to release the YO records under one provision of the YO statute, and describe the duties specifically authorized by law' to allow for their release under another' ... . Accordingly, the CPL specifically provides the Board with access to YO-related documents ... . As the Board's inclusion of defendant's YO adjudication 'in assessing the risk of reoffense was based on the Board's expertise and experience,' it is entitled to judicial deference ... . As neither SORA nor the CPL 'prohibit[s] the Board's consideration of YO adjudications for the limited public safety purpose of accurately assessing an offender's risk level,' Supreme Court appropriately assessed points under risk factors 9 and 10, relating to defendant's prior YO adjudication ...". ***People v. Simono*, 2018 N.Y. Slip Op. 02291, First Dept 4-3-18**

EVIDENCE, CIVIL PROCEDURE.

HEARSAY IN ACCIDENT REPORT NOT ADMISSIBLE UNDER THE BUSINESS RECORDS EXCEPTION TO THE HEARSAY RULE, DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED.

The First Department, reversing Supreme Court, determined defendants' summary judgment motions should have been granted because the hearsay in an accident report was not admissible: "... [A]lthough the report's author had a business duty to prepare the report, the statement in the report that the platform 'must have been moved during demolition and trench work . . . [by defendant]' indicated that he did not have first hand knowledge of the occurrence and was relying on speculative statements made by others, who are not identified. Nor is there any indication that this inference was based on first hand knowledge of a third party who was under a business duty to inform the author (... CPLR 4518). The business records exception to the hearsay rule does not permit the receipt into evidence of entries based upon voluntary hearsay statements made by third parties not engaged in the business or under a duty in relation thereto ...". ***76th & Broadway Owner LLC v. Consolidated Edison Co. of N.Y. Inc.*, 2018 N.Y. Slip Op. 02409, First Dept 4-5-18**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

USE OF A MAKESHIFT LADDER WHEN AN A-FRAME WAS AVAILABLE OR DESCENDING THE LADDER BACKWARDS WITH SHOES UNTIED DID NOT CONSTITUTE THE SOLE PROXIMATE CAUSE OF THE FALL, PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON HIS LABOR LAW § 240(1) CAUSE OF ACTION PROPERLY GRANTED.

The First Department determined plaintiff's motion for summary judgment on his Labor Law § 240(1) cause of action was properly granted. Use of a makeshift ladder when an A-frame ladder was available, the fact that plaintiff descended the

ladder backwards, and the fact that plaintiff's boots may have been untied did not constitute the sole proximate cause of the accident: "Plaintiff electrician was injured when he fell from a makeshift wooden ladder while negotiating the distance between the first-floor slab of the building under construction and the ground about five feet below, as he was helping unload a delivery of supplies that was being unloaded from the truck on ground level and placed on the slab. Although plaintiff had been provided an A-frame ladder that morning which was in the basement of the building, the parties cite no evidence contradicting plaintiff's testimony that he could not use it to access the slab because the ground was covered in dirt, debris, and rocks. Plaintiff's decision to use the makeshift ladder that his coworkers were also allegedly using was not the sole proximate cause of the accident where he was never instructed not to use it ... . Moreover, where no proper safety device was provided, the fact that his boots may have been untied or that he may have been descending the makeshift ladder backwards was not the sole proximate cause of his accident ... ". ***Jarzabek v. Schafer Mews Hous. Dev. Fund Corp.*, 2018 N.Y. Slip Op. 02295, First Dept 4-3-18**

LANDLORD-TENANT, CORPORATION LAW.

BECAUSE ONLY A CORPORATE ENTITY FORMED BY PLAINTIFF TENANT WAS NAMED ON THE LEASE, PLAINTIFF WAS NOT ENTITLED TO RENT STABILIZATION PROTECTIONS.

The First Department, reversing Supreme Court, over a dissent, ,determined plaintiff (Fox) was not entitled to the protections of rent stabilization because the lease was in the name of a corporate entitled formed by the plaintiff and plaintiff was not named in the lease: "In 2008, at Fox's suggestion, a renewal lease was entered into by plaintiff MBE Ltd., an entity wholly owned by Fox, with the understanding that Fox would continue to occupy the apartment; MBE executed renewal leases for the apartment in 2010 and 2012. Fox has continued to live in the apartment since MBE became the tenant of record. In 2014, defendant 12 East 88th LLC purchased the building and informed Fox that the lease would not be renewed. Because the 2008 lease, and the subsequent lease renewals, named MBE as the sole tenant and did not identify as the occupant of the apartment a particular individual with a right to demand a renewal lease, Fox is not entitled to the renewal of the lease ... . [T]his Court [has] established that 'a corporation is entitled to a renewal lease where the lease specifies a particular individual as the occupant and no perpetual tenancy is possible' ... . Our ... cases have construed the first requirement strictly, denying rent stabilization protections to individual occupants who are not actually identified in an entity's rent stabilized lease ...". ***Fox v. 12 E. 88th LLC*, 2018 N.Y. Slip Op. 02289, First Dept 4-3-18**

MUNICIPAL LAW, LANDLORD-TENANT.

CITY OF NEW YORK PROGRAM TO MOVE HOMELESS INTO APARTMENTS VIOLATES THE URSTADT LAW BY IMPOSING RENT CONTROLS ON BUILDINGS NOT PREVIOUSLY SUBJECT TO CONTROL.

The First Department, reversing Supreme Court, in a full-fledged opinion by Justice Sweeney, determined the City of New York's Living in Communities (LINC) Program, designed to move homeless persons into apartments, violated the Urstadt Law, which prohibits the expansion (by a city) of rent controls to buildings beyond those subject to controls at the time the law was enacted (1971): "The 'Urstadt Law was intended to check City attempts, whether by local law or regulation, to expand the set of buildings subject to rent control or stabilization, and particularly to do so in the teeth of State enactments aimed at achieving the opposite effect' ... . * * * Where the LINC Program runs afoul of the Urstadt Law ... is in its use of mandatory riders that compel a landlord to renew a lease for up to five years at a minimum increase specifically tied to other City rent regulatory programs to which the housing unit is not presently subject. The application of Local Law 10 to compel acceptance of LINC Program rent vouchers as presently structured effectively expands the number of buildings subject to City control by imposing on those housing units a more stringent control than presently exists. This creates exactly the situation which the Urstadt Law forbids ... . In determining whether a local law imposes more stringent or restrictive control over a housing unit than presently existed, the 'substance rather than the form of the local law is determinative'... . Here, the effect of the LINC lease riders clearly and improperly expands City regulatory control to housing units not presently subject to that control." ***Alston v. Starrett City, Inc.*, 2018 N.Y. Slip Op. 02420, First Dept 4-5-18**

SECOND DEPARTMENT

CIVIL PROCEDURE, BANKRUPTCY.

FAILURE TO LIST CAUSE OF ACTION AGAINST DEFENDANT IN A BANKRUPTCY SCHEDULE OF ASSETS MAY PRECLUDE SUIT UNDER THE DOCTRINE OF JUDICIAL ESTOPPEL, MOTION TO AMEND ANSWER TO INCLUDE JUDICIAL ESTOPPEL DEFENSE PROPERLY GRANTED.

The Second Department determined defendant's (Hurst's) motion to amend her answer and her motion to dismiss on judicial estoppel grounds were properly granted. Plaintiff had failed to list a cause of action against defendant in her bankruptcy proceeding. Judicial estoppel therefore precluded plaintiff's action against defendant: "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 (see CPLR 3025[b]...). Lateness alone is not a barrier to the amendment ... .' It must be lateness coupled with significant prejudice to the other side, the very elements of the laches doctrine'... . The determination to permit or deny amendment is committed to the sound discretion of the trial court ... , Contrary to the plaintiff's contention, Hurst's proposed judicial estoppel defense based on its failure to schedule its current claims against her in its third bankruptcy proceeding was not palpably insufficient or patently devoid of merit. The doctrine of judicial estoppel precludes a party from taking a position in one legal proceeding which is contrary to that which it took in a prior proceeding, simply because its interests have changed ... . 'The twin purposes of the doctrine are to protect the integrity of the judicial process and to protect judicial integrity by avoiding the risk of inconsistent results in two proceedings'... . '[T]he integrity of the bankruptcy system depends on full and honest disclosure by debtors of all of their assets'... . By failing to list causes of action on bankruptcy schedules of assets, the debtor represents that it has no such claims ... . Thus, the doctrine of judicial estoppel may bar a party from pursuing claims which were not listed in a previous bankruptcy proceeding ...". ***Moran Enters., Inc. v. Hurst*, 2018 N.Y. Slip Op. 02321, Second Dept 4-4-18**

CONTRACT LAW, REAL ESTATE, CIVIL PROCEDURE, EVIDENCE.

CONTRACT WAS ENFORCEABLE DESPITE PARTIES' EXPECTATION A MORE FORMAL CONTRACT WOULD BE EXECUTED LATER; PLAINTIFF'S MOTION TO CONFORM THE COMPLAINT TO THE PROOF AT TRIAL SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined an enforceable real estate purchase contract had been formed and plaintiff's motion to conform the complaint to the proof at trial should have been granted. The court noted that the parties' expectation that a more formal contract will be executed later is not really relevant: "Although Berger [defendant's principal] testified that he expected that a final contract would be signed after it had been put in 'proper form' by an attorney, 'the existence of a binding contract is not dependent on the subjective intent of [the parties]' ... . 'In determining whether the parties entered into a contractual agreement and what were its terms, it is necessary to look, rather, to the objective manifestations of the intent of the parties as gathered by their expressed words and deeds' ... . Notably, the ... contract contains all of the essential terms of a contract for the sale of real property, designated the parties, and identified and described the subject matter of the contract . The contract was signed ... , and all changes to the contract were initialed ... . Moreover, the contract contained no provision indicating that an additional signed agreement would be necessary to create a binding agreement ... and, even where the parties 'anticipat[e] that a more formal contract will be executed later, the contract is enforceable if it embodies all the essential terms of the agreement' ... . The Supreme Court improvidently exercised its discretion in denying the plaintiff's motion to conform its complaint to the proof at trial (see CPLR 3025[c]). '[A]bsent prejudice, courts are free to permit amendment even after trial" ... . "The burden of establishing prejudice is on the party opposing the amendment' ... . 'Prejudice, of course, is not found in the mere exposure of the defendant to greater liability. Instead, there must be some indication that the defendant has been hindered in the preparation of his case or has been prevented from taking some measure in support of his position' ... . Here, in opposition to the plaintiff's motion, the defendants failed to show that the amendment would hinder the preparation of their cases or prevent them from taking some measure in support of their positions at trial and, therefore, the plaintiff's motion to conform its complaint to the proof should have been granted." ***Metropolitan Lofts of NY, LLC v. Metroeb Realty 1, LLC*, 2018 N.Y. Slip Op. 02319, Second Dept 4-4-18**

CRIMINAL LAW, ATTORNEYS.

DESIGNATING ATTORNEY AS STANDBY COUNSEL WAS INSUFFICIENT, DEFENDANT'S REFUSAL TO BE REPRESENTED BY THE SUBSTITUTE COUNSEL WHO APPEARED FOR SENTENCING REQUIRED THE COURT TO CONDUCT A SEARCHING INQUIRY TO BE SURE THE DEFENDANT UNDERSTOOD THE CONSEQUENCES OF REPRESENTING HIMSELF.

The Second Department, remitting the case for a new second violent felony offender determination and resentencing, held that the sentencing judge should have made a searching inquiry concerning defendant's wish to proceed pro se. Defendant's attorney was sick and defendant did not want to be represented by the attorney who appeared to represent him (Klein). Simply designating Klein as "standby counsel" was not sufficient: "At the sentencing proceeding, the Supreme Court asked the defendant if the defendant wanted Klein to represent him, and the defendant answered in the negative. The court continued the sentencing proceeding, with the defendant appearing pro se and Klein present as a 'standby' attorney or legal advisor, and thereafter adjudicated the defendant a second violent felony offender and imposed sentence. As the People correctly concede, the Supreme Court erred in allowing the defendant to proceed pro se at the sentencing proceeding without conducting a searching inquiry to ascertain whether the defendant appreciated the dangers and advantages of giving up the fundamental right to counsel ... . Contrary to the defendant's contention, since the record demonstrates that his plea of guilty was entered voluntarily, knowingly, and intelligently, the Supreme Court providently exercised its discretion in denying, without a hearing, the defendant's motion to withdraw his plea ...". ***People v. Charles*, 2018 N.Y. Slip Op. 02334, Second Dept 4-4-18**

CRIMINAL LAW, EVIDENCE.

DEFENDANT HAD PLED GUILTY IN ANOTHER COUNTY TO POSSESSION OF THE SAME WEAPON USED IN THE INSTANT ROBBERY, CONVICTION VIOLATED THE PROTECTION AGAINST DOUBLE JEOPARDY, EVIDENCE OF THE PRIOR CONVICTION PROPERLY ADMITTED UNDER *MOLINEUX*.

The Second Department determined defendant's conviction for possession of a weapon violated the protection against double jeopardy. Defendant had pled guilty to possession of the same weapon in a different county. However, proof the conviction was admissible in the trial under *Molineux* criteria: "Prior to the defendant's trial in this case, the defendant pleaded guilty in Nassau County to possessing the same gun that was used in the instant robbery. There was no evidence offered at trial to show that the defendant's possession of the gun was not continuous. Thus, the defendant's possession of the same gun on December 14, 2011, in Kings County in connection with the instant robbery, and on December 20, 2011, in Nassau County, constituted a single offense for which he could be prosecuted only once ... . [T]he Supreme Court properly admitted evidence of the defendant's conviction in Nassau County ... , the underlying facts of that conviction, including that the gun was recovered during a car stop in Nassau County ... , and ballistics evidence showing that the loaded gun recovered from defendant's car ... , was the same gun used in the instant robbery committed in Kings County ... . Evidence of the defendant's conviction in Nassau County of criminal possession of a weapon in the fourth degree was probative of the defendant's intent to commit the instant robbery in the complainant's home, was inextricably interwoven with the instant robbery, and was necessary to complete the narrative of events leading to the defendant's arrest in the instant robbery case ... . In addition, the probative value of this evidence outweighed the risk of prejudice to the defendant ... , and the court's limiting instruction to the jury served to alleviate any prejudice resulting from the admission of the evidence ...". ***People v. Wright*, 2018 N.Y. Slip Op. 02347, Second Dept 4-4-18**

CRIMINAL LAW, EVIDENCE, APPEALS.

ALLOWING DEFENDANT TO BE CROSS-EXAMINED ABOUT A PRIOR ROBBERY WHICH WAS THE SUBJECT OF A PENDING APPEAL WAS ERROR, NEW TRIAL ORDERED.

The Second Department, reversing defendant's conviction, determined the trial court's allowing Sandoval evidence of a prior robbery which was the subject of a pending appeal was error, and the error was not harmless under the facts: "We ... reverse the judgment of conviction because of an erroneous Sandoval ruling made by the Supreme Court ... . At trial, the court permitted the defendant to be cross-examined about a prior robbery conviction which, at that time, was the subject of a pending appeal ... . However, the Court of Appeals has held, and the People concede, that defendants may not be examined 'about the underlying facts of an unrelated criminal conviction on appeal, for the purpose of impeaching his credibility' ... . Sandoval errors are subject to harmless error analyses ... . Here, however, we cannot conclude that the evidence of guilt was overwhelming or that there was no reasonable possibility that the error might have contributed to the conviction ...". ***People v. Wahaab*, 2018 N.Y. Slip Op. 02332, Second Dept 4-4-18**

DEBTOR-CREDITOR, CIVIL PROCEDURE.

USURY IS AN AFFIRMATIVE DEFENSE WHICH IS WAIVED IF NOT RAISED, SUPREME COURT SHOULD NOT HAVE SEVERED USURIOUS PROVISIONS OF LOAN AGREEMENTS WHERE DEFENDANT DEFAULTED.

The Second Department, reversing Supreme Court, determined Supreme Court did not have the power to find provisions of loan agreements usurious. Defendant defaulted in the action to enforce the loan agreements. Usury is an affirmative defense which is waived if not raised by a defendant: "Pursuant to CPLR 3215, a plaintiff may seek a default judgment against a defendant who fails to appear or answer ... . A plaintiff moving for a default judgment against a defendant must submit proof of service of the summons and complaint, proof of the facts constituting the cause of action, and proof of the defaulting defendant's failure to answer or appear ... . Here, the plaintiff, by its submissions, met all of these requirements and, thus, demonstrated its entitlement to a default judgment against the defendants ... . The Supreme Court erred when it severed those provisions of the agreements which it found to be illegal pursuant to the criminal usury statute. Usury is an affirmative defense which a defendant must either assert in an answer or as a ground to move to dismiss the complaint pursuant to CPLR 3211. Otherwise, the defense is waived ...". ***Power Up Lending Group, Ltd. v. Cardinal Resources, Inc.*, 2018 N.Y. Slip Op. 02351, Second Dept 4-4-18**

DISCIPLINARY HEARINGS (INMATES), RELIGION.

DISTRIBUTING A LETTER WHICH DEALT WITH RELIGIOUS (NATION OF ISLAM) INFORMATION DID NOT VIOLATE ANY PRISON GUIDELINES OR POLICIES, MISBEHAVIOR DETERMINATION ANNULLED.

The Second Department annulled the misbehavior (smuggling) determination. Petitioner was accused of smuggling a letter. But part of petitioner's duties was sending out religious information (Nation of Islam). The letter was religious in nature. The charges did not allege the violation of any particular guideline or policy which was violated: "The charges against the petitioner here were not supported by substantial evidence. Although the inmate misbehavior report charged failure to comply with and follow guidelines and instructions given by staff regarding facility correspondence procedures... , it did

not specify any particular guideline or instruction with which the petitioner had failed to comply. Further, the correction officer who authored the report could not identify the particular correspondence policy he believed the petitioner had violated. Accordingly, the finding that the petitioner violated rule 180.11 must be annulled ... . In addition, the hearing evidence established that the petitioner, in his capacity as inmate facilitator for the prison's Nation of Islam office, had duties including sending religious materials to other inmates from the Nation of Islam office, and neither the misbehavior report nor the testifying correction officer identified any regulation prohibiting the petitioner, in that capacity, from including the subject letter with the other materials. Accordingly, the finding that the petitioner violated rule 114.10 must also be annulled ...". ***Matter of Smith v. Annucci*, 2018 N.Y. Slip Op. 02330, Second Dept 4-4-18**

MEDICAL MALPRACTICE, INTENTIONAL TORTS, PUBLIC HEALTH LAW, PERSONAL INJURY.

CAUSE OF ACTION ALLEGING DEFENDANTS PERFORMED AN UNWANTED C-SECTION BIRTH STATES AN INTENTIONAL TORT SUBJECT TO THE ONE YEAR STATUTE OF LIMITATIONS, THE PUBLIC HEALTH LAW DOES NOT CREATE A PRIVATE RIGHT OF ACTION AGAINST HOSPITALS.

The Second Department determined several distinct issues (some not addressed here) that arose from a lawsuit alleging the defendant doctors and hospital performed a c-section birth against plaintiff's wishes. The cause of action based upon defendants' performing an unwanted procedure alleged an intentional tort and, based upon the one-year statute of limitations, was untimely. The Public Health Law cause of action was not appropriate because those statutes and regulations do not apply to hospitals (as opposed to residential health care facilities): "... [I]t is clear from the statutory scheme that Public Health Law § 2803-c was not intended to apply to hospitals. Public Health Law § 2801-d authorizes a private right of action by patients of 'residential health care facilities' for the violation of rights enumerated in Public Health Law § 2803-c. 'Residential health care facility' is defined by the statute as 'a nursing home or facility providing health-related service' (Public Health Law § 2801[3]). Since the hospital is not a "residential health care facility," this provision is not applicable to the hospital ... . The fact that the legislature did not specify that a private right of action was available against hospitals indicates that providing a private right of action to hospital patients was contrary to the legislative scheme. Therefore, no private right of action under the Public Health Law should be inferred ...". ***Dray v. Staten Is. Univ. Hosp.*, 2018 N.Y. Slip Op. 02314, Second Dept 4-4-18**

THIRD DEPARTMENT

CRIMINAL LAW.

FAILURE TO ALLEGE AN OVERT ACT IN THE CONSPIRACY COUNT REQUIRED REVERSAL AND DISMISSAL OF THE COUNT AS JURISDICTIONALLY DEFECTIVE.

The Third Department reversed defendant's conviction for conspiracy because the indictment did not allege an overt act: "We find merit in defendant's pro se contention that count 4 of the indictment, charging him with conspiracy in the second degree, must be dismissed. Pursuant to Penal Law § 105.20, '[a] person shall not be convicted of conspiracy unless an overt act is alleged and proved to have been committed by one of the conspirators in furtherance of the conspiracy' … . Here, count 4 neither alleges that an overt act was committed nor includes factual allegations describing such an act. There is no assertion that defendant or the codefendants took any action beyond agreeing to 'engage in or cause the performance of [conduct constituting a class A felony].' Moreover, the indictment's reference to Penal Law § 150.15 does not incorporate an overt act allegation by reference, as the requirement is not found in that provision ... . Accordingly, defendant's conviction of conspiracy in the second degree under count 4 of the indictment must be reversed and the sentence imposed thereon vacated, and said count must be dismissed as jurisdictionally defective ...". ***People v. Pichardo*, 2018 N.Y. Slip Op. 02365, Third Dept 4-5-18**

CRIMINAL LAW, APPEALS.

DEFENDANT'S STATEMENT AT SENTENCING THAT HE DIDN'T MEAN TO HURT THE VICTIM, RAISING THE POSSIBILITY OF THE JUSTIFICATION DEFENSE, REQUIRED FURTHER INQUIRY BY THE COURT, PLEA VACATED DESPITE FAILURE TO MAKE POSTALLOCUTION MOTION.

The Third Department, reversing defendant's conviction, determined defendant's statement at sentencing that he didn't mean to hurt the victim required further inquiry by the court: "Although the record does not disclose that defendant made the appropriate postallocution motion required of him to adequately preserve this claim for our review ... , we find that defendant made statements at sentencing that cast doubt upon his guilt and the voluntariness of his plea, thus triggering the narrow exception to the preservation requirement and imposing a duty upon County Court 'to inquire further to ensure that defendant's guilty plea [was] knowing and voluntary'... . A trial court 'should conduct a hearing [or further inquiry] when at plea-taking or upon sentencing it appears the defendant misapprehends the nature of the charges or the consequences of [the] plea'... . In addition, statements made by a defendant that negate an element of the crime to which a plea has been entered, raise the possibility of a justification defense or otherwise suggest an involuntary plea 'require[s] the trial

court to then conduct a further inquiry or give the defendant an opportunity to withdraw the plea' ... . At sentencing, defendant stated, 'I was sorry that the person got hurt. I didn't mean to hurt him. I was just trying to protect my family inside my home.' When confronted by County Court with the fact that he had allocuted during the plea colloquy that he intended to hurt the victim, defendant stated, 'I was scared, so I intend[ed] to hurt him.' Without any further inquiry or discussion, County Court then proceeded to sentence defendant without providing him with an opportunity to withdraw his plea, notwithstanding his statements raising the possibility of a justification defense. "***People v. Chin*, 2018 N.Y. Slip Op. 02363, Third Dept 4-5-18**

CRIMINAL LAW, ATTORNEYS.

COUNTY COURT'S FAILURE TO MAKE A SEARCHING INQUIRY WHEN DEFENDANT INDICATED HE WISHED TO REPRESENT HIMSELF REQUIRED REVERSAL, DESPITE PRESENCE OF STANDBY COUNSEL.

The Third Department, reversing defendant's conviction, determined the trial court failed to make a searching inquiry after defendant indicated he wished to represent himself. The trial was conducted with standby counsel: County Court failed to conduct a sufficient searching inquiry on the record here. At arraignment, defendant unequivocally expressed his intention to forgo his right to counsel and to instead represent and defend himself. Despite defendant's clear expression of intent from the earliest possible opportunity, County Court made no immediate attempt, either at arraignment or subsequent pretrial proceedings, to conduct the requisite searching inquiry on the record. It was not until the first day of trial that County Court made any attempt to fulfill its obligation to determine whether defendant had knowingly, voluntarily and intelligently waived his right to counsel. At that time, County Court asked defendant a series of relevant questions relating to his background and pedigree, as well as his physical, mental and emotional capacity to represent himself. However, County Court's belated searching inquiry fell short; the court neither 'tested defendant's understanding of choosing self-representation," nor warned of "the 'risks inherent in proceeding pro se' ... . At no point in this record did the court address the dangers and disadvantages of self-representation or impress upon defendant the 'singular importance' of being represented by counsel ... . In contrast, at trial and prior to trial, County Court made various unwarranted laudatory comments about defendant's aptitude for self-representation, thereby giving defendant the probable impression that his decision to proceed without counsel was in his best interest. In fact, at several points in the record, defendant undermined any conclusion that his waiver of the right to counsel was knowing, voluntary and intelligent by demonstrating a fundamental misunderstanding of the role of an attorney. For example, as a result of defendant's uninformed decision, neither he nor his standby counsel attended jury selection. ... ". ***People v. Myers*, 2018 N.Y. Slip Op. 02361, Third Dept 4-5-18**

CRIMINAL LAW, ENVIRONMENTAL LAW, MUNICIPAL LAW.

VILLAGE CODE ENFORCEMENT OFFICER CHARGED WITH RECEIVING A BRIBE AND ENDANGERING THE PUBLIC HEALTH IN CONNECTION WITH THE DEMOLITION OF A BUILDING CONTAINING ASBESTOS, CHARGES SHOULD NOT HAVE BEEN DISMISSED IN THE INTEREST OF JUSTICE PURSUANT TO CPL § 210.40.

The Third Department, reversing Supreme Court, determined Supreme Court abused its discretion in dismissing a case in the interest of justice pursuant to Criminal Procedure Law § 210.40. Defendant, a village code enforcement officer, was charged (along with the village mayor) with receiving a bribe and endangering the public health (among several other charges) in connection with the demolition of a building containing asbestos without proper abatement and approval. The mayor had pled guilty to three misdemeanors: "... [O]ur review of the record discloses that some factors certainly militate in favor of defendant — his lack of a criminal record or history of misconduct and the fact that he was removed from his position as the Code Enforcement Officer for the Village. They are, however, not wholly dispositive in this case ... . [W]e find that the court improvidently exercised its discretion in granting defendant's motion inasmuch as this case does not present 'extraordinary and compelling circumstance[s] . . . which cry out for fundamental justice' ... . We do not … share the court's view that it was unclear from the record that there was no harm to the environment or to individuals in the vicinity of the demolished building ... . The record evidence demonstrates that due to the demolition, the asbestos — a legislatively-recognized carcinogenic agent ... — became friable, meaning that it could crumble and create a dust. More to the point, the record evidence reveals that not only did the dust that was created as a consequence of the demolition lead to the stopping of nearby traffic, workers associated with the demolition were exposed to it. Indeed, one worker stated that, based on his experience as a contractor, he believed that asbestos was present. ... We also find that Supreme Court incorrectly assessed that dismissing the indictment would have a minimal impact upon the confidence of the public in the criminal justice system ... inasmuch as permitting a public servant to elude prosecution for an alleged abuse of his or her position's power cannot be said to foster public confidence ... . We do not agree with Supreme Court that imposing an authorized sentence upon defendant 'would serve absolutely no purpose' had he been tried and convicted of the charged crimes ... . To the contrary, deterring individuals from committing a similar crime in the future is a goal served by sentencing a defendant who has been convicted of a crime ...". ***People v. Snowden*, 2018 N.Y. Slip Op. 02369, Third Dept 4-5-18**

CRIMINAL LAW, EVIDENCE.

REVERSIBLE ERROR TO REFUSE TO ALLOW IN EVIDENCE THE DETECTIVE'S RECORDED STATEMENTS MADE TO DEFENDANT BEFORE THE MIRANDA WARNINGS AND HER CONFESSION, STATEMENTS WERE NOT OFFERED FOR THEIR TRUTH BUT RATHER TO SHOW DEFENDANT'S STATE OF MIND AND TO EXPLAIN WHY SHE CONFESSED.

The Third Department, in a full-fledged opinion by Justice Mulvey, reversing defendant's conviction, determined the jury should have been allowed to hear and see the videotaped statements made by the detective to the defendant prior to the Miranda warnings and defendant's confession to the possession of drugs found in her house. Defendant's son had also been arrested and the detective told defendant her son was involved in a shooting and was going to prison. Defendant argued at trial that she falsely confessed to the possession of the drugs in an effort to protect her son: "... [T]he pre-Miranda portion of the recorded interview does not constitute impermissible hearsay. It consists of statements by the detective to defendant concerning her son's gang membership, extensive criminal behavior and suspected involvement in the shooting that took place the night before. Defendant did not seek to introduce this portion of the recording to prove the truth of any of the statements made therein. Rather, she sought to put this evidence before the jury 'to establish [her] state of mind upon hearing [them]' ... . Further, the substance of the pre-Miranda portion of the interrogation was relevant and material to the state of mind purposes for which defendant sought to offer it. It is beyond cavil that the circumstances surrounding the making of a confession, including the manner in which it was extracted, are relevant to the question of its voluntariness ... . Thus, the statements and representations made by the detective during the pre-Miranda portion of the interrogation, and the environment in which they were uttered, had a bearing on whether defendant's inculpatory statements were the product of a 'free and unconstrained' state of mind ... . Under defendant's theory of the case, the statements made by the detective during the pre-Miranda portion of the recording not only went to the voluntariness of her confession, but also established why she confessed falsely. Accordingly, County Court's evidentiary rulings here excluded evidence directly relevant to a central issue in this case — defendant's state of mind at the time that she confessed to possessing the drugs." ***People v. Hall*, 2018 N.Y. Slip Op. 02368, Third Dept 4-5-18**

CRIMINAL LAW, EVIDENCE, APPEALS.

FAILURE TO INSTRUCT THE JURY THAT A WITNESS WAS AN ACCOMPLICE AS A MATTER OF LAW REQUIRED REVERSAL.

The Third Department, reversing defendant's conviction in the interest of justice, determined the jury should have been instructed that a witness, Dozier, was an accomplice as a matter of law and his testimony therefore required corroboration: "... '[T]o be an accomplice for corroboration purposes, the witness must somehow be criminally implicated and potentially subject to prosecution for the conduct or factual transaction related to the crimes for which the defendant is on trial'... . Here, Dozier's unimpeached testimony established that he was at the second-floor apartment on the day in question to purchase crack cocaine ... . He was arrested and charged, along with defendant and the remaining codefendants, with crimes stemming from his presence in the apartment on that date and thereafter pleaded guilty to criminal possession of a controlled substance in the third degree in exchange for his truthful testimony against defendant. Because Dozier 'could have been (and was) charged with a crime 'based upon the same or some of the same facts or conduct' upon which the charges against defendant were based,' he was an accomplice as a matter of law ... . County Court was therefore required to instruct the jury that Dozier was an accomplice as a matter of law and that defendant could not be convicted on Dozier's testimony absent corroborative evidence (see CPL 60.22 [1]). 'Failure to so charge the jury was necessarily harmful error,' given that the case against defendant rested substantially — if not exclusively — upon the testimony of Dozier ...". ***People v. Pettus*, 2018 N.Y. Slip Op. 02366, Third Dept 4-5-18**

FAMILY LAW.

INCLUDING INCOME FROM STOCK ON A JOINT TAX RETURN, USING INCOME FROM THE STOCK FOR MARITAL PURPOSES AND USING THE STOCK AS COLLATERAL FOR A LOAN DID NOT TRANSMUTE THE STOCK FROM SEPARATE TO MARITAL PROPERTY.

The Third Department determined Supreme Court did not err in finding IBM stock to be the wife's separate property in this divorce proceeding, The facts that income from the stock was reported on joint tax returns and was used for marital expenses did not convert the stock to marital property: "... [T]he mere reporting of income earned from the separate assets of one spouse on a joint return does not transmute the separate property to marital property because both spouses are required to report all of their income, whatever the source, on a joint return ... . [A]contrary rule 'would force married persons to file separate income tax returns, and to pay higher income taxes, simply to protect the non-marital status of their separate property' ... . Here, the wife's assertion that the IBM stock was her separate property was not contrary to any position that she had taken by reporting income derived from her IBM stock on the parties' joint income tax returns as dividends and capital gains ... . It is also well-settled that the use of funds withdrawn from an account that is separate property to pay marital expenses does not change the character of the account to marital property ... . Thus, the use of dividends earned on the wife's IBM stock to pay marital expenses was insufficient to transform the stock to marital property. Similarly, the pledge of

the IBM stock as collateral for the loan used to acquire several parcels of real property located in Florida did not transmute all or any portion of the stock to separate property. This conclusion is illustrated by the fact that a spouse who contributes separate property toward the purchase of a marital asset, or whose separate property is used to pay a marital debt that was incurred to acquire a marital asset, is entitled to a credit for the separate property contribution ...". ***Giannuzzi v. Kearney*, 2018 N.Y. Slip Op. 02378, Third Dept 4-5-18**

FORECLOSURE, APPEALS.

PLAINTIFF DID NOT PROVE AT TRIAL THAT HE HAD STANDING TO BRING THE FORECLOSURE ACTION, HE DID NOT PROVE PHYSICAL POSSESSION OF THE ORIGINAL NOTE AT THE TIME THE ACTION WAS BROUGHT AND DID NOT PROVE THE NOTE WAS INDORSED IN BLANK OR TO HIM, APPELLATE COURT CAN INDEPENDENTLY WEIGH THE EVIDENCE AFTER A NONJURY TRIAL.

The Third Department, reversing County Court after a trial, determined plaintiff did not prove he had standing to bring the foreclosure action: "... [T]he complaint should have been dismissed for lack of standing. Because defendant raised the issue of standing as an affirmative defense in his answer, plaintiff had to prove his standing to maintain this foreclosure action in order to be entitled to relief... . To establish standing, plaintiff was required 'to demonstrate that, at the time that the action was commenced, [he] was the holder or assignee of the mortgage and the holder or assignee of the underlying note'... . As the issue of standing was resolved following a nonjury trial, we will 'independently review the probative weight of the evidence, together with the reasonable inferences that may be drawn therefrom, and grant the judgment warranted by the record' ... . 'Holder status is established where the plaintiff possesses a note that, on its face or by allonge, contains an indorsement in blank or bears a special indorsement payable to the order of the plaintiff'... . While there was testimony that plaintiff possessed the original note at the time of trial in 2015, there was no proof that he was in possession of the original note when he commenced this foreclosure action five years earlier. Even if he was, the note — which was payable to Trustees Capital — was neither indorsed in blank nor specially indorsed to him. Consequently, plaintiff's physical possession of the note could not render him the lawful holder thereof for purposes of enforcing it ...". ***McCormack v. Maloney*, 2018 N.Y. Slip Op. 02385, Third Dept 4-5-18**

LANDLORD-TENANT, REAL PROPERTY ACTIONS AND PROCEEDINGS LAW, REAL PROPERTY LAW.

RETALIATORY EVICTION, CONSTRUCTIVE EVICTION AND BREACH OF WARRANTY OF HABITABILITY DEFENSES SHOULD HAVE BEEN CONSIDERED IN THIS EVICTION PROCEEDING.

The Third Department, reversing County Court (which had affirmed Town Court), determined that the tenant-respondent's defenses in this eviction proceeding should have been considered: " 'When a landlord-tenant relationship exists, the landlord may maintain a special proceeding to remove a tenant if, as relevant here, '[t]he tenant continues in possession of any portion of the premises after the expiration of his [or her] term' ... . The tenant is free, however, to raise 'any legal or equitable defense, or counterclaim' in answering the allegations in the petition ... . In that regard, respondent asserted a defense of retaliatory eviction, which includes the scenario wherein a landlord terminates a tenancy 'to punish the tenant for complaining to government authorities and then . . . brings a holdover proceeding to evict the tenant' ... . Respondent made '[a] good faith complaint . . . to a governmental authority of the landlord's violation of any health or safety law, regulation, code, or ordinance' within the six months prior to the commencement of this proceeding ... . Town Court further failed to grapple with the defenses of constructive eviction and breach of the implied warranty of habitability raised by respondent. County Court correctly observed that these defenses cannot forestall an eviction in a holdover proceeding, but overlooked that they are viable 'defense[s] to the recovery of rent' in such proceeding …". ***Matter of Kirkview Assoc. LP v. Amrock*, 2018 N.Y. Slip Op. 02389, Third Dept 4-5-18**

MUNICIPAL LAW, LAND USE, ENVIRONMENTAL LAW, ZONING,

TOWN'S SITE PLAN REVIEW LAW IS CONSISTENT WITH THE TOWN'S COMPREHENSIVE PLAN AND IS A VALID SUBSTITUTE FOR ZONING ORDINANCES, TOWN PLANNING BOARD HAD THE AUTHORITY TO IMPOSE CONDITIONS ON THE STORAGE OF FIREWOOD UNDER THE SITE PLAN REVIEW LAW.

The Third Department, reversing Supreme Court, determined that the town's Site Plan Review Law was a valid substitute for zoning ordinances and explained the difference. The court also explained the meaning of a "comprehensive plan" in this context. In the underlying action the petitioners contested certain conditions placed upon the storage and sale of firewood imposed by the town planning board and argued that the planning board did not have the authority, under the Site Plan Review Law, to impose the conditions: " 'The primary goal of a zoning ordinance must be to provide for the development of a balanced, cohesive community which will make efficient use of the town's available land' ... . In contrast, site plan review reflects 'public interest in environmental and aesthetic considerations, the need to increase the attractiveness of commercial and industrial areas in order to invite economic investment, and the traditional impulse for controls that might preserve the character and value of neighboring residential areas' ... . Site plan review furthers those ends by 'permit[ting] municipalities to regulate the development and improvement of individual parcels in a manner not covered under the usual provisions of

building and zoning codes which establish specific standards for construction of buildings, provide for specific limitations on use, and fix definite numerical criteria for density, building set backs and frontage and height requirements' ... . There is no statutory directive that a municipality employ both zoning and site plan review as mechanisms of land-use control. ... The trial court ... relied upon the absence of zoning or other land use policies to determine that the Site Plan Review Law ran afoul of the requirement that '[a]ll town land use regulations must be in accordance with a comprehensive plan' ... . A comprehensive plan 'need not be contained in a single document; indeed, it need not be written at all"... . Rather, "[t]he court may satisfy itself that the municipality has a [comprehensive] plan and that authorities are acting in the public interest to further it by examining all available and relevant evidence of the municipality's land use policies' ...". ***Matter of Bovee v. Town of Hadley Planning Bd.*, 2018 N.Y. Slip Op. 02387, Third Dept 4-5-18**

PERSONAL INJURY, CIVIL PROCEDURE, EMPLOYMENT LAW.

ALTHOUGH THE BILL OF PARTICULARS MENTIONED NEGLIGENT HIRING AND RETENTION IN THIS BUS-PASSENGER-INJURY CASE, THE COMPLAINT DID NOT; THEREFORE THERE WERE NO GROUNDS FOR THE DEMAND TO DISCOVER REPORTS OF PREVIOUS ACCIDENTS INVOLVING THE BUS DRIVER.

The Third Department, reversing (modifying) Supreme Court, determined plaintiff was not entitled to discover the reports of other accidents involving defendant bus driver. Plaintiff's children were injured after getting off the bus. Both the driver (Morin) and his employer (CDTA) were sued. Although the bill of particulars mentioned negligent hiring and retention, the complaint did not. Therefore there were no grounds for the discovery of the reports of prior accidents: "The allegations of negligence set forth in the complaint, as they relate to Morin and CDTA, pertain solely to Morin's operation of the bus on the day of the incident ... . Specifically, the complaint alleges that, after discharging the infant passengers, Morin 'negligently remained in that position for a considerable period of time, causing the bus to obstruct the path of travel for other vehicles in violation of the Vehicle and Traffic Law[].' It further alleges that Morin was 'negligent, careless and reckless' in failing to illuminate his hazard lights or any other signal to alert drivers of the presence of the bus during that time. Critically absent from the complaint is any allegation of direct negligence on the part of CDTA. Thus, the complaint 'gives not the slightest indication of a theory of liability of negligent supervision[, hiring or retention]'... . Although plaintiff alleged a theory of negligent hiring and retention in his bill of particulars, '[i]t is well settled that a bill of particulars is intended to amplify the pleadings, limit the proof, and prevent surprise at trial . . . [, and it] may not be used to allege a new theory not originally asserted in the complaint' ...". ***Schonbrun v. DeLuke*, 2018 N.Y. Slip Op. 02386, Third Dept 4-5-18**

PRODUCTS LIABILITY, CIVIL PROCEDURE, EVIDENCE.

FACT THAT PLAINTIFF COULD NOT IDENTIFY THE PARTICULAR MACY'S STORE AT WHICH THE SKIRT WHICH CAUGHT FIRE WAS PURCHASED DID NOT WARRANT SUMMARY JUDGMENT IN FAVOR OF MACY'S, POINTING TO GAPS IN PLAINTIFF'S PROOF IS NOT SUFFICIENT FOR SUMMARY JUDGMENT.

The Third Department, reversing Supreme Court, determined that the Macy's defendants did not eliminate all triable issues of fact concerning whether Macy's sold the plaintiff's skirt which caught fire from a heater. Although plaintiff could not identify the store where the skirt was purchased, Macy's could not rely on the gaps in plaintiff's proof as the basis for summary judgment. There was testimony from a buyer which indicated the skirt could have been purchased at a Macy's store: "The Macy defendants failed to meet their initial burden of establishing that they did not sell the skirt at issue ... . The Macy defendants correctly note that neither plaintiff nor her mother could identify the specific store from which the skirt was purchased. Merely pointing to gaps in plaintiff's proof, however, does not suffice for the Macy defendants to meet their threshold burden ... . Furthermore, plaintiff testified that the skirt had an 'Angie' label on it. Although a product director employed by the Macy defendants, who was previously a buyer, testified that she purchased Angie-labeled skirts from Star of India and that the Macy defendants sold skirts that were purchased from Star of India, her testimony was equivocal as to whether the type of skirt at issue was ever sold by the Macy defendants. In view of the foregoing evidence, the Macy defendants failed to eliminate all triable issues of fact as to whether they sold the skirt and, therefore, their motion should have been denied regardless of the sufficiency of the [other] defendants' opposition ...". ***Palmatier v. Mr. Heater Corp.*, 2018 N.Y. Slip Op. 02382, Third Dept 4-5-18**

REAL PROPERTY LAW.

QUESTION OF FACT ABOUT THE HOSTILITY ELEMENT OF A PRESCRIPTIVE EASEMENT, PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The Third Department, reversing Supreme Court, determined plaintiffs' (Schwengbers') motion for summary judgment in this prescriptive easement case should not have been granted. The action concerned a shared driveway and a question of fact was raised whether plaintiffs' use of the driveway was "hostile:" " 'A party claiming a prescriptive easement must show . . . that the use of the easement was open, notorious, hostile and continuous for a period of 10 years' ... . Hostility is the only element contested here. Once the other elements of a prescriptive easement are established, 'hostility is generally presumed, thus shifting the burden to the defendant to demonstrate that the use was permissive' ... . However, permission can be inferred when 'the relationship between the parties is one of neighborly cooperation and accommodation,' in which case no

presumption of hostility will arise ... . Moreover, 'where permission can be implied from the beginning, no adverse use may arise until the owner of the servient tenement is made aware of the assertion of a hostile right' ... . 'Generally, the question of implied permission is one for the factfinder to resolve' ... . Schwengber ... made assertions regarding her cordial and cooperative relationship — specifically relative to the driveway — with her neighbors who owned defendant's parcel from 1974 to 2011. These assertions could be read to infer that plaintiffs had implied permission to use the driveway. Inasmuch as Schwengber's affidavit contained assertions that supported inferences of both hostility and permissive use, plaintiffs failed to meet their initial burden on their summary judgment motion. Even if plaintiffs had met their burden, defendant submitted evidence indicating that his immediate predecessor-in-interest had an amicable and neighborly arrangement with plaintiffs." ***Schwengber v. Hultenius*, 2018 N.Y. Slip Op. 02379, Third Dept 4-5-18**

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