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CasePrepPlus

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COURT OF APPEALS

ADMINISTRATIVE LAW, CONSTITUTIONAL LAW, EMPLOYMENT LAW.

DEPARTMENT OF HEALTH REGULATIONS PLACING HARD CAPS ON EXECUTIVE COMPENSATION AND ADMINISTRATIVE EXPENDITURES BY HEALTHCARE PROVIDERS RECEIVING PUBLIC FUNDS PROPERLY PROMULGATED.

The Court of Appeals, in a full-fledged opinion by Judge DiFiore, over a two-judge dissent, determined that the hard caps imposed by Department of Health (DOH) regulations on the executive compensation and administrative expenditures by healthcare providers receiving public funds were properly promulgated. Another regulation which sought to impose a soft cap was deemed to have exceeded the regulatory powers of the DOH. The court's analysis applied the *Boreali* factors which address the line between administrative rule-making and legislative policy-making (separation of powers): "In totality, following consideration of the Boreali factors, we are unconvinced that, in adopting the hard cap regulations, DOH exceeded its regulatory authority. The Legislature expressed a policy goal — that state healthcare funds should be expended in the most efficient and effective manner to maximize the quality and availability of public care — and the hard cap regulations, which focus exclusively on the appropriate use of state funds, are directly tied to that goal without improperly subverting it in favor of unrelated public policy interests ... . * * * ... [T]he soft cap regulation cannot be said to here 'fill in details of a broad policy.' Rather than determining the best way to regulate toward the legislative goal identified in its enabling legislation (i.e., using state funds to purchase affordable, quality care) with respect to the soft cap DOH appears to have envisioned an additional goal of limiting executive compensation as a matter of public policy and regulated to that end. Thus, we agree with the conclusion of the courts below that the soft cap regulation was promulgated in excess of DOH's administrative authority." ***Matter of LeadingAge N.Y., Inc. v. Shah*, 2018 N.Y. Slip Op. 06965, CtApp 10-18-18**

CONTRACT LAW, CIVIL PROCEDURE, SECURITIES.

WARRANTIES AND REPRESENTATIONS CLAUSE IN RESIDENTIAL MORTGAGE-BACKED SECURITIES PURCHASE AGREEMENT DID NOT POSTPONE THE ACCRUAL OF A BREACH OF CONTRACT ACTION, THE ACTION WAS THEREFORE TIME-BARRED.

The Court of Appeals, in a full-fledged opinion by Judge Fahey, over a two-judge dissent, determined that the language of a mortgage loan purchase and warranties agreement (MLPWA) did not postpone the accrual of a breach of contract cause of action and, therefore, the statute of limitations had expired. This is another case arising out of the sale of residential mortgage-backed securities which were supported by allegedly defective mortgage loans that did not comply with the representations and warranties in the agreement: "... [P]laintiff argued that the statute of limitations had yet to lapse, relying upon a provision in the MLPWA that it refers to as the 'accrual clause,' which states …: 'Any cause of action against the Seller relating to or arising out of the breach of any representations and warranties … shall accrue as to any Mortgage Loan upon (i) discovery of such breach by the Purchaser or notice thereof by the Seller to the Purchaser, (ii) failure by the Seller to cure such breach, substitute a Qualified Substitute Mortgage Loan or repurchase such Mortgage Loan as specified above and (iii) demand upon the Seller by the Purchaser for compliance with this Agreement.' ... In New York, the default accrual rule for breach of contract causes of action is that the cause of action accrues when the contract is breached ... . '[E]xcept in cases of fraud where the statute expressly provides otherwise, the statutory period of limitations begins to run from the time when liability for wrong has arisen even though the injured party may be ignorant of the existence of the wrong or injury'... . This Court has 'repeatedly rejected accrual dates which cannot be ascertained with any degree of certainty, in favor of a bright line approach,' and for that reason, we do not 'apply the discovery rule to statutes of limitations in contract actions' ... . 'To extend the highly exceptional discovery notion to general breach of contract actions would effectively eviscerate the Statute of Limitations in this commercial dispute arena' ... . * * * ... [General Obligations Law 17-103] requires an agreement to extend the statute of limitations to be made 'after accrual of the cause of action,' and it allows extension of the limitations period only for, at most, the time period that would apply if the cause of action had accrued on the date of the agreement, i.e., six years from the date that the agreement was made if the limitations period is six years ... . An agreement to extend the statute of limitations that does not comply with these requirements 'has no effect' ... . In addition, CPLR 201 provides that an action 'must be commenced within the time specified in this article unless a different time is prescribed by law or a shorter

time is prescribed by written agreement,' and '[n]o court shall extend the time limited by law for the commencement of an action.'" ***Deutsche Bank Natl. Trust Co. v. Flagstar Capital Mkts.*, 2018 N.Y. Slip Op. 06851, CtApp 10-16-18**

CRIMINAL LAW, ATTORNEYS.

DEFENDANT'S REQUEST TO REPRESENT HIMSELF, MADE AFTER ELEVEN JURORS HAD BEEN SELECTED, WAS PROPERLY REJECTED AS UNTIMELY.

The Court of Appeals, in a full-fledged opinion by Judge DiFiore, over a three-judge dissent, determined defendant's request to represent himself after 11 jurors had been selected was properly rejected as untimely: "... [P]rior to opening statements, but after 11 jurors were selected and sworn, defendant sought to invoke his right to proceed pro se. As set forth in the seminal case of People v. McIntyre, there is a three-prong analysis to determine when a defendant in a criminal case may invoke this right: '(1) the request [must be] unequivocal and timely asserted, (2) there [must have] been a knowing and intelligent waiver of the right to counsel, and (3) the defendant [must] not engage[] in conduct which would prevent the fair and orderly exposition of the issues' (36 NY2d 10, 17 [1974]). This appeal relates to the first prong — specifically, we must consider whether defendant's request was untimely as a matter of law because it was made after commencement of the trial. We hold that, in conformity with the statutory scheme set forth in the Criminal Procedure Law, the jury trial has commenced when jury selection begins. Accordingly, the trial court's determination that defendant's request to proceed pro se, made near the conclusion of jury selection, was untimely was not error. * * * ... [A] request to represent oneself in a criminal trial is timely where the application to proceed pro se is made before the trial commences. The Criminal Procedure Law defines the commencement of trial as the beginning of jury selection. Where 11 jurors had been selected and sworn as trial jurors before defendant's request to proceed pro se was made, defendant's request was untimely. As a result, there was no legal error in the trial court's determination that the request to represent himself was untimely and in its denial of such request without further inquiry." ***People v. Crespo*, 2018 N.Y. Slip Op. 06849, CtApp 10-16-18**

EDUCATION-SCHOOL LAW, EVIDENCE, ADMINISTRATIVE LAW.

COLLEGE'S DETERMINATION STUDENT VIOLATED THE CODE OF STUDENT CONDUCT SUPPORTED BY SUBSTANTIAL EVIDENCE, EVIDENTIARY STANDARD DEFINED.

The Court of Appeals, reversing the Appellate Division, determined that the college's determination that petitioner-student violated the code of student conduct was supported by substantial evidence: " 'We emphasize that [t]he substantial evidence standard is a minimal standard' ... , and 'demands only that a given inference is reasonable and plausible, not necessarily the most probable'... . Stated differently, '[r]ationality is what is reviewed under the substantial evidence rule' ...; substantial evidence is 'such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact'. Where substantial evidence exists, the reviewing court may not substitute its judgment for that of the agency, even if the court would have decided the matter differently ... . '[O]ften there is substantial evidence on both sides of an issue disputed before an administrative agency' ... . Where substantial evidence exists to support a decision being reviewed by the courts, the determination must be sustained, 'irrespective of whether a similar quantum of evidence is available to support other varying conclusions'... . Moreover, hearsay is admissible as competent evidence in an administrative proceeding, and if sufficiently relevant and probative may constitute substantial evidence even if contradicted by live testimony on credibility grounds ... . Contrary to petitioner's argument, the hearsay evidence proffered at the administrative hearing, along with petitioner's testimony, provides substantial evidence in support of the finding that he violated respondents' code of conduct. The hearing board also could have reasonably interpreted some of petitioner's conceded behavior as consciousness of guilt and concluded that his version of the events was not credible. Ultimately, it was the province of the hearing board to resolve any conflicts in the evidence and make credibility determinations. The Appellate Division improperly engaged in a re-weighing of the evidence when it substituted its own factual findings for those of respondents ...". ***Matter of Haug v. State Univ. of N.Y. at Potsdam*, 2018 N.Y. Slip Op. 06964, CtApp 10-18-18**

EMPLOYMENT LAW, LABOR LAW, ADMINISTRATIVE LAW.

APPRENTICES WHO WORK OUTSIDE THE THEIR APPRENTICESHIP TRAINING CANNOT BE PAID THE LOWER APPRENTICE RATES, HERE APPRENTICE GLAZIERS DOING IRONWORK WHEN INSTALLING STOREFRONTS MUST BE PAID AT THE HIGHER JOURNEY-LEVEL RATE.

The Court of Appeals, reversing the Appellate Division, determined that the prevailing wage provision of Labor Law § 220 was properly interpreted by the Department of Labor (DOL) to mean that apprentices who work outside of their apprenticeship training cannot be paid at the lower apprenticeship rate. Here apprentice glaziers who were doing ironwork when installing storefronts must be paid higher journey-level rates for ironwork: "... [T]he DOL interprets Labor Law § 220 (3-e) to mean that apprentices employed on public work projects may be paid apprentice rates only if they are performing tasks within the trade classification (e.g., 'glazier,' 'ironworker') that is the subject of the apprenticeship program in which they are enrolled. Apprentices who are performing tasks, in the installation of storefronts, curtain wall, and preglazed windows, that are classified as ironwork tasks may be paid the apprentice rate only if they are enrolled in an ironworker apprentice program (approved by the DOL), as opposed to a glazier apprentice program. Apprentices learning any trade other than

ironwork, including those enrolled in a glazier apprenticeship program, must be paid journey-level ironworker prevailing wages and benefit rates if they are engaged in the parts of a work process that are classified as ironwork tasks. * * * Given that Labor Law § 220 as a whole was 'intended to prevent employers from cutting standards of construction work by hiring an excessive number of unskilled employees, and to ensure that learning-level workers receive approved, supervised training' ... , it was rational for the DOL to conclude that section 220 (3-e) prohibits employers from diluting standards by hiring apprentices to perform tasks in trades for which they are not training." ***International Union of Painters & Allied Trades, Dist. Council No. 4 v. New York State Dept. of Labor*, 2018 N.Y. Slip Op. 06963, CtApp 10-18-18**

FAMILY LAW.

FAMILY COURT MADE REASONABLE EFFORTS TO REUNITE MOTHER, WHO IS INTELLECTUALLY DISABLED, WITH HER CHILD, WHO WAS REMOVED AFTER A NEGLECT FINDING, THE APPLICABILITY OF REASONABLE ACCOMMODATIONS UNDER THE AMERICANS WITH DISABILITIES ACT (ADA) AND THE ADA'S INTERPLAY WITH NEW YORK LAW IN THIS CONTEXT EXPLAINED.

The Court of Appeals, in a full-fledged opinion by Judge Wilson, over a dissent, determined that the New York City Administration for Children's Services (ACS) had made reasonable efforts toward family reunification in this case where mother, Stephanie L, is intellectually disabled and her child, Lacee L, after a neglect finding, was placed in kinship care. The court noted that the Americans with Disabilities Act (ADA) provides guidance in determined what constitutes reasonable accommodations under New York law: "Although ACS undoubtedly must comply with the ADA, ACS's failure to offer or provide certain services at the time a six-month permanency reporting period ends does not necessarily mean that ACS has failed to make 'reasonable efforts.' Family Court is not required to determine compliance with the ADA in the course of a permanency proceeding. The ADA's 'reasonable accommodations' test is often a time- and fact-intensive process with multiple layers of inquiry ... . That adjudication is best left to separate administrative or judicial proceedings, if required ... . Family Court is charged with assessing whether reasonable efforts were made to achieve the permanency goal 'in accordance with the best interest and safety of the child' ... . Here, the record reflects that Family Court was working assiduously to evaluate and accommodate Stephanie L.'s need for services tailored to her own disabilities as they related to parenting Lacee L. ... [T]he ADA contains no fixed time period for compliance, and the reasonableness of efforts to provide an accommodation will vary with the facts of each case ... . New York's six-month measuring period is not a final determination as to an agencies' efforts to provide services, but a periodic checkpoint to help ensure that at-risk children are not falling through bureaucratic fissures ... . Family Court has substantial discretion to make factual determinations that ACS' inchoate attempts to provide services have been 'reasonable.' In other words, even as to accommodations that might be required under the ADA, the failure of ACS to offer or deliver such accommodations by the end of a given measuring period does not necessarily mean that ACS has violated the ADA or failed to make reasonable efforts under New York law." ***Matter of Lacee L. (Dekodia L.)*, 2018 N.Y. Slip Op. 06966, CtApp 10-18-18**

FIRST DEPARTMENT

CRIMINAL LAW.

NO EVIDENCE ROBBERY VICTIM SAW A FIREARM, ROBBERY FIRST CONVICTION VACATED.

The First Department, reversing the robbery first conviction, over a partial dissent, determined that there was no evidence the victim saw a firearm: "... [T]he evidence did not establish the element of display of what appeared to be a firearm ... . The robbery was accomplished by assaulting the victim and taking his wallet. Although an eyewitness saw the display of what appeared to be a firearm, there was no evidence that the victim ever saw it ...". ***People v. Allende*, 2018 N.Y. Slip Op. 06967, First Dept 10-18-18**

CRIMINAL LAW, APPEALS, MENTAL HYGIENE LAW.

THE DENIAL OF DEFENDANT'S PETITION FOR A DE NOVO JURY TRIAL TO DETERMINE WHETHER HE IS MENTALLY ILL IS APPEALABLE AS OF RIGHT AND THE PETITION SHOULD HAVE BEEN GRANTED, AN EXCEPTION TO THE MOOTNESS DOCTRINE APPLIED AND DEFENSE COUNSEL'S STATEMENTS AND THE DEFENSE EXPERT'S TESTIMONY AT THE HEARING TO THE EFFECT DEFENDANT WAS MENTALLY ILL DID NOT CONSTITUTE A WAIVER OF THE DEFENDANT'S RIGHT TO A DE NOVO TRIAL.

The First Department, reversing Supreme Court, determined defendant's petition requesting a de novo jury trial on whether defendant is mentally ill should have been granted. The First Department held that the exception to the mootness doctrine applied to allow appeal, the denial of the petition was appealable as of right, and the remarks of defense counsel and the testimony of the defense expert at the hearing to the effect defendant is mentally ill did not waive defendant's right to a trial de novo: "This case satisfies the exception to the mootness doctrine because there is '(1) a likelihood of repetition, either between the parties or among other members of the public; (2) a phenomenon typically evading review; and (3) a showing of significant or important questions not previously passed on, i.e., substantial and novel issues' ... . Commitment

and retention proceedings generally involve orders of short duration, which typically evade review ... . Moreover, the issue before us is substantial, as it requires us to decide whether [*4]statements by defendant's counsel and his expert could operate to deprive a defendant of his statutory right to demand a jury trial de novo on the 'basic liberty issue' of whether he can be confined ... . … [T]there can be no serious dispute that the order of the motion court, which denied defendant the opportunity to present his case before a jury, as provided for under CPL 330.20(16), affected a substantial right. * * * Since the motion court's order affected a substantial right of defendant, we hold that his appeal is properly before us as one taken as of right under CPLR 5701(a)(2)(v). * * * Here, defendant timely expressed his dissatisfaction with a recommitment order that was based on a threshold finding that he had a mental illness. Once defendant met those core requirements, he was entitled to a de novo trial at which a jury would decide whether he was mentally ill based on the evidence then existing." ***Matter of New York State Off. of Mental Health v. Marco G.*, 2018 N.Y. Slip Op. 06998, First Dept 10-18-18**

PERSONAL INJURY.

QUESTION OF FACT WHETHER LEG OF A CLOTHING RACK IN A STORE WAS OPEN AND OBVIOUS, STORE'S MOTION FOR SUMMARY JUDGMENT IN THIS SLIP AND FALL CASE PROPERLY DENIED.

In this slip and fall case, the First Department determined there was a question of fact whether the leg of a closing rack in a store was an open and obvious danger: "There is no duty to warn of an open and obvious danger that can be seen by an 'observer reasonably using his or her senses' ... . 'Because of the factual nature of the inquiry, whether a danger is open and obvious is most often a jury question' ... . Here, defendant failed to show that the leg of the clothing rack that caused the accident was open and obvious and not inherently dangerous as a matter of law. Plaintiff testified that she could only see two racks ahead of her as she pushed her way through clothes when she tripped on the leg from one of the racks and that she did not see it before she fell ... . The photographs in the record are insufficient to establish defendant's burden to show that the leg of the clothing rack was an open obvious risk that was readily observable or that the premises was kept in a reasonably safe condition, because the deposition testimony establishes that none of them accurately depict the accident location as it appeared when plaintiff fell ... . Defendant further failed to meet its burden to establish that its employees did not cause or create the condition by placing the store's clothing racks too close together with enough merchandise on them to make it difficult for customers such as plaintiff to be able see the clothing rack's leg sticking out into the aisle. Its sales associate testified that it was defendant's employees who placed the racks at the accident location before plaintiff fell." ***Stadler v. Lord & Taylor LLC*, 2018 N.Y. Slip Op. 06861, First Dept 10-16-18**

ZONING, MUNICIPAL LAW, ADMINISTRATIVE LAW.

ROOF OF A PROPOSED BUILDING WOULD NOT BE ACCESSIBLE TO ALL WHO RESIDED ON THE ZONING LOT, THEREFORE THE OPEN SPACE REQUIREMENTS OF THE ZONING RESOLUTION WOULD NOT BE MET BY THE ROOF SPACE, PERMIT ALLOWING CONSTRUCTION OF THE BUILDING SHOULD NOT HAVE BEEN ISSUED.

The First Department, in a full-fledged opinion by Justice Oing, reversing Supreme Court, over a dissent, determined that the NYC "open space" zoning resolution (ZR) requirements cannot be satisfied on a building by building basis. The permit allowing the construction of a nursing home facility on a parking lot, therefore, should not have been issued. The open space on the roof of the proposed building would not be accessible to all who resided on the zoning lot. Such access is part of the definition of "open space:" "The language in ZR § 12-10 is 'clear and unambiguous' ... . ZR § 12-10 has always defined 'open space' as being 'accessible to and usable by all persons occupying a #dwelling unit# or a #rooming unit# on the #zoning lot#' ... . That language unambiguously requires open space to be accessible to all residents of any residential building on the zoning lot, not only the building containing the open space in question. To further bolster our finding that this language is clear and unambiguous, the 2011 amendments to ZR §§ 23-14 and 23-142 eliminated all references to 'building' and replaced it with 'zoning lot.' Equally dispositive is the identical change in the definition of 'open space ratio' in ZR § 12-10. Of course, the impracticality of allowing the residents of one building on a zoning lot to have access to, and use of, open space located on the rooftop of another building on the zoning lot is obvious. Yet, respondents' apparent contention concerning ZR § 12-10's open space requirement — that any rooftop that may be considered open space for the purposes of the open space requirement shall or must be considered open space irrespective of access — gives credence to the impracticality. That is not what ZR § 12-10 says. ZR § 12-10 unambiguously provides that '[o]pen space may be provided on the roof of . . . [a] building containing residences' and that '[a]ll such roof areas used for open space shall meet the requirements set forth in this definition.' Thus, any rooftop space that is to be considered open space for the purposes of satisfying the open space requirement under the Zoning Resolution must be accessible and usable by all residents on a zoning lot. Lest there be any doubt, we find that the 2011 amendments now preclude the use of the building-by-building methodology, which had been an exception to this clear statutory import." ***Matter of Peyton v. New York City Bd. of Stds. & Appeals*, 2018 N.Y. Slip Op. 06870, First Dept 10-16-18**

SECOND DEPARTMENT

CONTRACT LAW, DEBTOR-CREDITOR, CIVIL PROCEDURE.

FEE-SPLITTING ARRANGEMENT BETWEEN PHYSICIANS AND NON-PHYSICIANS IS ILLEGAL UNDER THE EDUCATION LAW AND CANNOT BE ENFORCED BY THE COURTS, SUPREME COURT PROPERLY SEARCHED THE RECORD AND AWARDED SUMMARY JUDGMENT TO DEFENDANTS IN THIS ACTION ON A PROMISSORY NOTE.

The Second Department determined Supreme Court properly searched the record and granted defendant's summary judgment in this action on a promissory note. The agreement at issue was an illegal contract involving a fee-splitting arrangement between physicians and non-physicians which is prohibited by the Education Law: "We agree with the Supreme Court's determination to deny those branches of the plaintiff's motion which were for summary judgment on the causes of action to recover the balance due on the promissory note and for an award of costs and attorney's fees, and, upon searching the record, to award the defendants summary judgment dismissing those causes of action. Contrary to the plaintiff's contentions, the evidence submitted by the parties in connection with the motion for summary judgment established, prima facie, that the agreement and the promissory note were a pretext for an unlawful fee-splitting arrangement in violation of the Education Law because they circumvented New York's prohibition on physicians splitting fees with nonphysicians (see Education Law §§ 6509-a, 6530[19] ...). 'It is the settled law of this State (and probably of every other State) that a party to an illegal contract cannot ask a court of law to help him [or her] carry out his [or her] illegal object, nor can such a person plead or prove in any court a case in which he [or she], as a basis for his [or her] claim, must show forth his [or her] illegal purpose' ... . 'Where the parties' arrangement is illegal the law will not extend its aid to either of the parties . . . or listen to their complaints against each other, but will leave them where their own acts have placed them' ...". ***Linchitz Practice Mgt., Inc. v. Daat Med. Mgt., LLC*, 2018 N.Y. Slip Op. 06891, Second Dept 10-17-18**

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA).

PEOPLE'S REQUEST FOR AN UPWARD DEPARTURE SHOULD NOT HAVE BEEN GRANTED.

The Second Department determined the People's request for an upward departure in this SORA risk assessment proceeding should not have been granted: "An upward departure is permitted only if the court concludes, upon clear and convincing evidence, 'that there exists an aggravating . . . factor of a kind, or to a degree, not otherwise adequately taken into account by the guidelines' ... . In determining whether an upward departure is permissible and, if permissible, appropriate, a SORA court must engage in a three-step inquiry. First, the court must determine whether the People have articulated, as a matter of law, a legitimate aggravating factor. Next, the court must determine whether the People have established, by clear and convincing evidence, the facts supporting the presence of that factor in the case before it. Upon the People's satisfaction of these two requirements, an upward departure becomes discretionary. If, upon examining all of the circumstances relevant to the offender's risk of reoffense and danger to the community, the court concludes that the presumptive risk level would result in an underassessment of the risk or danger of reoffense, it may upwardly depart ... . If, however, the People do not satisfy the first two requirements, the court does not have the discretion to depart from the presumptive risk level... . In this case, the People failed at the hearing to identify 'an aggravating . . . factor of a kind, or to a degree, not otherwise adequately taken into account by the guidelines' ... . Specifically, the defendant's abuse of trust within a family relationship is already adequately accounted for by the Guidelines ...". ***People v. Mota*, 2018 N.Y. Slip Op. 06950, Second Dept 10-17-18**

DENTAL MALPRACTICE, CIVIL PROCEDURE, PERSONAL INJURY.

QUESTION OF FACT WHETHER THE CONTINUOUS TREATMENT DOCTRINE APPLIED TO TOLL THE STATUTE OF LIMITATIONS IN THIS DENTAL MALPRACTICE ACTION, DOCTRINE MAY APPLY TO A DENTIST WHO RETIRED BASED ON TREATMENT PROVIDED BY OTHER DENTISTS.

The Second Department, reversing Supreme Court, determined there was a question of fact whether the continuous treatment doctrine tolled the statute of limitations in this dental malpractice case. The doctrine may apply to one of the dentists (Gold) who retired by imputing to him the continued treatment by other dentists: " 'Treatment' does not necessarily terminate upon the last visit, if further care or monitoring of the condition is explicitly anticipated by both physician and patient, as manifested by a regularly scheduled appointment for the near future ... . Thus, '[i]ncluded within the scope of continuous treatment' is a timely return visit instigated by the patient to complain about and seek treatment for a matter related to the initial treatment' ... . Even the monitoring of an abnormal condition may be sufficient to support the application of the continuous treatment toll ... . The critical inquiry is not whether the defendant failed to make a diagnosis or undertake a course of treatment during the period of limitation, but whether the plaintiff continued to seek treatment for the same or related conditions giving rise to his or her claim of malpractice, during that period... . Accordingly, a defendant cannot defeat the application of the continuous treatment doctrine merely because of a failure to make a correct diagnosis as to the underlying condition, if the defendant treated the plaintiff continuously over the relevant time period for symptoms that are ultimately

traced to that condition ... . Here, the plaintiff does not claim merely that the moving defendant failed to diagnose her condition and treat her for it … . Rather, she alleged that between 2009 and 2015, she was treated continuously for symptoms ultimately traced to abnormal and severe periodontal disease. Both the plaintiff's affidavit and her expert's affidavit, which referred to numerous specific notations in the plaintiff's dental records, raised triable issues of fact as to whether a course of treatment for periodontal disease was established and therefore the continuous treatment doctrine would apply to toll the statute of limitations ...". ***Cohen v. Gold*, 2018 N.Y. Slip Op. 06878, CtApp 10-17-18**

ELECTION LAW.

FAILURE TO TIMELY FILE CERTIFIED MINUTES OF THE CONVENTION REQUIRED REMOVAL OF TWO CANDIDATES FOR SUPREME COURT FROM THE BALLOT.

The Second Department, reversing Supreme Court, determined the failure to timely file the certified minutes of the convention of the Democratic Committee for the Thirteenth Judicial District required removal of the names of two Supreme Court Justice candidates from the ballot: "Under the statutory scheme, as to nominations flowing from a judicial nominating convention, certificates of party nomination must be filed not later than the day after the last day to hold such convention, and the minutes of such convention, duly certified by the Chair and Secretary, must be filed within 72 hours after the adjournment of the convention (see Election Law § 6-158[6]). The statute requires that both documents be filed; the certificate of party nomination may not stand alone, as the certified minutes provide the necessary authentication that the convention made the nominations set forth in the certificate ... . Since no certified convention minutes have been filed, and no reason has been offered as a basis upon which such failure could be excused, we are left with no alternative but to hold that the failure to file certified convention minutes renders the attempt to nominate these candidates ineffectual, and their names must be removed from the ballot." ***Matter of Fuentes v. Catalano*, 2018 N.Y. Slip Op. 07034, Second Dept 10-17-18**

EMPLOYMENT LAW, PERSONAL INJURY.

INSURANCE COMPANY NOT VICARIOUSLY LIABLE FOR AN ALLEGED CIVIL ASSAULT AND BATTERY BY A PRIVATE INVESTIGATOR, THE INVESTIGATOR WAS DEEMED A SUBCONTRACTOR, NOT AN EMPLOYEE.

The Second Department determined the MetLife was not vicariously liable for an alleged civil assault and battery by a private investigator, who was deemed to be a subcontractor, not an employee of MetLife: " 'The doctrine of respondeat superior renders a master vicariously liable for a tort committed by his [or her] servant within the scope of employment. Conversely, the general rule is that an employer who hires an independent contractor is not liable for the independent contractor's negligent acts' ... . ' The determination of whether an employer-employee relationship exists turns on whether the alleged employer exercises control over the results produced, or the means used to achieve the results. Control over the means is the more important consideration' ... . However, '[i]ncidental control over the results produced without further indicia of control over the means employed to achieve the results will not constitute substantial evidence of an employer-employee relationship' ... . Here, the contract between MetLife and Scope provided that Scope's 'affiliates and agents' were 'solely personnel of [Scope] and not MetLife,' and that Scope would have 'full responsibility for the actions and omissions of all personnel employed by [Scope] or any agents who are involved in performing the Services and for any losses arising therefrom.' The contract likewise contained a clause in which Scope agreed to indemnify MetLife for, inter alia, losses resulting from 'negligent or wrongful acts.' Although, as the plaintiffs point out, a rider to the contract sets forth 'Minimum Standards' for private investigators employed by Scope, '[t]he requirement that the work be done properly is a condition just as readily required of an independent contractor as of an employee and not conclusive as to either' ...". ***McHale v. Metropolitan Life Ins. Co.*, 2018 N.Y. Slip Op. 06895, Second Dept 10-17-18**

FAMILY LAW.

PAYOR OF VOLUNTARY SPOUSAL SUPPORT SHOULD HAVE BEEN GIVEN CREDIT FOR THOSE PAYMENTS IN THIS DIVORCE ACTION.

The Second Department, reversing Supreme Court, determined the voluntary support and legal-obligations payments made by husband to wife should have been credited against the arrears owed by him: "Voluntary payments made for the support and legal obligations of a spouse should be applied as a credit to the calculation of arrears owed by the payor spouse... . When the payor spouse relieves the other spouse from paying obligations for which the other spouse would be responsible, such payments must be considered as satisfying, in whole or part, maintenance and/or child support ... . Here, the defendant is entitled to credits against his maintenance obligation as established in the judgment of divorce with regard to the plaintiff's share of such expenses such as mortgage, real estate taxes, and automobile insurance payments ... . We disagree with the plaintiff's contention that the defendant's voluntary payments made pursuant to the preliminary conference order, which does not specifically enumerate the payments to be made, cannot qualify as 'payments of pendente lite spousal maintenance actually made pursuant to Court Order.' The preliminary conference order, as so-ordered by the Supreme Court, plainly contemplated that the defendant would continue to make voluntary payments for the benefit of the plaintiff and the parties' children. To deny the payor spouse a credit for payments made on account of the other spouse's expenses would not only be inequitable by providing a windfall for the benefitted spouse, but it would also discourage voluntary

support payments during the pendency of matrimonial actions and likely cause a precipitous rise of pendente lite motion practice by nonmonied spouses. Just as a party who unnecessarily prolongs a matrimonial action should not be rewarded, common sense dictates that a party who avoids unnecessary motion practice and preserves assets and time by agreeing to voluntarily pay the expenses of the other party should not be punished by being denied appropriate credits therefor." ***Stern v. Stern*, 2018 N.Y. Slip Op. 06959, Second Dept 10-17-18**

FAMILY LAW.

IN THIS PATERNITY PROCEEDING THE COURT SHOULD NOT HAVE ORDERED GENETIC MARKER TESTING WITHOUT FIRST RESOLVING THE ISSUE OF EQUITABLE ESTOPPEL.

The Second Department, remitting the matter for a hearing on equitable estoppel in this paternity proceeding, determined that generic marker testing should not have been ordered without first resolving the equitable estoppel issue: "Family Court Act § 532 provides that, in a proceeding to establish paternity, 'on the court's own motion or the motion of any party, [the court] shall order the mother, her child and the alleged father to submit to one or more genetic marker or DNA tests' ... . However, 'no paternity test shall be ordered upon a written finding by the court that it is not in the best interests of the child on the basis of, inter alia, equitable estoppel' ... . 'Where a party to a paternity proceeding raises an issue of equitable estoppel, that issue must be resolved before any biological testing is ordered' ... . Here, the Family Court should not have directed the petitioner and the child to submit to genetic marker testing before resolving the issue of equitable estoppel ... . We remit the matter ... for a hearing on the issue of equitable estoppel. If, and only if, the court determines that equitable estoppel should not be applied based upon the child's best interests, then the court should direct genetic marker or DNA tests and reach a determination thereon ...". ***Matter of George C.S. v. Kerry-Ann B.*, 2018 N.Y. Slip Op. 06917, Second Dept 10-17-18**

FAMILY LAW, CONTRACT LAW.

DOMESTIC RELATIONS ORDER WHICH CONFLICTED WITH THE STIPULATION OF SETTLEMENT IN THIS DIVORCE ACTION COULD NOT BE ENFORCED.

The Second Department, reversing Supreme Court, determined the stipulation of settlement in this divorce action controlled, and a domestic relations order (DRO) which did not conform to the stipulation could not be enforced: " 'A stipulation of settlement that has been incorporated but not merged into a judgment of divorce is a contract subject to principles of contract construction and interpretation' ... . 'A court may not write into a contract conditions the parties did not insert or, under the guise of construction, add or excise terms, and it may not construe the language in such a way as would distort the apparent meaning' ... . 'A domestic relations order entered pursuant to a stipulation of settlement can convey only those rights to which the parties stipulated as a basis for the judgment' ... . Contrary to the plaintiff's contention, the formula set forth in her proposed DRO conflicts with the stipulation of settlement, which provided for a 'fifty/fifty division of all pension benefits accumulated from the date of this marriage ... through the date of service of the summons and complaint ... ,' and that the plaintiff is 'to be the recipient of 50 percent of any and all benefits payable to the [defendant] upon his retirement which were accumulated during that period of time' … .. The stipulation of settlement made no reference to the formula set forth in *Majauskas v. Majauskas* (61 NY2d 481), nor can such a reference be implied from the unambiguous terms of the stipulation ... . Since the stipulation is controlling, the Supreme Court should not have granted the plaintiff's cross motion for leave to enter her proposed DRO ...". ***McPhillips v. McPhillips*, 2018 N.Y. Slip Op. 06896, Second Dept 10-17-18**

FAMILY LAW, CONTRACT LAW, ATTORNEYS.

PETITION FOR SANCTIONS AGAINST DEFENDANT'S ATTORNEY FOR FRIVOLOUS CONDUCT SHOULD HAVE BEEN GRANTED, DEFENDANT'S ATTORNEY, WITHOUT PROOF, CONTENDED THE PRENUPTIAL AGREEMENT HAD BEEN REPLACED, APPARENTLY IN ORDER TO DELAY THE PROCEEDINGS.

The Second Department, reversing Supreme Court, determined plaintiff's application to impose sanctions against defendant's attorney for frivolous conduct should have been granted: "... [T]he Supreme Court improvidently exercised its discretion in denying the plaintiff's application to impose sanctions in the form of attorneys' fees and expenses against the defendant's attorney pursuant to 22 NYCRR 130-1.1. Although '[a]n agreement between spouses or prospective spouses which is fair on its face will be enforced according to its terms unless there is proof of fraud, duress, overreaching, or unconscionability' ... , the defendant, through her attorney, moved to set aside the prenuptial agreement contending, in effect, that there had been a novation such that the prenuptial agreement had been replaced by the affidavit of support. The defendant's attorney provided no legal authority supporting this contention. Even though the court granted that branch of the plaintiff's cross motion which was, in effect, to preclude the defendant from seeking to set aside the parties' prenuptial agreement, the defendant's attorney later attempted, at the nonjury trial, to question the plaintiff about the affidavit of support, arguing, in effect, that the affidavit of support replaced the prenuptial agreement. The defense then rested without presenting evidence. The conduct of the defendant's attorney was frivolous within the meaning of 22 NYCRR 130-1.1(c). The defendant's attorney continued to advance his contention relating to the affidavit of support, which was completely without merit in law, in contravention of the Supreme Court's prior ruling. Moreover, that contention could not be supported by a reasonable argument for an extension, modification, or reversal of existing law, and the conduct of the defendant's

attorney appears to have been undertaken primarily to delay or prolong the resolution of the litigation ...". ***Tamburello v. Tamburello*, 2018 N.Y. Slip Op. 06961, Second Dept 10-17-18**

FAMILY LAW, EVIDENCE.

CUSTODY MODIFICATION PETITION SHOULD NOT HAVE BEEN GRANTED WITHOUT A HEARING.

The Second Department, remitting the matter for a hearing, determined that Family Court should not have granted mother's modification and violation petitions without holding a hearing: "Where a facially sufficient petition has been filed, modification of orders relating to custody and visitation generally require a full and comprehensive hearing at which a parent is to be afforded a full and fair opportunity to be heard ... . A decision regarding child custody and parental access should be based on admissible evidence ... . Here, in making its determination, the Family Court relied solely on information provided at court conferences, and the hearsay statements and conclusions of the forensic evaluator, whose opinions and credibility were untested by either party ... . The court should have conducted a hearing to ascertain the child's best interests before it modified the ... Order ...". ***Matter of Migliore v. Santiago*, 2018 N.Y. Slip Op. 06911, Second Dept 10-17-18**

FAMILY LAW, IMMIGRATION LAW, CRIMINAL LAW.

ADJUDICATED JUVENILE DELINQUENT NOT ELIGIBLE FOR SPECIAL IMMIGRANT JUVENILE STATUS (SIJS).

The Second Department, in a full-fledged opinion by Justice Rivera, over an extensive dissent, determined that an adjudicated juvenile delinquent was not eligible for special immigrant juvenile status (SIJS): "On the instant appeal, this Court is presented with the issue of whether the Family Court properly denied the renewed motion of Keanu S. (hereinafter the child) for the issuance of an order declaring that he is dependent on the Family Court and making specific findings so as to enable him to petition the United States Citizenship and Immigration Services for special immigrant juvenile status pursuant to 8 USC § 1101(a)(27)(J). Specifically, the Family Court rejected the child's contention that he was dependent upon a juvenile court, within the meaning of 8 USC § 1101(a)(27)(J)(i), by virtue of his placement in the custody of the Commissioner of Social Services of the City of New York following his adjudication as a juvenile delinquent. ... [W]e agree with the Family Court's determination and conclude that such a placement does not satisfy the requirement of dependency under the statute. * * * We hold that the child herein is not an intended beneficiary of the SIJS provisions. He was not placed in the custody of the Commissioner of Social Services due to his status as an abused, neglected, or abandoned child. Instead, he was placed in the custody of the Commissioner of Social Services after committing acts which, if committed by an adult, would have constituted serious crimes. His violent acts and misconduct have resulted in painful and terrible consequences to his victims. In fact, even while under probation, his encounters with the law persisted. In effect, the child attempts to utilize his wrongdoings and the resultant juvenile delinquency adjudication as a conduit or a vehicle to meet the dependency requirement for SIJS. Such a determination is in conflict with the primary intent of Congress in enacting the SIJS scheme, namely, to protect abused, neglected, and abandoned immigrant children. We cannot fathom that Congress envisioned, intended, or proposed that a child could satisfy this requirement by committing acts which, if committed by adults, would constitute crimes, so as to warrant a court's involvement or the legal commitment to an individual appointed by a state or juvenile court." ***Matter of Keanu S.*, 2018 N.Y. Slip Op. 06918, Second Dept 10-17-18**

FORECLOSURE, CIVIL PROCEDURE, EVIDENCE.

BANK'S EVIDENCE OF STANDING TO BRING THE FORECLOSURE ACTION INSUFFICIENT.

The Second Department, reversing Supreme Court, determined that plaintiff bank did not demonstrate standing to bring the foreclosure action: "Where, as here, the note has been endorsed in blank, the purported holder of the note must establish its standing by demonstrating that the original note was physically delivered to it prior to the commencement of the action (see UCC 3-202[1]; 3-204[2] ...). The plaintiff attempted to establish its standing through the affidavit of Jonathan Manko, an officer of Bank of America, N.A., the purported servicing agent for the plaintiff. Manko averred that he reviewed all of the documents attached to his affidavit and 'authenticate[d] them as coming directly from the loan file at issue herein and kept in the ordinary course of business.' Manko averred that this action was commenced on December 30, 2010, and at that time, the plaintiff was in possession of the original note and mortgage. However, the plaintiff failed to demonstrate that the records Manko relied upon were admissible under the business records exception to the hearsay rule (see CPLR 4518[a]) because Manko, an officer of Bank of America, N.A., did not attest that he was personally familiar with the plaintiff's record-keeping practices and procedures ...". ***Bank of N.Y. Mellon v. Selig*, 2018 N.Y. Slip Op. 06874, Second Dept 10-17-18**

LABOR LAW-CONSTRUCTION LAW, WORKERS' COMPENSATION, EVIDENCE.

PLAINTIFF IN THIS LABOR LAW § 240(1) ACTION WAS INJURED WHEN THE ROOF OF THE BUILDING COLLAPSED, HIS ACTION AGAINST HIS EMPLOYER (A DEMOLITION COMPANY) WAS BARRED BY THE EXCLUSIVITY PROVISIONS OF THE WORKERS' COMPENSATION LAW, QUESTION OF FACT WHETHER THE COLLAPSE WAS FORESEEABLE IN THE ACTION AGAINST THE BUILDING OWNER, EVIDENCE THAT BEAMS HAD BEEN CUT WAS INADMISSIBLE HEARSAY.

The Second Department determined plaintiff's Labor Law § 240(1) action against his employer (a demolition company) was barred by the exclusivity provisions of the Workers' Compensation Law. Plaintiff fell when the roof of the building collapsed. Plaintiff's motion for summary judgment against the owner of the building was properly denied because there was a question of fact whether the collapse of the roof was foreseeable: "In order for liability to be imposed under Labor Law § 240(1), there must be 'a foreseeable risk of injury from an elevation-related hazard . . . , as defendants are liable for all normal and foreseeable consequences of their acts' ... . In support of his motion for summary judgment, the plaintiff failed to demonstrate, prima facie, that the partial collapse of the roof and, in turn, the need for safety devices to protect the plaintiff from that hazard, were foreseeable ... . The plaintiff's deposition testimony that he was told that the roof collapsed because the beams from the third-floor ceiling had been cut constituted inadmissible hearsay ...". ***Paguay v. Cup of Tea, LLC*, 2018 N.Y. Slip Op. 06926, Second Dept 10-17-18**

MENTAL HYGIENE LAW.

POWERS GRANTED TO THE GUARDIAN FOR AN INCAPACITATED PERSON SHOULD NOT HAVE EXCEEDED THOSE RECOMMENDED BY THE COURT APPOINTED EVALUATOR.

The Second Department determined Supreme Court properly appointed a guardian for an incapacitated person, but should not have granted powers to the guardian over and above the powers recommended by the court-appointed evaluator: "Mental Hygiene Law § 81.11(f) provides that '[i]f on or before the return date designated in the order to show cause the alleged incapacitated person or counsel for the alleged incapacitated person raises issues of fact regarding the need for an appointment under this article and demands a jury trial of such issues, the court shall order a trial by jury thereof.' Mental Hygiene Law § 81.11(f) further states that '[f]ailure to make such a demand shall be deemed a waiver of the right to trial by jury.' ... Nevertheless, the judgment must be modified since the broad powers granted to the appointed guardian are inconsistent with the statutory requirement that the guardian be granted 'only those powers which are necessary to provide for personal needs and/or property management of the incapacitated person in such a manner as appropriate to the individual and which shall constitute the least restrictive form of intervention' (Mental Hygiene Law § 81.02[2]; see Mental Hygiene Law § 81.03[d]). Under the circumstances presented, the Supreme Court should have granted the guardian only those limited powers recommended in the report of the court-appointed evaluator." ***Matter of Heidi B. (Pasternak)*, 2018 N.Y. Slip Op. 06899, Second Dept 10-17-18**

MUNICIPAL LAW, WORKERS' COMPENSATION.

INJURED POLICE OFFICER CAN RECEIVE BOTH WORKERS' COMPENSATION AND GENERAL MUNICIPAL LAW § 207-c BENEFITS.

The Second Department determined a police officer injured trying to subdue and emotionally disturbed person can receive both Workers' Compensation and General Municipal Law § 207-c benefits. The police chief denied the General Municipal Law § 207-c benefits. Supreme Court annulled the police chief's denial holding that the police chief was estopped from denying the benefits because Workers' Compensation benefits had been awarded. The Second Department found that the estoppel doctrine did not apply but affirmed on different grounds: "... [T]he Workers' Compensation Board's determination in favor of the petitioner did not collaterally estop the Incorporated Village of Muttontown and the Chief of Police (hereinafter together the appellants) from denying the petitioner's application for General Municipal Law § 207-c benefits. '[A] determination by the Workers' Compensation Board that an injury is work-related' does not, 'by operation of collateral estoppel, automatically entitle an injured employee to General Municipal Law § 207-c benefits' ... . 'General Municipal Law 207-c benefits apply to a narrower class of work-related injury, relative to the performance of law enforcement duties' ... . A determination denying an application for benefits pursuant to General Municipal Law § 207-c may be annulled only if it was arbitrary and capricious ... . 'An action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts' ... . In order to establish entitlement to General Municipal Law § 207-c benefits, a municipal employee must prove a 'direct causal relationship between job duties and the resulting illness or injury'... . Here, the appellants' denial of the petitioner's application for benefits under General Municipal Law § 207-c was arbitrary and capricious. The documentation in the record established a causal connection between the performance of the petitioner's duties and her injuries." ***Matter of Lavin v. Incorporated Vil. of Muttontown*, 2018 N.Y. Slip Op. 06909, Second Dept 10-17-18**

PERSONAL INJURY.

PLAINTIFF OFFERED DIFFERENT EXPLANATIONS OF THE CAUSE OF HIS FALL, COURT HELD PLAINTIFF COULD NOT IDENTIFY THE CAUSE OF HIS FALL, REQUIRING DISMISSAL.

The Second Department determined plaintiff's action in this slip and fall case was properly dismissed. Plaintiff had offered several different allegations about the cause of his fall. The court held plaintiff was unable to identify the cause of his fall: "The defendant established its prima facie entitlement to judgment as a matter of law by demonstrating, through the submission, inter alia, of the plaintiff's deposition testimony and amended bill of particulars, that the plaintiff could not identify the cause of his fall without engaging in speculation ... . In opposition, the plaintiff failed to raise a triable issue of fact. The plaintiff's sworn statement, submitted in opposition to the defendant's motion, that he expected the floor of the diner to be 'level with the landing,' presented what appears to be a feigned issue of fact designed to avoid the consequences of his prior deposition testimony ... ". ***Pasqualoni v. Jacklou Corp.*, 2018 N.Y. Slip Op. 06928, Second Dept 10-17-18**

PERSONAL INJURY, EVIDENCE.

PLAINTIFF COULD NOT IDENTIFY THE CAUSE OF HER FALL FROM A FIRE ESCAPE, OPPOSITION PAPERS RAISED A FEIGNED ISSUE OF FACT, DEFENDANT'S SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined plaintiff could not identify the cause of her fall from a fire escape and defendant's motion for summary judgment should have been granted. The cause of the fall alleged in the opposition papers was deemed a feigned issue of fact: "The defendant established its prima facie entitlement to judgment as a matter of law through the plaintiff's deposition testimony, which demonstrated that the plaintiff was unable to identify the cause of her fall ... . In opposition, the plaintiff failed to raise a triable issue of fact ... . The plaintiff's affidavit, in which she identified the cause of her fall as a 'rusted metal shard' from the fire escape ladder, which pierced her hand, presented what appears to be a feigned issue of fact, designed to avoid the consequences of her earlier deposition testimony that her hand was 'thrown off' the ladder, but she did not know why ... . Under these circumstances, it would be speculative to conclude that any of the alleged statutory and building code violations or dangerous conditions set forth in her expert's affidavit, even if fully credited, proximately caused her accident ...". ***Burns v. Linden St. Realty, LLC*, 2018 N.Y. Slip Op. 06876, Second Dept 10-17-18**

PERSONAL INJURY, EVIDENCE.

DEFENDANTS DEMONSTRATED THEY DID NOT HAVE NOTICE OF A DEFECTIVE MOVIE THEATER SEAT AND THE RES IPSA LOQUITUR DOCTRINE DID NOT APPLY BECAUSE SOMEONE OTHER THAN DEFENDANTS COULD HAVE DAMAGED THE SEAT.

The Second Department, reversing Supreme Court, determined the defendants demonstrated it did not have notice of a defective seat in a movie theater and the res ipsa loquitur doctrine did not apply because the seat could have been caused by someone other than the defendants: "The defendants demonstrated, prima facie, that they neither created nor had actual or constructive notice of the defective condition of the subject seat ... . In opposition, the plaintiff failed to raise a triable issue of fact as to whether the defendants created or had notice of the particular condition ... . The doctrine of res ipsa loquitur was not applicable because the evidence presented did not adequately exclude the chance that the seat had been damaged by someone other than the defendants ...". ***Newisky v. United Artists Kaufman Astoria 14 Regal Cinemas*, 2018 N.Y. Slip Op. 06880, Second Dept 10-17-18**

PERSONAL INJURY, EVIDENCE, CIVIL PROCEDURE.

SLIP AND FALL OCCURRED WITHIN FOUR HOURS OF THE END OF PRECIPITATION, THEREFORE DEFENDANTS WERE NOT LIABLE, NEWLY SUBMITTED EVIDENCE IN SUPPORT OF THE MOTION TO RENEW DID NOT AFFECT THE APPLICABILITY OF THE FOUR HOUR RULE.

The Second Department determined the defendants demonstrated the storm in progress rule insulated them from liability in this snow and ice sidewalk slip and fall case because the slip and fall occurred less than four hours after the precipitation stopped. The motion to renew was properly denied because the newly submitted evidence did not call into question the applicability of the four-hour rule: "... [T]he defendants demonstrated that, pursuant to Administrative Code of the City of New York § 16-123(a), which requires building owners to clear ice and snow from an abutting sidewalk within four hours after the snow ceases to fall, excluding the hours between 9:00 p.m. and 7:00 a.m., they had no duty to clear the sidewalk until 10:20 a.m., which was several hours after the plaintiff's accident. The plaintiff moved, in effect, for leave to renew and reargue her opposition to the defendants' motion for summary judgment. In support of that branch of her motion which was for leave to renew, the plaintiff submitted the deposition testimony of a former employee of the defendants who witnessed the accident. The plaintiff argued that she was unable to present this evidence in opposition to the motion for summary judgment because the defendants deliberately delayed disclosing the identity of the witness until just before they made that motion. ... A motion for leave to renew 'shall be based upon new facts not offered on the prior motion that would change

the prior determination' (CPLR 2221[e][2]) and 'shall contain reasonable justification for the failure to present such facts on the prior motion'... . Here, we agree with the Supreme Court's determination to deny that branch of the plaintiff's motion which was for leave to renew her opposition to the defendants' motion for summary judgment. The newly submitted evidence would not have changed the prior determination ... . The new facts relied on, consisting of the deposition testimony of the defendants' former employee, did not raise a triable issue of fact as to whether the defendants had a duty to clear the sidewalk prior to the plaintiff's accident or whether they created or exacerbated a dangerous condition by engaging in negligent snow removal efforts." ***Ghoneim v. Vision Enters. Mgt., LLC*, 2018 N.Y. Slip Op. 06884. Second Dept 10-17-18**

PERSONAL INJURY, MUNICIPAL LAW, CIVIL PROCEDURE.

MOTION TO SERVE AN AMENDED NOTICE OF CLAIM AS A LATE NOTICE OF CLAIM PROPERLY DENIED, AMENDED NOTICE PURPORTED TO ADD NEW THEORIES OF LIABILITY AND A TIME-BARRED DERIVATIVE CLAIM.

The Second Department determined the motion to serve an amended notice of claim as a late notice of claim in this pedestrian accident case was properly denied. The original notice of claim alleged inadequate street lighting prevented the defendant driver from seeing the infant plaintiff. The amended notice of claim purported to add theories of liability and purported to add mother's derivative claim. Mother's claim could not be added because the infancy toll of the statute of limitations did not apply to her: "... [T]he plaintiffs failed to proffer a reasonable excuse for the delay in serving a notice of claim that described the infant plaintiff's injuries as arising from any negligence on the part of the Town other than that related to the nonfunctioning street lights, as described in the original notice of claim ... . The plaintiffs also failed to demonstrate a causal nexus between the infancy of one of the plaintiffs and the delay ... . Moreover, the plaintiffs did not demonstrate that, within 90 days after the accident or a reasonable time thereafter, the Town acquired actual knowledge of the essential facts constituting the claim that it was negligent with respect to anything other than the street lights... . The plaintiffs also failed to establish that the Town would not be substantially prejudiced by the delay ... . The proposed amended notice of claim with respect to the mother's derivative claim is time-barred because the statute of limitations expired before the plaintiffs moved to serve a late notice of claim, and the toll for infancy pursuant to CPLR 208 does not apply to a parent's derivative cause of action ... . We also agree with the Supreme Court's determination denying that branch of the plaintiffs' motion which was for leave to serve an amended notice of claim. A notice of claim may be amended only to correct good faith and nonprejudicial technical mistakes, omissions, or defects, not to substantively change the nature of the claim or the theory of liability ... . The proposed amendments to the notice of claim added new theories of liability related to the Town's ownership, operation, control, design, planning, study, retention, supervision, maintenance, repair, inspection, and management of the street and sidewalks on Swalm Street. Such amendments are not technical in nature and are not permitted as late-filed amendments to a notice of claim under General Municipal Law § 50-e(6) ...". ***Palacios v. Town of N. Hempstead*, 2018 N.Y. Slip Op. 06927, Second Dept 10-17-18**

THIRD DEPARTMENT

CIVIL PROCEDURE.

MOTION FOR LEAVE TO AMEND THE COMPLAINT SHOULD HAVE BEEN GRANTED, CRITERIA EXPLAINED.

The Third Department determined a motion for leave to amend the complaint should have been granted and explained the criteria: "CPLR 3025 (b) provides generally that leave to amend a pleading 'shall be freely given.' '[T]he rule on a motion for leave to amend a pleading is that the movant need not establish the merits of the proposed amendment and, '[i]n the absence of prejudice or surprise resulting directly from the delay in seeking leave, such applications are to be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit' ... . Here, the proposed amendment does not change the theory of recovery, but seeks to further develop facts supporting plaintiff's second cause of action for breach of contract. In addition, plaintiff did not delay in seeking the amendment and, given that the amendment is confined to matters that were in the original complaint, there is no prejudice to defendant ... . In view of the foregoing, leave to amend the complaint should have been granted." ***Gulfstream Anesthesia Consultants, P.A. v. Cortland Regional Med. Ctr., Inc.*, 2018 N.Y. Slip Op. 07018, Third Dept 10-18-18**

CIVIL PROCEDURE, MUNICIPAL LAW, ZONING, APPEALS.

REVERSING SUPREME COURT THE THIRD DEPARTMENT NOTED THAT SUMMARY JUDGMENT MAY BE AWARDED ON THE BASIS OF AN UNPLEADED CAUSE OF ACTION AND DID SO IN FAVOR OF THE TOWN IN THIS ZONING AND BUILDING CODE VIOLATION CASE.

The Third Department, reversing Supreme Court, determined the complaint in this zoning and building code violation case should not have been dismissed by the court sua sponte, and should not have awarded summary judgment to the defendant property owner. The Third Department noted that summary judgment may be awarded on an upleaded cause of action in the absence of prejudice and awarded summary judgment in favor of the town (plaintiff): "... [P]laintiff established

the material facts through an affidavit by its Code and Zoning Enforcement Officer, who detailed the zoning and building code violations found on defendant's property and averred that defendant had not remedied them after being served with orders to do so. The statements in the affidavit were corroborated by documentary and photographic evidence, and defendant submitted no opposition that might have raised material questions of fact. Supreme Court correctly observed that the complaint did not name a cause of action or identify the legal basis for the relief requested, and plaintiff's motion papers suffered from the same problem. Plaintiff now points to authority for the relief sought by it (see Executive Law § 382 [3]; Village Law § 7-714 ...), however, and summary judgment may be granted on an unpleaded cause of action 'where the proof supports such a cause of action and the opposing party has not been misled to its prejudice' ... . The evidence substantiates plaintiff's entitlement to the relief sought — relief that plaintiff has consistently sought and was narrowed in its notice of motion for summary judgment — and there is no indication that defendant was prejudiced by the failure to identify the statutes authorizing it sooner. Thus, we grant plaintiff's motion for summary judgment and remit so that Supreme Court may fashion an appropriate remedial order." ***Village of Sharon Springs v. Barr*, 2018 N.Y. Slip Op. 07022, Third Dept 10-18-19**

CONTRACT LAW, REAL ESTATE.

SELLERS STRUCTURED THEIR OFFER TO SELL PROPERTY WITH THE INTENT TO DEPRIVE PLAINTIFF OF HIS RIGHT OF FIRST REFUSAL, SELLERS EXHIBITED BAD FAITH AS A MATTER OF LAW, SUPREME COURT REVERSED.
The Third Department, reversing Supreme Court, determined plaintiff had the right of first refusal on the sale of a car wash. Defendant sellers' attempt to put a restriction on the deed to prohibit the operation of a car wash on the property was deemed a deliberate, bad faith effort to defeat plaintiff's first refusal rights: "The inclusion of the deed restriction within the purchase agreement was precisely targeted to prevent plaintiff — which defendants knew was in the car wash business and had entered into the right of first refusal as a means of preserving its opportunity to operate a car wash on the property — from exercising its first refusal rights. We find that [the] documentation conclusively demonstrates that defendants improperly structured their agreement to defeat plaintiff's first refusal rights .... As defendants did not disavow these submissions, or the intent contained therein, they failed to meet their burden to raise an issue of fact in this regard. Under the circumstances presented here, the purchase agreement was thus entered into in bad faith as a matter of law ... . Accordingly, as plaintiff demonstrated a right to enforcement of the contract, its cross motion for partial summary judgment should have been granted, and the complaint and cross claims should not have been dismissed." ***Clifton Land Co. LLC v. Magic Car Wash, LLC*, 2018 N.Y. Slip Op. 07027, Third Dept. 10-18-18**

FAMILY LAW.

FAMILY COURT SHOULD NOT HAVE DISMISSED MOTHER'S VISITATION PETITION FOR FAILURE TO PROSECUTE.
The Third Department, reversing Family Court, determined mother's petition to complete a visitation arrangement should not have been dismissed for failure to prosecute: "We agree with the mother that Family Court's determination ... to dismiss her petition on the basis of failure to prosecute was erroneous. Although the mother was not present at the ... hearing date, her absence was explained, albeit at the last minute, by her counsel, and counsel was ready to call the grandparents as witnesses as directed by the mother ... . Notwithstanding counsel's intent to do so and before the close of all proof, Family Court expressed an opinion about the mother's ability to prove her case, never permitted the mother's counsel to offer testimonial proof and subsequently dismissed the mother's petition. Under these circumstances, we find that there was no failure by the mother to prosecute her petition ... , and Family Court erred in dismissing it... . Accordingly, the matter must be remitted to continue the fact-finding hearing on the mother's petition. In view of the foregoing, the mother's remaining contentions are academic." ***Matter of Crisell v. Fletcher*, 2018 N.Y. Slip Op. 07016, Third Dept 10-18-18**

FAMILY LAW, CIVIL PROCEDURE.

MATTER REMITTED FOR FINDINGS CONCERNING WHETHER NEW YORK IS THE MORE APPROPRIATE OR CONVENIENT FORUM FOR THE CUSTODY PROCEEDINGS, CUSTODY PROCEEDINGS WERE PENDING IN A MISSISSIPPI COURT.
The Third Department, reversing and remitting the matter to make a record, determined that Family Court properly communicated with the Mississippi court in which mother had also commenced a pending custody proceeding but did not make a sufficient record in finding that Mississippi court retained jurisdiction of the custody: "The Mississippi court's statements during the conference confirm that a child custody proceeding was still pending in that state and had been commenced prior to the mother's Family Court proceeding, as those terms are defined by the UCCJEA [Uniform Child Custody Jurisdiction and Enforcement Act] ... . Because the custody portion of the divorce action was still pending in Mississippi when the mother filed her custody modification petition in Family Court, the applicable provision of the UCCJEA is Domestic Relations Law § 76-e, entitled '[s]imultaneous proceedings.' Pursuant to that statute, a New York court may not exercise jurisdiction if, at the time the New York proceeding is commenced, a custody proceeding concerning the same child

has been commenced in another state having jurisdiction under the UCCJEA, unless a court in the other state terminates or stays that proceeding because a New York court constitutes a more convenient forum under Domestic Relations Law § 76-f ... . Procedurally, if a New York court determines that a custody proceeding has been commenced in another court in accordance with the UCCJEA, the New York court must stay its proceeding, communicate with the other court and, if the other court does not determine that New York is the more appropriate forum, dismiss the proceeding (see Domestic Relations Law § 76-e [2]). ... Although Family Court stated in its order that the Mississippi court 'has retained jurisdiction,' that does not sufficiently answer the jurisdictional question under the UCCJEA. The Mississippi court, as the court where the first of two simultaneous child custody proceedings was filed, had to determine whether New York would be a more appropriate or convenient forum ...". ***Matter of Hiles v. Hiles*, 2018 N.Y. Slip Op. 07004, Third Dept 10-18-18**

FAMILY LAW, EVIDENCE.

FATHER REBUTTED THE STATUTORY PRESUMPTION THAT THE CHILD'S MEDICAL CONDITION WAS THE RESULT OF NEGLECT AND ABUSE, NEGLECT AND ABUSE FINDINGS REVERSED.

The Third Department, reversing Family Court, determined the respondent father had rebutted the presumption that the child's medical condition was caused by abuse with medical evidence. Because the neglect and abuse petition relied entirely on the statutory presumption, the neglect and abuse findings were not supported: "Family Ct Act § 1046 (a) (ii) provides that petitioner may establish 'a prima facie case of child abuse or neglect . . . through evidence that the child sustained an injury that would ordinarily not occur absent an act or omission of the respondent, and that the respondent was the caretaker of the child at the time that the injury occurred' ... . Contrary to respondent's contention, petitioner did so here. It was undisputed that respondent was alone with the child when she stopped breathing, and the consulting pediatrician testified to her involvement in the child's case and the reasons that she became convinced that recent, nonaccidental trauma was the only explanation for the child's condition. This prima facie case did not guarantee a finding of abuse or neglect, but 'establish[ed] a rebuttable presumption of parental culpability which the court may or may not accept based upon all the evidence in the record'... . Petitioner must still prove abuse or neglect by a preponderance of the evidence and, importantly, proof of 'a reasonable explanation for the child's injuries' will rebut the presumption of culpability ... . As such, before relying upon the presumption set forth by Family Ct Act § 1046 (a) (ii), 'the court should consider such factors as the strength of the prima facie case and the credibility of the witnesses testifying in support of it, the nature of the injury, the age of the child, relevant medical or scientific evidence and the reasonableness of the caretaker's explanation in light of all the circumstances' ...". ***Matter of Liana HH. (Christopher HH.)*, 2018 N.Y. Slip Op. 07001, Third Dept 10-18-18**

FAMILY LAW, EVIDENCE.

MOTHER WAS NOT GIVEN THE CHANCE TO ADEQUATELY RESPOND TO THE ALLEGATIONS FORMING THE BASIS OF FAMILY COURT'S FINDING THAT MOTHER VIOLATED A VISITATION ORDER, MATTER REMITTED.

The Third Department, remitting the matter, determined that mother never got the chance to respond to allegations which were the basis for granting father's violation petition. Father alleged mother denied the father parenting time in violation of the temporary order of custody and visitation: "We agree with the mother that she was not given adequate notice of the allegation forming the basis of Family Court's determination. In granting the father's violation petition, Family Court found that the mother violated the June 2015 order by denying the father parenting time on January 22, 2017. Any denial of visitation on this specific date, however, was never alleged by the father in either his violation petition or his emergency application. Rather, this claim was raised for the first time when the parties appeared before Family Court on January 23, 2017. Moreover, Family Court did not entertain any proof with respect to the actual allegations in the father's pleadings. In this regard, when the mother's counsel inquired as to the purpose of the January 23, 2017 hearing, Family Court responded that it was to address specifically what transpired on January 22, 2017. Furthermore, there is no indication in the record that the father moved to amend his pleadings to add an allegation relating to the January 22, 2017 incident ... or moved to conform the pleadings to the proof adduced at the hearing after the parties testified ...". ***Matter of Pike v. Bigelow*, 2018 N.Y. Slip Op. 07006, Third Dept 10-18-18**

FAMILY LAW, EVIDENCE.

MOTHER'S PETITION FOR CUSTODY AND PERMISSION TO RELOCATE TO TEXAS SHOULD HAVE BEEN GRANTED.

The Third Department, reversing Family Court, determined mother's request to relocate should have been granted: "We find that Family Court's determination denying the mother's relocation request and granting the parties joint legal custody is not supported by a sound and substantial basis in the record. If not permitted to relocate, the mother's only potential resource — besides public assistance — would be the father. Given the father's significant criminal history — which includes domestic violence against the mother — this is not a situation we can countenance. Further, there is nothing in the record to

suggest that the father is willing or able to assist the mother or the child in any way. The undisputed evidence was that the father's financial support and parenting time was limited, sporadic and offered at his whim. Indisputably, the mother has been the child's primary caretaker, the father provided almost no financial support and his very limited relationship with the child existed only through the mother's efforts. Moreover, given the father's history and evidence of domestic violence, we do not believe that joint legal custody is in the child's best interests ... . We note that, although not dispositive, the trial attorney for the child did not oppose the mother's petition or her relocation request ... . We are mindful that our holding results in the child residing a significant distance from the father. The record indicates that the mother has consistently made the effort to remain in contact with the father, to send pictures and to initiate telephone calls and visits. We discern no basis upon which to conclude that she will not continue to do so. As the child grows, such contact will become more important and have a greater impact on the father's ability to establish and maintain a relationship with the child. Accordingly, we remit this matter to Family Court to establish an appropriate schedule for telephone calls and parenting time with the father." ***Matter of Fisher v. Perez*, 2018 N.Y. Slip Op. 07014, Third Dept 10-18-18**

FAMILY LAW, EVIDENCE, APPEALS.

FAMILY COURT SHOULD HAVE HELD A HEARING TO DETERMINE WHETHER THE MATERNAL GRANDPARENTS HAD STANDING TO SEEK VISITATION AND WHETHER VISITATION WOULD BE IN THE CHILD'S BEST INTERESTS, FAMILY COURT HAD MADE FINDINGS BASED UPON PRIOR PROCEEDINGS THAT WERE NOT PART OF THE RECORD.

The Third Department held that a hearing was necessary to determine whether the maternal grandparents had standing to seek visitation and whether such visitation would be in the child's best interests. Family Court, based on prior proceedings that were not part of the record, had found that the maternal grandparents had standing but visitation would not be in the best interests of the child: "A grandparent may establish a statutory right to visitation where 'circumstances show that conditions exist which equity would see fit to intervene' ... . To determine whether visitation is appropriate, a court must first decide whether the grandparent has standing to seek visitation before deciding whether visitation is in the child's best interests ... . Standing is established where the grandparent demonstrates that there is 'a sufficient existing relationship with the[] grandchild . . . [or] a sufficient effort to establish one, so that the court perceives it as one deserving the court's intervention'... . The sufficiency of the grandparent's efforts in this regard 'must always be measured against what [he or she] could reasonably have done under the circumstances' ... . If standing is established, the court's best interests determination 'requires evaluation of a variety of factors, including the nature and extent of the existing relationship between the grandparent and child, the basis and reasonableness of the parent's objections, the grandparent's nurturing skills and attitude toward the parent[], the attorney for the child's assessment and the child's wishes' ...". ***Matter of Ferguson v. Weaver*, 2018 N.Y. Slip Op. 07005, Third Dept 10-18-18**

FREEDOM OF INFORMATION LAW (FOIL), RETIREMENT AND SOCIAL SECURITY LAW.

POLICE PERSONNEL RECORDS CAN BE REDACTED TO REMOVE PERSONAL IDENTIFYING INFORMATION.

The Third Department, reversing Supreme Court, determined that the police personnel records sought in the FOIL request could be redacted to remove personal identifying information: "When this case was previously before this Court, we remitted the matter to Supreme Court for an in camera inspection of records related to the hiring of certain individuals for high-ranking positions within the police departments of the four respondent institutions that are operated by respondent State University of New York ... . The matter was remitted with the directive that the court determine the extent to which the requested documents contain information exempt from disclosure and whether such information can be redacted while still protecting the personal privacy of those individuals ... . On remittal, Supreme Court reviewed 1,344 pages of resumes, applications and related correspondence sent by applicants for the subject police department positions and, in May 2017, it maintained that redaction was not possible. * * * While respondents argue that such extreme redaction renders the remaining information useless in determining whether the four respondent institutions complied with Retirement and Social Security Law § 211 in issuing waivers to the incumbents of the subject police department positions, petitioner need not demonstrate the information's potential efficacy to obtain disclosure ... Further, as the identifying information falls squarely within a personal privacy Freedom of Information Law exemption, the court need not engage in a 'balancing [of] the privacy interests at stake against the public interest in disclosure of the information' ... , which would have required a review of the purpose of the request and the relevancy of the records. As such, we reject respondents' notion that all substantive information is identifying, and, while we acknowledge that the task is arduous, the four respondent institutions must review the data once again, delete identifying information while leaving nonidentifying metrics intact and disclose the same. By way of guidance, much of the information concerning particular states, schools and police departments can be easily redacted, leaving the raw data, including positions held, education level, rank and other relevant experience." ***Matter of Police Benevolent Assn. of N.Y. State, Inc. v. State of New York*, 2018 N.Y. Slip Op. 07019, Third Dept 10-18-18**

INSURANCE LAW, CIVIL PROCEDURE, EVIDENCE.

THE INSURANCE POLICY WAS PROPERLY AUTHENTICATED AND IT EXCLUDED COVERAGE FOR THE PROPERTY DAMAGE, MOTION TO DISMISS THE COMPLAINT SHOULD HAVE BEEN GRANTED.

The Third Department, reversing Supreme Court, determined the insurance policy was properly authenticated and the policy unambiguously excluded coverage for the property damage at issue and dismissed the complaint: "The insurance policy submitted by defendant in support of its motion was sufficiently authenticated by the sworn affidavit of defendant's president, who stated that, based upon his review of defendant's files, defendant's proffer was a 'full and complete copy' of the insurance policy issued to plaintiffs ... . [W]e find that the terms of the policy conclusively refute plaintiffs' claim that defendant is obligated to cover the structural damage caused to their barn by Calhoun's operation of their tractor and hay baler. By its unambiguous terms, the policy insured plaintiffs only against direct physical loss caused to the barn by 11 specifically delineated perils. Accepting the allegations in plaintiffs' complaint as true and affording them the benefit of every possible favorable inference... , the alleged cause of the structural damage here — the tractor and hay baler 'br[ea] k[ing] through the barn floor' — does not fall under one of the covered perils. The section of the policy cited by plaintiffs as providing coverage is inapplicable, as that section applies solely to liability insurance coverage arising out of third-party claims made against plaintiffs. Accordingly, as the insurance policy conclusively disposes of plaintiffs' claim, defendant's motion to dismiss pursuant to CPLR 3211 (a) (1) should have been granted and the complaint dismissed ...". ***Calhoun v. Midrox Ins. Co.*, 2018 N.Y. Slip Op. 07024, Third Dept 10-18-18**

MEDICAID, ADMINISTRATIVE LAW.

MATTER REMITTED TO THE COMMISSIONER OF HEALTH TO DETERMINE WHETHER BONE SURGERY TO REPAIR CANCER-RELATED DAMAGE TO PETITIONER'S JAW IS COVERED UNDER MEDICAID, IF THERE IS A CONFLICT BETWEEN THE DSS REGULATIONS AND THE DEPARTMENT OF HEALTH'S GUIDELINES, THE REGULATIONS CONTROL.

The Third Department, annulling the Commissioner of Health's determination, in a full-fledged opinion by Justice McCarthy, sent the matter back with instruction to consider whether there was a conflict between the Medicaid (Department of Social Services, DSS) regulations and the Department of Health's (DOH's) guidelines. If there is a conflict, the regulations prevail. Petitioner's request for osseous surgery to reconstruct her jaw after damage caused by cancer treatments was denied. The Commissioner had determined the surgery was not covered: "Medicaid does not cover every medically necessary procedure; 'medical necessity and coverage are distinct concepts' ... . A 'medical necessity' analysis is only required and relevant when the requested procedure is covered in the first place. Thus, the initial question is whether osseous surgery is covered by New York's Medicaid program. * * * The Commissioner committed an error of law when he determined, based on the Medicaid dental manual and without recognizing a potential conflict between the manual and the regulations, that osseous surgery cannot be a covered service under Medicaid. Due to this error, respondents did not reach other issues. Specifically, there was no determination as to whether petitioner established that her request for prior approval of that surgery should be granted pursuant to the regulation as a 'dental service[] required for . . . the relief of pain' (18 NYCRR 506.2 [b] [1]). If she did not meet her burden, there is no conflict between the regulation and guidelines, so the Medicaid dental manual would prevent approval of the surgery. If petitioner did establish that the surgery is required to relieve her pain (which would, perforce, mean that the surgery was medically necessary), the regulations would prevail and the Commissioner must approve the surgery as covered by Medicaid. Because this issue requires factual findings and falls within DOH's expertise, it should be decided by the agency in the first instance ...". ***Matter of Rovinsky v. Zucker*, 2018 N.Y. Slip Op. 07026, Third Dept 10-18-18**

MUNICIPAL LAW, NEGLIGENCE, TRESPASS.

NEGLIGENCE AND TRESPASS ACTIONS AGAINST THE TOWN BASED UPON A LANDSLIDE WHICH CAUSED FLOODING OF PLAINTIFF'S LAND SHOULD HAVE BEEN DISMISSED.

The Third Department determined the negligence and trespass action against the town in this lawsuit stemming from a landslide should have been dismissed. The town had issued a permit for the placement of fill. Plaintiff's alleged the landslide blocked a stream and flooded plaintiff's land: "... [T]o hold a municipality liable for negligence in the exercise of a governmental function, a plaintiff must show that the municipality owed it a special duty beyond that owed to the public at large ... . As a basis for the Town's negligence, the complaint in this action alleges ... that plaintiff owned land near the ... property that was affected by the landslide and resulting flooding. However, the complaint does not allege that the Town had assumed any duty to act on plaintiff's behalf or that the Town made any representations upon which plaintiff justifiably relied. ... '[A] trespass claim represents an injury to the right of possession, and the elements of a trespass cause of action are an intentional entry onto the land of another without permission. Regarding intent, the defendant 'must intend the act which amounts to or produces the unlawful invasion, and the intrusion must at least be the immediate or inevitable conse-

quence of what he or she willfully does, or which he or she does so negligently as to amount to willfulness' ... . Plaintiff alleged that the Town issued the permit for the performance of work, including grading and other land disturbance activities and placement of fill, notwithstanding its knowledge that significant slope failures resulting in landslides had previously occurred in the immediate vicinity, which the complaint alleges constituted a 'dangerous recurring condition.' Plaintiff further alleged that the Town failed to properly supervise the work that was conducted pursuant to the permit; however, it did not allege that the Town directly participated in placement of the fill that caused the landslide." ***City of Albany v. Normanskill Cr., LLC*, 2018 N.Y. Slip Op. 07020, Third Dept 10-18-18**

REAL PROPERTY TAX LAW.

PROPERTY TAX ASSESSMENTS WERE PROPERLY REDUCED BY OVER $20 MILLION BUT THE COURT CANNOT REDUCE THE ASSESSMENTS BELOW THE AMOUNTS REQUESTED IN THE PETITION.

The Third Department upheld the reduction in the assessed value of petitioner's property by over $20 million, but noted the court cannot reduce the assessment to an amount lower than that requested in the petition: "Supreme Court erred when it valued the property below the amount that petitioner requested in the petitions. As relevant here, 'an assessment may not be ordered reduced to an amount less than that requested by the petitioner in a petition or any amended petition' (RPTL 720 [1] [b]...). In its RPTL article 7 petitions, petitioner sought to reduce the 2015 assessed value of the property to only $28 million and the 2016 assessed value to only $25 million. As Supreme Court assessed the property for the 2015 tax year at $27,912,000 and for the 2016 tax year at $24,483,000, the orders and judgments must be modified, accordingly." ***Matter of Champlain Ctr. N. LLC v. Town of Plattsburgh*, 2018 N.Y. Slip Op. 07021, Third Dept 10-18-18**

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