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FIRST DEPARTMENT

CONTRACT LAW, FRAUD, CONVERSION.

DEFENDANT'S ALLEGED FAILURE TO REPAY MONEY PAID BY PLAINTIFFS PURSUANT TO A CONTRACT WHICH HAD BEEN TERMINATED STATED A CAUSE OF ACTION FOR CONVERSION, FRAUD IN THE INDUCEMENT CAUSE OF ACTION PROPERLY DISMISSED BECAUSE IT WAS BASED UPON NON-ACTIONABLE FUTURE EVENTS AND NON-ACTIONABLE OPINION ON THE PART OF THE DEFENDANT.

The First Department determined plaintiffs' cause of action for conversion should not have been dismissed and the cause action for fraud in the inducement was based upon non-actionable future conduct or events and non-actionable opinion. Plaintiffs hired defendant for extensive renovation work. Plaintiffs terminated the contract based upon defendant's allegedly fraudulent requests for payment which were not used for the claimed purposes. When plaintiffs terminated the contract they demanded the return of $400,000 of the $840,000 they had paid. Defendant returned only about $85,000 and did not provide an accounting: "When plaintiffs terminated the contract mid-construction and demanded a return of $400,000 of the $840,000 they had paid, defendant allegedly returned only $84,622.65, without providing an accounting, and allegedly diverted the balance of such monies to his personal use. These allegations sufficiently state a cause of action for conversion ... . Plaintiffs' cause of action alleging fraud in the inducement was properly dismissed, as it is founded upon non-actionable promises of future conduct or events, rather than present fact ... and non-actionable opinion of defendant as to his entity's resources and capability of undertaking the luxury renovation work sought by plaintiffs ...". ***Yablon v. Stern*, 2018 N.Y. Slip Op. 03650, First Dept 5-22-18**

CRIMINAL LAW.

AFTER THE PEOPLE HAD EXERCISED THEIR PEREMPTORY CHALLENGES TO JURORS AND DEFENSE COUNSEL HAD BEGUN EXERCISING HER PEREMPTORY CHALLENGES, THE TRIAL COURT ALLOWED THE PEOPLE TO BELATEDLY MAKE A PEREMPTORY CHALLENGE, THAT WAS REVERSIBLE ERROR.

The First Department determined it was reversible error to allow the People to belatedly exercise a peremptory challenge to a juror (Mrs. C) after the People had indicated the chosen jurors were acceptable and the defense attorney had started exercising her peremptory challenges: " 'The right of peremptory challenge given to an accused person is a substantial right,' and the order in which peremptory challenges are made 'is matter of substance' 'intended for the benefit of the defendant' ... . The statute governing the order for peremptory challenges is not a 'mere rule of procedure,' but is 'a right secured to the defendant' ... . The requirement that the People make peremptory challenges first 'is imperative,' and violation of that rule is 'a substantial, and not a mere technical error' ... . The People here had completed their peremptory challenges for the round, and expressly told the court that the remaining prospective jurors, including Ms. C., were acceptable. It was only while defense counsel was making her peremptory challenges that the People sought to belatedly challenge Ms. C. Under these circumstances, the court's decision to allow the challenge and excuse the juror constitutes reversible error ... . Although the People contend that there was no bad faith in their belated request to exercise the peremptory challenge, CPL 270.15(2) does not contain an exception for good faith. Nor has the Court of Appeals recognized a good faith exception in its decisions strictly construing the statute." ***People v. Robinson*, 2018 N.Y. Slip Op. 03731, First Dept 5-24-18**

CRIMINAL LAW, EVIDENCE.

THE PEOPLE DID NOT PROVE AT THE SUPPRESSION HEARING THAT THE SEARCH OF DEFENDANT'S PERSON AFTER A STREET STOP WAS SUPPORTED BY PROBABLE CAUSE.

The First Department, reversing Supreme Court, determined defendant's motion to suppress items taken from his person should have been granted because the sequence of events which would have legitimized the search was not proven at the hearing: "... [W]e agree with the People that the police had reasonable suspicion to detain defendant based on the detective's report that he saw a possible drug transaction in which a Hispanic man later identified as defendant, who was wearing a black leather jacket, handed a bag containing two small white objects to another man before walking away, in close temporal and spatial proximity to defendant's apprehension ... . However, this information did not establish probable cause to arrest and search defendant. The detective did not testify that he observed anything that appeared to be money being

exchanged or handled by either of the two men, that there was anything furtive about their behavior aside from the sheer brevity of their encounter, or that the area was particularly drug prone ... . When the detective recovered a bag containing drugs after the apparent buyer discarded it, this clearly raised the level of suspicion to probable cause. However, the non-testifying officers had detained defendant based only on the information known at the time of the initial radioed report. The People's assertion that the search occurred after the testifying detective made a confirmatory identification of defendant is unsupported by the record. In fact, the detective could not specify when the search occurred, or when he learned about it, and the People did not call any witnesses to testify about the nature and timing of the search based on personal knowledge." ***People v. Ayarde*, 2018 N.Y. Slip Op. 03750, First Dept 5-24-18**

INSURANCE LAW.

THE CASE INVOLVES A NEW JERSEY INSURANCE POLICY ISSUED TO A NEW JERSEY COMPANY WHICH WAS DOING SUBWAY WORK IN NEW YORK, PURSUANT TO A 2017 COURT OF APPEALS RULING, WHETHER NEW YORK INSURANCE LAW'S TIMELY DISCLAIMER STATUTE APPLIES DEPENDS ON WHETHER THE INSURED HAS A SUBSTANTIAL BUSINESS PRESENCE IN NEW YORK, MATTER REMITTED FOR DEVELOPMENT OF THE RECORD ON THAT ISSUE.

The First Department, over an extensive two-justice dissent, determined the case, which was affected by a 2017 Court of Appeals decision, needed to be sent back for more fact-finding. The Court of Appeals case, *Carlson v. American Intl. Group, Inc.* (30 NY3d 288 [2017]), held that the timely disclaimer provisions of New York Insurance Law 3240 (d)(2) applied to insureds located in New York, which was defined to include insureds with a "substantial business presence" in New York: "Everest [the insurer successfully argued in Supreme Court that] it had no duty to defend or indemnify because section 3240(d)(2) applies only to insurance policies 'issued or delivered' in New York. Everest argued that it is a New Jersey insurer and that it issued the policy to East Coast, a New Jersey company, and that therefore the policy was not 'issued or delivered' in New York. ... Supreme Court, relying upon Carlson v. American Intl. Group., Inc., (130 AD3d 1477 [4th Dept 2015]) [reversed by the Court of Appeals], ... granted Everest's cross motion, holding that because the policy was issued and delivered outside of New York State, the timeliness requirements of § 3240(d)(2) did not apply. ... [T]he first prong of [the Court of Appeals decision in] Carlson was satisfied in this case. The risks covered under the Everest policy include the Queensboro Plaza project, which is located in New York State. However, we find that the record is not sufficiently developed for us to decide whether East Coast [the insured company] had a substantial business presence in New York under the Court of Appeals' decision in Carlson. * * * Because the Carlson Court did not set forth a specific definition of substantial business presence, and because the record is insufficiently developed concerning East Coast's business presence in New York, we remand to allow the parties to develop the record and give Supreme Court an opportunity to meaningfully review the case in light of Carlson. ***Vista Eng'g Corp. v. Everest Indem. Ins. Co.*, 2018 N.Y. Slip Op. 03730, First Dept 5-24-18**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

ACCIDENT DID NOT INVOLVE AN ELEVATION-RELATED RISK, DEFENDANT SUBCONTRACTORS DID NOT EXERCISE CONTROL OF THE PLAINTIFF, THE AREA OR THE WORK, DEFENDANTS' SUMMARY JUDGMENT MOTION SHOULD HAVE BEEN GRANTED.

The First Department, reversing Supreme Court, determined the Labor Law § 240(1) cause of action should have been dismissed because the accident, tripping over a pile of sand on ground level, did not involve an elevation-related risk. The Labor Law §§ 241(6) and 200 causes of action should have been dismissed because the defendants (subcontractors USRC and A-Deck) did not exercise control over the plaintiff, the area or the work: "... [T]he Labor Law § 241(6) claim should be dismissed because neither USRC nor A-Deck may be held liable under that statute. 'Labor Law § 241(6) does not automatically apply to all subcontractors on a site or in the chain of command' ... . 'Rather, for liability under the statute to attach to a defendant, a plaintiff must show that the defendant exercised control either over the plaintiff, the specific work area involved or the work that gave rise to the injury' ... . Here, there is no evidence that either USRC or A-Deck exercised any control over the plaintiff, the specific work area involved or the work that gave rise to plaintiff's injury. The Labor Law § 200 claim should also be dismissed as neither USRC nor A-Deck may be held liable under that statute. 'Section 200 of the Labor Law merely codified the common-law duty imposed upon an owner or general contractor to provide construction site workmen with a safe place to work' ... . 'An implicit precondition to this duty to provide a safe place to work is that the party charged with that responsibility have the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition' ... . Here, there is no evidence that either USRC or A-Deck had the authority to control the activity that brought about plaintiff's injury." ***Adagio v. New York State Urban Dev. Corp.*, 2018 N.Y. Slip Op. 03744, First Dept 5-24-18**

MUNICIPAL LAW, ADMINISTRATIVE LAW, CONSTITUTIONAL LAW.

THE NYC LANDMARK PRESERVATION COMMISSION'S DESIGNATION OF TWO BUILDINGS AS PART OF A PROTECTED LANDMARK HAD A RATIONAL BASIS AND WAS NOT AN UNCONSTITUTIONAL TAKING, PETITIONER SOUGHT TO DEMOLISH THE TWO BUILDINGS AND CONSTRUCT CONDOMINIUMS.

The First Department, in a full-fledged opinion by Justice Kahn, determined that the NYC Landmark Preservation Commission (LPC) acted rationally when it included two buildings among 13 others designated as a landmark, called the First Avenue Estate or FAE historic landmark. The petitioner wanted to destroy the two buildings and construct condominiums, an action prohibited by the landmark designation. The First Department further held that the landmark designation was not an unconstitutional taking. The opinion is extensive and detailed and cannot be fairly summarized here. ***Matter of Stahl York Ave. Co., LLC v. City of New York*, 2018 N.Y. Slip Op. 03653, First Dept 5-22-18**

PERSONAL INJURY.

BACKING INTO A PARKED CAR IS PRIMA FACIE EVIDENCE OF NEGLIGENCE, PLAINTIFF, WHO WAS INJURED WHEN THE PARKED CAR WAS PUSHED INTO HIM, ENTITLED TO SUMMARY JUDGMENT.

The First Department, in a case remitted after reversal by the Court of Appeals, determined plaintiff was entitled to summary judgment in this vehicle accident case. Plaintiff was injured when a sanitation truck, which was backing up, slid on ice and hit a parked car. which in turn struck plaintiff. Initially the plaintiff's motion for summary judgment was denied because the plaintiff did not demonstrate freedom from comparative fault. The Court of Appeals reversed, holding that plaintiffs do not need to demonstrate freedom from comparative fault to be entitled to summary judgment. On remittal the First Department held that striking a parked vehicle is prima facie evidence of negligence and plaintiff's summary judgment motion was granted: "It was Ramos's [the driver] and Carter's [the employee guiding the driver] responsibility to take into account weather and road conditions and to tailor their actions accordingly to avoid collisions ... . The record demonstrates that the truck hit the parked car either because Ramos reacted to an abrupt hand signal from Carter and hit the brakes while he was driving on ice, causing a skid he could not abate, or because Ramos failed to adequately respond to Carter's directives. Whether there were chains on the tires or not, defendant's employees were obligated to maintain control of the truck and to avoid collisions with parked cars while backing up, and were negligent in failing to do so ...". ***Rodriguez v. City of New York*, 2018 N.Y. Slip Op. 03634, First Dept 5-22-18**

PERSONAL INJURY.

BUILDING INSPECTION REPORT STATED STAIRWAY WHERE PLAINTIFF FELL WAS IN NEED OF REPAIR, DEFENDANT SUBMITTED EVIDENCE OF GENERAL CLEANING PRACTICES, THEREFORE DEFENDANT DID NOT DEMONSTRATE IT DID NOT HAVE CONSTRUCTIVE OR ACTUAL NOTICE OF THE ALLEGED CRACK IN THE STAIRWAY.

The First Department determined defendant property owner's motion for summary judgment in this stairway slip and fall case was properly denied. Plaintiff alleged she tripped and fell on a crack in the stairway. A 2012 building inspection report stated that the stairway needed repair. And the defendant submitted only the building's general cleaning routine: "The record shows that defendant failed to demonstrate that it lacked actual notice of the stairway defect, since an April 2012 building inspection report states that the property's ramps, steps and railing required repair. Defendant also failed to demonstrate that it did not have constructive notice of the alleged defect, because it submitted evidence only as to the building's general cleaning routine, and failed to show when the stairway had last been inspected prior to the accident … . In light of defendant's failure to meet its initial burden to establish that it lacked actual or constructive notice of the defective condition of the stairway, the burden never shifted to plaintiff to establish how long the condition was in existence ...". ***Javier v. New York City Hous. Auth.*, 2018 N.Y. Slip Op. 03736, First Dept 5-24-18**

PERSONAL INJURY.

CONFLICTING ASSERTIONS ABOUT THE PRESENCE OF LIQUID ON A STAIRWAY PRECLUDED SUMMARY JUDGMENT IN THIS SLIP AND FALL CASE.

The First Department determined conflicting evidence about the presence of liquid on a stairway precluded summary judgment in this slip and fall case: "Plaintiff testified that on the day of the accident (Thanksgiving) she took the stairs down from the third floor and they were dry. This was sometime between 11:30am and noon that day. When she returned some twenty minutes later, sometime between 11:50 a.m. and 12:20 p.m., plaintiff walked up the same flight of stairs. On her way up, she noticed there was some liquid or water on the steps and she sidestepped the puddle. Later that day, at 3 p.m., plaintiff took the same flight of stairs a third time, this time with her son. Plaintiff testified that as she walked down the stairs at 3 p.m. she slipped and fell. Her testimony is that she slipped on water or some liquid substance that had no smell and that it was in the same location on the stairs where she had previously observed a puddle earlier that afternoon. Defendant denies that it had actual notice of the condition alleged. Defendant's building caretaker testified that she inspected the staircase twice that day, following an established schedule. Her first inspection was at approximately 8:20 a.m. and her second

inspection was at 12:30 p.m.[] The caretaker denied having seen any liquid or water on the steps either time and defendant also contends no one made any complaints about a wet condition on the stairs that day. The conflicting testimony as to whether or not there was water on the steps at the time the caretaker's second inspection implicates issues of credibility. If, as plaintiff claims, there was water on the steps at or shortly before 12:30 p.m., when the caretaker did her second inspection, then defendant knew, or in the exercise of reasonable care, should have known that a dangerous condition existed but, nevertheless, failed to remedy the situation ... . The evidence submitted by defendant was not sufficient to demonstrate, prima facie, that defendant did not have actual notice of the allegedly hazardous condition prior to plaintiff's fall ...". ***Capers v. New York City Hous. Auth.*, 2018 N.Y. Slip Op. 03749, First Dept 5-24-18**

PERSONAL INJURY.

QUESTIONS OF FACT ABOUT THE CAUSE OF PLAINTIFF'S FALL AND DEFENDANT'S CONSTRUCTIVE NOTICE PRECLUDED THE AWARD OF SUMMARY JUDGMENT TO THE DEFENDANT IN THIS STAIRWAY SLIP AND FALL CASE.

The First Department, reversing Supreme Court, determined an issue of fact whether the defendant property owner had constructive notice of inconsistently worn and slippery steps precluded the award of summary judgment to the defendant. The First Department also found that the cause of the fall was sufficiently identified by plaintiff's expert opinion, despite the difficulty in discerning the defect from the photographs: "Plaintiff identified the cause of his fall on stairs in a building owned and managed by defendants sufficiently to withstand summary judgment. He was not required to identify at the time of the accident 'exactly where [he] fell and the precise condition that caused [him] to fall; ... . He identified the location of his fall at his deposition. Plaintiff also explained that it was the 'concave' shape of the steps that caused him to slip. This testimony was corroborated by plaintiff's expert, who opined that the stairs were dangerously slippery and were disproportionately worn in the middle, creating an unsafe 'inward sloping condition' ... . Plaintiff's expert's opinion was properly considered, although it was not timely disclosed, since there was no showing of prejudice to defendants ... . Plaintiff's evidence of the cause of his fall is also sufficient to raise issues of fact as to the existence of a defective condition. While it is difficult to discern a concave or sloping condition in the photographs in the record, the photographs are not sufficiently clear to be conclusive. The record also presents issues of fact as to defendants' notice of the alleged defects. Inconsistently worn and slippery steps are not latent defects and do not appear overnight. In addition, defendants submitted evidence showing that they had an opportunity to observe the defects. The building superintendent informally inspected the stairs at least three times a week during cleaning. Thus, if the defects are found to exist, it will be reasonable to infer that defendants had constructive notice of them ...". ***Johnson v. 675 Coster St. Hous. Dev. Fund*, 2018 N.Y. Slip Op. 03756, First Dept 5-24-18**

TRUSTS AND ESTATES.

DATE OF WOMAN'S DISAPPEARANCE, NOT THE STATUTORY DEFAULT DATE FIVE YEARS LATER, WAS THE CORRECT DATE OF DEATH.

The First Department, reversing Surrogate's Court, determined the date of the disappearance of Kathleen (January 31, 1982), not the statutory default date (January 31, 1987) was the date of the Kathleen's death: "Petitioner submitted evidence that Kathleen disappeared without explanation, and without her car and personal effects, on January 31, 1982. Kathleen has not been seen or heard from since that date. Kathleen's sisters submit affidavits in which they recite that they were close with her, and communicated with her several times a month, prior to her disappearance. They state that it is inconceivable that Kathleen would abruptly cease all communication with family and friends. Kathleen was also a medical student at Mt. Sinai Medical School at the time of her disappearance. She was two months away from graduation. According to her family it was Kathleen's dream to become a doctor and it would be incomprehensible that she would walk away from her studies when she was so close to her goal. Respondent ... has not submitted an affidavit refuting or explaining this evidence. We find that this evidence is sufficient to establish a 'high[] probab[ility]' that Kathleen died on the date of her disappearance ...". ***Matter of McCormack*, 2018 N.Y. Slip Op. 03733, First Dept 5-24-18**

SECOND DEPARTMENT

ADMINISTRATIVE LAW, CIVIL PROCEDURE.

THE TOLLING PROVISION OF CPLR 205 APPLIES TO AN ARTICLE 78 PROCEEDING SEEKING REVIEW OF AN ADMINISTRATIVE RULING, THE PETITION, WHICH WAS MARKED OFF THE CALENDAR BUT NOT DISMISSED ON THE MERITS, CAN BE RE-FILED WITHIN SIX MONTHS OF THE DISMISSAL.

The Second Department determined the tolling provision in CPLR 205 which allows an action which was dismissed (but not on the merits) to be started again within six months applies to Article 78 actions seeking review of an administrative ruling, here a ruling by the NYS Liquor Authority: "As the petitioner correctly contends, CPLR 205(a) applies not only to actions but also to special proceedings under CPLR article 78 ... . The toll of CPLR 205(a) would not apply, however, if the prior

proceeding was dismissed on the merits; thus, the court must determine whether the order dismissing the prior proceeding is entitled to res judicata effect ... . Here, the prior proceeding was dismissed after being marked off the calendar. Contrary to the Authority's contention, '[a] dismissal of an action by being marked off the Trial Calendar is not a dismissal on the merits,' and '[a] new action on the same theory is therefore not barred by the doctrine of res judicata'... . Moreover, there is nothing in the order denying the petitioner's motion to restore the prior proceeding to the calendar which suggests that the prior proceeding was dismissed with prejudice ...". ***Matter of Lindenwood Cut Rate Liquors, Ltd. v. New York State Liq. Auth.*, 2018 N.Y. Slip Op. 03680, Second Dept 5-23-18**

CIVIL PROCEDURE.

WHERE DEFENDANT PRESENTS EVIDENCE HE DID NOT RECEIVE NOTICE OF THE COURT CONFERENCES, HIS MOTION TO VACATE HIS DEFAULT MUST BE GRANTED AS A MATTER OF LAW.

The Second Department determined defendant's motion to vacate his default should have been granted as a matter of law. Defendant submitted an affidavit stating that he had never been notified of the court conferences and the plaintiff did not offer any contrary evidence: "Generally, to vacate an order striking a defendant's answer based upon his or her default in appearing for a scheduled conference before the court, the defendant is required to demonstrate both a reasonable excuse for his or her failure to appear and a potentially meritorious defense ... . However, '[i]n the absence of actual notice of [a] conference date, [a] defendant's failure to appear at that conference [cannot] qualify as a failure to perform a legal duty, the very definition of a default' ... . In that situation, the defendant's default is considered a nullity and vacatur of the default 'is required as a matter of law and due process, and no showing of a potentially meritorious defense is required' ...". ***Notaro v. Performance Team*, 2018 N.Y. Slip Op. 03692, Second Dept 5-23-18**

CIVIL PROCEDURE, CONTRACT, NEGLIGENCE.

EMAIL DID NOT MEET THE REQUIREMENTS OF CPLR 2104 FOR AN OUT OF COURT STIPULATION OF SETTLEMENT, SETTLEMENT AGREEMENT NOT ENFORCEABLE.

The Second Department determined the writing and execution requirements for an out-of-court stipulation of settlement were not met by an e-mail sent by the defendant in a slip and fall case: "To be enforceable, a stipulation of settlement must conform to the criteria set forth in CPLR 2104 ... . Where, as in the instant case, counsel for the parties did not enter into a settlement in open court, an 'agreement between parties or their attorneys relating to any matter in an action . . . is not binding upon a party unless it is in a writing subscribed by him or his attorney' ... . The plain language of CPLR 2104 requires that 'the agreement itself must be in writing, signed by the party (or attorney) to be bound' ... . An email message may be considered 'subscribed' as required by CPLR 2104, and, therefore, capable of enforcement, where it 'contains all material terms of a settlement and a manifestation of mutual accord, and the party to be charged, or his or her agent, types his or her name under circumstances manifesting an intent that the name be treated as a signature' ... . Here, the email confirming the settlement agreement was sent by counsel for the party seeking to enforce the agreement, [defendant]. There is no email subscribed by the plaintiff, who is the party to be charged, or by her former attorney. In the absence of a writing subscribed by the plaintiff or her attorney, the settlement agreement is unenforceable against the plaintiff ...". ***Kataldo v. Atlantic Chevrolet Cadillac*, 2018 N.Y. Slip Op. 03669, Second Dept 5-23-18**

COURT OF CLAIMS, NEGLIGENCE, TRUSTS AND ESTATES.

FAILURE TO STRICTLY COMPLY WITH THE NOTICE PROVISIONS OF THE COURT OF CLAIMS ACT IN THIS WRONGFUL DEATH CLAIM REQUIRED THAT THE CLAIM BE DISMISSED.

The Second Department determined claimant's wrongful death action was properly dismissed because claimant failed to comply with the notice requirements of the Court of Claims Act and commenced the claim before the appointment of an administrator of her son's estate: " '[B]ecause suits against the State are allowed only by the State's waiver of sovereign immunity and in derogation of the common law, statutory requirements conditioning suit must be strictly construed'... . Court of Claims Act § 10(3) provides that a claim to recover damages for personal injuries caused by the negligence of a state employee must be filed within 90 days after the accrual of such claim, unless the claimant within such time serves a written notice of intention to file a claim, in which event the claim must be filed within two years after the accrual of the claim ... . Court of Claims Act § 10(2) provides that a wrongful death claim must be filed within 90 days after the appointment of an executor or administrator of a decedent, unless the claimant within such time serves a written notice of intention to file a claim, in which event the claim must be filed within two years after the death of the decedent ... . Here, neither the claim nor the notice of intention to file a claim was filed within 90 days after the accrual of the personal injury claim, and thus, the personal injury claim was not timely. Moreover, since the claim was commenced prior to the claimant's appointment as administrator of her son's estate, she failed to comply with the requirements for commencing a wrongful death claim ... . The failures to strictly comply with Court of Claims Act § 10(2) and (3) were jurisdictional defects compelling dismissal of the claim ...". ***Kiesow v. State of New York*, 2018 N.Y. Slip Op. 03670, Second Dept 5-23-18**

CRIMINAL LAW, EVIDENCE.

ALTHOUGH THE PEOPLE MADE AN UNTIMELY MOTION FOR A BUCCAL SWAB FOR DNA TESTING, THE ERROR DID NOT REQUIRE REVERSAL.

The Second Department determined the People's motion to compel defendant to submit to a buccal swab for DNA testing was untimely under Criminal Procedure Law § 240.90. But the admission of the evidence did not require reversal because the error did not implicate defendant's constitutional rights. ***People v. Cox*, 2018 N.Y. Slip Op. 03698, Second Dept 5-23-18**

CRIMINAL LAW, EVIDENCE.

TRIAL COURT PROPERLY GAVE THE GALBO JURY INSTRUCTION RE DEFENDANT'S POSSESSION OF STOLEN PROPERTY IN THIS BURGLARY CASE.

The Second Department determined the trial court properly gave the Galbo charge in this burglary case: "... Supreme Court [did not] in giving the jury a Galbo charge (see People v. Galbo, 218 NY 283) to the effect that the defendant's guilt of burglary could be inferred from his recent, unexplained, and exclusive possession of the stolen items. The prosecution presented both circumstantial and direct evidence, including admissions made by the defendant during a series of telephone calls, that the defendant committed the burglary and possessed the items, and there was no reasonable view of the evidence whereby the jury could have found that the defendant unlawfully possessed the property without also finding that he committed the burglary ...". ***People v. Jones*, 2018 N.Y. Slip Op. 03703, Second Dept 5-23-18**

EDUCATION-SCHOOL LAW, NEGLIGENCE, MUNICIPAL LAW.

SUPREME COURT, IN THIS NEGLIGENT SUPERVISION ACTION, HAD USED CRITERIA FOR DETERMINING A MOTION FOR LEAVE TO FILE A LATE NOTICE OF CLAIM WHICH HAS SINCE BEEN CHANGED BY THE COURT OF APPEALS, MATTER REMITTED FOR A RULING UNDER THE CURRENT LAW.

The Second Department determined that Supreme Court used the wrong criteria for analyzing whether plaintiffs' motion for leave to file a late notice of claim should have been granted. Plaintiffs' child was seriously injured in a game at school which was supervised by teachers. In 2016 the Court of Appeals (Matter of Newcomb) held that a plaintiff must make an initial showing that the school would not be prejudiced by a late notice, then the school must come forward with evidence it would be prejudiced. Supreme Court had analyzed the criteria under the existing law at the time, which was changed by Matter of Newcomb. The Second Department found, under the Matter of Newcomb criteria, plaintiffs had presented sufficient proof of a lack of prejudice to shift the burden to the school. The matter was remitted for analysis under the current law: "The plaintiffs submitted an affidavit from the infant plaintiff's father in which he averred that he received a call from school personnel informing him about his child's injury and requesting his presence at the school. When the father arrived at the school minutes later, he observed an assistant principal, two security guards, the school nurse, and New York City Fire Department personnel attending to the situation and the injuries of his daughter. At that time, the infant plaintiff's father was informed that his daughter was playing a game with other children wherein they were jumping on each other's backs. He also learned that this activity occurred under the supervision of three or four teachers, two of whom were named in his affidavit. The infant plaintiff was transported by ambulance from the school to the hospital. The infant plaintiff allegedly fractured the tibia and fibula of her right leg, and underwent surgery as a result of her injuries. Given the evidence of the number of school personnel attending to the situation, the reporting of the incident to the infant plaintiff's father, and the seriousness of the alleged injuries, the plaintiffs argued that a number of reports would likely have been prepared, and that such reports were in the possession of the defendants. Under certain circumstances, this Court has recognized that the 'existence of reports in [a defendant's] own files concerning . . . facts and circumstances' of an incident may be 'the functional equivalent of an investigation' ...". ***N.F. v. City of New York*, 2018 N.Y. Slip Op. 03663, Second Dept 5-23-18**

EDUCATION LAW-SCHOOL LAW, NEGLIGENCE, MUNICIPAL LAW, EMPLOYMENT LAW, CIVIL PROCEDURE.

ASSISTANT PRINCIPAL INJURED BREAKING UP A STUDENT FIGHT DID NOT DEMONSTRATE A SPECIAL RELATIONSHIP WITH THE SCHOOL DISTRICT, MOTION TO SET ASIDE THE VERDICT AS NOT SUPPORTED BY SUFFICIENT EVIDENCE SHOULD HAVE BEEN GRANTED.

The Second Department determined defendant school district's motion to set aside the verdict for legal insufficiency should have been granted. Plaintiff assistant principal sued the district after she was injured breaking up a fight between students. She had previously been injured by a student and had complained that more security was needed on the floor where she was hurt. The Second Department explained that plaintiff could not recover unless a special relationship with the school district had been proven: "On a legal sufficiency challenge, whether made pursuant to CPLR 4401 at the close of the plaintiffs' case or pursuant to CPLR 4404(a) to set aside the jury verdict, the relevant inquiry is whether there is any rational process by which the trier of fact could base a finding in favor of the nonmoving party ... . Absent the existence of a special relationship between the defendants and the injured plaintiff, liability may not be imposed on the defendants for the breach of a duty owed generally to persons in the school system and members of the public ... . A special relationship can

be formed, inter alia, if the defendants voluntarily assumed a special duty to the injured plaintiff upon which she justifiably relied ... . In order to succeed on this theory, the plaintiffs were required to establish four elements: (1) an assumption by the defendants, through promises or actions, of an affirmative duty to act on behalf of the injured plaintiff; (2) knowledge on the part of defendants' agents that inaction could lead to harm; (3) some form of direct contact between the defendants' agents and the injured plaintiff; and (4) the injured plaintiff's justifiable reliance on the defendants' affirmative undertaking ...". ***Morgan-Word v. New York City Dept. of Educ.*, 2018 N.Y. Slip Op. 03673, Second Dept 5-23-18**

FAMILY LAW, IMMIGRATION LAW.

MOTHER'S PETITION SEEKING FINDINGS TO ALLOW HER CHILD TO APPLY FOR SPECIAL IMMIGRANT JUVENILE STATUES SHOULD NOT HAVE BEEN DISMISSED, MOTHER WAS NOT REQUIRED TO BE FINGERPRINTED OR TO SUBMIT CERTAIN DOCUMENTATION, JUDGE'S COMMENTS ABOUT THE CHILD'S SPEAKING SPANISH REQUIRED TRANSFER TO A DIFFERENT JUDGE.

The Second Department determined Family Court should not have dismissed mother's petition to have Family Court make the findings necessary for the child to apply for special immigrant juvenile status (SIJS) and should not have required mother to be fingerprinted and provide unnecessary documentation. The Second Department further held that the petition must be transferred to a different judge because of the judge's comments about the child's speaking Spanish: "Contrary to the Family Court's determination, in a proceeding such as this pursuant to Family Court Act § 661(a) for '[g]uardianship of the person of a minor or infant,' there is no express statutory fingerprinting requirement ... , or any express requirement to submit documentation pertaining to the Office of Children and Family Services ... . Further, under the circumstances of this case, the court erred in dismissing the petition and denying the motion for 'failure to prosecute' based upon the mother's failure to submit documentation regarding, inter alia, the child's enrollment in school ... . Since the Family Court dismissed the guardianship petition and denied the mother's motion without conducting a hearing or considering the child's best interests, we remit the matter to the Family Court, Nassau County, for a hearing and a new determination thereafter of the petition and the motion ... . In addition, in light of certain remarks made by the Family Court Judge during the course of the proceedings, we deem it appropriate that the matter be heard by a different Judge. The remarks included: that the child 'should be speaking English a lot better' after having been in the United States for two years; that the child should 'make some friends who speak English'; that if the child only spoke Spanish, 'what are you gonna do, you're gonna be hanging around just where you are'; and that the child '[c]an't speak English, doesn't go to school, it's wonderful. It's a great country America.' These remarks were inappropriate and cannot be countenanced." ***Matter of A. v. P.*, 2018 N.Y. Slip Op. 03674, Second Dept 5-23-18**

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

COURT SHOULD NOT HAVE CONVERTED THE MOTION TO DISMISS TO A MOTION FOR SUMMARY JUDGMENT, BANK'S LETTER SEEKING TO REVOKE THE ACCELERATION OF THE MORTGAGE BEFORE THE STATUTE OF LIMITATIONS FOR A FORECLOSURE ACTION RAN OUT WAS NOT DOCUMENTARY EVIDENCE UPON WHICH A MOTION TO DISMISS COULD BE BASED.

The Second Department, reversing Supreme Court, determined the bank's (Citimortgage's) motion to dismiss the plaintiff's action to cancel and discharge a mortgage should not have been granted. The bank started a foreclosure action in 2009 and the statute of limitations expired on March 17, 2015. On March 13, 2015, the bank sent a letter to plaintiff purporting to de-accelerate the loan and re-institute the loan as an installment loan. The Second Department determined the motion to dismiss should not have been converted to a motion for summary judgment and the March 13, 2015, letter did not constitute documentary evidence sufficient to dismiss the complaint. There was no proof when the letter was mailed and it could have arrived after the statute of limitations expired: "Here, the Supreme Court should not have converted Citimortgage's motion pursuant to CPLR 3211(a) to dismiss the complaint to one for summary judgment without providing 'adequate notice to the parties' (CPLR 3211[c]...). None of the recognized exceptions to the notice requirement is applicable here. No specific request for summary judgment was made by any party, the parties did not deliberately chart a summary judgment course, and the action did not exclusively involve issues of law which were fully appreciated and argued by the parties ... . 'In order for evidence submitted in support of a CPLR 3211(a)(1) motion to qualify as documentary evidence,' it must be unambiguous, authentic, and undeniable. Judicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are essentially undeniable, would qualify as documentary evidence in the proper case. However, neither affidavits, deposition testimony, nor letters are considered documentary evidence within the intendment of CPLR 3211(a)(1)' ... . Furthermore, '[a] lender may revoke its election to accelerate the mortgage, but it must do so by an affirmative act of revocation occurring during the six-year statute of limitations period subsequent to the initiation of the prior foreclosure action'...". ***Soroush v. Citimortgage, Inc.*, 2018 N.Y. Slip Op. 03724, Second Dept 5-23-18**

FREEDOM OF INFORMATION LAW (FOIL).

CIVILIAN COMPLAINT REVIEW BOARD'S RECORDS CONCERNING A PARTICULAR POLICE OFFICER EXEMPT FROM DISCLOSURE UNDER THE PUBLIC OFFICERS LAW AND CIVIL RIGHTS LAW.

The Second Department, reversing Supreme Court, determined the Civilian Complaint Review Board (CCRB) records concerning a particular police officer were exempt from disclosure under the Public Officers Law and Civil Rights Law: "Public Officers Law § 87(2)(a) provides, among other exceptions, that an agency may deny access to records that 'are specifically exempted from disclosure by state or federal statute.' One such statute is Civil Rights Law § 50-a, which, as relevant here, provides: 'All personnel records used to evaluate performance toward continued employment or promotion, under the control of any police agency or department . . . shall be considered confidential and not subject to inspection or review . . . except as may be mandated by lawful court order' (Civil Rights Law § 50-a[1]). As the Court of Appeals has acknowledged, the Legislature's purpose in enacting Civil Rights Law § 50-a(1) was 'to limit access to said personnel records by criminal defense counsel, who used the contents of the records, including unsubstantiated and irrelevant complaints against officers, to embarrass officers during cross-examination' ... . We agree with the Appellate Division, First Department, that records of the CCRB relating to complaints and proceedings against police officers are exempt from disclosure under Civil Rights Law § 50-a(1) ... . The records that the petitioner requested are 'personnel records used to evaluate performance toward continued employment or promotion.' " ***Matter of Luongo v. Records Access Officer*, 2018 N.Y. Slip Op. 03681, Second Dept 5-23-18**

INSURANCE LAW, CIVIL PROCEDURE.

THE MOTOR VEHICLE ACCIDENT INDEMNIFICATION CORPORATION (MVAIC) CANNOT DEMAND A RELEASE FROM THE PLAINTIFF ONCE THE MVAIC'S OBLIGATION TO PAY HAS BEEN REDUCED TO A JUDGMENT.

The Second Department modified the judgment in this uninsured driver traffic accident case. Although the Motor Vehicle Accident indemnification Corporation (MVAIC) can withhold payment until it receives a release from the plaintiff pursuant to a settlement agreement, the MVAIC cannot demand a release where, as here, a court has issued a judgment: " 'Where judgment has been entered against an uninsured defendant in favor of a qualified person, Insurance Law § 5210 provides that a qualified person may petition the court to compel MVAIC to pay the amount of a judgment against that uninsured defendant that remains unpaid, subject to the limitations contained therein' ... . Here, the petitioner demonstrated that she obtained the underlying judgment ... , which remained unpaid. However, the sum sought by the petitioner, and the amount the Supreme Court directed MVAIC to pay, exceeded MVAIC's statutory limit of liability. The maximum limit of MVAIC's liability under the Insurance Law is $25,000 (see Insurance Law § 5210[a][1]). MVAIC's contention that the petitioner is not entitled to interest because the delay in payment was caused by the plaintiff's failure to execute a release in the proper amount is without merit. While MVAIC has the right to a release upon the settlement of a claim (see Insurance Law § 5213[b]; CPLR 5003-a), MVAIC is not entitled to such a release when ordered to pay on a judgment." ***Matter of Baker v. Motor Veh. Acc. Indem. Corp.*, 2018 N.Y. Slip Op. 03676, Second Dept 5-23-18**

MEDICAL MALPRACTICE.

PLAINTIFFS' EXPERT DID NOT SPECIALIZE IN THE RELEVANT AREA OF MEDICINE, HIS AFFIDAVIT THEREFORE DID NOT RAISE A QUESTION OF FACT, THERE WAS A QUESTION OF FACT WHETHER THE EMERGENCY EXCEPTION APPLIED TO THE GENERAL RULE A HOSPITAL IS NOT LIABLE FOR THE TREATMENT PROVIDED BY PRIVATE ATTENDING PHYSICIANS.

The Second Department, modifying Supreme Court, determined (1) the plaintiff's expert did not raise a question of fact about the quality of care provided by two of the defendants because he did not specialize in emergency medicine and didn't indicate he had familiarized himself with the standard of care in that specialty, and (2) there was a question of fact whether the emergency exception applied to the general rule that a hospital is not vicariously liable for the treatment provided by private attending physicians: " '… [W]here a physician opines outside his or her area of specialization, a foundation must be laid tending to support the reliability of the opinion rendered' ... . Here, the plaintiffs' expert, who was board-certified in internal medicine and infectious disease, did not indicate in his affirmation that he had training in emergency medicine, or what, if anything, he did to familiarize himself with the standard of care for this specialty. ... 'As a general rule, a hospital is not vicariously liable for the malpractice of a private attending physician who is not its employee' ... . However, 'an exception to the general rule exists where a patient comes to the emergency room seeking treatment from the hospital and not from a particular physician of the patient's choosing' ... . Here, the hospital established its prima facie entitlement to judgment as a matter of law by its submission of the deposition testimony of the doctors and physician's assistant involved in the plaintiff's care, which indicated that they were not employees of the hospital ... . In opposition, however, the plaintiffs raised a triable issue of fact as to whether the hospital could be held vicariously liable for the medical malpractice of the individuals involved in the plaintiff's care as independent contractors, based upon the emergency room exception ...". ***Galluccio v. Grossman*, 2018 N.Y. Slip Op. 03664, Second Dept 5-23-18**

PERSONAL INJURY.

MERCHANDISE RACK IN THE AISLE OF DEFENDANT STORE WAS OPEN AND OBVIOUS AND NOT INHERENTLY DANGEROUS.

The Second Department determined a merchandise rack in the aisle of defendant store was open and obvious and not inherently dangerous: "[Plaintiff] commenced this action ... to recover damages for personal injuries she allegedly sustained when she fell at the defendants' department store in Yonkers, while attempting to walk past a merchandise rack situated in one of the aisles. ... 'A landowner has a duty to maintain his or her premises in a reasonably safe manner'... . 'However, there is no duty to protect or warn against an open and obvious condition which, as a matter of law, is not inherently dangerous' ... . Here, the defendants established their prima facie entitlement to judgment as a matter of law by submitting evidence, including the decedent's deposition testimony, demonstrating that the merchandise rack in the aisle was both open and obvious and that it was not inherently dangerous ...". ***Nannariello v. Kohl's Dept. Stores, Inc.*, 2018 N.Y. Slip Op. 03689, Second Dept 5-23-18**

PERSONAL INJURY.

PLAINTIFF INJURED IN A SLAM DUNK COMPETITION AT BASKETBALL CAMP, DEFENDANT ENTITLED TO SUMMARY JUDGMENT UNDER THE ASSUMPTION OF THE RISK DOCTRINE.

The Second Department, reversing Supreme Court, determined plaintiff assumed the risk of injury in a slam dunk competition at basketball camp: "Under the doctrine of primary assumption of risk, '[i]f the risks [of a sporting activity] are known by or perfectly obvious to [a voluntary participant], he or she has consented to them and the [defendant] has discharged its duty of care by making the conditions as safe as they appear to be' ... . Risks inherent in a sporting activity are those which are known, apparent, natural, or reasonably foreseeable consequences of the participation ... . Participants are not deemed to have assumed the risks of reckless or intentional conduct, or concealed or unreasonably increased risks ...". ***Osmond v. Hofstra Univ.*, 2018 N.Y. Slip Op. 03693, Second Dept 5-23-18**

PERSONAL INJURY.

SMALL DEFECT THAT WAS UNDER THE HANDRAIL AND NOT IN THE WALKING SURFACE OF THE STAIRWAY WAS TRIVIAL AND NOT ACTIONABLE.

The Second Department, reversing Supreme Court in this slip and fall case, determined the defect in the stairway, which was small and was not located in the walking surface of the stairway, was trivial and not actionable: "... [T]he defendant's expert reviewed the transcript of the plaintiff's examination pursuant to General Municipal Law § 50-h, together with color photographs identified and marked by the plaintiff during that examination, which depicted the exact location of the alleged defect. The expert also conducted an inspection of the accident location. Based on his review and inspection, the expert averred that the alleged defect was located three inches from the left stairway wall, directly underneath the handrail. Moreover, the height differential between the nosing and the stair measured one-half inch at its greatest depth. Considering the location of the alleged defect, which was not on a walking surface of the stairway ... , together with all other relevant surrounding circumstances, the defendant established, prima facie, that the alleged defect was trivial ...". ***Stanley v. New York City Hous. Auth.*, 2018 N.Y. Slip Op. 03726, Second Dept 5-23-18**

PERSONAL INJURY.

PLAINTIFF'S DEPOSITION TESTIMONY, SUBMITTED BY THE DEFENDANT IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT IN THIS STAIRWAY SLIP AND FALL CASE, CONFLICTED WITH THE DEFENDANT'S EVIDENCE, SUMMARY JUDGMENT WAS NECESSARILY DENIED WITHOUT REFERENCE TO THE OPPOSING PAPERS,

The Second Department determined defendant property owner's motion for summary judgment in this stairway slip and fall case was properly denied. There was a conflict between the plaintiff's description of the defect and the area where she fell (included in the deposition testimony submitted by the defendant) and the defendant's evidence of the location of the defect: "In moving for summary judgment, the defendant was obligated to come forward with evidence establishing its prima facie entitlement to judgment as a matter of law by eliminating all material issues of fact as to its potential liability... . However, in view of the conflicting accounts submitted by the defendant as to the location of the defect which allegedly caused the plaintiff's fall, the defendant failed to sustain its prima facie burden on the motion. Accordingly, denial of the motion was required, without regard to the adequacy of the plaintiff's submissions in opposition ...". ***Tavarez v. Pistilli Assoc. III, LLC*, 2018 N.Y. Slip Op. 03727, Second Dept 5-23-18**

PERSONAL INJURY, MUNICIPAL LAW.

ACCIDENT REPORT DID NOT ALERT CITY TO THE ESSENTIAL ELEMENTS OF THE CLAIM IN THIS FIRE TRUCK TRAFFIC ACCIDENT CASE, AND THE EXCUSE FOR THE DELAY IN SEEKING TO FILE A LATE NOTICE OF CLAIM, LAW OFFICE FAILURE, WAS INSUFFICIENT, PETITION FOR LEAVE TO FILE A LATE NOTICE OF CLAIM PROPERLY DENIED.

The Second Department determined the petition for leave to file a late notice of claim in this fire truck traffic accident case was properly denied. The accident report did not alert the city to the essential facts of the action, the motion was not timely made, and the excuse, law office failure, was insufficient: "The police accident report and the letter from petitioner's counsel … were inadequate to provide the City with actual knowledge of the facts constituting the claim against it. These documents failed to alert the City to the petitioner's claim that she had been seriously injured as a result of the motor vehicle accident ... . Furthermore, the notice of claim, served upon the City almost 2 months after the 90-day statutory period had expired, was served too late to provide the City with actual knowledge of the essential facts constituting the claim within a reasonable time after the 90-day statutory period had expired ... . The petitioner's delay in serving the notice of claim upon the City was the result of law office failure, which is not a sufficient excuse ... . The petitioner proffered no excuse for the delay between the time the City disallowed the claim and the commencement of this proceeding ... . In addition, the petitioner presented no 'evidence or plausible argument' that her delay in serving a notice of claim did not substantially prejudice the City in defending against the petitioner's claim on the merits ...". ***Matter of Naar v. City of New York*, 2018 N.Y. Slip Op. 03683, Second Dept 5-23-18**

PERSONAL INJURY, VEHICLE AND TRAFFIC LAW.

ALTHOUGH DEFENDANT GOULD DEMONSTRATED THE OTHER DRIVER, DEFENDANT PAPPAS, FAILED TO YIELD THE RIGHT-OF-WAY, DEFENDANT GOULD DID NOT DEMONSTRATE THE VEHICLE AND TRAFFIC LAW VIOLATION WAS THE SOLE PROXIMATE CAUSE OF THE ACCIDENT, THEREFORE DEFENDANT GOULD WAS NOT ENTITLED TO SUMMARY JUDGMENT.

The Second Department determined the defendant driver (Gould) who collided with another defendant driver (Pappas) who had failed to yield the right-of-way was not entitled to summary judgment, noting that there can be more than one proximate cause of an accident: " 'There can be more than one proximate cause of an accident' ... , and '[g]enerally, it is for the trier of fact to determine the issue of proximate cause' ... . While the driver with the right-of-way is entitled to assume that other drivers will obey the traffic laws requiring them to yield ... , the driver with the right-of-way also has an obligation to keep a proper lookout and see what can be seen through the reasonable use of his or her senses to avoid colliding with other vehicles ... . The Gould defendants failed to establish their prima facie entitlement to judgment as a matter of law dismissing the cross claims asserted against them. While they submitted evidence that the Pappas vehicle failed to yield the right-of-way to their vehicle, in violation of Vehicle and Traffic Law § 1142(a), the submissions in support of their motion failed to establish the Gould defendants' freedom from fault and that the Pappas vehicle's failure to yield the right-of-way was the sole proximate cause of the accident ... . Based on their submissions, which included the deposition transcripts of the respective parties, the Gould defendants failed to eliminate all triable issues of fact as to whether Gould took reasonable care to avoid the collision ...". ***Miron v. Pappas*, 2018 N.Y. Slip Op. 03672, Second Dept 5-23-18**

REAL ESTATE.

DEFENDANTS DID NOT DEMONSTRATE PLAINTIFF COULD NOT PROVE IT WAS READY, WILLING AND ABLE TO CLOSE IN THIS ACTION FOR SPECIFIC PERFORMANCE, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN DENIED WITHOUT CONSIDERING THE OPPOSING PAPERS,

The Second Department, reversing Supreme Court, determined defendants were unable to demonstrate that plaintiff was not able to prove whether plaintiff was ready, willing, and able to close in the action for specific performance: "To prevail on a cause of action for specific performance of a contract for the sale of real property, a plaintiff purchaser must establish that it substantially performed its contractual obligations and was ready, willing, and able to perform its remaining obligations, that the vendor was able to convey the property, and that there was no adequate remedy at law ... . Here, on that branch of their motion which was for summary judgment dismissing the cause of action for specific performance, the defendants failed to meet their prima facie burden of establishing that the plaintiff was unable to prove one or more of the elements of its cause of action. The defendants failed to demonstrate the absence of triable issues of fact as to whether the plaintiff purchaser was ready, willing, and able to close on Contract One ... . The defendants also failed to eliminate triable issues of fact with respect to whether they validly cancelled the contracts. Similarly, since the defendants did not establish that they validly cancelled the contracts, they did not demonstrate their prima facie entitlement to a judgment declaring that the contracts are not binding and are unenforceable. Since the defendants failed to establish their prima facie entitlement to judgment as a matter of law dismissing the cause of action for specific performance and declaring that the contracts are not binding

and are unenforceable, the Supreme Court should have denied the defendants' motion regardless of the sufficiency of the opposing papers ...". ***Chester Green Estates, LLC v. Arlington Chester, LLC*, 2018 N.Y. Slip Op. 03657, Second Dept 5-23-18**

REAL PROPERTY ACTIONS AND PROCEEDINGS LAW.

DISMISSAL OF DEFENDANT'S COUNTERCLAIM FOR ADVERSE POSSESSION PROPERLY GRANTED, ELEMENTS OF PRE-AMENDMENT PROOF OF A CLAIM OF RIGHT APPLIED TO THE DISPUTED PROPERTY.

The Second Department, after explaining the current law of adverse possession and finding that the prior (pre-amendment) law applied in this case, determined the defendant's (Dominici's) counterclaim seeking adverse possession of disputed property was properly dismissed: "... [T]he 2008 amendments to the adverse possession statutes contained in RPAPL article 5 (see id.) are not applicable where, as here, the alleged adverse possessor's property right, as alleged, vested prior to the enactment of those amendments ... . … On October 1, 2012, the plaintiff became the titled owner of the property located at 541 Middle Country Road in Coram (hereinafter the 541 Property), which is adjacent to the property located at 543 Middle Country Road in Coram (hereinafter the 543 Property). The plaintiff had a survey taken on January 7, 2014, which showed that the owner of the 543 Property had encroached on a certain area of the 541 Property by paving, installing a fence, and putting a shed on the area. The president of the defendant, Michael Dominici, asserted in an affidavit that when he became the titled owner of the 543 Property in 1985, the paving and fence were already present, leading him to believe the disputed portion of the property belonged to the defendant. … Under the pre-amendment law, in order to establish a claim to property by adverse possession, a claimant must prove, by clear and convincing evidence, that possession of the property was (1) hostile and under a claim of right, (2) actual, (3) open and notorious, (4) exclusive, and (5) continuous for the required period ... . While adverse possession is not a favored method of procuring title to real property, it is both a necessary and recognized method of acquiring title... . Further, under the law existing at the time the adverse possession by the defendant occurred, in order to defeat the claim of right, actual knowledge by the possessor as to who was the true owner was insufficient; an overt acknowledgment during the statutory period that ownership rested with another party was required ... . Here, there was no "overt acknowledgment" by Dominici that ownership rested with another party." ***SLC Coram, LLC v. 543 Middle Country Rd. Realty, LLC*, 2018 N.Y. Slip Op. 03723, Second Dept 5-23-18**

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