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FIRST DEPARTMENT

ADMINISTRATIVE LAW, EVIDENCE.

FACTS WHICH LED TO A PROCEEDING THAT WAS ULTIMATELY SEALED AND HEARSAY ARE ADMISSIBLE AT ADMINISTRATIVE HEARINGS, THE NEW YORK CITY HOUSING AUTHORITY DID NOT VIOLATE PETITIONER'S DUE PROCESS RIGHTS IN THIS DRUG ACTIVITY-DELINQUENT RENT ACTION.

The First Department, reversing Supreme Court, noted that an administrative tribunal can consider the facts which led up to a record which is sealed and hearsay can be considered at an administrative hearing. The matter which was before the New York City Housing Authority (NYCHA) concerned drug activity at an apartment and rent delinquency. Supreme Court had held that petitioner's due process rights were violated (reversed by the First Department): "... [T]he IAS court erred in rejecting the arresting officer's testimony because the underlying criminal proceeding against petitioner had been dismissed and sealed. The sealing of a criminal case will not immunize a defendant against all future consequences of the charges, and an administrative tribunal is permitted to consider evidence of the facts leading to those charges when they are independent of the sealed records... . The IAS court's finding that the officer's testimony was improperly based on sealed records, rather than his independent recollection, was simply not accurate. Regardless, the 'reception of erroneously unsealed evidence at [an administrative] hearing does not, without more, require annulment of respondent's determination' ... . The IAS court also improperly rejected the officer's testimony as impermissible hearsay. It is well-settled that hearsay is admissible in administrative proceedings, that it may be the basis for an administrative determination and — if sufficiently relevant and probative — may constitute substantial evidence alone ... . Petitioner did not suffer any due process violation at the hands of NYCHA." ***Matter of Rosa v. New York City Hous. Auth., Straus Houses*, 2018 N.Y. Slip Op. 02552, First Dept 4-12-18**

CIVIL PROCEDURE.

A COURT HAS THE DISCRETION TO GRANT A MOTION TO RENEW THAT IS NOT BASED ON NEWLY DISCOVERED EVIDENCE.

The First Department noted that, although a motion to renew should be based upon newly discovered evidence, a court has the discretion to grant a motion to renew based on evidence which was available: "Although it is true that a motion to renew should generally be based upon newly-discovered facts, this rule is not inflexible, and the court has discretion to grant renewal in the interest of justice even upon facts that were known to the movant at the time the original motion was made ... . Here, we decline to interfere with the court's discretionary decision to grant renewal. Further, in view of the strong policy in favor of resolving disputes on the merits, and in the absence of prejudice to defendants, we conclude that the motion court, upon renewal, providently exercised its discretion in vacating the judgment." ***Kaszar v. Cho*, 2018 N.Y. Slip Op. 02555, First Dept 4-12-18**

CRIMINAL LAW, ATTORNEYS.

DEFENSE COUNSEL WAS NOT INEFFECTIVE FOR DECLINING THE COURT'S OFFER TO INSTRUCT THE JURY IT COULD DEVIATE FROM THE ACQUIT-FIRST RULE AFTER THE JURY INDICATED IT HAD DEADLOCKED ON THE TOP COUNT.

The First Department determined defense counsel was not ineffective for turning down the court's offer to instruct the jury that it need not adhere to the "acquit-first" rule. The jury had sent out two notes indicating deadlock on the top count (murder): "Defendant also argues that counsel was ineffective for failing to accept the court's offer, prompted by the prosecutor's suggestion, to deviate from the 'acquit-first' rule ... , and allow the jury, which had submitted two deadlock notes as to the top charge of murder in the second degree, to consider the lesser included count of manslaughter in the first degree without first reaching a not guilty verdict on the higher charge. We need not decide whether, as the People argue, counsel's choice categorically cannot be deemed professionally unreasonable because the procedure the court made available was clearly contrary to New York law. Rather, we find that the choice counsel faced was quintessentially a judgment call, involving a significant measure of instinct and intuition, and therefore that the course chosen cannot be deemed to lack any objectively reasonable strategic basis. For example, counsel could reasonably have believed, as the court indicated it did, that there was

some possibility of acquittal on all counts if the course of deliberations was not interrupted by an instruction authorizing departure from the acquit-first rule. In any event, defendant has likewise failed to establish ineffective assistance of counsel under either the state or federal standard." ***People v. Tineo-Santos*, 2018 N.Y. Slip Op. 02425, First Dept 4-10-18**

CRIMINAL LAW, ATTORNEYS.

DEFENDANT'S REQUEST TO REPLACE OR DISMISS HIS STANDBY COUNSEL PROPERLY DENIED.

The First Department determined Supreme Court properly denied defendant's request to replace or dismiss defendant's standby attorney: "After permitting defendant to represent himself at trial, the court providently exercised its discretion in declining to replace or dismiss defendant's standby counsel. Initially, to the extent defendant sought to proceed with no standby counsel at all, that request was properly denied. That option would have risked a mistrial in the event termination of defendant's pro se status became necessary, and this was of particular concern because defendant had a history of disrupting the proceedings ... . Defendant was under no obligation to solicit or accept any advice from his standby counsel. Furthermore, there was no good cause for replacement of defendant's standby counsel, who was defendant's third assigned attorney, with yet another attorney ... . While the record sometimes shows contentious exchanges between defendant and this attorney, the record also shows that he consulted with him, as a legal advisor, on other occasions. There was no irreconcilable conflict amounting to good cause for substitution... , nor does any disagreement over trial strategy ... . The attorney's negative comments about defendant, quoted in a newspaper article, should have been avoided, but they were made well before trial, and did not prejudice defendant or amount to an irreconcilable conflict." ***People v. Findley*, 2018 N.Y. Slip Op. 02545, First Dept 4-12-18**

CRIMINAL LAW, EVIDENCE, FAMILY LAW.

13-YEAR-OLD APPELLANT'S CONFESSION MADE WITHOUT MOTHER PRESENT WAS ADMISSIBLE, THE INTERROGATOR'S HAVING APPELLANT WRITE A LETTER PURPORTEDLY TO APOLOGIZE TO THE VICTIM DID NOT RENDER THE CONFESSION INVOLUNTARY, STATEMENTS BY THE VICTIM IN MEDICAL RECORDS WERE ADMISSIBLE TO CORROBORATE THE CONFESSION.

The First Department, in a full-fledged opinion by Justice Singh, over a two-justice dissenting opinion, affirmed the juvenile delinquent adjudication finding that appellant committed offenses which, if he were an adult, would constitute criminal sexual act, sexual abuse, sexual misconduct and endangering the welfare of a child. It was alleged that appellant, who was 13, put his penis in the anus and mouth of L.F., who was nine. The majority concluded the fact that the appellant's mother left the room during the police interrogation (at appellant's request) and the investigator's having the appellant write a "letter of apology" to the victim during the interrogation did not render the appellant's confession involuntary. The majority further held that the statements in the medical records made by L.F. during a physical exam were relevant to treatment and therefore admissible to corroborate the confession: "While a parent may choose not to be present when a child is being interviewed, 'the police should always ensure that the parent is aware of the right of access to his or her child during questioning,' and if asked to leave, 'the parent should be made aware that he or she is not required to leave' ... . To be sure, the presence of a parent is important, as a parent may help a child understand Miranda warnings 'so that the child can consciously and voluntarily choose whether to waive or to exercise his constitutional rights to remain silent, to have an attorney present at his questioning, and to have an attorney provided for him without charge if he is indigent' ... . A parent present at questioning also is able to 'monitor the interrogation lest the police engage in coercive tactics…. . However, a child does not have an absolute right to the presence of a parent during interrogation, and 'it does not follow as a matter of law that a child's confession obtained in the absence of a parent is not voluntary' ... . * * * ... [A]ppellant's confession is corroborated by the medical records, which were properly admitted into evidence by Family Court. ... Hospital records are admissible under the business records exception to the hearsay rule when they reflect 'acts, occurrences or events that relate to diagnosis, prognosis or treatment or are otherwise helpful to an understanding of the medical or surgical aspects' of the patient's hospitalization ...". ***Matter of Luis P.*, 2018 N.Y. Slip Op. 02564, First Dept 4-12-18**

DEBTOR-CREDITOR, FRAUD, CIVIL PROCEDURE, CONTRACT LAW.

FRAUDULENT CONVEYANCE, TORTIOUS INTERFERENCE WITH CONTRACT, AND DEBTOR-CREDITOR LAW CAUSES OF ACTION INSUFFICIENTLY PLED, COMPLAINT SHOULD HAVE BEEN DISMISSED.

The First Department, reversing Supreme Court, determined the fraudulent conveyance allegations, which were made "upon information and belief," were insufficient, and the tortious interference with contract allegations were insufficient because there was no allegation the contract would not have been breached but for the defendant's conduct: "Plaintiff alleges that defendants engaged in a fraudulent scheme to transfer and dispose of the assets of several related entities (the judgment debtors) in order to thwart plaintiff's ability to collect debts owed by those entities, including judgments in two related actions. The actual fraudulent conveyance claims, under the common law and Debtor and Creditor Law (DCL) § 276, should be dismissed because plaintiff failed to allege fraudulent intent with the particularity required by CPLR 3016(b) ... . The key allegations were made '[u]pon information and belief,' without identifying the source of the information ... . Moreover, the timing of the allegedly fraudulent transfers - beginning two years before the judgment debtors incurred the

subject debts - undermines the claim of fraudulent intent... . The constructive fraudulent conveyance claims pursuant to DCL 273, 274, and 275 should be dismissed because plaintiff failed to sufficiently allege that the transfers were made without fair consideration, as the relevant allegations were all made '[u]pon information and belief'... Because the viability of the claims under DCL 276-a, 278, and 279 depends on the viability of the other fraudulent conveyance claims, these claims should likewise be dismissed. The tortious interference claim should be dismissed because plaintiff failed to sufficiently allege that the contract 'would not have been breached but for' the defendant's conduct' .. . The relevant allegations were vague and conclusory and supported by 'mere speculation' ...". ***Carlyle, LLC v. Quik Park 1633 Garage LLC*, 2018 N.Y. Slip Op. 02436, First Dept 4-10-18**

EMPLOYMENT LAW, ARBITRATION.

ARBITRATOR'S DETERMINATION THAT THE ACKNOWLEDGED SEXUAL HARASSMENT DID NOT RISE TO THE LEVEL OF A DISCHARGEABLE OFFENSE VIOLATED PUBLIC POLICY AND WAS IRRATIONAL.

The First Department, in a full-fledged opinion by Justice Manzanet-Daniels, reversing Supreme Court, determined the arbitrator's ruling in this sexual harassment action violated public policy and was irrational. The arbitrator agreed with the findings of fact made by the Equal Employment Opportunity (EEO) investigation (which supported the sexual harassment allegations made by Melendez against Aiken) but determined the behavior did not rise to the level of a dischargeable offense: "The arbitrator's decision fashions a remedy that violates public policy. Moreover, it contains language maligning victims in an entirely inappropriate manner, including statements that it was incumbent on Melendez to take appropriate action if she felt Aiken's comments were inappropriate. Such a 'blame the victim' mentality inappropriately shifts the burden of addressing a hostile work environment onto the employee. The arbitrator's decision belies the realities of workplace sexual harassment. The fact that the victim did not earlier report Aiken's behavior is not atypical and should in no way be construed as absolving Aiken of his misconduct. The arbitrator's decision effectively prevents petitioners from following their policies and fulfilling their legal obligations to protect against workplace sexual harassment. It is the employer's responsibility to implement appropriate policies to protect against workplace harassment, including the institution of appropriate complaint procedures that encourage victims to come forward, and the implementation of appropriate sanctions that are designed to deter offensive behavior. ... Accordingly, public policy prohibits enforcement of the arbitration award in this case ... . Further, the arbitrator's decision is irrational as it purports to adopt the findings of the EEO in all respects, and yet arrives at the unsustainable conclusion that Aiken did not violate the workplace sexual harassment policy ...". ***Matter of New York City Tr. Auth. v. Phillips*, 2018 N.Y. Slip Op. 02442, First Dept 4-10-18**

FAMILY LAW, APPEALS.

MOTHER WAS ENTITLED TO A RECOMMENDATION ON INCARCERATION FROM THE SUPPORT MAGISTRATE WITHIN FIVE DAYS OF THE FINDING HUSBAND WAS IN WILLFUL VIOLATION OF THE SUPPORT ORDER, BECAUSE NO RECOMMENDATION WAS MADE, MOTHER WAS EFFECTIVELY DENIED THE ABILITY TO OBJECT OR APPEAL.

The First Department, reversing Family Court, determined mother was entitled to a ruling from the support magistrate on whether incarceration was recommended based on father's willful violation of a child support order. Rather than making the recommendation, the support magistrate postponed the ruling and husband continued to violate the order for several months while the Family Court proceedings were ongoing, effectively making it impossible for mother to object or appeal: "The Family Court denied the mother's objections to the Support Magistrate's fact-finding order because it found that the order was not 'final.' The order cited Family Court Act Section 439(e), which permits objections to a 'final' order of a Support Magistrate, and Section 439(a), which provides that a 'determination by a Support Magistrate that a person is in willful violation of an order . . . and that recommends commitment . . . shall have no force and effect until confirmed by a judge of the court.' This was error. First, under the plain language of the statute, the Support Magistrate's fact-finding order was not an order that 'shall have no force and effect until confirmed by a judge of the court,' since it did not recommend incarceration. The Support Magistrate's failure to make a recommendation as to incarceration upon his finding of willfulness essentially constituted a recommendation against incarceration, since the mother could not seek that remedy without a recommendation from the Support Magistrate. Moreover, the parties were entitled to a complete written fact-finding order, including a recommendation as to incarceration, within five court days following completion of the hearing on the mother's violation petition ... . Accordingly, the Family Court should have considered the mother's objections, and, upon doing so, should have exercised its authority to remand the matter to the Support Magistrate for an immediate recommendation as to incarceration, or to make, with or without holding a new hearing, its own findings of fact and order based on the record ...". ***Matter of Carmen R. v. Luis I.*, 2018 N.Y. Slip Op. 02422, First Dept 4-10-18**

FORECLOSURE, CIVIL PROCEDURE.

FAILURE TO CITE STATUTORY BASIS FOR MOTION TO VACATE DEFAULT IN NOTICE OF MOTION NOT FATAL; QUESTION WHETHER DEFENDANT WAS SERVED IN THIS FORECLOSURE ACTION REQUIRED A TRAVERSE HEARING; BECAUSE DEFENDANT DID NOT RESIDE AT THE SUBJECT PROPERTY CPLR 3215(g)(3) NOTICE NOT REQUIRED.

The First Department, reversing Supreme Court, determined (1) the failure to cite the CPLR provision upon which the cross motion to vacate the default was based was not fatal to the motion because the basis was clear from the motion papers, (2) there was a question of fact whether defendant was served with the foreclosure summons and complaint requiring a traverse hearing, and (3) because defendant did not live at the subject premises (he lived next door), the CPLR 3215(G)(3) notice requirement did not apply: "Plaintiff argues that the subject action is not a residential mortgage foreclosure action because such actions involve foreclosure of a 'home loan,' which according to RPAPL (Real Property Actions and Proceedings Law) 1304(6)(iii) is any loan secured by property 'which is or will be occupied by the borrower as the borrower's principal dwelling.' It is undisputed that defendant does not reside at the mortgaged property. ... Therefore, plaintiff asserts the action is not subject to the additional mailing requirement of CPLR 3215. CPLR 3215(g)(3) provides that when a default judgment 'based upon nonappearance is sought against a natural person in an action based upon nonpayment of a contractual obligation, 'that person is entitled to additional notice of the action, which is provided by mailing the summons to his or her place of residence. The provision was enacted out of concern for 'unsophisticated homeowners' who 'do not receive sufficient notice that they are about to lose their homes through foreclosure' ... . As defendant does not reside at the mortgaged property, this foreclosure proceeding does not place his home at risk. Accordingly, we find that plaintiff was not required to serve a 3215(g)(3) notice on defendant." ***Bank of Am., N.A. v. Diaz*, 2018 N.Y. Slip Op. 02421, First Dept 4-10-18**

FRAUD, CONTRACT LAW, ATTORNEYS.

FORUM SELECTION CLAUSE APPLIES TO NONSIGNATORY ATTORNEY BASED UPON ATTORNEY'S RELATIONSHIP WITH THE PARTIES; PARTIES' FAILURE TO CAREFULLY READ THE AGREEMENTS BLAMED ON ATTORNEY'S FRAUDULENT ASSURANCES; FRAUD, FRAUD IN THE INDUCEMENT, BREACH OF FIDUCIARY DUTY AND BREACH OF CONTRACT ALLEGATIONS AGAINST ATTORNEY STATED CAUSES OF ACTION.

The First Department determined the defendants' counterclaims against their attorney, David, stated causes of action for fraud, fraud in the inducement, breach of fiduciary duty and breach of contract. Defendants alleged that David's assurances led defendants to sign joint venture agreements to their detriment without carefully reading them. The court noted that, although David was not a signatory to the agreements, the forum selection clauses applied to him because of his relationship with the defendants, as expressed in an email: "The allegations of the complaint state a cause of action for fraudulent inducement ... . The well settled principle relied on by David that a party claiming fraudulent inducement cannot be said to have justifiably relied on a representation negated by the plain terms of the contract they signed does not apply here, since his alleged assurances and fraud were the very cause of defendants' failure to review the documents carefully. As it was reasonable for defendants to rely on the advice of counsel, we also reject David's arguments premised on the plain language of the agreements that defendants admit they did not read carefully. Defendants' allegations describing their attorney-client relationship with David state a cause of action for breach of fiduciary duty. For example, they allege that he served as their attorney for years, both before and during the instant transaction, negotiating unrelated contracts and handling unrelated lawsuits and trusts and estates matters. While in support of the fraudulent inducement claim defendants allege that the agreements were 'brought about by fraud,' because, inter alia, David held himself out as their attorney and caused them to sign unfavorable agreements that he drafted, in contrast, in support of the fraud claim defendants focus on events following the execution of the agreements, namely, David's 'scheme to manufacture a bogus default' of the loan so as to seize valuable collateral without paying for it. These allegations state a cause of action for fraud ...". ***Suttongate Holdings Ltd. v. Laconm Mgt. N.V.*, 2018 N.Y. Slip Op. 02424, First Dept 4-10-18**

PERSONAL INJURY, CONTRACT LAW.

NEGLIGENCE CAUSES OF ACTION AGAINST THE DISTRIBUTOR AND RETAIL SELLER OF A SULFURIC ACID DRAIN OPENER, AND THE NEGLIGENT DISCHARGE OF A CONTRACTUAL OBLIGATION CAUSE OF ACTION AGAINST THE DISTRIBUTOR, SHOULD NOT HAVE BEEN DISMISSED.

The First Department, reversing (modifying) Supreme Court determined negligence causes of action against the distributor (Durst) and (Canje) retailer of a sulfuric acid drain opener, and a negligent discharge of a contractual obligation (launching an instrument of harm) cause of action against the distributor should not have been dismissed: "Because defendant Canje, the retail outlet at which the product was purchased, never agreed to abide by the sale policy of the manufacturer, third-party defendant Hercules Chemical Company, Inc., to restrict the sale of the product to plumbing and/or building professionals, it cannot be held liable for launching a force of harm in negligent discharge of a contractual obligation (see generally Espinal v. Melville Snow Contrs., 98 NY2d 136, 140 [2002]). However, issues of fact exist whether defendant Durst, the distributor that sold the product to Canje, had a contractual duty to refrain from selling the product to Canje and wheth-

er Durst breached this duty and its acknowledged contractual undertakings to take appropriate steps to assure the proper sale and use of the product and to comply with the Seller's Notice prohibiting sales to non-professionals and the display of the product where it was easily accessible. Durst argues that even if it breached such a duty it did not launch a force or instrument of harm. However, ... [t]his case, in which there is evidence that Durst created the unsafe condition by supplying the product without proper safeguards, is ... akin to Landon v. Kroll Lab. Specialists, Inc. (22 NY3d 1 [2013]), in which the Court of Appeals found that the allegation that the defendant's negligent testing procedures subjected the plaintiff to legal proceedings stated a cause of action based on the launch of a force of harm." ***Janiya W.-G. v. Smith*, 2018 N.Y. Slip Op. 02557, First Dept 4-12-18**

PERSONAL INJURY, MUNICIPAL LAW, LABOR LAW, EMPLOYMENT LAW.

FIREFIGHTER'S DEATH DURING A TRAINING EXERCISE NOT ACTIONABLE UNDER GENERAL MUNICIPAL LAW § 205-a AND LABOR LAW § 27-a.

The First Department determined plaintiff probationary firefighter's death from dehydration during fire department training (functional skills training or FST) was not the type of occupational injury which is actionable under General Municipal Law § 205-a and Labor Law § 27-a: "Decedent ... , a probationary firefighter, passed away due to dehydration while performing the Fire Academy's physically demanding Functional Skills Training (FST) exercise course, which was designed to simulate actual firefighting tasks under a controlled environment. Plaintiff is not entitled to recover under GML § 205-a, as the injuries decedent sustained were not the type of occupational injury that Labor Law § 27-a was designed to protect, but rather, arose from risks unique to firefighting work ... . While the performance of the FST course was part of training, and not part of firefighting per se, the ability to perform it efficiently was a necessary and important part of the job, as it ensures that a firefighter could effectively perform the tasks during an actual fire. The risks of dehydration and other physiological conditions experienced during FST training are the same as those inherent in actual firefighting. Given the special dangers firefighters face, and their responsibility to protect the public, judgments as to how they should be trained are better left for the FDNY supervisors and not second-guessed by the Department of Labor." ***Sears v. City of New York*, 2018 N.Y. Slip Op. 02430, First Dept 4-10-18**

SECOND DEPARTMENT

ATTORNEYS, CONTRACT LAW.

MOTION, MADE BY PLAINTIFF'S NEW COUNSEL, TO VACATE A STIPULATION ENTERED INTO BY PRIOR COUNSEL SHOULD NOT HAVE BEEN GRANTED, PRIOR COUNSEL HAD THE APPARENT AUTHORITY TO ENTER THE STIPULATION AND PLAINTIFF CAN NOT LATER ARGUE PRIOR COUNSEL LACKED AUTHORITY.

The Second Department determined Supreme Court should not have vacated a stipulated entered into in open court and signed by an attorney who had represented the plaintiff and had the apparent authority to enter the stipulation. The motion to vacate was made by new counsel hired by plaintiff: "The stipulation, signed by counsel for each party in this action during a court appearance, is a binding contract (see CPLR 2104 ...). Contrary to the plaintiff's contention, her counsel at the time of the stipulation had the apparent authority to enter into the stipulation. This prior counsel signed and verified the summons and complaint, appeared for the plaintiff at the preliminary conference and the compliance conference, and filed a note of issue, all before entering into the stipulation on the plaintiff's behalf. The presence of an attorney at pretrial conferences constitutes 'an implied representation by [the client] to defendants that [the attorney] had authority' to bind the client to a stipulation ... . Indeed, only attorneys who are authorized to enter into binding stipulations may appear at pretrial conferences ... . Here, the plaintiff's engagement of her prior counsel to represent her throughout the litigation and to appear on her behalf at pretrial and compliance conferences precludes her from arguing that prior counsel lacked the authority to bind her to the stipulation. 'A stipulation made by the attorney may bind a client even where it exceeds the attorney's actual authority if the attorney had apparent authority to enter into the stipulation' ...". ***Chae Shin Oh v. Jeannot*, 2018 N.Y. Slip Op. 02446, Second Dept 4-11-18**

ATTORNEYS, FRAUD.

THE EXPENSE OF DEFENDING AN ACTION WHICH STEMMED FROM AN ATTORNEY'S MISREPRESENTATION CAN MEET THE INJURY REQUIREMENT OF A JUDICIARY LAW § 487 ACTION.

The Second Department determined the expense required to defend an action that resulted from an attorney's misrepresentation can meet the injury requirement of a Judiciary Law § 487 cause of action: "Judiciary Law § 487 imposes civil and criminal liability on any attorney who '(1) [i]s guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party; or, (2) [w]ilfully delays his client's suit with a view to his own gain'... . A plaintiff may state a Judiciary Law § 487 cause of action by relying upon a defendant's intentional deceit during the course of an underlying action ... . A cause of action alleging a violation of Judiciary Law § 487 must be pleaded with specificity ... and is

'focuse[d] on the attorney's intent to deceive, not the deceit's success' ... . Accordingly, although injury to the plaintiff is an essential element of a Judiciary Law § 487 cause of action ... , 'recovery of treble damages under Judiciary Law § 487 does not depend upon the court's belief in a material misrepresentation of fact in a complaint'... . Rather, because defending the action is a result of the misrepresentation, a party's legal expenses in defending the lawsuit may be treated as the proximate result of the misrepresentation ...". ***Betz v. Blatt*, 2018 N.Y. Slip Op. 02444, Second Dept 4-11-18**

CIVIL PROCEDURE.

DECLARATORY JUDGMENT DECIDED BY DEFAULT CANNOT SUPPORT THE APPLICATION OF THE DOCTRINE OF COLLATERAL ESTOPPEL, THE ISSUES HAVE NOT BEEN LITIGATED.

The Second Department, reversing Supreme Court, noted that a declaratory judgment decided on default does not support the application of the doctrine of collateral estoppel because the issues were not litigated: " 'The party seeking to invoke collateral estoppel has the burden to show the identity of the issues, while the party trying to avoid application of the doctrine must establish the lack of a full and fair opportunity to litigate' ... . 'If the issue has not been litigated, there is no identity of issues between the present action and the prior determination' ... . In this case, since the determination in the declaratory judgment action regarding insurance coverage for the subject van was decided on default and, thus, was not actually litigated ... , [the nominal defendants] failed to demonstrate that there was an identity of issues between the present proceeding and the determination in the declaratory judgment action." ***Matter of Hereford Ins. Co. v. McKoy*, 2018 N.Y. Slip Op. 02466, Second Dept 4-11-18**

CIVIL PROCEDURE.

A PLAINTIFF FACED WITH A MOTION TO DISMISS FOR FAILURE TO STATE A CAUSE OF ACTION NEED NOT SUBMIT ANY EVIDENCE OR AFFIDAVITS IN OPPOSITION BUT RATHER CAN STAND ON THE SUFFICIENCY OF THE COMPLAINT.

The Second Department noted that a plaintiff, when faced with a motion to dismiss for failure to state a cause of action, need not submit any evidence or affidavits in opposition, but may simply stand on the pleadings: "While a court is permitted to consider evidentiary material submitted by a defendant in support of a motion to dismiss pursuant to CPLR 3211(a)(7)... , 'affidavits submitted by a defendant will almost never warrant dismissal under CPLR 3211 unless they establish conclusively that [the plaintiff] has no cause of action' ... . The plaintiff 'may not be penalized for failure to make an evidentiary showing in support of a complaint that states a claim on its face' ... . Indeed, if a plaintiff chooses to stand on his or her pleading alone, 'confident that its allegations are sufficient to state all the necessary elements of a cognizable cause of action, he [or she] is at liberty to do so and, unless the motion to dismiss is converted by the court to a motion for summary judgment, he [or she] will not be penalized because he [or she] has not made an evidentiary showing in support of his [or her] complaint' ... . Here, the Supreme Court did not convert motion pursuant to CPLR 3211(a)(7) to dismiss to a motion for summary judgment. The amended complaint states a cause of action as against [defendant] and [defendant's] submissions, including an affidavit of its president, did not conclusively establish that the plaintiff has no cause of action against it ...". ***Yu Chen v. Kupoint (USA) Corp.*, 2018 N.Y. Slip Op. 02498, Second Dept 4-11-18**

CRIMINAL LAW.

THE CROSS-RACIAL IDENTIFICATION JURY INSTRUCTION SHOULD HAVE BEEN GIVEN, ERROR HARMLESS HOWEVER.

The Second Department determined Supreme Court should have instructed the jury on cross-racial identification, but further determined the error was harmless: "In People v. Boone (30 NY3d 521, 535), the Court of Appeals held that where, as here, 'a witness's identification of the defendant is at issue, and the identifying witness and defendant appear to be of different races, a trial court is required to give, upon request, during final instructions, a jury charge on the cross-race effect, instructing (1) that the jury should consider whether there is a difference in race between the defendant and the witness who identified the defendant, and (2) that, if so, the jury should consider (a) that some people have greater difficulty in accurately identifying members of a different race than in accurately identifying members of their own race and (b) whether the difference in race affected the accuracy of the witness's identification.' ... [U]nder the circumstances of the present case, the Supreme Court's failure to give a cross-racial identification charge constituted harmless error. The defendant identified himself as the individual shown in a surveillance video taken inside a deli adjacent to the smoke shop approximately 40 minutes before the robbery. A surveillance video taken outside the deli at that time showed the individual on the sidewalk walking past the smoke shop and entering the deli. Additionally, the surveillance video taken outside the deli showed the same individual entering and exiting the smoke shop at the exact time of the robbery. Immediately after the crime, the complainant gave a very precise and detailed description of the defendant to a detective, which included a unique identifying characteristic, namely, a brown birthmark on the white of the defendant's eye. During the arrest process of the defendant, the arresting detective immediately observed the distinctive marking on the defendant's eye. Under the circumstances, the error in failing to administer the charge on cross-racial identification was harmless, as there was overwhelming evidence of

the defendant's guilt, and no significant probability that the defendant would have been acquitted if not for the error ...". ***People v. Bradley*, 2018 N.Y. Slip Op. 02481, Second Dept 4-11-18**

CRIMINAL LAW.

DEFENDANT WAS ELIGIBLE FOR CONDITIONAL SEALING OF THE RECORDS OF DRUG-RELATED CONVICTIONS PURSUANT TO CPL § 160.58 NOTWITHSTANDING THAT HE WAS ALSO CONVICTED OF DWAI WHICH IS NOT COVERED BY THE SEALING STATUTE; THE SHOCK INCARCERATION PROGRAM WHICH DEFENDANT COMPLETED MET THE JUDICIAL DIVERSION REQUIREMENTS OF THE SEALING STATUTE.

The Second Department, reversing County Court, determined that defendant was eligible for conditional sealing of the record of his drug-related convictions pursuant to Criminal Procedure Law (CPL) § 160.58. The fact that defendant was also convicted of Driving While Ability Impaired (DWAI), which is not an offense covered by CPL § 160.58, did not preclude the sealing (as County Court had held). The Second Department rejected the argument that the shock incarceration program defendant completed was not the type of judicial diversion program contemplated by CPL § 160.58: "We conclude, first, that the County Court erroneously interpreted CPL 160.58 as prohibiting sealing in light of the DWAI conviction. CPL 160.58 does not contain a 'clearly expressed' limitation on a court's authority to order sealing in cases in which a defendant pleads guilty to an accusatory instrument that contains an offense that does not qualify for sealing. Indeed, the fact that the statute refers to the sealing of an "offense" suggests that discrete offenses may be sealed even if an accusatory instrument to which a defendant pleaded guilty contained other offenses. Had the Legislature intended to limit the court's authority as the County Court found, it could easily have specified that sealing was confined to cases in which a defendant was charged only with offenses defined in articles 220 and 221 of the Penal Law or a specified offense defined in CPL 410.91. Particularly in light of the expansive approach taken by the Court of Appeals in interpreting the DLRA [Drug Law Reform Act], the omission of a limitation on a court's authority to seal qualifying drug offenses when coupled in an accusatory instrument with nonqualifying offenses should be interpreted as intentional ... . We further conclude that, contrary to the People's contention, by successfully completing court-ordered Shock incarceration and further treatment during his period of PRS, the defendant successfully completed a 'judicially sanctioned drug treatment program of similar duration, requirements and level of supervision' as judicial diversion and drug treatment alternative to prison." ***People v. Parker*, 2018 N.Y. Slip Op. 02487, Second Dept 4-11-18**

CRIMINAL LAW.

THE COURT'S FAILURE TO SENTENCE DEFENDANT IN ACCORDANCE WITH THE PLEA AGREEMENT ON ONE INDICTMENT REQUIRED THAT THE DEFENDANT BE GIVEN THE OPPORTUNITY TO WITHDRAW HIS PLEAS TO THAT INDICTMENT AND ANOTHER INDICTMENT FROM WHICH NO APPEAL HAD BEEN TAKEN.

The Second Department determined the failure to resentence defendant in accordance with the plea agreement required that the defendant be given the opportunity to withdraw his pleas, not only to the charges in indictment on which he was resentenced, but also the charges in prior indictment from which the defendant had not appealed: "Here, the defendant contends that both of the underlying judgments should be reversed and the underlying guilty pleas vacated on the ground that the County Court deviated from the terms of the plea agreement by imposing an aggregate term of seven years' imprisonment instead of the aggregate term of five years' imprisonment that it had promised the defendant when he agreed to plead guilty. To the extent that the defendant seeks vacatur of the underlying pleas and reversal of the underlying judgments due to an alleged violation of the plea agreement, such a contention is not reviewable on this appeal since the defendant has only appealed from the resentence ... . [T]he County Court erred in resentencing the defendant to a period of postrelease supervision on the conviction of criminal sale of a firearm in the third degree that exceeded the period of postrelease supervision that had been promised to the defendant in connection with the plea agreement, without first affording the defendant the opportunity to withdraw his plea of guilty to that count ... . Furthermore, inasmuch as the defendant's plea of guilty on [the prior indictment], and his plea of guilty to the charge of criminal sale of a controlled substance in the third degree under [the second indictment] were induced by the promise that the sentences on the two indictments would all run concurrently, the defendant must be afforded the opportunity to withdraw his pleas of guilty under both of the indictments, for all three convictions ...". ***People v. Robinson*, 2018 N.Y. Slip Op. 02490, Second Dept 4-11-18**

FAMILY LAW.

EXTRAORDINARY CIRCUMSTANCES WARRANTED THE AWARD OF CUSTODY TO A GRANDPARENT AND THE SHARING OF CUSTODY WITH THE PARENTS.

The Second Department determined extraordinary circumstances warranted the award of custody to a grandparent and the sharing of custody with the parents: "... [T]he Family Court properly found that the paternal grandmother demonstrated the existence of extraordinary circumstances. The children's parents were either unable or unwilling to provide the children with basic personal hygiene, clean clothes, adequate medical or dental care, or an appropriate place to sleep, and they also lacked insight into the children's particular needs, which included multiple special needs with respect to one of the children... . In particular, the mother forgot to feed the children on several occasions, and the children often came to school

hungry and dressed in dirty clothing that smelled of cat urine and feces. Moreover, the parents did not remedy the situation, despite multiple efforts by school personnel. After finding the existence of extraordinary circumstances, the Family Court next inquired into what custodial arrangement would serve the children's best interests. The court properly determined that the children's best interests would be served by shared legal custody among the paternal grandmother and parents, with primary residential custody to the paternal grandmother and frequent contact and visitation between the parents and the children." ***Matter of Conroy v. Conroy*, 2018 N.Y. Slip Op. 02462, Second Dept 4-11-18**

FAMILY LAW, IMMIGRATION LAW.

MOTHER'S IMMIGRATION STATUS DID NOT AFFECT HER STATUS AS A DOMICILIARY OF NEW YORK, HER GUARDIANSHIP PETITIONS SHOULD NOT HAVE BEEN DENIED, FAMILY COURT SHOULD HAVE MADE THE FINDINGS NECESSARY TO ALLOW HER CHILDREN TO APPLY FOR SPECIAL IMMIGRANT JUVENILE STATUS (SIJS).

The Second Department, reversing Family Court, determined mother's immigration status did not prevent her from being appointed guardian of her children and Family Court should have made the findings necessary for the children to apply for special immigrant juvenile states (SIJS): "Family Court improperly dismissed the guardianship petitions. Contrary to the court's determination, the mother was not required to demonstrate that she has 'legal status in this country' or had taken steps to obtain such status to qualify as a guardian. '[D]omicile means living in [a] locality with intent to make it a fixed and permanent home' ... . An individual's lack of lawful status in the United States is 'immaterial to the issue of his [or her] domicile and, therefore, his [or her] eligibility to receive letters [of guardianship]'... . Here, notwithstanding the mother's immigration status, the record demonstrates her intent to permanently reside in New York State. Thus, the mother cannot be deemed a 'non-domiciliary alien' who is ineligible to receive letters of guardianship ... . Furthermore, the Family Court should have granted the children's motions for the issuance of an order making the requisite declaration and specific findings so as to enable them to petition for SIJS." ***Matter of Alan S. M. C.*, 2018 N.Y. Slip Op. 02459, Second Dept 4-11-18**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

PROPERTY OWNER'S LIABILITY UNDER LABOR LAW § 240(1) FOR PLAINTIFF'S FALL FROM A SCAFFOLD THAT DID NOT HAVE SAFETY RAILINGS IS BASED UPON ITS STATUS AS AN OWNER, NOT NEGLIGENCE, THEREFORE PROPERTY OWNER ENTITLED TO INDEMNIFICATION FROM GENERAL CONTRACTOR.

The Second Department, reversing Supreme Court, determined plaintiff, who fell from a scaffold that did not have a safety railing, was entitled to summary judgment on his Labor Law § 240(1) cause of action. The property owner was entitled to summary judgment against the general contractor on its indemnification action because the property owner was not negligent: "Labor Law § 240(1) requires property owners and contractors to furnish, or cause to be furnished, safety devices, such as scaffolds, which are 'so constructed, placed and operated as to give proper protection' to workers.' To establish liability pursuant to Labor Law § 240(1), a plaintiff must demonstrate a violation of the statute and that such violation was a proximate cause of his or her injuries'... . Here, the plaintiff established his prima facie entitlement to judgment as a matter of law by demonstrating that he was injured when he fell from a scaffold that lacked safety rails on the sides, and that he was not provided with a safety device to prevent him from falling ... . In opposition, the defendant failed to raise a triable issue of fact. Additionally, the Supreme Court should have granted the defendant's (property owner's) motion for summary judgment on the third-party cause of action for contractual indemnification against the general contractor. The defendant established its prima facie entitlement to judgment as a matter of law by submitting a copy of a 'Release and Hold Harmless Agreement,' together with evidence showing that it was free from any negligence in connection with the accident ... . Here, the defendant is liable to the plaintiff under Labor Law § 240(1) based solely upon its status as the owner of the premises. There is no evidence that the defendant was negligent, or that it directed, controlled, or supervised the manner in which the plaintiff performed his work...". ***Marulanda v. Vance Assoc., LLC*, 2018 N.Y. Slip Op. 02452, Second Dept 4-11-18**

MUNICIPAL LAW, PERSONAL INJURY.

A POLICE OFFICER'S OR POLICE DEPARTMENT'S KNOWLEDGE OF AN ACCIDENT CANNOT BE CONSIDERED ACTUAL KNOWLEDGE OF THE ESSENTIAL FACTS OF THE CLAIM BY THE MUNICIPALITY, REQUEST FOR LEAVE TO FILE A LATE NOTICE OF CLAIM PROPERLY DENIED.

The Second Department determined Supreme Court properly denied the petition for leave to file a late notice of claim. Petitioner alleged she fell and was injured while riding a bus owned by the county. A county police report was made about the incident. The Second Department held that the fact that the county was aware of the accident does not demonstrate the county was aware of the essential facts constituting the claim: " 'In determining whether to grant a petition for leave to serve a late notice of claim or to deem a late notice of claim timely served nunc pro tunc, [the] court must consider all relevant circumstances, including whether the public corporation acquired actual knowledge of the essential facts constituting the claim within 90 days after the claim arose or a reasonable time thereafter, whether the delay would substantially prejudice the public corporation in its defense, and whether the claimant demonstrated a reasonable excuse for the failure to serve a timely notice of claim'... . 'While the presence or the absence of any one of the factors is not necessarily determinative, whether the municipality had actual knowledge of the essential facts constituting the claim is of great importance'... . 'The

determination of an application for leave to serve a late notice of claim is left to the sound discretion of the court' ... . The petitioner failed to establish that the respondents received timely, actual notice of the essential facts constituting the claim by reason of a police accident report filled out by an officer who responded to the scene of the petitioner's accident. 'Generally, knowledge of a police officer or of a police department cannot be considered actual knowledge of the public corporation itself regarding the essential facts of a claim' ... . The fact that the Nassau County Police Department had actual knowledge of the accident, without more, cannot be considered actual knowledge of the essential facts underlying the claim against the respondents ...". ***Matter of Cruz v. Transdev Servs., Inc.*, 2018 N.Y. Slip Op. 02463, Second Dept 4-11-18**

PERSONAL INJURY.

THE ROOT OVER WHICH PLAINTIFF TRIPPED WALKING THROUGH A LANDSCAPED AREA ADJACENT TO A PARKING LOT WAS INHERENT TO THE NATURE OF THE AREA AND THEREFORE NOT ACTIONABLE.

The Second Department determined that the root plaintiff tripped over in a landscaped area was inherent to the area and was not actionable: "The plaintiff commenced this action seeking to recover damages for injuries he alleges he sustained when he tripped and fell as he was walking on a landscaped area on the defendants' property. The plaintiff testified at his deposition that on the date at issue, he had parked his vehicle in the defendants' parking lot and then stepped up over a curb and walked through a landscaped area of the grounds adjacent to the parking lot as a way of accessing the sidewalk to the defendants' store. The landscaped area consisted of trees, shrubs, and mulch, and near the plaintiff's parking spot, there was a gap in the shrubbery. The plaintiff was walking through the gap when he tripped and fell on a root just below the surface of the mulch. ... ... [A] landowner 'will not be held liable for injuries arising from a condition on the property that is inherent or incidental to the nature of the property, and that could be reasonably anticipated by those using it' ... . Here, the defendants established their prima facie entitlement to judgment as a matter of law by demonstrating that the root that had caused the plaintiff to trip and fall was inherent or incidental to the landscaped area and that it could be reasonably anticipated by those using it ..". ***Miano v. Rite Aid Hdqtrs. Corp.*, 2018 N.Y. Slip Op. 02453, Second Dept 4-11-18**

PERSONAL INJURY, EMPLOYMENT LAW.

MAINTENANCE WORKER'S BACK INJURY FROM CARRYING A HEAVY BAG OF GARBAGE WAS CAUSED BY A RISK INHERENT IN THE WORK, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined plaintiff maintenance worker's back injury, caused by picking up a heavy bag of garbage, was not actionable because the injury was from a risk inherent in the work: "The defendant [lessee] established its prima facie entitlement to judgment as a matter of law dismissing the complaint by submitting evidence demonstrating that the subject garbage bag was not over a weight accepted or contractually agreed upon by the defendant and the plaintiff's employer at the time of the alleged incident, and that the plaintiff's injury resulted from a risk inherent in his assigned work as a maintenance worker ...". ***Moody v. Kelly Drye & Warren, LLP*, 2018 N.Y. Slip Op. 02454, Second Dept 4-11-18**

THIRD DEPARTMENT

CRIMINAL LAW, EVIDENCE.

REQUEST FOR A FRYE HEARING CONCERNING A COMPUTER PROGRAM (TRUEALLELE) THAT PURPORTS TO IDENTIFY DNA CONTAINED IN A MIXTURE THAT COULD NOT OTHERWISE BE TIED TO THE DEFENDANT PROPERLY DENIED BASED ON THE RESULTS OF A HEARING ON THE SAME ISSUE IN ANOTHER CASE, EVEN THOUGH THAT CASE IS ON APPEAL; DEFENSE REQUEST FOR THE ORIGINAL CODE FOR THE PROGRAM, MADE FOR THE FIRST TIME DURING CROSS-EXAMINATION OF THE PEOPLE'S EXPERT, PROPERLY DENIED.

The Third Department determined Supreme Court properly denied a DNA-related *Frye* hearing based on a *Frye* hearing held in another case, even though that case is on appeal. The hearing was requested concerning a computer program (TrueAllele) which calculates the probability a defendant's DNA is in a mixture that could not otherwise be definitively tied to the defendant. The original code for the computer program, called the source code, could have been requested by the defendant for a pre-trial analysis by a defense expert. The defense never requested the source code but attempted to have the TrueAllele expert provide the source code during cross-examination. The argument that cross-examination was impeded because the source code was not made available to the defense at trial was rejected. Only an expert could analyze it and there had been no timely request for it by the defense: "...DNA analysis did not definitively tie defendant to the genetic material recovered from the pistol. The People accordingly sought to present proof of a re-analysis conducted with the TrueAllele Casework System (hereinafter TrueAllele), a computer program that subjects a DNA mixture to statistical modeling techniques to infer what DNA profiles contributed to the mixture and calculate the probability that DNA from a known individual contributed to it. Defendant argued that the TrueAllele evidence should be precluded or that the general acceptance of the technique in the scientific community should be assessed via a Frye hearing. Supreme Court denied the application due to the fact that an extensive Frye hearing had been conducted on the issue in another criminal case in the

same county and that a determination, issued weeks before the trial in this matter, was rendered finding that the procedure was not novel and was generally accepted by the relevant scientific community ...". ***People v. Fields*, 2018 N.Y. Slip Op. 02503, Third Dept 4-12-18**

ELECTION LAW, FREEDOM OF INFORMATION LAW (FOIL).

ELECTRONIC IMAGES OF ELECTION BALLOTS MAY BE OBTAINED THROUGH A FREEDOM OF INFORMATION LAW (FOIL) REQUEST.

The Third Department, over a concurrence and a two-justice dissent, determined electronic images of election ballots are accessible under the Freedom of Information Law (FOIL) after they have been preserved in accordance with the Election Law: "The dispute before us poses a question of public significance: whether electronic images of ballots cast in an election are accessible under the Freedom of Information Law ... . We conclude that, once electronic ballot images have been preserved in accordance with the procedures set forth in Election Law § 3-222 (1), there is no statutory impediment to disclosure and they may be obtained through a FOIL request. Our analysis is informed by the advent of electronic voting in New York (see generally Election Law § 7-202 [4]). As more fully set forth in the record, upon inserting a ballot into an electronic voting machine, it is scanned and an image of it is stored in a random fashion on portable flash drives, which preserve the secrecy of the ballot. The original ballot is then deposited by the scanner into a secure ballot box under the machine. After the polls close, the machine prints out a tabulated results tape containing the official record of votes cast on that particular machine. One of the flash drives is removed from the machine and returned to the applicable board of elections, while the other remains with the machine and is used during the recanvass process. As is relevant here, the content on the portable flash drives is then copied to permanent electronic storage media, such as a hard drive, after which the temporary storage media may be reused in another election ...". ***Matter of Kosmider v. Whitney*, 2018 N.Y. Slip Op. 02517, Third Dept 4-12-18**

ENVIRONMENTAL LAW.

AFTER THE DEPARTMENT OF ENVIRONMENTAL CONSERVATION (DEC) AND THE PERMIT APPLICANT CAME TO AN AGREEMENT, A REQUEST BY AFFECTED PROPERTY OWNERS FOR FURTHER ADJUDICATION OF ISSUES RELATING TO THE APPROVAL OF TWO DEVELOPMENT PROJECTS IN THE CATSKILLS WAS PROPERLY DENIED BY THE DEC COMMISSIONER.

The Third Department, in a full-fledged opinion by Justice Mulvey, addressing many substantive issues not summarized here, determined the Department of Environmental Conservation (DEC) Commissioner's rulings approving two development projects in the Catskills were proper. The DEC and the permit applicant were in agreement. Only the petitioners (apparently an alliance of affected property owners) were requesting further review, including a request for the adjudication of "substantive and significant" issues (which was denied). The court explained the criteria for further adjudication in this context: "Where, as here, there is no dispute between DEC staff and the permit applicant, adjudication is required only if the issue is 'both substantive and significant' ... . 'An issue is substantive if there is sufficient doubt about the applicant's ability to meet statutory or regulatory criteria applicable to the project, such that a reasonable person would require further inquiry' ... . 'An issue is significant if it has the potential to result in the denial of a permit, a major modification to the proposed project or the imposition of significant permit conditions in addition to those proposed in the draft permit' ... . 'The resolution of whether an issue is substantive and significant requiring an adjudicatory hearing is left to the Commissioner and will not be disturbed absent a showing that it is predicated upon an error of law, is arbitrary or capricious, or represents an abuse of discretion' ... . Further, where 'the judgment of the agency involves factual evaluations in the area of the agency's expertise and is supported by the record, such judgment must be accorded great weight and judicial deference'...". ***Matter of Catskill Heritage Alliance, Inc. v. New York State Dept. of Envtl. Conservation*, 2018 N.Y. Slip Op. 02516, Third Dept 4-12-18**

INSURANCE LAW.

WATER DAMAGE, ALLEGED TO HAVE BEEN CAUSED BY HURRICANE SANDY, WAS DEMONSTRATED TO HAVE RESULTED FROM WEAR AND TEAR AND WAS THEREFORE SUBJECT TO THE POLICY EXCLUSION.

The Third Department determined the insurer's motion for summary judgment in this property damage case was properly granted. Plaintiff alleged water damage to its hotel was caused by Hurricane Sandy. There was an exclusion in the policy for "wear and tear." The insurer's expert presented evidence that the water damage was due, inter alia, to improper flashing and the absence of proper caulking around the windows: "The dictionary definition of 'wear and tear' is 'the loss, injury, or stress to which something is subjected by or in the course of use' ... . Nothing in the policy language suggests that an average insured would expect the phrase to have another meaning or that the language is subject to any other reasonable interpretation. As for the application of the exclusion in this case, defendant supported its summary judgment motion with the affidavit and report of an engineer with experience in 'structural investigation[s] and failure determinations' who inspected the property several weeks after the hurricane. His examination of the hotel's exterior walls revealed "improper flashing detail" consisting of failed caulk that had originally been installed to seal the areas where each room's exterior walls and windows

met the hotel's concrete floors and surrounding masonry walls. According to the engineer, the caulk had separated from these surfaces as a result of age and lack of maintenance, creating spaces through which water could migrate into the walls. The engineer observed significant deterioration in the walls' internal framing, as well as other indications that water had been seeping into the walls for a long time; in a follow-up inspection several years later, he also found evidence that water continued to enter the walls after the hurricane as a result of the failed caulk, causing new damage to surfaces that had been repaired after the storm." ***Superhost Hotels Inc. v. Selective Ins. Co. of Am.*, 2018 N.Y. Slip Op. 02519, Third Dept 4-12-18**

PERSONAL INJURY.

QUESTION OF FACT WHETHER SPECTATOR PROTECTION AT A HOCKEY RINK WAS SUFFICIENT, PLAINTIFF WAS STRUCK BY A PUCK.

The Third Department determined there was a question of fact whether defendant municipality and hockey club were negligent in failing to adequately protect the plaintiff, a spectator, from being struck by a hockey puck, The goals had been repositioned in areas where there was no protective netting behind them: "It is well-settled that an owner or operator of an athletic field or facility 'is not an insurer of the safety of its spectators' ... and that, under the assumption of risk doctrine, consenting '[s]pectators and bystanders . . . assume risks associated with a sporting event or activity, even at times when they are not actively watching the event' ... . However, 'a plaintiff will not be deemed to have assumed the risks of reckless or intentional conduct, or concealed or unreasonably increased risks'... . Notwithstanding a spectator's assumption of risk, an owner or occupier of land remains under a duty to exercise reasonable care under the circumstances to prevent injury to those who are present on the property ... . In the context of hockey rinks, 'the owner's duty owed to spectators is discharged by providing screening around the area behind the hockey goals, where the danger of being struck by a puck is the greatest, as long as the screening is of sufficient extent to provide adequate protection for as many spectators as may reasonably be expected to desire to view the game from behind such screening' ... . [P]laintiffs' proof demonstrating that defendants' repositioning of the hockey goals along the less protected sides of the rink — 'where the danger of being struck by a puck is greatest' ... — was sufficient to show the existence of a triable issue of fact as to whether defendants satisfied their reasonable duty of care owed to the child walking down the ramp behind the repositioned goal." ***Smero v. City of Saratoga Springs*, 2018 N.Y. Slip Op. 02521, Third Dept 4-12-18**

PERSONAL INJURY.

DEFENDANTS DID NOT ELIMINATE ALL TRIABLE ISSUES OF FACT ABOUT CONSTRUCTIVE NOTICE OF THE ICY CONDITION IN THIS SLIP AND FALL CASE.

The Third Department determined defendants did not eliminate all trial issues of fact in this ice and snow slip and fall case. The defendants did not demonstrate when the area had last been cleared or inspected. The fact that the fall occurred in a restricted area was not determinative because defendants were aware the area was used by people and there were no signs instructing people not to use it: "Even if we agreed with defendants that they did not create the alleged dangerous condition, we conclude that defendants did not meet their initial moving burden inasmuch as their own proof failed to eliminate all triable issues of fact on the issue of constructive notice... ... In this regard, defendants' proof, including the photographs, did not suffice to show when they last cleaned or inspected the area in question ... . Additionally, even though the area where plaintiff slipped and fell was a restricted area, the record evidence shows that defendants were aware that people would cross through this area and there were no signs instructing people not to do so." ***Hurley v. City of Glens Falls*, 2018 N.Y. Slip Op. 02529, Third Dept 4-12-18**

PERSONAL INJURY.

NEGLIGENT ENTRUSTMENT ACTION SURVIVED SUMMARY JUDGMENT, DEFENDANT ENTRUSTED HER MOTORCYCLE TO AN OPERATOR WHO DID NOT HAVE A DRIVER'S LICENSE.

The Third Department determined the action for negligent entrustment of a motorcycle properly survived a summary judgment motion. The motorcycle was borrowed by Perkins from Hines. When Zimmer pulled out of his driveway, Perkins, who was operating the motorcycle, swerved and hit a tree. Perkins sued Zimmer and Zimmer sued Hines for negligent entrustment. Perkins had a driving permit but did not have a driver's license: "... [T]his appeal deals with a negligent entrustment cause of action; the issue is not Perkins' negligence in operating the motorcycle, but whether Hines should have entrusted the motorcycle to him in the first instance ... . Thus, the fact that Perkins did not possess a motorcycle license "is a factor to consider in determining whether" Hines knew or should have known if Perkins was competent to operate her motorcycle. ... We reject Hines' argument that a negligent entrustment cause of action cannot stand under the present circumstances because the person who was injured (Perkins) was the one to whom a dangerous instrument was allegedly negligently entrusted ... . Similarly, it is irrelevant that Zimmer was not physically injured. The injury alleged to him here is 'financial harm resulting from potential liability of a 'concurrent' tort-feasor' for Perkins' injuries while using the dangerous instrument ... . Zimmer is not precluded from obtaining a recovery from Hines merely because Perkins may not be able to directly recover from Hines based on her negligent entrustment of the motorcycle to him; the situation is analogous to one in which a third-party tortfeasor 'may implead for contribution or indemnity the employer of an injured employee,

despite the employee's inability to recover from the employer directly' due to the Workers' Compensation Law ...". ***Perkins v. County of Tompkins*, 2018 N.Y. Slip Op. 02530, Third Dept 4-12-18**

REAL PROPERTY ACTIONS AND PROCEEDINGS LAW, CONTRACT LAW.

SUPREME COURT SHOULD NOT HAVE DEVIATED FROM THE STIPULATION ENTERED INTO BY THE PARTIES WHICH DESCRIBED THE DAMAGES AVAILABLE UNDER REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL) FOR THE INADVERTENT REMOVAL OF TREES FROM PLAINTIFFS' PROPERTY BY DEFENDANTS.

The Third Department, reversing Supreme Court, determined the trial court erred when it deviated from a stipulation entered into by the parties concerning the measure of damages for trees inadvertently cut and removed from plaintiffs' property by defendants: "... Supreme Court erred in deviating from their stipulation in rendering the damages award. No grounds have been shown to vacate the parties' clearly expressed agreement as to the merchantability of the various trees or the methodology to be used in formulating the award. As the parties here were 'free to chart their own course [and] fashion the basis upon which [this] particular controversy [would] be resolved' ... , Supreme Court was not free to substitute its own judgment for that of the parties ... . We must therefore determine, in the exercise of our discretion and in accordance with the parties' stipulation, the appropriate measure of damages to be awarded as a consequence of defendants' illegal removal of the 442 trees from plaintiffs' property. * * * Considering the facts and circumstances of this case, and mindful of the overriding purpose and intent of RPAPL 861, we find that plaintiffs are entitled to statutory damages of $250 per tree for the 442 trees cut and removed... . We emphasize that our discretionary determination in this regard is narrow and circumscribed by the parties' stipulation ... , which we are bound to honor." ***Halstead v. Fournia*, 2018 N.Y. Slip Op. 02525, Third Dept 4-12-18**

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