August 24, 2018

CasePrepPlus

An advance sheet service summarizing recent and significant New York appellate cases

Editor: **Bruce Freeman**

NEW YORK STATE BAR ASSOCIATION
Serving the legal profession and the community since 1876

FIRST DEPARTMENT

LANDLORD-TENANT, MUNICIPAL LAW, CIVIL PROCEDURE.

WHERE THERE IS NO FRAUD ON THE LANDLORD'S PART, THE NYC DEPARTMENT OF HOUSING AND COMMUNITY RENEWAL CANNOT LOOK BACK FURTHER THAN THE FOUR-YEAR STATUTE-OF-LIMITATIONS PERIOD IN THE RENT STABILIZATION LAW TO DETERMINE THE BASE RENT FOR CALCULATING AN OVERCHARGE.

The First Department, reversing the NYC Department of Housing and Community Renewal (DHCR), over an extensive two-justice dissent, determined the DHCR erred when it looked back more than for years from the date of the rent overcharge complaint to determine the base rent for calculating the amount of the overcharge. There was no dispute that the landlord was receiving J-51 tax benefits and was therefore subject to the Rent Stabilization Law (RSL), which had a four-year statute of limitations: "The primary question presented in this appeal is how to determine the proper rent on the base date. * * * ... [I]n the absence of evidence of fraud, this Court has declined to look back more than four years before the filing of the overcharge complaint to set the base date rent ... .In the case at bar, DHCR was not arbitrary and capricious in finding that landlord did not engage in a fraudulent scheme to evade the Rent Stabilization Law. As a consequence, DHCR was prohibited from looking at the unit's rental history before November 2, 2005 [four years before the overcharge complaint]. ... [The legislature] not only set a four-year limitations period, but it also explicitly barred any 'examination of the rental history of the housing accommodation prior to the four-year period preceding the filing of a complaint' (RSL § 26-516[a][2]). The Court of Appeals has found that the purpose of the four-year limitations period is 'to alleviate the burden on honest landlords to retain rent records indefinitely' ... . The Court of Appeals has made what we have called a 'limited exception' to the four-year limitations period in cases where landlords act fraudulently ... . To expand this exception to landlords who have not engaged in fraud would create a much broader exception that would appear to negate the temporal limits contained in the Rent Stabilization Law and the CPLR." ***Matter of Regina Metro. Co., LLC v. New York State Div. of Hous. & Community Renewal*, 2018 N.Y. Slip Op. 05797, First Dept 8-16-18**

LANDLORD-TENANT, MUNICIPAL LAW, CIVIL PROCEDURE.

LANDLORDS PROPERLY CALCULATED THE RENT OVERCHARGE PURSUANT TO THE NYC RENT STABILIZATION CODE BY CHOOSING A BASE RENT DATE FOUR YEARS BEFORE THE DATE DEEMED TO BE WHEN THE OVERCHARGE COMPLAINT WOULD HAVE BEEN FILED HAD THE LAW BEEN CLEAR AT THE TIME.

The First Department, over a dissent, determined the defendants-landlords had properly calculated a rent overcharge by going back four years from a date deemed to be when the tenants would have filed a rent overcharge complaint (none had been filed because the relevant law was unclear at the time): "Defendants chose May 1, 2010 as the date on which plaintiffs would be deemed to have filed a claim for overcharges, in the absence of any such claim having been filed, and then used these 2526.1(a) standards to fix the base date for determining the overcharge as May 1, 2006, the date four years before they undertook their review. Defendants then reduced plaintiffs' rent and forwarded payment to them for the overcharges so reflected. In June 2010 defendants filed registrations for the years 2006, 2007, 2008 and 2009 in accordance with these recalculations." ***Raden v. W 7879, LLC*, 2018 N.Y. Slip Op. 05799, First Dept 8-16-18**

MENTAL HYGIENE LAW, TRUSTS AND ESTATES, CONSTITUTIONAL LAW, APPEALS.

DECISION TO WITHDRAW LIFE SUPPORT FROM A DEVELOPMENTALLY DISABLED MAN IN A VEGETATIVE STATE PURSUANT TO THE CRITERIA IN SURROGATE'S COURT PROCEDURE ACT 1750-b DID NOT VIOLATE HIS RIGHT TO EQUAL PROTECTION UNDER THE LAW.

The First Department, in a full-fledged opinion by Justice Renwick, over a concurring opinion, determined that the decision to allow the withdrawal of life support from an 80-year-old developmentally disabled person (M.G.), who was in a vegetative state, did not violate M.G.'s right to equal protection under the law. Although M.G. had died, the appeal was considered as an exception to the mootness doctrine: "... [W]e are satisfied that Supreme Court's decision with regard to M.G. was consistent with SCPA 1750-b's requirements for withdrawal of life-sustaining treatment. The undisputed medical evidence establishes that before his demise, M.G. was in a permanent vegetative state; he suffered from multiple organ fail-

ure of the lungs, kidneys, and brain. M.G. had no neurologic function and did not respond to stimuli or breathe without a ventilator. The medical expert's opinion was that the need for hemodialysis, the chest tubes, and ventilation were ongoing, that M.G.'s lack of cognitive ability could not be cured, and that there was no chance of meaningful neurological recovery. It was thus abundantly clear that M.G. was completely unable to interact with his environment, and that the medical probability that he would ever return to a cognitive sentient state, as distinguished from a chronic vegetative existence, was virtually non-existent. Any medical treatment administered would have provided minimal, if any, benefit and would only have postponed M.B.'s death rather than improve his life. In short, M.G.'s condition was irreversible, and treatment would have imposed an extraordinary burden on him... . The best interests of the patient under SCPA 1750-b embraces not only recovery or the avoidance of pain but also a dignified death. The guardian's decision conformed with the obligation to promote the patient's well-being, and to the extent possible, the decision of M.G. himself." ***Matter of Sloane v. M.G.*, 2018 N.Y. Slip Op. 05800, First Dept 8-16-18**

SECOND DEPARTMENT

ATTORNEYS, LEGAL MALPRACTICE, NEGLIGENCE.

PLAINTIFF COULD NOT HAVE PREVAILED IN THE UNDERLYING SLIP AND FALL CASE BECAUSE OF THE STORM IN PROGRESS RULE, LEGAL MALPRACTICE ACTION BASED UPON A FAILURE TO SERVE THE CORRECT PARTY SHOULD HAVE BEEN DISMISSED.

The Second Department, reversing Supreme Court, determined that the legal malpractice action should have been dismissed because plaintiff could not have prevailed in the underlying slip and fall case. The slip and fall case was dismissed because the proper party was not served. The Second Department held that the plaintiff could not have proved liability for the slip and fall case because of the storm in progress rule: "[The] submissions demonstrated that a storm was in progress at the time of the accident, that there was no preexisting ice on the ground when the storm commenced, and that the property owner did not create or exacerbate the allegedly dangerous condition created by the storm in progress... . Since the defendants made a prima facie showing that the storm in progress rule applied to the underlying action, the burden shifted to the plaintiff to show that something other than the precipitation from the storm in progress caused the accident ... . The plaintiff failed to raise a triable issue of fact. Accordingly, the Supreme Court should have granted the defendants' motion for summary judgment dismissing the complaint because the plaintiff could not have prevailed in the underlying action against the property owner ...". ***Blair v. Loduca*, 2018 N.Y. Slip Op. 05744, Second Dept 6-15-18**

ATTORNEYS, LEGAL MALPRACTICE, NEGLIGENCE, CIVIL PROCEDURE.

ALLEGATIONS OF NEGLIGENCE IN A LEGAL MALPRACTICE CONTEXT DO NOT SUPPORT A CAUSE OF ACTION ALLEGING A JUDICIARY LAW § 487 VIOLATION, INTENT TO DECEIVE MUST BE ALLEGED WITH PARTICULARITY, JUDICIARY LAW CAUSE OF ACTION SHOULD HAVE BEEN DISMISSED.

The Second Department determined the causes of action alleging legal malpractice, breach of contract, and fraud were properly dismissed. The court further found that the cause of action alleging a violation of Judiciary Law § 487 should have been dismissed as well, noting that allegations of negligence do not meet the "intent to deceive" element of a Judiciary Law action: "Contrary to the defendants' contention, the cause of action alleging a violation of Judiciary Law § 487 was not duplicative of the cause of action alleging legal malpractice. 'A violation of Judiciary Law § 487 requires an intent to deceive, whereas a legal malpractice claim is based on negligent conduct' ... . Nevertheless, the Supreme Court should have granted that branch of the defendants' motion which was for summary judgment dismissing the cause of action alleging a violation of Judiciary Law § 487. A chronic extreme pattern of legal delinquency is not a basis for liability pursuant to Judiciary Law § 487 ... . Further, the plaintiffs failed to allege sufficient facts demonstrating that the defendant attorneys had the 'intent to deceive the court or any party' ... . Allegations regarding an act of deceit or intent to deceive must be stated with particularity (see CPLR 3016[b]...). That the defendants commenced the underlying action on behalf of the plaintiffs and the plaintiffs failed to prevail in that action does not provide a basis for a cause of action alleging a violation of Judiciary Law § 487 to recover the legal fees incurred." ***Bill Birds, Inc. v. Stein Law Firm, P.C.*, 2018 N.Y. Slip Op. 05743, Second Dept 8-15-18**

CIVIL PROCEDURE.

FAILURE TO ATTACH PLEADINGS TO A MOTION FOR SUMMARY JUDGMENT PROPERLY DISREGARDED BY THE MOTION COURT.

The Second Department noted that plaintiff's failure to attach the pleadings to plaintiff's motion for summary judgment was not a fatal defect: "The defendants' contention that the plaintiff's failure to annex the pleadings to its motion papers was a fatal defect is without merit. CPLR 3212(b) requires, inter alia, that a moving party support its motion for summary judgment by attaching a copy of the pleadings. However, CPLR 2001 permits a court, at any stage of an action, to disregard a party's mistake, omission, defect, or irregularity if a substantial right of a party is not prejudiced ... . Here, the pleadings were not only electronically filed and available to the Supreme Court and the parties, but the answer was submitted by

the defendants in opposition to the motion, and the summons and complaint were submitted in reply by the plaintiff. The defendants did not assert that they were prejudiced by the omission. Under such circumstances, the court properly disregarded the plaintiff's omission ...". ***Sensible Choice Contr., LLC v. Rodgers*, 2018 N.Y. Slip Op. 05790, Second Dept 8-15-18**

CIVIL PROCEDURE.

OMISSION OF RETURN DATE FROM AN ORDER TO SHOW CAUSE, WHICH DID NOT RESULT IN PREJUDICE, SHOULD HAVE BEEN DISREGARDED AS A TECHNICAL DEFECT.

The Second Department, reversing Supreme Court, determined the plaintiffs' serving a faulty copy of an order to show cause which did not include the return date should not have been deemed a jurisdictional defect. The defendants appeared on the return date, so there was no prejudice: "Unbeknownst to the plaintiffs, the Kings County Clerk's Office encountered some type of error when scanning and uploading the signed order to show cause to the eCourts system. The digital copy of the order to show cause omitted the page containing the return date of February 27, 2015, among other things, although the remaining pages feature the handwritten notation '2/27/15.' The plaintiffs printed the faulty digital copy without noticing the error and served that copy on the defendants with supporting papers, using the method specified in the order to show cause. * * * 'The failure to give proper notice of a motion deprives the court of jurisdiction to hear the motion' ... . However, the defect in service here was 'merely technical'... . Under these circumstances, given that no substantial right of the defendants was prejudiced, the Supreme Court should have disregarded the irregularity and determined the motion on the merits (see CPLR 2001 ...)." ***Young v. City of New York*, 2018 N.Y. Slip Op. 05793, Second Dept 8-15-18**

CIVIL PROCEDURE, PERSONAL INJURY.

SUPREME COURT PROPERLY GRANTED DEFENDANTS' MOTION TO SET ASIDE THE VERDICT IN THIS PERSONAL INJURY ACTION UNLESS PLAINTIFF STIPULATED TO A SUBSTANTIAL REDUCTION IN DAMAGES FOR PAST AND FUTURE PAIN AND SUFFERING.

The Second Department determined defendant's motion to set aside the verdict i(CPLR 4404(a)) n this personal injury case was properly granted. Supreme Court ordered a new trial unless plaintiff agreed to a reduction from $1.2 million to $750,000 for past pain and suffering, and from $3 million to $1.25 million for future pain and suffering. Plaintiff had injured his back after a fall of two feet: "A jury's determination with respect to awards for past and future pain and suffering will not be set aside unless the award deviates materially from what would be reasonable compensation (see CPLR 5501[c]...). 'The reasonableness of compensation must be measured against relevant precedent of comparable cases' ... . 'Although prior damage awards in cases involving similar injuries are not binding upon the courts, they guide and enlighten them with respect to determining whether a verdict in a given case constitutes reasonable compensation'... . Considering the nature and the extent of the injuries sustained by the plaintiff, the awards for past pain and suffering and future pain and suffering, as reduced by the Supreme Court, do not deviate materially from what would be reasonable compensation ...". ***Garcia v. CPS 1 Realty, LP*, 2018 N.Y. Slip Op. 05753, Second Dept 8-15-18**

CIVIL PROCEDURE, FORECLOSURE.

NO REASONABLE EXCUSE FOR FAILURE TO SEEK A DEFAULT JUDGMENT WITHIN ONE YEAR, DEFENDANTS' MOTION TO DISMISS THE COMPLAINT IN THIS FORECLOSURE ACTION SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined defendants' motion to dismiss the complaint in this foreclosure action should have been granted. Plaintiff did not seek a default judgment within one year and did not provide an excuse for the delay: "The plaintiff failed to seek a default judgment on the unanswered complaint within one year after the default, as required by CPLR 3215(c) ... . To avoid dismissal of the action as abandoned pursuant to CPLR 3215(c), the plaintiff was required to demonstrate a reasonable excuse for its delay in seeking a default judgment and a potentially meritorious cause of action... . The plaintiff failed to offer a reasonable excuse for its delay in seeking a default judgment. Since the plaintiff failed to proffer a reasonable excuse for its delay in seeking a default judgment, this Court need not consider whether it had a potentially meritorious cause of action... . A defendant may waive the right to seek a dismissal pursuant to CPLR 3215(c) by serving an answer or taking any other steps which may be viewed as a formal or informal appearance ... . Here, the defendants did not appear in the action, either formally or informally." ***Federal Natl. Mtge. Assn. v. Heilpern*, 2018 N.Y. Slip Op. 05752, Second Dept 8-15-18**

CIVIL PROCEDURE, TRUSTS AND ESTATES.

MOTION TO AMEND THE COMPLAINT BY NAMING PLAINTIFF IN HER CAPACITY AS THE REPRESENTATIVE OF HER HUSBAND'S ESTATE, WHERE THE ORIGINAL COMPLAINT WAS ERRONEOUSLY BROUGHT IN HER INDIVIDUAL CAPACITY, WAS PROPERLY GRANTED.

The Second Department determined plaintiff's motion to amend her complaint in this legal malpractice action to sue as a representative of the estate of her husband, rather than in her individual capacity, was properly granted: " '[A]n amendment which would shift a claim from a party without standing to another party who could have asserted that claim in the

first instance is proper since such an amendment, by its nature, does not result in surprise or prejudice to the defendants who had prior knowledge of the claim and an opportunity to prepare a proper defense' ... . The Supreme Court providently exercised its discretion in granting the plaintiff leave to amend the complaint to substitute herself in her representative capacity as the plaintiff in place of herself in her individual capacity. The proposed amendment, which only sought to shift the causes of action from the plaintiff in her individual capacity to herself in her representative capacity, was proper since the allegations set forth in the complaint gave the appellants notice of the legal malpractice causes of action being asserted against them in the amended complaint ... . Moreover, the appellants' contention that they would be prejudiced by the amendment because the applicable statute of limitations had expired by the time the plaintiff sought leave to amend the complaint is without merit, since the original complaint was timely filed and gave the appellants notice of the transactions and occurrences pleaded in the amended complaint (see CPLR 203[f] ...)". ***D'Angelo v. Kujawski*, 2018 N.Y. Slip Op. 05750, Second Dept 8-15-18**

COURT OF CLAIMS, MEDICAL MALPRACTICE, NEGLIGENCE.

MOTION TO FILE A LATE NOTICE OF CLAIM IN THIS MEDICAL MALPRACTICE ACTION SHOULD NOT HAVE BEEN GRANTED, CRITERIA FOR LATE NOTICE IN THE COURT OF CLAIMS EXPLAINED.

The Second Department, reversing the Court of Claims, determined claimants' motion to file a late notice of claim in this medical malpractice action should not have been granted: " 'Court of Claims Act § 10(6) permits a court, in its discretion, upon consideration of the enumerated factors, to allow a claimant to file a late claim' ... . The enumerated factors are whether the delay in filing was excusable, the State of New York had notice of the essential facts constituting the claim, the State had an opportunity to investigate the circumstances underlying the claim, the claim appears to be meritorious, the State is prejudiced, and the claimant has any other available remedy ... . 'No one factor is deemed controlling, nor is the presence or absence of any one factor determinative' ... . The claimants failed to demonstrate a reasonable excuse for the delay of more than one year and eight months in seeking leave to file a late claim. ... 'Merely having or creating hospital records, without more, does not establish actual knowledge of a potential injury where the records do not evince that the medical staff, by its acts or omissions, inflicted any injury' on the claimants' decedent attributable to malpractice or negligence ... . The claimants also failed to demonstrate that the defendant had an opportunity to timely investigate the facts underlying the claim, as well as locate and examine witnesses while their memories of the facts were still fresh ... . In addition, the claimants failed to demonstrate a potentially meritorious cause of action based on their allegations of medical malpractice, since they failed to provide an affidavit of merit from a physician ...". ***Decker v. State of New York*, 2018 N.Y. Slip Op. 05751, Second Dept 8-15-18**

CRIMINAL LAW.

PETITIONER, A LEVEL THREE SEX OFFENDER UNDER POST-RELEASE SUPERVISION, CAN BE PLACED IN RESIDENTIAL CORRECTIONS FACILITIES PENDING THE AVAILABILITY OF COMMUNITY HOUSING THAT IS MORE THAN 1000 FEET FROM A SCHOOL.

The Second Department, applying standard rules of statutory construction, determined the Department of Corrections and Community Supervision (DOCCS) had the authority to place petitioner, a level-three sex offender under post-release supervision, in residential corrections facilities pending the availability of Sexual Assault Reform Act (SARA) compliant housing (more 1000 feet from a school): " 'Statutes which relate to the same subject matter must be construed together unless a contrary legislative intent is expressed' ... . 'The courts must harmonize the various provisions of related statutes and . . . construe them in a way that renders them internally compatible' ... . 'In the case of a conflict between a general statute and a special statute governing the same subject matter, the general statute must yield ... . 'Finally, [a] construction rendering statutory language superfluous is to be avoided' ... . [C]onstruing the relevant statutes together, DOCCS has authority to temporarily place a level three sex offender who has already completed more than six months of his or her postrelease supervision, as did the petitioner in this case, into residential treatment facility housing in the event such offender is unable to locate SARA-compliant community housing. Moreover, it is clear that DOCCS's authority to keep such an offender in residential treatment facility housing ends when the offender successfully identifies or otherwise obtains SARA-compliant community housing." ***People v. Warden, Westchester County Corr. Facility*, 2018 N.Y. Slip Op. 05777, Second Dept 8-15-18**

CRIMINAL LAW, APPEALS.

MATTER SENT BACK TO RECONSTRUCT THE RECORD ABOUT POSSIBLE BRADY MATERIAL THAT WAS TO BE REVIEWED BY THE JUDGE, CURRENT RECORD IS SILENT ON THE ISSUE.

The Second Department sent the matter back for a hearing to reconstruct the record as to what, if any, material was provided to the court for in camera review. Defendant alleged statements which constituted *Brady* material were to be given to the judge for a determination whether the material should be provided to the defense. But the record gave no indication what the materials were: "On appeal, the defendant argues that the failure to disclose the requested material constituted a Brady violation. The People were unable to provide to this Court any material they provided to the trial court for in camera review.

They indicate that they have no record in their files of what material may have been submitted to the trial court. The People assert that, nevertheless, the defendant's Brady claim is based on matter dehors the record, and thus cannot be reviewed on direct appeal. However, to the extent that material was produced to the trial court for in camera review, it is properly part of the record, and the defendant's Brady claim would thus be reviewable on direct appeal. Under these circumstances, we deem it appropriate to remit the matter for a hearing to reconstruct the record as to what, if any, material was provided to the trial court for in camera review ... , and thereafter to report to this Court with all convenient speed. The appeal is held in abeyance in the interim, and we do not decide any other issues at this time." ***People v. DeFelice*, 2018 N.Y. Slip Op. 05781, Second Dept 8-15-18**

DEBTOR-CREDITOR.

ASSIGNMENT OF AN INTEREST IN A JUDGMENT WAS VALID EVEN THOUGH THE PARTY WHO PAID THE ASSIGNOR HAD NOT BEEN NOTIFIED OF THE ASSIGNMENT, PAYMENT MADE IN GOOD FAITH TO THE ASSIGNOR TREATED AS IF MADE TO THE ASSIGNEE.

The Second Department, reversing Supreme Court, held that a payment made in good faith to a party (Bynum) who had already assigned his interest in a judgment should be treated as if payment had been made to the right party (the assignee), and the assignment was valid, even though the party who made the payment (Scheiner) was not notified of it: " 'An obligor is entitled to a credit for payments mistakenly made to the assignor rather than to the assignee when those payments are made in good faith and in ignorance of the assignment' ... . Here, the plaintiffs conceded that Scheiner was entitled to a credit for the $12,000 payment he made to Bynum, and in determining the plaintiffs' motion and upon vacating the satisfaction of judgment, the Supreme Court recalculated the amount of the judgment to reflect that offset. Contrary to the court's determination, the failure to notify Scheiner of the assignment did not render the assignment ineffective ...". ***1051 Corp v. Bynum*, 2018 N.Y. Slip Op. 05740, Second Dept 8-15-18**

EDUCATION-SCHOOL LAW, NEGLIGENCE.

LEAVE TO FILE A LATE NOTICE OF CLAIM AGAINST THE SCHOOL DISTRICT IN THIS STUDENT BULLYING AND HARASSMENT ACTION WAS PROPERLY GRANTED, CRITERIA EXPLAINED.

The Second Department determined the petition for leave to file a late notice of claim in this student bullying and harassment case was properly granted. The plaintiff alleged the school was negligent in failing to prevent or stop the bullying: "... [T]he infant petitioner submitted evidence showing that she made persistent complaints over a period of years to district employees that she had been verbally and physically harassed by a certain group of fellow students, and that the abuse continued despite the school district's intermittent corrective actions. Contrary to the school district's contentions, the infant petitioner demonstrated that the district had actual notice of more than just the discrete incidents to which it responded; it had notice of the alleged pattern of abuse. Under the circumstances presented here, the infant petitioner sufficiently demonstrated that the district had actual notice of the essential facts constituting the claim within 90 days of accrual or within a reasonable time thereafter ... , and that the district was not substantially prejudiced by the delay in serving the notice of claim ... . The school district's contention that it would be prejudiced by the delay because two of the petitioner's three prior guidance counselors no longer work at the school was not sufficient to meet its burden of making a 'particularized showing' of prejudice in maintaining a defense on the merits... .. Given the petitioner's infancy, the school district's actual notice, and the absence of prejudice, the lack of a reasonable excuse will not bar the granting of leave to serve a late notice of claim ...". ***Matter of C.B. v. Carmel Cent. Sch. Dist.*, 2018 N.Y. Slip Op. 05761, Second Dept 8-15-18**

ENVIRONMENTAL LAW, ADMINISTRATIVE LAW, APPEALS.

TOWN PLANNING BOARD PROPERLY RESCINDED A 1987 NEGATIVE SEQRA DECLARATION FOR A SUBDIVISION BECAUSE OF THE NEW REGULATORY LANDSCAPE, COURT'S REVIEW POWERS ARE LIMITED TO WHETHER THE BOARD SATISFIED SEQRA PROCEDURALLY AND SUBSTANTIVELY.

The Second Department determined the town planning board's rescission of a 1987 negative declaration under the State Environmental Quality Review Act (SEQRA) was proper. The board found that the regulatory landscape in 2013 constituted new information or a change in circumstances justifying rescission. The court noted that its review powers are limited to whether the board's action satisfied SEQRA procedurally and substantively, and cannot include determining whether the board was "correct:" "The record supports the Planning Board's conclusion that changes in the regulatory landscape for environmental matters constituted new information or a change in circumstances ... . Moreover, in determining that the project may result in significant adverse environmental impacts, the Planning Board identified specific environmental concerns relevant to the criteria for determining significance ... . The petitioners argue that the Planning Board's conclusion was incorrect. However, 'it is not the role of the courts to weigh the desirability of any action or choose among alternatives, but to assure that the agency itself has satisfied SEQRA, procedurally and substantively' ... . Our review is limited to 'whether the agency procedures were lawful and whether the agency identified the relevant areas of environmental concern, took a

hard look at them, and made a reasoned elaboration of the basis for its determination' ... . Here, the Planning Board satisfied this standard." ***Leonard v. Planning Bd. of the Town of Union Vale*, 2018 N.Y. Slip Op. 05757, Second Dept 8-15-18**

FAMILY LAW, ATTORNEYS, CIVIL PROCEDURE, CONTRACT LAW.

HUSBAND'S ATTORNEY SHOULD NOT HAVE BEEN DISQUALIFIED ON THE GROUND SHE WOULD BE A WITNESS FOR THE WIFE, PLENARY ACTION SEEKING TO SET ASIDE A PRENUPTIAL AGREEMENT PROPERLY JOINED WITH DIVORCE ACTION, INTERIM ATTORNEY'S FEES NOT AVAILABLE FOR THE ACTION TO SET ASIDE THE PRENUPTIAL AGREEMENT.

The Second Department, reversing (modifying) Supreme Court, determined (1) husband's counsel should not have been disqualified on the ground she would be a witness, (2) the plenary action seeking to set aside the prenuptial agreement on grounds of duress, coercion, undue influence and unconscionabiltiy is properly joined with the divorce action, (3) and interim attorney's fees are not available for the action to set aside the prenuptial agreement: "Rule 3.7 of the Rules of Professional Conduct... provides that, unless certain exceptions apply, '[a] lawyer shall not act as advocate before a tribunal in a matter in which the lawyer is likely to be a witness on a significant issue of fact' ... . In order to disqualify counsel on the ground that he or she may be called as a witness, a party moving for disqualification must demonstrate that (1) the testimony of the opposing party's counsel is necessary to his or her case, and (2) such testimony would be prejudicial to the opposing party... . Here, the wife failed to demonstrate that [the attorney's] testimony will be necessary to her case ... . 'The trial court has broad discretion in determining whether to order consolidation' (... see CPLR 602[a]). The interests of justice and judicial economy are better served by consolidation or a joint trial in those cases where the actions share material questions of law or fact ... . A motion to consolidate or join for trial should be granted absent a showing of prejudice to a substantial right by a party opposing the motion ... . The Supreme Court should not have awarded the wife interim counsel fees in the sum of $10,000 pursuant to Domestic Relations Law § 237, as that statute does not permit the recovery of fees for legal work performed on nonmatrimonial matters, including where, as here, a party seeks an award of counsel fees incurred in an action to set aside a prenuptial agreement ...". ***Lombardi v. Lombardi*, 2018 N.Y. Slip Op. 05758, Second Dept 8-15-18**

FORECLOSURE, CIVIL PROCEDURE.

JUDGE SHOULD NOT HAVE, SUA SPONTE, DISMISSED A FORECLOSURE COMPLAINT AND SHOULD NOT HAVE ADDRESSED THE ISSUE OF STANDING, WHICH IS NOT JURISDICTIONAL AND COULD NOT BE RAISED BY A DEFAULTING DEFENDANT.

The Second Department, reversing Supreme Court, determined the judge should not have, sua sponte, dismissed a foreclosure complaint based upon an alleged failure of a condition precedent, and the judge should not have addressed the issue of standing, which was not a jurisdictional issue and was not, and could not be, raised by defendant, who had defaulted: " 'A court's power to dismiss a complaint, sua sponte, is to be used sparingly and only when extraordinary circumstances exist to warrant dismissal' ... . Here, the Supreme Court was not presented with any extraordinary circumstances warranting a sua sponte dismissal of the complaint... . The plaintiff's alleged failure to satisfy a condition precedent in the mortgage by failing to provide the defendant with 30 days' written notice of his default in making mortgage payments, even if true, did not deprive the court of jurisdiction to enter a judgment of foreclosure and sale ... . To the extent that the Supreme Court addressed the issue of the plaintiff's standing in the order appealed from, a party's lack of standing does not constitute a jurisdictional defect and does not warrant a sua sponte dismissal of the complaint by the court Moreover, since the defendant defaulted in appearing or answering the complaint, and failed to move to vacate his default, he is precluded from asserting lack of standing as a defense ...". ***Countrywide Home Loans, Inc. v. Campbell*, 2018 N.Y. Slip Op. 05749, Second Dept 8-15-18**

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

BANK MUST DEMONSTRATE IT HAS STANDING TO FORECLOSE TO ESTABLISH BOTH A VALID NOTICE OF THE ACCELERATION OF THE NOTE AND A VALID NOTICE OF THE DE-ACCELERATION OF THE NOTE, BANK WAS NOT ENTITLED TO DISMISS THE ACTION SEEKING TO CANCEL AND DISCHARGE A NOTE AND MORTGAGE ON STATUTE OF LIMITATIONS GROUNDS, AND PLAINTIFF WAS NOT ENTITLED TO SUMMARY JUDGMENT ON THE GROUND THE BANK HAD NOT VALIDLY DE-ACCELERATED THE NOTE TO STOP THE RUNNING OF THE STATUTE.

The Second Department, modifying Supreme Court, in a full-fledged opinion by Justice Dillon, determined plaintiff's motion for summary judgment in this action to cancel and discharge a note and mortgage pursuant to Real Property Actions and Proceedings Law (RPAPL) 1501 was properly denied, but defendant' motion to dismiss the complaint pursuant to CPLR 3211 should not have been granted. Plaintiff argued the debt had been accelerated and the statute of limitations for foreclosure had passed, defendant argued it had de-accelerated the debt and the statute had not run. The court, disagreeing with the First Department, noted that the language in a letter to the effect that the failure to cure the delinquency within 30 days "will result in acceleration" of the note does not constitute sufficient notice of the acceleration such that the statute of limitations starts to run. In addition, the court held, as a matter of first impression, standing to bring the foreclosure action

is a pre-requisite both for a valid acceleration and a valid de-acceleration of the note: "Courts must ... be mindful of the circumstance where a bank may issue a de-acceleration letter as a pretext to avoid the onerous effect of an approaching statute of limitations and to defeat the property owner's right pursuant to RPAPL 1501 to cancel and discharge a mortgage and note. Here, however, the de-acceleration letter containing a clear and unequivocal demand that the homeowner meet her prospective monthly payment obligations constitutes a de-acceleration in fact and cannot be viewed as pretextual in any way. ... We hold for the first time in the Appellate Division, Second Department, that just as standing, when raised, is a necessary element to a valid acceleration, it is a necessary element, when raised, to a valid de-acceleration as well. Here, the de-acceleration notice ... does not establish that [defendant] had standing to de-accelerate the earlier demand that the plaintiff's mortgage debt be paid in its entirety, and no other evidence submitted ... demonstrates that it had standing." ***Milone v. US Bank Natl. Assn.*, 2018 N.Y. Slip Op. 05760, Second Dept 8-15-18**

FORECLOSURE, REAL PROPERTY LAW, CONTRACT LAW.

DESPITE THE TERMS OF THE REAL PROPERTY PURCHASE CONTRACT, WHICH PURPORTED TO REQUIRE THE DEFENDANT PURCHASER TO FORFEIT ALL MONTHLY PAYMENTS WHICH HAD BEEN MADE AND VACATE THE PROPERTY UPON DEFAULT, DEFENDANT HAD ACQUIRED EQUITABLE TITLE TO THE PROPERTY, PLAINTIFFS' ONLY AVAILABLE REMEDIES ARE TO BRING AN ACTION TO FORECLOSE OR AN ACTION FOR THE PURCHASE PRICE.

The Second Department, reversing Supreme Court, determined that plaintiffs, who had effectively taken back a mortgage on property sold to defendant, could not enforce the purchase contract which purported to declare the contract null and void and require the defendant to vacate the property upon default. Defendant, by making substantial monthly payments pursuant to the contract, had acquired equitable title to the property. Plaintiffs only available remedies are foreclosure or an action at law for the purchase price: "A rider to the [purchase] contract contained a provision providing that in the event the defendant defaulted in making payments under the contract and failed to cure, and that said default resulted in the plaintiffs' inability to pay an existing mortgage on the property, the defendant forfeited all monies paid as liquidated damages, the contract was deemed null and void, and the premises were to be vacated in good condition. * * * 'The execution of a contract for the purchase of real estate and the making of a partial payment gives the contract vendee equitable title to the property' ... . '[T]he vendor merely holds the legal title in trust for the vendee, subject to the vendor's equitable lien for the payment of the purchase price in accordance with the terms of the contract' ... . Accordingly, the vendee under a land sale contract has acquired an interest in the property that must be extinguished before the vendor can resume possession, notwithstanding whether a provision in the contract provides that in the event of the vendee's uncured default in payment, the vendor has the right to declare the contract terminated and repossess the premises... . A vendor may not enforce his rights by an action in ejectment, but must instead proceed to foreclose the vendee's equitable title or bring an action at law for the purchase price ... . The defendant, having executed a contract for the purchase of property from the plaintiffs, and having made substantial payments to the plaintiffs pursuant to the contract, held equitable title to the property... . Under these circumstances, upon the defendant's default in making payments under the contract, the plaintiffs could not seek relief pursuant to the provision of the rider that provided for the contract to be deemed null and void, the premises vacated, and the defendant to forfeit all monies paid as liquidated damages. The plaintiffs were required to proceed to foreclose the defendant's equitable title or bring an action at law for the purchase price ...". ***Russell v. Pisana*, 2018 N.Y. Slip Op. 05789, Second Dept 8-15-18**

MUNICIPAL LAW, FALSE ARREST, FALSE IMPRISONMENT, MALICIOUS PROSECUTION.

POLICE REPORT DID NOT NOTIFY CITY OF THE NATURE OF PETITIONER'S FALSE ARREST, FALSE IMPRISONMENT AND MALICIOUS PROSECUTION CLAIMS, PETITION TO FILE LATE NOTICE OF CLAIM PROPERLY DENIED.

The Second Department determined the petition to file a late notice of claim in this false arrest, false imprisonment and malicious prosecution action was properly denied. The police report association with petitioner's arrest did not provide notice of the claims to the city and that allegation that petitioner's assigned counsel did not timely inform him of the notice of claim requirement was not an adequate excuse: "... [T]he involvement of a City police officer in arresting the petitioner did not, without more, establish that the City acquired actual knowledge of the essential facts constituting the petitioner's claims of false arrest, false imprisonment, and malicious prosecution within 90 days following their accrual or a reasonable time thereafter... . In addition, the contents of the arrest report and the certificate of disposition, submitted by the petitioner in support of his application, were insufficient to impute actual knowledge to the City of the facts underlying his claims ... . Further, the petitioner failed to establish that the delay in serving a notice of claim and seeking leave to serve such notice would not substantially prejudice the City in maintaining its defense on the merits with respect to those claims ...". ***Matter of Islam v. City of New York*, 2018 N.Y. Slip Op. 05763, Second Dept 8-15-18**

PERSONAL INJURY.

PLAINTIFF INJURED WHEN CHAIR IN CUSTODIAN'S BREAK ROOM COLLAPSED, SCHOOL DEMONSTRATED IT DID NOT HAVE NOTICE OF THE DANGEROUS CONDITION AND RES IPSA LOQUITUR DID NOT APPLY BECAUSE THE CHAIR WAS DEEMED NOT TO BE IN THE EXCLUSIVE CONTROL OF THE SCHOOL DISTRICT.

The Second Department determined the school district was not liable for injuries to a subcontractor working at a school. A chair in the custodian's break room collapsed when plaintiff was sitting in it. The school demonstrated a lack of notice of the dangerous condition and the res ipsa loquitur doctrine did not apply because the school was deemed not to have exclusive control over the chair: "The School District established its prima facie entitlement to judgment as a matter of law by submitting evidence establishing that it did not have actual or constructive notice of any defect in the chair ... . Since the plaintiff presented only unsubstantiated hearsay in opposition to the School District's motion, he failed to raise a triable issue of fact ... . Moreover, contrary to the plaintiff's contention, the doctrine of res ipsa loquitur is inapplicable, because one of the required factors for the doctrine to apply—that the instrumentality of the injury was in the exclusive control of the School District— cannot be established. The chair was located in the custodian break room accessible to third-party contractors of the School District, giving numerous people access to it ...". ***Brennan v. Wappingers Cent. Sch. Dist.*, 2018 N.Y. Slip Op. 05745, Second Dept 8-15-18**

PERSONAL INJURY, EDUCATION-SCHOOL LAW.

SNOW-REMOVAL EFFORTS NOT PARTICULARIZED, SCHOOL DISTRICT'S MOTION FOR SUMMARY JUDGMENT IN THIS SLIP AND FALL CASE PROPERLY DENIED.

The Second Department determined the defendant school district's motion for summary judgment in this slip and fall case was properly denied. The evidence demonstrated 19 inches of snow had fallen in the days preceding the slip and fall and the school district did not demonstrate the nature of the snow and ice removal efforts it made. The Second Department noted Supreme Court should not have considered the inadequate-lighting allegation because it was not in the notice of claim or the amended bill of particulars: "In support of its motion, the district submitted a certified weather report, which demonstrated that there was a snowstorm on February 13, 2014, resulting in a snow/ice accumulation of 11.8 inches, a snowstorm on February 14, 2014, with an additional snow/ice accumulation of 9.2 inches, and another inch of snow falling on February 15, 2014, followed by trace amounts on February 16, 2014, culminating in a snow/ice cover totaling 19 inches on the date of the accident. Moreover, the affidavits of the district's director of facilities and operations and middle school principal failed to provide any information about the district's snow and ice removal practices, or what was done to remove snow and ice from the premises prior to the accident, except to state generally that a facilities and operations staff member finished 'all maintenance efforts' at the middle school by 2:59 p.m. on the date of the accident ...". ***Pickles v. Hyde Park Cent. Sch. Dist.*, 2018 N.Y. Slip Op. 05787, Second Dept 8-15-18**

NEGLIGENCE, EDUCATION-SCHOOL LAW.

SCHOOL DISTRICT'S MOTION FOR SUMMARY JUDGMENT IN THIS STUDENT ON STUDENT ASSAULT CASE SHOULD HAVE BEEN GRANTED, THE STUDENT'S ACTIONS WERE IMPULSIVE AND COULD NOT HAVE BEEN ANTICIPATED.

The Second Department, reversing Supreme Court, determined that the school district's motion for summary judgment in this student on student assault case should have been granted. The student's pushing plaintiff's daughter was an impulsive act which could not have been anticipated or prevented by supervision: "... [T]he District established its prima facie entitlement to judgment as a matter of law dismissing the cause of action alleging negligent supervision of the plaintiff's daughter by submitting evidence demonstrating that it did not have actual or constructive notice of the dangerous conduct that caused the injury, and that the other student's act of running up behind the daughter and pushing her as she was walking down the hallway at dismissal time was impulsive and could not have been anticipated ... . In opposition, the plaintiff failed to raise a triable issue of fact. The District also established its prima facie entitlement to judgment as a matter of law dismissing the cause of action alleging negligent hiring, training, and supervision of its employees ...". ***Ramirez v. Brentwood Union Free Sch. Dist.*, 2018 N.Y. Slip Op. 05788, Second Dept 8-15-18**

PERSONAL INJURY, LANDLORD-TENANT.

THEATER NOT LIABLE FOR THIRD PARTY ASSAULT IN PARKING LOT, ASSAULT WAS SUDDEN AND WAS NOT FORESEEABLE.

The Second Department, reversing Supreme Court, determined defendant movie theater's (Regal's) motion for summary judgment in this parking lot assault case should have been granted. The third-party assault by Casallas-Gonzalez was sudden and was not foreseeable: "A landlord is under a duty to take minimal precautions to protect its tenants and invitees from foreseeable harm, 'including the harm caused by a third party's foreseeable criminal conduct on the premises'... . 'To establish that criminal acts were foreseeable, the criminal conduct at issue must be shown to be reasonably predictable based on the prior occurrence of the same or similar criminal activity at a location sufficiently proximate to the subject location' ... . Knowledge of ambient neighborhood crime, standing alone, is insufficient to establish foreseeability ... . Here, Re-

gal established its prima facie entitlement to judgment as a matter of law through the submission of evidence demonstrating that the physical altercation between the injured plaintiff and Casallas-Gonzalez was a sudden and unforeseeable event that could not have been anticipated or prevented by the provision of greater security measures ... . Regal also established prima facie that the alleged criminal acts committed by Casallas-Gonzalez were not reasonably predictable ...". ***Muzafarov v. Casallas-Gonzalez*, 2018 N.Y. Slip Op. 05771, Second Dept 8-15-18**

PERSONAL INJURY, CIVIL PROCEDURE, EVIDENCE.

DESPITE FAILURE TO DISCLOSE EXPERT, AFFIDAVIT FROM EXPERT PROPERLY CONSIDERED IN SUPPORT OF DEFENDANTS' SUMMARY JUDGMENT MOTION IN THIS SLIP AND FALL CASE, DEFECT FOUND TO BE TRIVIAL AS A MATTER OF LAW.

The Second Department determined Supreme Court properly considered an expert's affidavit as part of defendants' timely motion for summary judgment, and properly determined the defect which allegedly caused plaintiff's fall was trivial as a matter of law: " '[A] party's failure to disclose its experts pursuant to CPLR 3101(d)(1)(i) prior to the filing of a note of issue and certificate of readiness does not divest a court of the discretion to consider an affirmation or affidavit submitted by that party's experts in the context of a timely motion for summary judgment' ... . Contrary to the plaintiff's contention, the Supreme Court providently exercised its discretion in considering the expert affidavit submitted by the defendants on their motion for summary judgment, since there was no evidence that the failure to disclose the identity of their expert witness pursuant to CPLR 3101(d)(1)(I) was intentional or willful, and there was no showing of prejudice to the plaintiff ... . 'A defendant seeking dismissal of a complaint on the basis that the alleged defect is trivial must make a prima facie showing that the defect is, under the circumstances, physically insignificant and that the characteristics of the defect or the surrounding circumstances do not increases the risks it poses' ... . 'Photographs which fairly and accurately represent the accident site may be used to establish that a defect is trivial and not actionable' ... . Here, the defendants made a prima facie showing of their entitlement to judgment as a matter of law by submitting, inter alia, an expert affidavit, photographs acknowledged by the plaintiff as accurately reflecting the condition of the alleged defect as it existed at the time of the accident, and the plaintiff's deposition testimony describing the time, place, and circumstances of the injury. ...". ***Cobham v. 330 W. 34th SPE, LLC*, 2018 N.Y. Slip Op. 05748, Second Dept 8-15-18**

TOXIC TORTS, PERSONAL INJURY, MUNICIPAL LAW, CIVIL PROCEDURE, FRAUD.

ACTIONS AGAINST THE COUNTY STEMMING FROM PLAINTIFF'S EXPOSURE TO ASBESTOS WHILE WORKING ON COUNTY PROPERTY WERE TIME BARRED, INCLUDING AN ACTION ALLEGING FRAUDULENT CONCEALMENT OF THE PRESENCE OF ASBESTOS.

The Second Department determined plaintiff's actions stemming from exposure to asbestos, including an action against the county alleging fraudulent concealment of the presence of asbestos where plaintiff worked, were time barred: "Generally, an action to recover damages for personal injuries caused by the latent effects of exposure to any substance or combination of substances must be commenced within three years of the date of discovery of the injury by the plaintiff or from the date when, through the exercise of reasonable diligence, such injury should have been discovered by the plaintiff, whichever is earlier (see CPLR 214-c[2] ...). 'For purposes of CPLR 214-c, discovery occurs when, based upon an objective level of awareness of the dangers and consequences of the particular substance, the injured party discovers the primary condition on which the claim is based' ... . Where, as here, a claim is asserted against a municipality, the statute of limitations as to the claim against the municipality is 1 year and 90 days and is measured from the date of discovery of the injury or from the date when, through the exercise of reasonable diligence, the injury should have been discovered, whichever is earlier ...". ***O'Brien v. County of Nassau*, 2018 N.Y. Slip Op. 05774, Second Dept 8-15-18**

WORKERS' COMPENSATION, EMPLOYMENT LAW.

PLAINTIFF WAS A SPECIAL EMPLOYEE OF OWNER OF THE PROPERTY ON WHICH PLAINTIFF WAS INJURED, PLAINTIFF'S RECOVERY RESTRICTED TO WORKERS' COMPENSATION BENEFITS.

The Second Department determined plaintiff, who worked for Manpower Group and was injured on property owned by Crystal Springs, was not able to sue Crystal Springs. Plaintiff was deemed to be a special employee of Crystal Springs and his only remedy was Workers' Compensation: "Pursuant to Workers' Compensation Law §§ 11 and 29(6), an employee who is entitled to receive workers' compensation benefits may not sue his or her employer based on injuries sustained by the employee. 'For purposes of the Workers' Compensation Law, a person may be deemed to have more than one employer—a general employer and a special employer'... . 'The receipt of Workers' Compensation benefits from a general employer precludes an employee from commencing a negligence action against a special employer' ... . 'A special employee is one who is transferred for a limited time of whatever duration to the service of another'... .' [A] person's categorization as a special employee is usually a question of fact' ... 'However, the determination of special employment status may be made as a matter of law where the particular, undisputed critical facts compel that conclusion and present no triable issue of fact' ... . 'Many factors are weighed in deciding whether a special employment relationship exists, and generally no single one is decisive. . . . Principal factors include who has the right to control the employee's work, who is responsible for the payment of wages

and the furnishing of equipment, who has the right to discharge the employee, and whether the work being performed was in furtherance of the special employer's or the general employer's business. . . . The most significant factor is who controls and directs the manner, details, and ultimate result of the employee's work.' " ***James v. Crystal Springs Water*, 2018 N.Y. Slip Op. 05756, Second Dept 8-15-18**

THIRD DEPARTMENT

INSURANCE LAW, CONTRACT LAW.

BUSINESS PURSUITS EXCLUSION IN THE HOMEOWNER'S INSURANCE POLICY DID NOT APPLY BECAUSE THE FIRE WOULD HAVE OCCURRED IRRESPECTIVE OF THE OPERATION OF THE BUSINESS, A RESPITE HOME FOR ELDERLY AND SPECIAL NEEDS ADULTS, THREE OF THE RESIDENTS DIED IN THE FIRE STARTED BY CHILDREN PLAYING IN THE GARAGE.

The Third Department determined that an exclusion in defendant-insurer's policy applied and coverage for the deaths of three residents of a respite home for the elderly and special needs adults should not have been disclaimed. The respite home was a private residence. The homeowners' son, who was 11, and other children, were playing with a gas grill in the garage and a fire started, killing the three residents. Although the policy excluded coverage for business-related injuries, incidents that would have occurred irrespective of the presence of the business were covered: "It is undisputed that the act of the insureds' son and the other children in playing with the gas grill lighter and accelerants was the impetus for the fire. Although the insureds' negligence in operating their business — i.e., the failure to have an adequate fire evacuation plan — may have been a contributing cause of decedents' deaths, it cannot be said as matter of law that the fire also was not a contributing cause. In other words, the fire would have occurred regardless of the insureds' business operations, thereby rendering the exception to the business pursuits exclusion applicable. Because the record discloses that decedents' deaths were not caused solely by acts that fell wholly within the business pursuits exclusion, defendant cannot escape its indemnity obligations with respect to decedents' deaths ...". ***Waddy v. Genessee Patrons Coop. Ins. Co.*, 2018 N.Y. Slip Op. 05794, Third Dept 8-15-18**

REAL PROPERTY LAW, ENVIRONMENTAL LAW.

OWNERS OF A PARCEL OF LAND WHICH ADJOINS A PARCEL RESTRICTED BY A COVENANT TO REMAIN FOREVER WILD DO NOT HAVE STANDING TO ENFORCE THE COVENANT.

The Third Department determined that the plaintiffs, who own land (parcel A) which adjoins land owned by defendant (parcel B), did not have standing to enforce the "forever wild" covenant in the deed to parcel B: "The standing issue requires that we determine whether the forever wild restriction is personal or runs with the land ... . In making that determination, 'we are guided by the general principles that because the law favors free and unencumbered use of real property, covenants purporting to restrict such use are strictly construed and restraints will be enforced only when their existence has been established by clear and convincing proof by the owner of the dominant estate' ... . 'One of the elements of a restrictive covenant that runs with the land is that the 'parties [to the conveyance that created the covenant] intended its burden to attach to the servient parcel and its benefit to run with the dominant estate' ... . Although there is evidence that the parties intended that the burden of the forever wild restriction run with parcel B, the record is bereft of evidence suggesting they intended that parcel A benefit from the restriction. ... [T]he forever wild restriction does not fall within the category of restrictive covenants that is recognized as being enforceable by an owner of a parcel that derives from a common grantor. In that regard, covenants that are entered into to implement a general, or common, scheme for the improvement or development of real property are enforceable by any grantee ... . Here, there is no scheme of development or covenant that is common to all three parcels." ***Gorman v. Despart*, 2018 N.Y. Slip Op. 05795, Third Dept 8-16-18**

To view archived issues of CasePrepPlus,
visit www.nysba.org/caseprepplus.