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FIRST DEPARTMENT

CRIMINAL LAW.

NO EVIDENCE THE VICTIM, AS OPPOSED TO AN EYEWITNESS, SAW A FIREARM, ROBBERY FIRST CONVICTION REVERSED.

The First Department, reversing defendant's robbery first conviction, determined that, although a witness saw a firearm, the victim did not: "... [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*, 2019 N.Y. Slip Op. 00195, First Dept 1-10-19**

CRIMINAL LAW.

FAILURE TO INSTRUCT THE JURY ON THE MEANING OF 'DEPRIVE' WITH RESPECT TO THE LARCENY ELEMENT OF ROBBERY REQUIRED REVERSAL OF DEFENDANT'S FELONY MURDER AND CRIMINAL POSSESSION OF A WEAPON CONVICTIONS.

The First Department, reversing defendant's felony murder and criminal possession of a weapon convictions, determined that the jury should have been instructed on the definition of "deprive" with respect to the larceny aspect of the underlying robbery: "In connection with the larceny element of attempted robbery, the offense underlying the felony murder charge, the court, upon defense counsel's request, should have instructed the jury on the definition of 'deprive' ... . The failure to so charge the jury as requested constitutes reversible error, since such omission 'could have misled the jury into thinking that any withholding, permanent or temporary, constituted larceny'... . Indeed, 'the concepts of deprive' and appropriate' . . . are essential to a definition of larcenous intent' and they connote a purpose . . . to exert permanent or virtually permanent use thereof' ... . It is the function of the jury to determine whether defendant intended to rob the victim and permanently keep the property taken from him. By failing to give the requested charge, the court usurped that function. While there are some cases in which the court's omission of the definition of a term or terms may constitute harmless error, under the facts of this case, the error was not harmless ...". ***People v. Ataroua*, 2019 N.Y. Slip Op. 00197, First Dept 1-10-19**

CRIMINAL LAW.

THE BATSON RECONSTRUCTION HEARING, HELD AFTER THE MATTER WAS SENT BACK BECAUSE OF THE LACK OF AN ADEQUATE RECORD FOR APPEAL, WAS ITSELF DEFICIENT, THE ORIGINAL PROSECUTOR DID NOT TESTIFY AND THE NOTES OF THE ORIGINAL PROSECUTOR WERE NOT PROVIDED TO THE COURT, CONVICTIONS REVERSED AND INDICTMENT DISMISSED.

The First Department, in a full-fledged opinion by Justice Manzanet-Daniels, over two separate dissenting opinions, reversing the defendant's convictions and dismissing the indictment, determined the Batson reconstruction hearing, held after the matter was sent back to the trial court because the record on appeal was not sufficient, did not demonstrate that the prosecution's peremptory challenges to African-American-male venire persons were justified by nondiscriminatory reasons. The Batson reconstruction hearing was itself deficient because it was held with a different prosecutor and the original prosecutor's notes were not provided, nor did the orignal prosecutor testify: "The purpose of a Batson reconstruction hearing is to attempt to recreate, after the fact, a record of the prosecutor's proffered justifications for striking certain venire persons. At such a hearing, it is typical to rely on the contemporaneous notes of the prosecutor and to elicit testimony from him or her. The prosecutor testifies as a sworn witness, and is subject to cross-examination concerning the strike or strikes ... . '[T]here is no better evidence of a prosecutor's intent than her notes from jury selection'... ; indeed, seminal opinions on Batson have referred to jury selection notes as evidence of prosecutorial bias (see e.g. Foster v. Chatman, ___ US ___, 136 S Ct 1737, 1755 [2016]). In Foster, the prosecutor's notes were not disclosed until post-conviction proceedings years later. The notes showed the letter "B" next to the names of the African American jurors and their names highlighted in green pen. Three decades after trial, the contents of the notes led the Supreme Court to reverse the defendant's conviction. No testimony or notes were offered at this Batson reconstruction hearing. The ADA who conducted the voir dire did not appear and his notes were

never disclosed. The ADA at the reconstruction hearing could only speculate as to the motives of his colleague. This procedure was insufficient to satisfy the requirements of Batson." ***People v. Watson*, 2019 N.Y. Slip Op. 00217, First Dept 1-10-19**

FORECLOSURE.

BANK'S POSSESSION OF THE NOTES CONSOLIDATED BY A CONSOLIDATION, EXTENSION AND MODIFICATION AGREEMENT (CEMA) CONFERRED STANDING TO BRING THE FORECLOSURE ACTION, POSSESSION OF THE ORIGINAL NOTES WAS NOT REQUIRED.

The First Department, in a full-fledged opinion by Justice Tom, over a two-justice dissent. determined that defendants' excuse for their default and their argument plaintiff bank (Wells Fargo) did not have standing were properly rejected by Supreme Court. The two dissenting justices agreed with defendants' arguments. Defendants alleged in their motion to vacate the default that their attorney received the summary judgment motion, filed for bankruptcy and never responded to the motion. On the standing issue defendants argued that possession of the original 2005 and 2008 notes issued by a nonparty, not the subsequent Consolidation, Extension and Modification Agreement (CEMA) note, which consolidated the 2005 and 2008 notes, was required to confer standing: "... [T]he CEMA makes clear that the consolidated note superseded the original notes and is the operative document in this case. As did the plaintiff in Weiss v. Phillips (157 AD3d 1 [1st Dept 2017]), Wells Fargo seeks foreclosure based on the CEMA and consolidated note. As we held the plaintiff did in Weiss, Wells Fargo established its entitlement to relief by submitting the CEMA, consolidated note, unchallenged evidence that it is the holder of the consolidated note, and nonpayment of the loan by the borrowers. As we also held in Weiss, 'In this case, because of the CEMA, standing is not an issue' and any absence of the underlying notes in this action is likewise accounted for by the CEMA ... . In other words, 'there is no legitimate question that [Wells Fargo] is the party entitled to enforce under the [consolidated] note, as evinced by . . . the CEMA' ... ". ***Wells Fargo Bank N.A. v. Ho-Shing*, 2019 N.Y. Slip Op. 00080, First Dept 1-8-19**

PERSONAL INJURY.

ALTHOUGH DEFENDANT LANDLORD DID NOT DEMONSTRATE WHEN THE STAIRS WERE LAST CLEANED OR INSPECTED, PLAINTIFF'S DEPOSITION TESTIMONY ESTABLISHED THE WETNESS ON WHICH SHE SLIPPED AND FELL COULD NOT HAVE BEEN PRESENT FOR MORE THAN AN HOUR, THEREFORE THE LANDLORD HAD NEITHER ACTUAL NOR CONSTRUCTIVE NOTICE OF THE CONDITION.

The First Department, reversing Supreme Court, determined that the plaintiff's deposition testimony demonstrated that the wetness on the stairs could not have been present for more than an hour. Therefore the defendant landlord had neither actual nor constructive notice of the condition and the landlord's motion for summary judgment in this slip and fall case should have been granted: "The building superintendent testified that he had no knowledge of the condition and received no complaints about it on the day of the accident. On the issue of constructive notice, although he described a reasonable cleaning and inspection routine... , there was no evidence when the stairs were last inspected or cleaned before plaintiff's accident so as to satisfy defendant's burden ... . Plaintiff's deposition testimony offered in support of defendant's motion, however, established that the water condition did not exist for a sufficient period of time to discover and remedy the problem ... . Thus, there was neither actual nor constructive notice of the wetness. Although plaintiff testified that she had complained about a wet condition on the stairs on three occasions between 2009 and 2013, she presented no evidence of a recurring condition unaddressed by defendants. Plaintiff also testified that she had no reason to believe that the stair was wet when she left her apartment at 5 p.m. and that she slipped on the stairs when she returned, less than an hour later. Thus, any wet condition was present for less than an hour, and might have been there only minutes or seconds before plaintiff slipped on it .... Plaintiff failed to raise any issue of fact requiring a trial. Plaintiff's argument that the absence of a handrail on both sides of the staircase raises an issue of fact as to defendants' negligence is speculative, as there is no evidence that the absence of a handrail played any role in her accident ...". ***Perez v. River Park Bronx Apts., Inc.*, 2019 N.Y. Slip Op. 00196, First Dept 1-10-19**

SECOND DEPARTMENT

ANIMAL LAW, CIVIL PROCEDURE.

VERDICT IN THIS DOG BITE CASE WAS NOT AGAINST THE WEIGHT OF THE EVIDENCE, EVIDENCE THAT THE DOG BIT PLAINTIFF'S FACE WHILE ATTEMPTING TO BITE THE FOOD IN PLAINTIFF'S HAND AND EVIDENCE THAT THE DOG ONLY BECAME RAMBUNCTIOUS AROUND FOOD SUPPORTED THE JURY'S CONCLUSION THAT THE DOG HAD NOT EXHIBITED VICIOUS PROPENSITIES.

The Second Department determined the motion to set aside the verdict as against the weight of the evidence in this dog bite case was properly denied. Infant plaintiff was bitten in the face when the dog jumped and attempted to bite the food in plaintiff's hand. The jury found that the dog did not have vicious propensities. The evidence that the dog only became excited and rambunctious around food supported the jury's verdict: "Pursuant to CPLR 4404(a), a court may set aside a jury

verdict as contrary to the weight of the evidence. A verdict is contrary to the weight of the evidence when ' the evidence so preponderate[d] in favor of the [movant] that [the verdict] could not have been reached on any fair interpretation of the evidence' ... . 'Whether a jury verdict should be set aside as contrary to the weight of the evidence does not involve a question of law, but rather requires a discretionary balancing of many factors' ... . The discretionary power to set aside a jury verdict must be exercised with considerable caution, 'for in the absence of indications that substantial justice has not been done, a successful litigant is entitled to the benefits of a favorable jury verdict'... . Additionally, in making this determination courts should keep in mind that '[i]t is within the province of the jury to determine issues of credibility, and great deference is accorded to the jury given its opportunity to see and hear the witnesses' ... . To recover in strict liability for damages caused by a dog bite, a plaintiff must prove that ' the dog had vicious propensities and that the owner of the dog, or person in control of the premises where the dog was, knew or should have known of such propensities' ... . This knowledge may be established with evidence of 'prior acts of a similar kind of which the owner had notice' ... . However, 'normal canine behavior' does not establish vicious propensities, and 'rambunctious behavior will show awareness of a vicious propensity only if it is the very behavior that resulted in [a] plaintiff's injury' ...". ***M.B. v. Hanson*, 2019 N.Y. Slip Op. 00106, Second Dept 1-9-19**

CIVIL PROCEDURE.

TRIAL JUDGE SHOULD HAVE CONDUCTED AN INQUIRY AFTER RECEIVING A NOTE INDICATING THAT A JUROR COULD NOT CONTINUE, INSTEAD THE JUDGE REPLACED THE JUROR WITH AN ALTERNATE WITHOUT AN INQUIRY, NEW TRIAL ORDERED.

The Second Department, reversing Supreme Court and ordering a new trial, determined the trial court in this medical malpractice action should have conducted an inquiry before replacing a juror with an alternate: "In 2013, CPLR 4106 was amended to provide that a trial court may discharge a regular juror and replace that juror with an alternate juror, even after deliberations have begun, if the juror has 'become[ ] unable to perform the duties of a juror' (CPLR 4106 ...). In determining whether discharge and replacement of a juror is appropriate, a trial court must, after receiving notice that a juror may not be able to perform his or her duty, make whatever inquiry is reasonably necessary to determine whether the juror should be discharged and replaced with an alternate juror ... . In this medical malpractice action, the Supreme Court received a note during deliberations that 'a juror cannot come to a fair decision due to emotional distress.' The court, however, refused to conduct any inquiry as to the nature of the juror's difficulty, and refused even to speak to the juror individually. Instead, over objection, it excused the juror and seated an alternate. The court's failure to make adequate inquiry was error, requiring a new trial ...". ***Garbie v. Ahmad*, 2019 N.Y. Slip Op. 00098, Second Dept 1-9-19**

CIVIL PROCEDURE, NEGLIGENCE, MEDICAL MALPRACTICE, EMPLOYMENT LAW.

BECAUSE THE ANESTHESIOLOGY GROUP (ATLANTIC) WAS ADDED AS A PARTY AFTER THE STATUTE HAD RUN BASED SOLELY ON VICARIOUS LIABILITY FOR ITS EMPLOYEE (DEBRADY) WHO HAD BEEN TIMELY SERVED, ATLANTIC'S POTENTIAL LIABILITY IN THIS MEDICAL MALPRACTICE ACTION CEASED WHEN DEBRADY'S MOTION FOR SUMMARY JUDGMENT WAS GRANTED, ATLANTIC COULD NOT BE HELD LIABLE FOR THE ACTIONS OF ANOTHER EMPLOYEE WHO WAS NEVER A PARTY (CANTALUPO), ALTHOUGH PLAINTIFF SUED A JOHN DOE, NO STEPS WERE TAKEN TO SUBSTITUTE CANTALUPO FOR THE JOHN DOE, ATLANTIC'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined that the relation-back doctrine did not allow plaintiff in this medical malpractice action to sue an anesthesiology group (Atlantic) as a defendant after the statute of limitations had been expired. Atlantic had been added as a defendant after the statute ran when it was discovered that a defendant anesthesiologist, DeBrady, worked for Atlantic at the time the procedure was performed on plaintiff. DeBrady's motion for summary judgment was not opposed and was granted. But Supreme Court held that Atlantic could remain a defendant because of the potential liability of another employee of Atlantic, non-party Cantalupo. The Second Department held that Atlantic's liability was based solely upon respondeat superior as the employer of DeBrady, who was no longer a defendant. The court noted that, although the complaint named a "John Doe, MD," Cantalupo could not be substituted as a party because plaintiff never moved to substitute Cantalupo and the requirements of CPLR 1024 were not met: "In order for a cause of action asserted against a new defendant to relate back to the date a claim was asserted against another defendant, the plaintiff must establish that '(1) the [cause of action] arises out of the same conduct, transaction, or occurrence, (2) the additional party is united in interest with the original party, and (3) the additional party knew or should have known that but for a mistake by the plaintiff as to the identity of the proper parties, the action would have been brought against the additional party as well … ' (... see CPLR 203[b]). In malpractice actions, such as this one, 'the defendants are considered united in interest when one is vicariously liable for the acts of the other'... . The second prong of the relation-back doctrine requires unity of interest with a party in the action ... . Since Atlantic was made a party to the action after the expiration of the statute of limitations based solely on its unity of interest with DeBrady, who was timely served, Atlantic's liability in the instant action cannot be predicated upon vicarious liability for the alleged negligent acts of other employees of Atlantic who are not parties to this action, including nonparty Cantalupo. Accordingly, Atlantic demonstrated its prima facie entitlement to

judgment as a matter of law dismissing the amended complaint insofar as asserted against it, upon dismissal of the action as against DeBrady ...". ***Ferrara v. Jerome Zisfein*, 2019 N.Y. Slip Op. 00096, Second Dept 1-9-19**

CRIMINAL LAW.

COURT NEVER RULED ON WHETHER THE PROSECUTOR'S INITIAL REASON FOR EXCLUDING AN AFRICAN-AMERICAN POTENTIAL JUROR WAS A CREDIBLE RACE-NEUTRAL REASON, THE REASONS OFFERED AFTER THE JUROR WAS QUESTIONED FURTHER SHOULD NOT HAVE BEEN CONSIDERED, NEW TRIAL ORDERED.
The Second Department, reversing defendant's conviction, determined the trial court did not handle the Batson challenge to the prosecutor's striking an African American juror correctly. When asked about her reasons, the prosecutor said the potential juror was too young to sit on a murder trial. Upon further questioning the potential juror had difficulty understanding and answering questions. But the court never ruled whether the prosecutor's initial reason for excluding the potential juror, his youth, was a credible race-neutral explanation: "New York courts apply the three-step test of Batson v. Kentucky (476 US 79) to determine whether a party has used peremptory challenges to exclude potential jurors for an impermissible discriminatory reason... . 'The first step requires that the moving party make a prima facie showing of discrimination in the exercise of peremptory challenges; the second step shifts the burden to the nonmoving party to provide race-neutral reasons for each juror being challenged; and the third step requires the court to make a factual determination as to whether the race-neutral reasons are merely a pretext for discrimination' ... . [T]he Supreme Court failed in its duty to determine whether the prosecutor's race-neutral explanations were credible (see ... United States v. Taylor, 636 F3d 901, 905 [7th Cir] ['when ruling on a Batson challenge, the trial court should consider only the reasons initially given to support the challenged strike, not additional reasons offered after the fact'])." ***People v. Alexander*, 2019 N.Y. Slip Op. 00135, Second Dept 1-9-19**

CRIMINAL LAW.

BECAUSE THE INSTANT CONVICTION WAS FOR A CLASS A FELONY, SUPREME COURT WAS NOT AUTHORIZED TO SENTENCE DEFENDANT AS A SECOND FELONY OFFENDER.
The Second Department, in affirming defendant's conviction and sentence, noted that defendant should not have been sentenced as a second felony offender because the instant conviction was for a class A felony: "... [T]he Supreme Court was not authorized to adjudicate the defendant a second violent felony offender since the instant conviction was for a class A felony rather than a class B, C, D, or E felony (see Penal Law §§ 70.02[1]; 70.04[1][a]). Therefore, we vacate the defendant's adjudication as a second violent felony offender. However, since the statutory sentencing parameters for a second violent felony offender do not include any specifications as to proper sentences for a class A felony because that crime is more serious than the crimes specified in those parameters, the error could not have affected the sentence imposed to the defendant's detriment (see Penal Law § 70.04[1][a]...). Therefore, the term of imprisonment imposed upon the defendant's conviction of a class A felony should not be disturbed." ***People v. Young*, 2019 N.Y. Slip Op. 00152, Second Dept 1-9-19**

CRIMINAL LAW, APPEALS.

BECAUSE THE COURT DID NOT IMPOSE CONDITIONS ON THE PLEAS AND SENTENCING COMMITMENTS, THE SENTENCE SHOULD NOT HAVE BEEN ENHANCED BASED ON THE PURPORTED VIOLATIONS OF CERTAIN CONDITIONS, INCLUDING THE DEFENDANT'S FAILURE TO APPEAR AT SENTENCING, ALTHOUGH THE ISSUE WAS NOT PRESERVED, THE APPELLATE COURT CONSIDERED IT IN THE INTEREST OF JUSTICE.
The Second Department determined the sentencing court should not have imposed an enhanced sentence (consecutive instead of concurrent) because defendant did not appear at sentencing because the court had not imposed his appearance as a condition for the pleas and sentencing commitments. Although the issue was not preserved, the court considered the appeal in the interest of justice: "The defendant entered pleas of guilty under three separate indictments. He was promised that the sentences imposed would run concurrently. The defendant did not appear in court on the scheduled sentencing date. Subsequently, in rendering the judgments of conviction, the Supreme Court directed, inter alia, the sentence imposed on the second judgment to run consecutively to the sentence imposed on the first judgment. ... [W]e exercise our interest of justice jurisdiction to vacate the sentences. Since the record does not establish that the Supreme Court imposed as a condition on the pleas and sentencing commitments that the defendant return on the scheduled sentencing date, the court should not have imposed enhanced sentences based on the defendant's violation of this purported condition ... . To the extent that the court also based its imposition of enhanced sentences on the defendant having violated certain other purported conditions, it likewise erred, since it had not imposed these conditions on the pleas and sentencing commitments." ***People v. Andre*, 2019 N.Y. Slip Op. 00136, Second Dept 1-9-19**

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA), APPEALS.

INSUFFICIENT EVIDENCE DEFENDANT SEX OFFENDER WAIVED HIS PRESENCE AT THE SORA RISK ASSESSMENT HEARING, ISSUE CONSIDERED IN THE INTEREST OF JUSTICE, NEW HEARING ORDERED.

The Second Department, exercising its interest of justice appellate jurisdiction, determined the evidence that defendant waived his presence at the SORA risk assessment hearing was insufficient. A new hearing was ordered: "A sex offender facing risk level classification under SORA has a due process right to be present at the SORA hearing... . 'To establish whether a defendant, by failing to appear at a SORA hearing, has waived the right to be present, evidence must be shown that the defendant was advised of the hearing date, of the right to be present at the hearing, and that the hearing would be conducted in his or her absence' ... . Reliable hearsay evidence, such as an affidavit, is admissible to establish waiver ... . Here, the sole 'evidence' that the defendant waived the right to be present was the statement by the court that it was informed off-the-record by the New York City Police Department Sex Offender Monitoring Unit that the defendant resided at an address in Manhattan and that notice of the hearing was sent to that address and not returned as undeliverable. There was no evidence, hearsay or otherwise, that the defendant expressed a desire to forgo his presence at the hearing ... . The fact that defense counsel had 'no evidence to indicate' that the defendant did not receive notice of the hearing was not sufficient to indicate a waiver." ***People v. Barney*, 2019 N.Y. Slip Op. 00153, Second Dept 1-9-19**

DISCIPLINARY HEARINGS (INMATES).

DISCIPLINARY DETERMINATION WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

The Second Department annulled the disciplinary determination because the allegation that petitioner did not leave the yard when directed to do so was not supported by substantial evidence: " 'A prison disciplinary determination must be supported by substantial evidence, meaning that in order to sustain a determination of guilt, a court must find that the disciplinary authorities have offered such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact' ... . A written misbehavior report made by an employee who observed an incident or ascertained the facts can constitute substantial evidence of an inmate's misconduct so long as it is sufficiently relevant and probative ... . Here, the record did not contain substantial evidence supporting the charges against the petitioner inasmuch as it failed to establish that the petitioner was one of the inmates who participated in the demonstration and refused to leave the yard when ordered to do so ...". ***Matter of Johnson v. Griffin*, 2019 N.Y. Slip Op. 00123, Second Dept 1-9-19**

EMINENT DOMAIN, ENVIRONMENTAL LAW.

CLAIMANT ENTITLED TO COMPENSATION BASED UPON THE VALUE OF THE LAND BEFORE IT WAS DESIGNATED PROTECTED WETLANDS WHICH COULD NOT BE DEVELOPED.

The Second Department modified (reduced) the award for condemnation of regulated land but upheld the Supreme Court's legal reasoning. Claimant owned vacant land in a commercial zone. After claimant acquired title New York City took title by eminent domain and designated the land as protected wetlands. Claimant sought the difference in value of the land before and after the wetlands regulation. The Second Department held that claimant was entitled to that relief but accepted the city's pre-regulation value of the land, which was substantially less than the claimant's valuation (which had been accepted by Supreme Court): "As the City does not dispute, the claimant established that there was a reasonable probability that the imposition of the wetlands regulations on the property would be found to constitute a taking, inasmuch as the parties agreed that the imposition of the regulations diminished the value of the property by approximately 95% and that there was virtually no chance that the New York State Department of Environmental Conservation would issue a permit allowing the property to be developed ... . Accordingly, the claimant established its entitlement to an increment ... . 'The increment above the regulated value of the property that must be added to the regulated value of the property is a percentage that represents the premium a reasonable buyer would pay for the probability of a successful judicial determination that the regulations were confiscatory' . 'When adding an increment to the value of vacant land to reflect its development potential, the specific increment which is selected and... applied must be based on sufficient evidence and be satisfactorily explained' ...". ***Matter of New Cr. Bluebelt Phase 3, Staten Is. Land Corp. (City of New York)*, 2019 N.Y. Slip Op. 00128, Second Dept 1-9-19**

FAMILY LAW.

CALCULATION OF ENHANCED EARNING CAPACITY STEMMING FROM A DEGREE EARNED DURING MARRIAGE IN THE CONTEXT OF ALLOCATING MARITAL PROPERTY IN A DIVORCE PROCEEDING EXPLAINED.

The Second Department determined Supreme Court property calculated the amount allocated to plaintiff wife for the enhanced earning capacity of defendant husband stemming from his MBA degree earned during the marriage: "The defendant's MBA degree is marital property subject to equitable distribution in this case... . The value of the MBA degree is measured by the present value of the enhanced earning capacity which it affords the defendant ... . The non-titled spouse is required to establish the value of the enhanced earning capacity and demonstrate that the non-titled spouse made a substantial contribution to the acquisition of the degree ... . Where a holder of an advanced degree has already embarked on his

or her career and has acquired a history of actual earnings, the theoretical valuation method, which compares the average lifetime earnings of a college graduate against the average lifetime earnings of a person holding the relevant advanced degree, must be discarded in favor of a more pragmatic and individualized analysis based on the titled spouse's remaining professional earning potential ... . Actual earnings, projected over time, are a recognized proxy for the value of a person's future earning capacity ... . The valuation must be founded in economic reality ...". ***Lynch v. Lynch*, 2019 N.Y. Slip Op. 00105, Second Dept 1-9-19**

FAMILY LAW.

FATHER WAS 40 MINUTES LATE FOR A HEARING, FATHER'S PETITION SHOULD NOT HAVE BEEN DISMISSED.
The Second Department, reversing Family Court, determined father's petition should not have been dismissed because he was 40 minutes late for a hearing: "... [T]he father explained that he had miscalendared the time of the hearing. Although we are sensitive to the Family Court's interest in adhering to its time-specific calendaring process, we find that, in light of the relatively short delay, the proceedings that had already taken place on the petition, the absence of prejudice to the mother, and the public policy in favor of resolving cases on the merits, the court improvidently exercised its discretion in denying the father's objections ... . Moreover, the father showed that he had a potentially meritorious petition ...". ***Matter of Pecoraro v. Ferraro*, 2019 N.Y. Slip Op. 00129, Second Dept 1-9-19**

FAMILY LAW, APPEALS, EVIDENCE.

AWARDING FATHER SOLE LEGAL CUSTODY DID NOT HAVE A SOUND AND SUBSTANTIAL BASIS IN THE RECORD, MOTHER'S PETITION FOR SOLE LEGAL CUSTODY SHOULD HAVE BEEN GRANTED.
The Second Department, reversing Family Court, determined that awarding sole legal custody to father did not have a sound and substantial basis in the record and mother's petition for sole legal custody should have been granted: " 'Findings of the Family Court which have a sound and substantial basis in the record are generally entitled to great deference on appeal because any custody determination depends to a great extent on the court's assessment of the credibility of the witnesses and the character, temperament, and sincerity of the parties'... . 'However, an appellate court would be seriously remiss if, simply in deference to the finding of a trial judge, it allowed a custody determination to stand where it lacked a sound and substantial basis in the record' ... Here, the Family Court's determination awarding the father sole legal and physical custody of the child does not have a sound and substantial basis in the record. Contrary to the court's conclusion, the parties had not been sharing custody of the child equally. Instead, the record reflects that the mother had been the child's primary caregiver for the majority of his life until the court granted the father's petition and that, at the time of the hearing, the father had the child on certain weekends. The evidence in the record also demonstrates that the court failed to take into consideration the custody arrangement in place at the time of the hearing, or even the 50/50 arrangement which was requested by the father during the proceeding. Moreover, the record demonstrates that the mother had taken a proactive role in the child's well being and development, developing well-thought-out plans to address the child's issues regarding medical care, schooling, and socialization ... . At the time of the hearing, the father had no concrete plans for the child's education, medical care, or social development." ***Matter of Lintao v. Delgado*, 2019 N.Y. Slip Op. 00125, Second Dept 1-9-19**

FAMILY LAW, ATTORNEYS.

EVEN THOUGH FATHER PAID WHAT HE OWED WHEN MOTHER FILED A PETITION FOR UNPAID CHILD SUPPORT, MOTHER WAS ENTITLED TO ATTORNEY'S FEES.
The Second Department, reversing Family Court, determined Family Court improvidently exercised its discretion when it denied mother's request for attorney's fees. Father was in arrears but paid what was owed after mother filed a petition for the unpaid child support. Mother was entitled to attorney's fees despite the fact that father withheld payment because of a dispute about cell phone bills and college expenses: "Pursuant to Family Court Act § 438(a), a court, in its discretion, may award reasonable attorneys' fees in an enforcement proceeding. The denial of an award of attorneys' fees to the mother in this case was an improvident exercise of discretion. The father paid the sum demanded for arrears in satisfying his child support obligations, but only after the mother was forced to expend attorneys' fees to commence an enforcement proceeding. The fact that the father was engaged in a dispute over whether he should be credited for payments for cell phone expenses and college expenses paid before the entry of the parties' judgment of divorce did not authorize him to engage in self-help by withholding child support payments that he ultimately did not dispute were due and owing." ***Matter of Mensch v. Mensch*, 2019 N.Y. Slip Op. 00126, Second Dept 1-9-19**

FAMILY LAW, CRIMINAL LAW, APPEALS.

ALLOCUTION CAST DOUBT ABOUT GUILT IN THIS JUVENILE DELINQUENCY PROCEEDING, AN EXCEPTION TO THE PRESERVATION REQUIREMENT FOR APPEAL.
The Second Department, reversing Family Court, determined that the plea allocution was defective in this juvenile delinquency proceeding. The allocution did not support the elements of the charged offense (grand larceny fourth degree if

committed by an adult) and the juvenile's foster care planner was not questioned about the offense, a defect which cannot be waived. Although no motion to withdraw was made, the allocution cast significant doubt about guilt which constitutes an exception to the the preservation requirement for appeal: "The appellant did not move to withdraw his admission on the grounds raised on appeal ... . However, this is one of the ' rare case[s] . . . where the [appellant's] recitation of the facts underlying the crime pleaded to clearly casts significant doubt upon the [appellant's] guilt,' [which] fall[s] into the narrow exception to the preservation requirement'... . In addition, the appellant was not required to preserve his contention that the Family Court erred in failing to obtain an allocution from the foster care case planner, since the statutory requirement of such an allocution may not be waived ... . * * * The Family Court did not elicit any additional details concerning the incident in order to clarify how the appellant came to be in possession of the $5 such that it could be concluded that he took it from the boy's person within the meaning of Penal Law § 155.30(5). Thus, the court 'did not elicit a sufficient factual basis to support [the appellant's] admission' ... . In addition, the appellant's admission was defective since his foster care case planner was present, but the Family Court failed to ascertain through allocution of the foster care case planner, as a person legally responsible for the appellant's care, 'that (a) [the appellant] committed the act or acts to which he [was] entering an admission, (b) he [was] voluntarily waiving his right to a fact-finding hearing, and (c) he [was] aware of the possible specific dispositional orders' ...". ***Matter of Richard S.*, 2019 N.Y. Slip Op. 00130, Second Dept 1-9-19**

FORECLOSURE, CIVIL PROCEDURE, EVIDENCE.

DEFENDANT DID NOT MAKE A PRIMA FACIE SHOWING THAT PLAINTIFF BANK DID NOT HAVE STANDING IN THIS FORECLOSURE ACTION BY MERELY POINTING OUT ALLEGED GAPS IN PLAINTIFF'S CASE, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT, THEREFORE, SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined that defendant did not make a prima facie showing that plaintiff bank lacked standing in this foreclosure action, as opposed to pointing to alleged gaps in plaintiff's case. Therefore defendant's motion for summary judgment should not have been granted: " 'On a motion for summary judgment, the burden is on the moving defendant to establish, prima facie, the plaintiff's lack of standing, rather than on the plaintiff to affirmatively establish its standing in order for the motion to be denied' ... . 'To defeat a defendant's motion, the plaintiff has no burden of establishing its standing as a matter of law' ... . Here, the defendant merely pointed to alleged gaps in the plaintiff's case and failed to meet her burden of establishing, prima facie, the plaintiff's lack of standing as a matter of law ...". ***Cenlar FSB v. Lanzbom*, 2019 N.Y. Slip Op. 00092, Second Dept 1-9-19**

FORECLOSURE, EVIDENCE.

DOCUMENTS SUBMITTED BY FANNIE MAE IN THIS FORECLOSURE ACTION DID NOT MEET THE REQUIREMENTS OF THE BUSINESS RECORDS EXCEPTION TO THE HEARSAY RULE, FANNIE MAE'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined the evidence submitted by the plaintiff (Fannie Mae) in this foreclosure action did not meet the requirements of the business records exception to the hearsay rule and, therefore, plaintiff's motion for summary judgment should not have been granted: "In support of those branches of its motion which were for summary judgment on the complaint insofar as asserted against the defendants and for an order of reference, Fannie Mae submitted affidavits of foreclosure specialists employed by Seterus, Inc., its loan servicer. The foreclosure specialists attested that they were personally familiar with the record-keeping practices and procedures of Seterus, Inc., but failed to lay a proper foundation for the admission of records concerning the defendants' payment history and default. Accordingly, Fannie Mae failed to demonstrate that the records relied upon in the affidavits were admissible under the business records exception to the hearsay rule (see CPLR 4518[a] ...). Since Fannie Mae's motion was based on evidence that was not in admissible form ... , Fannie Mae failed to establish its prima facie entitlement to judgment as a matter of law, and those branches of its motion which were for summary judgment on the complaint insofar as asserted against the defendants and for an order of reference should have been denied, regardless of the sufficiency of the defendants' papers in opposition ...". ***Federal Natl. Mtge. Assn. v. Marlin*, 2019 N.Y. Slip Op. 00095, Second Dept 1-9-19**

FORECLOSURE, EVIDENCE.

BANK DID NOT DEMONSTRATE COMPLIANCE WITH THE NOTICE PROVISIONS OF THE MORTGAGE IN THIS FORECLOSURE PROCEEDING, THE BANK'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing (modifying) Supreme Court, determined that the plaintiff bank did not demonstrate compliance with the notice provisions of the mortgage in this foreclosure proceeding. Therefore plaintiff's motion for summary judgment should not have been granted: "... [T]hose branches of the plaintiff's motion which were for summary judgment on the complaint insofar as asserted against [defendant], to strike his answer, and for the appointment of a referee to ascertain and compute the amount due should have been denied. The statements in the affidavit of the plaintiff's employee that was submitted in support of the motion failed to establish, prima facie, that the affiant mailed the required notice of default to [defendant] by first-class mail on any particular date, or actually delivered such notice to the designated address

if sent by other means, which was required by the terms of the mortgage as a condition precedent to foreclosure ...". ***Wells Fargo Bank, N.A. v. Sakizada*, 2019 N.Y. Slip Op. 00162, Second Dept 1-9-19**

FORECLOSURE, JUDGES, CIVIL PROCEDURE.

JUDGE WAS NOT PRESENTED WITH ANY EXTRAORDINARY CIRCUMSTANCES JUSTIFYING, SUA SPONTE, DISMISSAL OF THE COMPLAINT IN THIS FORECLOSURE ACTION.

The Second Department, reversing Supreme Court, determined there was no basis for the judge's, sua sponte, dismissal of the complaint in this foreclosure action: " 'A court's power to dismiss a complaint, sua sponte, is to be used sparingly and only when extraordinary circumstances exist to warrant dismissal' ... . Administrative Order 548/10, issued by the Chief Administrative Judge on October 20, 2010, and amended by Administrative Order 431-11 [requiring confirmation of the accuracy of the execution and notarization of an affidavit of merit] ... , was not in effect at the time the order of reference and the judgment of foreclosure and sale were issued ... . In this case, no substantial right of the defendant would have been affected by the substitution of a new affidavit of merit ... . Accordingly, the Supreme Court was not presented with any extraordinary circumstances warranting sua sponte dismissal of the complaint ...". ***LaSalle Bank N.A. v. Lopez*, 2019 N.Y. Slip Op. 00104, Second Dept 1-9-19**

FORECLOSURE, REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL), EVIDENCE.

BANK'S PROOF OF THE COMPLIANCE WITH THE NOTICE REQUIREMENTS OF RPAPL 1304 INSUFFICIENT, BANK'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined the bank's (Nationstar's) motion for summary judgment in this foreclosure action should not have been granted. Defendant alleged in her answer that plaintiff did not comply with the notice requirements of Real Property Actions and Proceedings Law (RPAPL) 1304. Therefore, in moving for summary judgment, the band was required to demonstrate compliance with RPAPL 1304 and its evidence of compliance was insufficient because it did not meet the requirements of the business records exception to the hearsay rule: " 'Generally, in moving for summary judgment in an action to foreclose a mortgage, a plaintiff establishes its prima facie case through the production of the mortgage, the unpaid note, and evidence of default' ... . However, where, as here, a defendant raises the issue of compliance with RPAPL 1304 as an affirmative defense, the moving party is also required to make a prima facie showing of strict compliance with RPAPL 1304 ... . * * * Here, Nationstar relied on the affidavit of its employee, Michael Woods, who averred, in relevant part, that 'the 90-day notices required by statute were mailed to [d]efendant by regular and certified mail to the last known mailing address and to the property address on January 3, 2013,' and that the letters 'were sent in separate envelopes from any other mailing or notice.' However, the record contains a single 90-day notice, bearing the plaintiff's letterhead and addressed to the defendant at the subject property, with no clear indication as to whether the mailing was made by registered or certified mail, or by first-class mail. Moreover, Woods—who is not an employee of the plaintiff—did not aver in his affidavit to having any familiarity with the plaintiff's mailing practices and procedures." ***Bank of Am., N.A. v. Bittle*, 2019 N.Y. Slip Op. 00086, Second Dept 1-9-19**

Similar issue and result in ***Bank of Am., N.A. v. Kljajic*, 2019 N.Y. Slip Op. 00087, Second Dept 1-9-19**

PERSONAL INJURY, CIVIL PROCEDURE.

MOTION TO SET ASIDE THE DAMAGES VERDICT IN THIS TRAFFIC ACCIDENT CASE AS AGAINST THE WEIGHT OF THE EVIDENCE SHOULD HAVE BEEN GRANTED, THE JURY FOUND THE INJURY TO BE PERMANENT BUT DID NOT AWARD DAMAGES FOR FUTURE PAIN AND SUFFERING, DAMAGES FOR PAST PAIN AND SUFFERING TOO LOW, MAY HAVE BEEN AN IMPERMISSIBLE COMPROMISE VERDICT.

The Second Department, reversing Supreme Court and granting a new trial, determined the jury's damages verdict in this rear-end collision, traffic accident case should have been granted. The jury found that plaintiff suffered a permanent injury but did not award plaintiff with damages for future pain and suffering. The Second Department further determined the $12,500 verdict for past pain and suffering was too low: "A jury verdict should be set aside as contrary to the weight of the evidence only if the jury could not have reached the verdict by any fair interpretation of the evidence... . Here, the Supreme Court should have granted the plaintiff's motion pursuant to CPLR 4404(a) to set aside the verdict on the issue of damages for past pain and suffering and future pain and suffering, as the verdict with respect to those damages was contrary to the weight of the evidence. The jury's determination that the plaintiff was not entitled to damages for future pain and suffering was inconsistent with the jury's finding that his injuries were permanent in nature and were proximately caused by the accident ... . Furthermore, whereas the jury was presented with conflicting evidence and theories as to the cause of the plaintiff's injuries, and the jury's award for past pain and suffering was inexplicably low, it appears that the verdict with respect to damages for past pain and suffering may have been the result of an impermissible compromise ...". ***Avissato v. McDaniel*, 2019 N.Y. Slip Op. 00084, Second Dept 1-9-19**

LABOR LAW-CONSTRUCTION LAW, CONTRACT LAW, PERSONAL INJURY.

CONTRACT RAISED QUESTIONS OF FACT WHETHER CONSTRUCTION MANAGER HAD SUFFICIENT AUTHORITY AND CONTROL TO BE HELD LIABLE FOR A FALL FROM A SCAFFOLD IN THIS LABOR LAW §§ 200, 240(1) AND 241(6) ACTION.

The Second Department determined there was a question fact whether defendant construction manager (Walsh) exercised sufficient supervision and control to be liable for plaintiff's injury when he fell from a scaffold in this Labor Law §§ 200, 240(1) and 241(6) action: "A construction manager of a work site is generally not responsible for injuries under Labor Law §§ 200, 240(1), or 241(6) unless it functions as an agent of the property owner or general contractor in circumstances where it has the ability to control the activity which brought about the plaintiff's injury ... . Here, a triable issue of fact exists as to whether Walsh had the authority to supervise or control the activity that brought about the plaintiff's injury ... . Among other things, in a 'Project Management Services Proposal' agreement (hereinafter the agreement) entered into between Walsh and Bakers Dozen, Walsh agreed, inter alia, to provide certain services as 'agent' of Bakers Dozen. The agreement further stated that, during the construction implementation phase, Walsh would '[i]ssue directives, clarifications and notices" and "monitor the site as required to maintain the progress of construction work.' " ***Maurisaca v. Bowery at Spring Partners, L.P.*, 2019 N.Y. Slip Op. 00109, Second Dept 1-9-19**

LABOR LAW-CONSTRUCTION LAW, CONTRACT LAW, PERSONAL INJURY.

QUESTIONS OF FACT WERE RAISED ABOUT DEFENDANT CON ED'S AUTHORITY AND RESPONSIBILITIES IN THIS LABOR LAW §§ 241(6) AND 200 ACTION, IN PART BY THE TERMS OF A CONTRACT, CON ED'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED, PLAINTIFF WAS USING AN EXCAVATOR WHEN IT TIPPED OVER INTO A CREEK.

The Second Department, reversing Supreme Court, determined defendant Con Ed's motion for summary judgment in this Labor Law § 241(6), § 200 and common law negligence action should not have been granted. Plaintiff was using an excavator in a narrow, sloped area when the excavator tipped over into a creek. The terms of a contract raised questions of fact about Con Ed's supervisory authority and responsibilities: "Con Ed did not demonstrate, prima facie, that Industrial Code § 23-4.2(c), which requires supervision for certain excavation work, was inapplicable here, nor did it demonstrate, prima facie, that this regulation was not violated ... . Further, Con Ed did not demonstrate, prima facie, that Industrial Code §§ 23-4.2(a) and 23-4.4(a), which require, inter alia, proper footing for certain work using excavators and similar equipment, were inapplicable here, or that these regulations were not violated in this case ... . Con Ed also did not demonstrate, prima facie, that Industrial Code §§ 23-9.4(c), and 23-9.5(a), which require, inter alia, the use of shoring and/or temporary sheeting for certain excavation work, were inapplicable here, or that these regulations were not violated in this case ... . Further, Con Ed did not show that any alleged violations of the aforementioned regulations did not constitute a proximate cause of the occurrence ... . Any comparative negligence on the part of the plaintiff does not preclude liability founded upon a violation of Labor Law § 241(6) ... . * * * There are 'two broad categories of actions that implicate the provisions of Labor Law § 200' ... . The first category involves worker injuries arising out of alleged dangerous or defective conditions on the premises where the work is performed ... . In those circumstances, '[f]or liability to be imposed on the property owner, there must be evidence showing that the property owner either created a dangerous or defective condition, or had actual or constructive notice of it without remedying it within a reasonable time' ... . 'The second broad category of actions under Labor Law § 200 involves injuries occasioned by the use of dangerous or defective equipment at the job site' ... . A property owner will be held liable under this category only if it possessed the authority to supervise or control the means and methods of the work ... . The requisite supervision or control exists for Labor Law § 200 purposes when the property owner bears responsibility for the manner in which the work is performed ... . 'The determinative factor is whether the party had the right to exercise control over the work, not whether it actually exercised that right' ...". ***Moscati v. Consolidated Edison Co. of N.Y., Inc.*, 2019 N.Y. Slip Op. 00112, Second Dept 1-9-19**

PERSONAL INJURY, LANDLORD-TENANT.

PLAINTIFF'S DECEDENT, WHO WAS DELIVERING MEALS ON WHEELS IN DEFENDANT'S BUILDING WHEN HE WAS ASSAULTED, ALLEGED THE ASSAILANT WAS AN INTRUDER WHO ENTERED THE BUILDING THROUGH A NEGLIGENTLY MAINTAINED ENTRANCE, THE LANDLORD'S DUTY TO PROTECT TENANTS EXTENDS TO GUESTS OF TENANTS, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court in this third-party assault case, determined the personal injury and wrongful death action against the landlord should not have been dismissed. Plaintiff's decedent was delivering "meals on wheels" in the building when he was assaulted, allegedly by an intruder who allegedly entered the building through a negligently maintained entrance: " 'Landlords have a common-law duty to take minimal precautions to protect tenants from foreseeable harm,' including a third party's foreseeable criminal conduct' ... . This duty extends to the guests of a tenant ... . A tenant or guest may recover damages, however, only on a showing that the landlord's negligent conduct was a proximate cause of the injury... . 'In premises security cases particularly, the necessary causal link between a landlord's culpable failure to provide adequate security and a tenant's injuries resulting from a criminal attack in the building can be established only

if the assailant gained access to the premises through a negligently maintained entrance. Since even a fully secured entrance would not keep out another tenant, or someone allowed into the building by another tenant, plaintiff can recover only if the assailant was an intruder' ... . Here, the defendant established its prima facie entitlement to judgment of a matter of law by presenting evidence that the lock on the only entrance to 341 Dumont Avenue was operable on the day of the incident ... . In opposition, however, the plaintiffs raised triable issues of fact as to whether the decedent's assailant was an intruder who entered the building through a negligently maintained entrance ...". ***Aminova v. New York City Hous. Auth.*, 2019 N.Y. Slip Op. 00083, Second Dept 1-9-19**

PERSONAL INJURY, MEDICAL MALPRACTICE, EVIDENCE, CIVIL PROCEDURE.

PLAINTIFF'S VERDICT IN THIS MEDICAL MALPRACTICE ACTION SET ASIDE IN THE INTEREST OF JUSTICE, DEFENDANTS WERE NOT ALLOWED TO CROSS EXAMINE PLAINTIFF'S EXPERTS ABOUT THE POSSIBLE NEGLIGENCE OF TWO NON-PARTY DOCTORS WHO ALSO TREATED PLAINTIFF, IN ADDITION, PLAINTIFF'S EXPERTS WERE NOT SHOWN TO BE QUALIFIED TO OFFER OPINION EVIDENCE CONCERNING EMERGENCY MEDICINE.

The Second Department, reversing Supreme Court, set aside the verdict in this medical malpractice case in the interest of justice. The defendants (Kirschen, Roberts and Winthrop) were involved in emergency treatment of the plaintiff for back pain. Subsequently surgery was performed by two additional (non-party) doctors (Obedian and Sonstein) to deal with an abscess on plaintiff's spine. At trial the defendants were not allowed to cross-examine plaintiff's experts about the possible negligence of the surgeons, which was deemed reversible error. The Second Department further held plaintiff's experts should not have been allowed to testify as experts in emergency medicine because no specialized knowledge of emergency medicine was demonstrated: " 'A motion pursuant to CPLR 4404(a) to set aside a verdict and for a new trial in the interest of justice encompasses errors in the trial court's rulings on the admissibility of evidence, mistakes in the charge, misconduct, newly discovered evidence, and surprise'... . In considering such a motion, '[t]he Trial Judge must decide whether substantial justice has been done, whether it is likely that the verdict has been affected and must look to his [or her] own common sense, experience and sense of fairness rather than to precedents in arriving at a decision' ... … [T]the evidence at trial failed to demonstrate that the plaintiff's injuries were capable of any reasonable or practicable division of allocation among Kirschen, Roberts, and Winthrop, and Obedian and Sonstein ... . Thus, if, as Kirschen, Roberts, and Winthrop propose, a jury were to find that Obedian and Sonstein departed from accepted medical practice and that this departure was a substantial factor in depriving the plaintiff of a substantial chance for an improved outcome, Obedian and Sonstein could be found at fault together with Kirschen, Roberts, and Winthrop ... . As a result, any evidence as to the culpability of Obedian and Sonstein was relevant under CPLR 1601(1) ... . The court's error in precluding Kirschen, Roberts, and Winthrop from cross-examining two of the plaintiff's expert witnesses on this issue deprived Kirschen, Roberts, and Winthrop of 'substantial justice' ...". ***Daniele v. Pain Mgt. Ctr. of Long Is.*, 2019 N.Y. Slip Op. 00093, Second Dept 1-9-19**

REAL ESTATE, CONTRACT LAW.

THERE EXISTS A QUESTION OF FACT WHETHER DEFENDANT'S FAILURE TO APPEAR AT THE LAW DAY CLOSING WAS WILLFUL WITHIN THE MEANING OF THE REAL ESTATE CONTRACT, PLAINTIFFS' MOTION SEEKING SUMMARY JUDGMENT ON THE ACTION TO RETAIN THE DOWN PAYMENT PROPERLY DENIED, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SEEKING THE RETURN OF THE DOWN PAYMENT SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing (modifying) Supreme Court, determined that defendant's motion for summary judgment in plaintiffs' action to retain the defendant's down payment because defendant did not appear at the real estate closing should not have been granted. Although plaintiffs demonstrated they were ready and willing close on the time-of--the-essence closing date, defendant raised a question of fact whether the failure to appear was "willful" within the meaning of the real estate contract. Defendant submitted evidence his application for credit in connection with a mortgage on the property had been declined. Plaintiff's motion for summary judgment was properly denied. But defendant's motion for summary judgment seeking return of his down payment should not have been granted: " 'The fundamental, neutral precept of contract interpretation is that agreements are construed in accord with the parties' intent' … . The best evidence of the parties' intent is their own writing... . A written agreement that is complete, clear, and unambiguous on its face is to be enforced according to the plain meaning of its terms ... . Here, the contract provided that a party would be considered in breach if a default was willful, and that the plaintiffs could retain the down payment as liquidated damages only if the defendant "willfully" defaulted under the contract. The defendant submitted a copy of a 'Statement of Credit Denial' from his lender which indicated that his application for an extension or renewal of credit with respect to a mortgage on the property had been declined. Consequently, a triable issue of fact existed as to whether the defendant had a lawful excuse for defaulting given the denial of his application to extend or renew his mortgage commitment, or whether he willfully defaulted. Accordingly, we agree with the Supreme Court's determination denying the plaintiffs' motion for summary judgment on the complaint. However, the Supreme Court should not have, upon searching the record, awarded summary judgment to the

defendant dismissing the complaint and directing the return of the down payment to the defendant. A buyer who defaults on a real estate contract without 'lawful excuse' cannot recover the down payment amount, 'at least where . . . that down payment represents 10% or less of the contract price' ... . Since a triable issue of fact existed as to whether the defendant's failure to close was willful, the Supreme Court should not have determined, at this juncture, that he was entitled to the return of his down payment." ***Goetz v. Trinidad*, 2019 N.Y. Slip Op. 00099, Second Dept 1-9-19**

THIRD DEPARTMENT

MENTAL HYGIENE LAW, CONTEMPT.

COURT ORDER WAS AMBIGUOUS AND ERRONEOUS AND COULD NOT THEREFORE BE THE BASIS OF A CONTEMPT FINDING AND SANCTIONS.

The Third Department, reversing Supreme Court, in a proceeding concerning the guardianship and trust assets of a disabled person, determined the trustee should not have been held in contempt based upon an ambiguous and erroneous court order and sanctions against the trustee were not justified in light of the ambiguity of and error in the order: "... [W]e find that, however uncooperative and dilatory the trustee was, [the court evaluator] did not demonstrate by clear and convincing evidence that the trustee violated a 'lawful, clear and unequivocal order' when he did not pay the fee award from the unfunded, unexecuted 2006 SNT [supplemental needs trust] as directed in the ex parte order and when he instead cross-moved to vacate that order ... . Moreover, given that the ex parte order referred to an incorrect SNT, which was not funded or executed, an error of which Supreme Court was made aware, the court should have granted the trustee's motion to vacate the ex parte order ... . A court may, in its discretion, award any party or counsel in a civil matter 'costs in the form of reimbursement for actual expenses reasonably incurred and reasonable [counsel] fees, resulting from frivolous conduct' and 'may impose financial sanctions upon any party or attorney' for frivolous conduct ... . However, such sanctions and costs may be imposed 'only upon a written decision setting forth the conduct on which the award or imposition is based, the reasons why the court found the conduct to be frivolous, and the reasons why the court found the amount awarded or imposed to be appropriate' ... . [G]iven ... the fact that the court orders were ambiguous or directed payment out of an incorrect, unfunded SNT, the trustee's conduct in response to those orders, much of it based upon the advice of counsel, was not shown to be frivolous ...". ***Matter of James H.*, 2019 N.Y. Slip Op. 00170, Second Dept 1-10-19**

WORKERS' COMPENSATION.

UNLIKE AN APPLICATION FOR AN ADMINISTRATIVE REVIEW OF A WORKERS' COMPENSATION LAW JUDGE'S (WCLJ'S) DECISION, WHICH HAS A 30-DAY TIME LIMIT, AN APPLICATION FOR A REHEARING OR TO REOPEN A CLAIM MUST BE MADE IN A REASONABLE TIME.

The Third Department determined the Workers' Compensation Board applied the wrong criteria to claimant's attempt to reopen her claim or seek a rehearing: "We agree with claimant that the Board applied the incorrect statutory framework in evaluating her application. Although a party seeking administrative review of a WCLJ decision must file a written application for review with the Board within 30 days of the filing of the decision (see Workers' Compensation Law § 23; 12 NYCRR 300.13 [a] [1]; [b] [3] [i]...), there is no statutorily-prescribed time period in which a claimant may seek rehearing or reopening of a claim; rather, the Board must determine if such application was made within a reasonable time after the claimant had knowledge of the facts constituting the grounds upon which the application is made (see 12 NYCRR 300.14 [b]...). Here, the Board did not assess whether claimant's application was made within a reasonable time. Accordingly, the decision is reversed and the matter is remitted to the Board to evaluate claimant's application as one for rehearing or reopening." ***Matter of Villagra v. Sunrise Senior Living Mgt.*, 2019 N.Y. Slip Op. 00169, Third Dept 1-10-19**

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