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CasePrepPlus

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FIRST DEPARTMENT

CIVIL RIGHTS LAW, CIVIL PROCEDURE, MUNICIPAL LAW.

VERDICT AWARDING ZERO DAMAGES FOR PAST PAIN AND SUFFERING IN THIS POLICE EXCESSIVE-FORCE CASE SET ASIDE; NEW TRIAL ORDERED UNLESS THE PARTIES STIPULATE TO A $200,000 DAMAGES AWARD.

The First Department determined the verdict awarding plaintiff zero damages for past pain and suffering should have been set aside in this police-excessive-force case (42 U.S.C. § 1983). The court ordered a new trial unless the parties stipulated to a $200,000 damages award: "Plaintiff sustained injuries when a New York City police officer smashed him in the nose with a bullet-proof shield after entering his apartment to execute a search warrant. After a trial, the jury found that the officer violated plaintiff's rights under the Fourth Amendment to the U.S. Constitution by using excessive force while arresting him and that the excessive force was a substantial factor in causing his injuries. However, the jury awarded plaintiff no damages for pain and suffering. * * * However, we find that the jury's failure to award damages for past pain and suffering is contrary to a fair interpretation of the evidence and deviates materially from what would be reasonable compensation (CPLR 5501[c]; ...). The undisputed evidence establishes that plaintiff was in pain the first night after being struck, that for about two weeks after the incident his broken nose and orbital bone fractures were 'kind of rough,' that he could only breathe through his mouth, that he had to get medication, that he suffered 'really bad' headaches, and that he required reconstructive nasal surgery as a result of his injuries." ***Shimukonas v. City of New York*, 2019 N.Y. Slip Op. 07147, First Dept 10-3-19**

CRIMINAL LAW, EVIDENCE, APPEALS.

DEFENDANT'S DRUG SALE CONVICTION WAS AGAINST THE WEIGHT OF THE EVIDENCE.

The First Department reversed defendant's drug-sale conviction as against the weight of the evidence. The police saw a woman approach defendant and the woman had a $10 bag of crack cocaine in her mouth when the police stopped her. The defendant had $10 in his pocket but no drugs on him. No exchange between the two was observed: "Two police officers testified that they observed defendant in a high drug trafficking area. They both saw defendant approach a man and talk to him. The man gave defendant money and there was an 'exchange,' but the officers did not see what was exchanged. Shortly thereafter, one of the officers witnessed a woman approach defendant. The officer saw the woman speak to defendant and then touch his hand, but the officer did not see any money or drugs exchanged. Defendant and the woman separated, and the officer approached the woman. The officer identified herself, said that she just saw what happened, and heard the woman chewing on something. She asked the woman to spit out the object, which turned out to be a small bag containing $10 worth of crack cocaine. The officer never saw the woman put the bag in her mouth or even bring her hand to her mouth. The police then arrested the woman and defendant. Defendant did not have any drugs on him, but had $10 in his sweatshirt pocket and other denominations of cash in his pants pocket. In the exercise of our factual review power, we conclude that the People did not prove beyond any reasonable doubt that defendant sold cocaine to the woman, which was the only crime charged. The officer who witnessed the transaction acknowledged she did not observe an exchange of anything, including money, drugs or unidentified objects, between defendant and the woman. In addition, the People's theory that the woman put the bag in her mouth after purchasing it from defendant was contradicted by the officer's testimony that she never saw the woman put anything into her mouth, or even put her hand to her mouth. Furthermore, the People's theory that defendant sold two $10 bags, one to the man and the other to the woman, was inconsistent with the cash found on defendant." ***People v. Correa*, 2019 N.Y. Slip Op. 07017, First Dept 10-1-19**

LABOR LAW-CONSTRUCTION LAW, EMPLOYMENT LAW.

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON HIS LABOR LAW § 240(1) CAUSE OF ACTION IN THIS LADDER-FALL CASE SHOULD HAVE BEEN GRANTED; THE PROPERTY OWNER WAS ENTITLED TO COMMON LAW INDEMNITY.

The First Department, reversing (modifying) Supreme Court, determined plaintiff was entitled to summary judgment on his Labor Law § 240(1) claim in this ladder-fall case, and the property owner, Church of God, was entitled to common law indemnity because plaintiff's work was supervised by his apparent employer, Belfor: "Plaintiff's testimony that the ladder wobbled, flipped, and flopped, causing him to fall, sets forth a prima facie violation of Labor Law § 240(1) ... . Defendants

failed to adduce any evidence rebutting plaintiff's showing, making summary judgment appropriate. Plaintiff testified that he was using a Belfor ladder at the time of his fall. Belfor's deponent, who had no knowledge of the accident, conceded that Belfor had ladders on site, and could not say whether plaintiff's employer, the subcontractor who furnished labor for the cleaning and debris removal portion of the project, also brought ladders. There were no other subcontractors on site. Belfor's deponent also testified that Belfor had a site supervisor, the only Belfor employee on site that day, and that he would have been 'in the thick of it,' and not performing paperwork or similar administrative tasks. Plaintiff, who wore a Belfor uniform at Belfor's behest, testified that Belfor employees were 'the bosses,' ordering him around. This evidence, taken together, is sufficient to establish that Church of God made a prima facie showing of entitlement to common law indemnity ...". ***Rivera-Astudillo v. Garden of Prayer Church of God in Christ, Inc.*, 2019 N.Y. Slip Op. 07033, First Dept 10-1-19**

SECOND DEPARTMENT

CRIMINAL LAW, EVIDENCE.

THE PRESUMPTION OF SUGGESTIVENESS RAISED BY THE PEOPLE'S FAILURE TO PRESENT THE PHOTO ARRAYS USED BY THE WITNESS TO IDENTIFY THE DEFENDANT WAS OVERCOME BY THE EVIDENCE OF THE SHEER NUMBER OF PHOTOS VIEWED BY THE WITNESS.

The Second Department determined the witness's identification of the defendant from photographs properly survived the motion to dismiss. The presumption of suggestiveness was overcome by the evidence of the sheer number of photographs shown to the witness. The court also held that rape first degree is a lesser included count of predatory sexual assault which was dismissed by the conviction on the higher court: "... [A]lthough the People did not produce in court the photographic arrays displayed through the use of the photo manager system, which gives rise to a presumption of suggestiveness, the People nevertheless rebutted that presumption and sustained their initial burden through the testimony of the detective, which established that she utilized the various databases applying the description of the perpetrator supplied by the complainant ... . The detective testified that the complainant was shown the computer-generated photo arrays a day after the incident occurred and then again three days later. The detective's unrebutted testimony established that 700 to 1,000 photographs were generated by the photo manager system, which were displayed in smaller arrays of photographs, from which, during the third viewing session, the complainant identified the defendant as the person who assaulted her ... . '[W]hen a photographic identification procedure involves showing a witness a preexisting file consisting of a large number of photographs, the sheer volume and scope of [the] procedure militates against the presence of suggestiveness' ... . Moreover, the complainant eventually identified the defendant in a lineup." ***People v. Castello*, 2019 N.Y. Slip Op. 07085, Second Dept 10-2-19**

CRIMINAL LAW, EVIDENCE.

NEW JERSEY PAROLEE'S CONSENT TO SEARCH AS A CONDITION OF PAROLE DID NOT APPLY TO A SEARCH DONE BY NEW YORK CITY POLICE IN QUEENS; STATEMENTS MADE WITHOUT MIRANDA WARNINGS, INCLUDING THE CONSENT TO SEARCH, AS WELL AS THE FRUITS OF THE SEARCH, PROPERLY SUPPRESSED.

The Second Department determined Supreme Court properly suppressed statements made without Miranda warnings, including the consent to search a safe, as well as the firearms seized from the safe. Although defendant was on parole in New Jersey, the search was done in Queens by New York City police. Therefore the consent to search provided by parolees as a condition of parole was not applicable: "... [A]lthough Soto had consented to searches by New Jersey parole officers as a condition of his parole, the record reveals that the NYPD officers, not the New Jersey parole officers, searched the safe after they were notified that the New Jersey parole officers found what appeared to be heroin in the apartment. Accordingly, the People cannot rely on Soto's consent given as a condition of parole to justify the warrantless search of the safe ... . Furthermore, since the NYPD officers failed to advise Soto of his Miranda rights prior to questioning him and obtaining his consent to open the safe, his statements regarding the safe and his consent to open it cannot be characterized as voluntary ... . Moreover, the People failed to proffer any argument as to why the warrantless search was proper as to Santiago. Accordingly, we agree with the Supreme Court's determination granting those branches of Soto's omnibus motion which were to suppress the firearms evidence and the statements made by him to the NYPD officers without the benefit of Miranda warnings, and that branch of Santiago's omnibus motion which was to suppress the firearms evidence ...". ***People v. Santiago*, 2019 N.Y. Slip Op. 07099, Second Dept 10-2-19**

CRIMINAL LAW, MENTAL HYGIENE LAW, APPEALS.

NO APPEAL LIES FROM THE DENIAL OF A MOTION TO WITHDRAW A PLEA OF NOT RESPONSIBLE BY REASON OF MENTAL DISEASE OR DEFECT.

The Second Department determined that no appeal lies from the denial of a motion to withdraw a plea of not responsible by reason of mental disease or defect: "... [A] motion pursuant to CPL 220.60 seeking to withdraw a plea to an indictment is part of a criminal action or, at the least, 'related to a . . . completed criminal action,' so as to come within the statutory defi-

nition of a '[c]riminal proceeding' (CPL 1.20[18]; ...). Moreover, in light of the nature of the relief sought in the motion, the motion is, by its nature, criminal, rather than civil ... . Accordingly, proper statutory authority under the Criminal Procedure Law must exist in order for the defendant to appeal from the denial of the motion ... . Such statutory authority does not exist. CPL 450.10 only provides that a defendant may appeal as of right from a judgment, sentence, or order made pursuant to specified provisions of CPL article 440, and thus, does not provide for appellate review, as of right, from an order denying a motion pursuant to CPL 220.60, to withdraw a plea of not responsible by reason of mental disease or defect. Nor does CPL 450.15 allow for such an appeal by permission, as that statute only permits an appeal from orders made pursuant to specified provisions of CPL article 440, and '[a] sentence . . . not otherwise appealable as of right' (CPL 450.15[3]). Finally, there is no avenue for appeal through CPL 330.20, which permits a party 'to proceedings conducted in accordance with the provisions of this section' to appeal, by permission, from certain orders rendered under CPL 330.20 (CPL 330.20[21]). The orders specified do not include an order denying a motion pursuant to CPL 220.60 to withdraw the plea ...". ***People v. Delano F.*, 2019 N.Y. Slip Op. 07089, Second Dept 10-2-19**

FAMILY LAW, EVIDENCE.

IN DISMISSING FATHER'S PETITION AND GRANTING MOTHER'S MOTION TO TERMINATE HER CHILD SUPPORT, FAMILY COURT RELIED ON HEARSAY AND EVIDENCE NOT TESTED BY CROSS-EXAMINATION, MATTER SENT BACK FOR A HEARING ON FATHER'S PETITION TO MODIFY CHILD SUPPORT.

The Second Department, reversing Family Court, determined father's petition for modification of child support should not have been denied and mother's motion to terminate her child support obligations should not have been granted based on hearsay and evidence not tested by cross-examination: "... [F]ather filed a petition to modify the child support order ... . The father asserted, as a change of circumstance, that the child was living with him. The mother moved for summary judgment dismissing the father's petition, and for termination of her child support obligation, on the ground of parental alienation, contending that the father had unjustifiably frustrated and interfered with her relationship with the child. * * * The Family Court, in making its determination that the father alienated the child from the mother, improperly relied on inadmissible information that had been provided at court conferences in earlier proceedings before a different judge. The court also improperly relied on hearsay statements and conclusions by an expert, whose credibility was not tested by either party, from an earlier forensic evaluation, and on statements and conclusions by two therapists, whose opinions and credibility were not tested by either party, made at a conference before a different judge ... . Accordingly, we disagree with the Family Court's determination to grant the mother's motion for summary judgment and for termination of her child support obligation, we reinstate the father's petition to modify the child support order ... , and we remit the matter to the Family Court ... for a hearing on that petition." ***Matter of McNichol v. Reid*, 2019 N.Y. Slip Op. 07073, Second Dept 10-2-19**

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

THE BANK DID NOT SUBMIT PROOF OF COMPLIANCE OF THE FILING REQUIREMENTS OF RPAPL 1306 IN THIS FORECLOSURE ACTION, THE BANK'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined that the bank's motion for summary judgment in this foreclosure action should not have been granted because the bank did not submit proof of compliance with the filing requirements of RPAPL 1306: "Pursuant to RPAPL 1306, lenders 'shall file with the superintendent of financial services . . . within three business days of the mailing of the notice required by [RPAPL 1304]' a form containing certain information regarding the borrower and the mortgage (RPAPL 1306[1]; see RPAPL 1306[2]). RPAPL 1306(1) further states that '[a]ny complaint served in [an action] initiated pursuant to [RPAPL article 13] shall contain, as a condition precedent to such [action], an affirmative allegation that at the time the [action] is commenced, the plaintiff has complied with the provisions of this section.' Here, in support of its motion, the plaintiff failed to submit any evidence of compliance with RPAPL 1306." ***JPMorgan Chase Bank, N.A. v. Lyon*, 2019 N.Y. Slip Op. 07060, Second Dept 10-2-19**

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

DEFENDANT WAS A 'BORROWER' AND THEREFORE WAS ENTITLED TO THE 90-DAY NOTICE REQUIRED BY RPAPL 1304; THE BANK HAD ARGUED SHE WAS NOT A BORROWER BECAUSE SHE DID NOT SIGN THE NOTE.

The Second Department, reversing Supreme Court, determined defendant was a "borrower" within the meaning of RPAPL 1304 and therefore she was entitled to the required 90-day notice, which she did not receive. That bank argued that she was not a borrower because only her deceased husband signed the note. However she was named on the mortgage and she signed the mortgage: "While RPAPL 1304 provides that the notice shall be sent to the 'borrower,' that term is not defined in the statute (see RPAPL 1304). It is undisputed that only the defendant's deceased husband, Solomon Forman, is identified as a "borrower" in the note which is secured by the mortgage. That is not determinative in this case. In the mortgage instrument, the defendant is referred to as a borrower. On the first page of the mortgage instrument, under the heading entitled 'Words Used Often in this Document,' the defendant is identified, along with her husband, as 'Borrower.' The defendant is also designated as 'Borrower' under her signature on the signature page of the mortgage instrument. While the plaintiff

contends that this standard mortgage form mischaracterizes the defendant as a borrower, any ambiguities in the language of the document must be construed against the plaintiff, as the plaintiff is the party who supplied the document ...". ***Bank of N.Y. Mellon v. Forman*, 2019 N.Y. Slip Op. 07045, Second Dept 10-2-19**

THIRD DEPARTMENT

APPEALS, CIVIL PROCEDURE, CIVIL RIGHTS LAW.

APPELLANT WAS NOT AGGRIEVED BY SUPREME COURT'S DECISION WHICH DENIED HER MOTION WITHOUT PREJUDICE PENDING FURTHER DISCOVERY; THEREFORE THE APPEAL MUST BE DISMISSED.

The Third Department determined the plaintiff's Joan and Christopher Porco were not aggrieved by Supreme Court's ruling and therefore could not appeal it. The underlying action alleges Civil Rights Law (right to privacy) violations related to a film made by defendant about a crime committed by Christopher Porco. The complaint alleged the film had been republished making the action timely. Supreme Court denied the motion without prejudice to try again after discovery: "Christopher Porco is not an aggrieved party. Defendant's motion sought dismissal of only those claims asserted by Joan Porco. In other words, defendant did not seek any relief against Christopher Porco. Supreme Court likewise did not grant defendant any relief against him. Accordingly, Christopher Porco has no basis to appeal from the February 2018 order. Regarding Joan Porco, Supreme Court held that she could not rely on the relation back doctrine for her claims in the amended complaint to be timely asserted. The court nonetheless denied defendant's motion without prejudice to renew upon completion of discovery after considering plaintiffs' republication argument. ... Accordingly, the court neither granted defendant any affirmative relief against Joan Porco nor withheld any affirmative relief requested by Joan Porco. Indeed, the only affirmative relief sought by Joan Porco was for leave to serve a second amended complaint, which the court granted and is not contested on appeal. Because Joan Porco was not granted incomplete relief, the exception to the aggrievement requirement ... does not apply in this case. Furthermore, a party is not aggrieved when his or her interests are only remotely or contingently affected by the order appealed from ... . Although Joan Porco's claims are subject to dismissal in the future given that Supreme Court denied defendant's motion without prejudice to renew, it is possible that defendant may never seek to renew its motion. And, even if defendant did move to renew, we can only surmise at this juncture how the court would decide it. Finally, to the extent that Joan Porco is dissatisfied with the court's rationale concerning the relation back doctrine, such dissatisfaction does not make her an aggrieved party ...". ***Porco v. Lifetime Entertainment Servs., LLC*, 2019 N.Y. Slip Op. 07122, Third Dept 10-3-19**

CRIMINAL LAW.

RESTITUTION ORDERED AT SENTENCING (ABOUT $45OO) WAS ABOUT $500 HIGHER THAN THE AMOUNT AGREED TO IN THE PLEA DEAL, DEFENDANT SHOULD HAVE BEEN GIVEN THE OPPORTUNITY TO WITHDRAW HIS PLEA.

The Third Department, over a two-justice dissent, determined that defendant is entitled to the opportunity to withdraw his plea because the amount of restitution ordered by the sentencing judge was about $500 higher than the amount ($4100) agreed to in the plea deal: "... '[A] sentencing court may not impose a more severe sentence than one bargained for without providing the defendant the opportunity to withdraw his or her plea' ... . Because the restitution imposed exceeds the amount presented by the People to which defendant agreed at the time of the plea and he seeks, among other things, vacatur of the plea, we deem it appropriate to exercise our interest of justice jurisdiction to take corrective action ... . Accordingly, we remit the matter for the purpose of allowing defendant to either accept the enhanced restitution amount or give defendant an opportunity to withdraw his plea ...". ***People v. Waldron*, 2019 N.Y. Slip Op. 07116, Third Dept 10-3-19**

DISCIPLINARY HEARINGS (INMATES), EVIDENCE.

INSUFFICIENT PROOF OF THE TESTING USED TO DETERMINE THE SUBSTANCES WERE CONTRABAND DRUGS, POSSESSION OF DRUGS CHARGE ANNULLED.

The Third Department annulled the possession of drugs charge because the proof of the testing procedures used on the substances alleged to be drugs was insufficient: "When positive results of a test of suspected contraband drugs are used as evidence at a disciplinary hearing, 7 NYCRR 1010.5 (d) directs that certain documents, including 'a statement of the scientific princip[les] and validity of the testing materials and procedures used,' be included in the record. This required document does not appear in the record, nor was it provided to petitioner despite his specific request and objections. Further, testimony from the testing officer offered no evidence of the procedures used. In view of the foregoing, that part of the determination finding petitioner guilty of possessing drugs is not supported by substantial evidence and must be annulled ...". ***Matter of McFarlane v. Annucci*, 2019 N.Y. Slip Op. 07123, Third Dept 10-3-19**

FOURTH DEPARTMENT

APPEALS, FAMILY LAW.

GRANDMOTHER'S APPEAL OF THE DENIAL OF VISITATION HEARD DESPITE THE FACT THAT GRANDMOTHER HAD BEEN GRANTED VISITATION WHILE THE APPEAL WAS PENDING; DISSENT ARGUED THE EXCEPTION TO THE MOOTNESS DOCTRINE SHOULD NOT HAVE BEEN APPLIED.

The Fourth Department affirmed Family Court's denial of grandmother's petition for custody and visitation and heard the appeal despite the fact that grandmother was subsequently granted visitation. The majority applied the exception to the mootness doctrine to hear the appeal. An extensive dissent argued the exception to the mootness doctrine did not apply and the appeal should have been dismissed: "We reject the grandmother's contention that the court erred in denying her petition for custody and granting custody to the mother. 'It is well established that, as between a parent and a nonparent, the parent has a superior right to custody that cannot be denied unless the nonparent establishes that the parent has relinquished that right because of surrender, abandonment, persisting neglect, unfitness or other like extraordinary circumstances' ... . Here, the grandmother failed to meet her burden of establishing that extraordinary circumstances exist to warrant an inquiry into whether an award of custody to the grandmother is in the best interests of the child ... . In particular, we conclude that the grandmother failed to establish her claim that the mother suffered from unaddressed, serious mental health issues that would warrant a finding of extraordinary circumstances ... . Contrary to the grandmother's further contention, we conclude that, as of the time that the order was entered, the record supports the court's determination that it was in the best interests of the subject child to deny the grandmother visitation 'in view of grandmother's failure to abide by court orders, the grandmother's animosity toward the [mother], with whom the child[now] reside[s], and the fact that the grandmother frequently engaged in acts that undermined the subject child[]'s relationship with' the mother ... . It is well settled that 'a court's determination regarding custody and visitation issues, based upon a first-hand assessment of the credibility of the witnesses after an evidentiary hearing, is entitled to great weight and will not be set aside unless it lacks an evidentiary basis in the record' ... , and we perceive no basis for disturbing the court's determination here ...". ***Matter of Smith v. Ballam*, 2019 N.Y. Slip Op. 07170, Fourth Dept 10-4-19**

CIVIL PROCEDURE, NEGLIGENCE.

THERE WAS NO CONFLICT BETWEEN NEW YORK AND PENNSYLVANIA LAW IN THIS PERSONAL INJURY CASE, THEREFORE NEW YORK LAW APPLIES AND THERE IS NO NEED FOR A CHOICE OF LAW ANALYSIS.

The Fourth Department determined New York applies in this action stemming from an accident in Pennsylvania: "New York law controls the resolution of its motion and this appeal. '[B]ecause New York is the forum state, i.e., the action was commenced here, New York's choice-of-law principles govern the outcome of this matter' ... . 'The first step in any case presenting a potential choice of law issue is to determine whether there is an actual conflict between the laws of the jurisdictions involved' ... . Here, defendant failed to establish the existence of any conflict between New York and Pennsylvania law with respect to the issues raised in the motion, and therefore we need not engage in any choice of law analysis ...". ***Farnham v. MIC Wholesale Ltd.*, 2019 N.Y. Slip Op. 07178, Fourth Dept 10-4-19**

CONTRACT LAW.

REMEDIES FOR BREACH OF CONTRACT WERE NOT CONFINED TO THE REMEDIES MENTIONED IN THE CONTRACT; THERE WAS NO INDICATION THE REMEDIES DESCRIBED WERE 'SOLE AND EXCLUSIVE.'

The Fourth Department, reversing Supreme Court, determined the breach of contract cause of action should not have been dismissed. Plaintiff provided a healthcare plan to defendant employer (ESC). Plaintiff alleged defendant extended healthcare coverage to an employee who was not qualified, and thereby breached the underlying contract: "... [D]ismissal under CPLR 3211 (a) (1) was not warranted. In granting the motion insofar as it sought dismissal of the breach of contract cause of action, the court determined that the provision of certain remedies in the Contract precluded plaintiff from seeking additional damages from ESC under the 'canon of contract construction expressio unius est exclusio alterius, that is, that the expression of one thing implies the exclusion of the other' ... . The court further determined that the indemnification provision in the Contract did not apply to disputes between the parties. We conclude that the court erred in determining that plaintiff was limited to the remedies set forth in the Contract. '[I]t is a basic tenet of the law of damages that where there has been a violation of a contractual obligation the injured party is entitled to fair and just compensation commensurate with [the] loss' ... . 'Limitations on a party's liability will not be implied and to be enforceable must be clearly, explicitly and unambiguously expressed in a contract' ... . As a result, '[u]nder New York law, a provision must be included in the agreement limiting a party's remedies to those specified in the contract in order for courts to find that th[o]se remedies are exclusive' ... . Here, the Contract provided that, in the event an ineligible person was enrolled in the health care plan, plaintiff "may elect" certain remedies. It also addressed the obligations of the person who had received such benefits. There was nothing

in the Contract stating that the contractual remedies were plaintiff's sole and exclusive remedies against ESC, i.e., the other party to the Contract ...". ***HealthNow N.Y., Inc. v. David Home Bldrs., Inc.*, 2019 N.Y. Slip Op. 07177, Fourth Dept 10-4-19**

CRIMINAL LAW.

DEFENDANT WAS ENTITLED EITHER TO THE VACATION OF HIS GUILTY PLEA OR TO A SENTENCE WHICH CONFORMED WITH THE SENTENCE PROMISE; DEFENDANT'S § 440 MOTION WAS NOT BARRED BY PROVISIONS OF CPL § 440.10.

The Fourth Department, reversing Supreme Court, determined defendant was entitled to either the vacation of his guilty plea or the imposition of a sentence which conformed to the plea bargain. Defendant had pled guilty to a drug possession charge and was told at the time of the plea he would not serve more than a year and a half in addition to his concurrent Massachusetts sentence. However, the Massachusetts sentence was subsequently reduced because of a cooperation agreement. Defendant's § 440 motion was not barred by CPL § 440.10 (2) (c) or (2) (b): "... [D]efendant's motion is not barred by CPL § 440.10 (2) (c) inasmuch as the relevant ground for relief did not arise until several years after the deadline to file a direct appeal from the judgment had expired. Further, contrary to the court's determination, defendant's motion is not barred by CPL 440.10 (2) (b) inasmuch as he never filed a direct appeal from the judgment. On the merits, it is well settled that, '[g]enerally, when a guilty plea has been induced by an unfulfilled promise either the plea must be vacated or the promise honored' ... . Here, the 'reduction of the preexisting sentence nullified a benefit that was expressly promised and was a material inducement to the guilty plea' ... , i.e., 'the judge's specific representation [that defendant's guilty plea in New York] would thereby extend his [aggregate] incarceratory term by a year and a half only' ...". ***People v. Valerio*, 2019 N.Y. Slip Op. 07192, Fourth Dept 10-4-19**

CRIMINAL LAW, APPEALS.

ATTEMPTED MENACING OF A POLICE OFFICER IS NOT A COGNIZABLE CRIME; CHARGING ATTEMPTED MENACING OF A POLICE OFFICER IS A MODE OF PROCEEDINGS ERROR THAT NEED NOT BE PRESERVED.

The Fourth Department determined that attempted menacing of a police officer is not a cognizable crime because "attempt" is included in the offense. This was a mode of proceedings error that did not have to be preserved: "We agree with defendant … that his conviction of attempted menacing a police officer or peace officer must be reversed because that offense is not a legally cognizable crime. As relevant here, Penal Law § 120.18 provides that '[a] person is guilty of menacing a police officer or peace officer when he or she intentionally places or attempts to place a police officer . . . in reasonable fear of physical injury, serious physical injury or death by displaying a deadly weapon, . . . pistol, . . . or other firearm, whether operable or not, where such officer was in the course of performing his or her official duties and the defendant knew or reasonably should have known that such victim was a police officer.' Thus, according to the definition of menacing a police officer or peace officer set forth in the Penal Law, the attempt to commit the crime is already an element of the offense, and 'there cannot be an attempt to commit a crime which is itself a mere attempt to do an act or accomplish a result' ... . Although defendant failed to raise this issue at trial, preservation is not required inasmuch as this issue constitutes a mode of proceedings error ...". ***People v. Dibble*, 2019 N.Y. Slip Op. 07165, Fourth Dept 10-4-19**

CRIMINAL LAW, EVIDENCE.

TRIAL EVIDENCE RENDERED THE SINGLE-COUNT INDICTMENT DUPLICITOUS REQUIRING REVERSAL.

The Fourth Department, reversing defendant's conviction, determined the trial evidence rendered the single-count indictment duplicitous. Defendant was charged with criminal mischief: "We agree with defendant, however, that the single-count indictment was rendered duplicitous by the trial evidence. CPL 200.30 (1) provides that '[e]ach count of an indictment may charge one offense only.' Thus, 'acts which separately and individually make out distinct crimes must be charged in separate and distinct counts' ... . Here, the indictment charged defendant with damaging 'the road surface at the intersection of Woolhouse Road and County Road #32' and thus was not facially defective. At trial, however, the evidence established that defendant committed two distinct offenses by damaging two different portions of the road at that intersection at two different times. Consequently, '[r]eversal is required because the jury may have convicted defendant of an unindicted [act of criminal mischief], resulting in the usurpation by the prosecutor of the exclusive power of the [g]rand [j]ury to determine the charges . . . , as well as the danger that . . . different jurors convicted defendant based on different acts' ...". ***People v. Kniffin*, 2019 N.Y. Slip Op. 07176, Fourth Dept 10-4-19**

CRIMINAL LAW, VEHICLE AND TRAFFIC LAW.

ALTHOUGH DEFENDANT DID NOT VIOLATE THE VEHICLE AND TRAFFIC LAW IN MAKING A LEFT TURN, THE OFFICER REASONABLY BELIEVED THERE WAS A VIOLATION; THE TRAFFIC STOP WAS JUSTIFIED AND THE SUPPRESSION MOTION WAS PROPERLY DENIED.

The Fourth Department determined: (1) the left turn made by the defendant from the right-most lane did not violate Vehicle and Traffic Law § 1160; and (2) the officer who stopped the defendant reasonably believed the turn was a traffic violation. Therefore the traffic stop was justified: "Unlike the language used in other subsections of section 1160, the language of sub-

section (b) does not specify how close to the center line a vehicle must be when it completes its turn, nor does it designate a specific lane within which the vehicle must complete the turn (compare § 1160 [b] with § 1160 [a], [c], [e]). In light of the more specific language employed elsewhere in the statute, we read the use of the more general phrase 'right of the center line' as meaningful and intentional ... . Indeed, reading 'right of the center line' to mean the lane to the immediate right of the center line, or as close to center as possible, would improperly render the more specific language used elsewhere in the statute superfluous ... . [S]uppression [of the seized weapon] is not required here because the stop was the result of the officer's objectively reasonable belief that he observed a traffic violation ... . In light of 'the reality that an officer may suddenly confront a situation in the field as to which the application of a statute is unclear—however clear it may later become[,]' an officer's misreading of a statute that is susceptible of multiple interpretations and has not been definitively construed by New York appellate courts may amount to a reasonable mistake of law justifying a traffic stop ... . Notwithstanding our interpretation of Vehicle and Traffic Law § 1160 (b) above, the 'right of the center line' language is, in our view, susceptible of multiple interpretations, including the interpretation taken by the officer here, and the ambiguity has not previously been definitively construed." ***People v. Turner*, 2019 N.Y. Slip Op. 07190, Fourth Dept 10-4-19**

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA).

THE CRIME TO WHICH DEFENDANT PLED DID NOT HAVE A FORCIBLE COMPULSION ELEMENT SO 10 POINTS SHOULD NOT HAVE BEEN ASSESSED ON THAT GROUND; HOWEVER THE MATTER WAS SENT BACK BECAUSE AN UPWARD DEPARTURE MIGHT BE WARRANTED.

The Fourth Department, reversing County Court, determined the offense to which defendant pled guilty, criminal sexual act in the first degree, does not have forcible compulsion as an element and therefore the risk assessment must be reduced by 10 points. However the court noted that an upward department might be appropriate and sent the matter back: "... [T]he court erred in that assessment inasmuch as defendant pleaded guilty to criminal sexual act in the first degree under subdivision (3) of Penal Law § 130.50, which does not require evidence of forcible compulsion ... , and there was no other evidence in the record establishing that defendant used forcible compulsion in committing the crime. When those 10 points are subtracted, defendant's total score makes him a presumptive level two risk. Nevertheless, we note that an upward departure from the presumptive level may be warranted, i.e., there may be evidence of 'an aggravating . . . factor of a kind, or to a degree, that is otherwise not adequately taken into account by the guidelines'... . Here, however, 'because defendant was determined to be a level three sex offender, County Court had no reason to consider whether clear and convincing evidence exists to warrant such a departure' ...". ***People v. Weber*, 2019 N.Y. Slip Op. 07197, Fourth Dept 10-4-19**

PERSONAL INJURY, LANDLORD-TENANT.

OUT-OF-POSSESSION LANDLORD DEMONSTRATED IT WAS NOT RESPONSIBLE FOR REPAIR OF THE DANGEROUS CONDITION; LANDLORD'S MOTION FOR SUMMARY JUDGMENT IN THIS SLIP AND FALL CASE SHOULD HAVE BEEN GRANTED.

The Fourth Department, reversing Supreme Court, determined that defendant landlord's motion for summary judgment in this slip and fall case should have been granted. Although there was a dangerous condition, defendant, as an out-of-possession landlord, was not responsible for its repair: "... [D]efendant submitted the lease between defendant and plaintiff's employer, which provided that the lessee was responsible for all maintenance and repair of the premises except for 'Major Improvements,' which the lease defined as 'any major repair (repairs that are not of the nature of ordinary maintenance such as local patches, caulking, flashing)' including 'replacement of the roof, replacement of load-bearing walls and foundations, [and] repairs to the concrete floor.' We conclude that maintenance of the allegedly bent or defective metal strip was not a 'Major Improvement[]' under the lease ... . Further, the record established that defendant relinquished control of the premises. The fact that, under the lease, defendant reserved the right to enter the leased premises for purposes of inspection and performing 'Major Improvements,' is ' insufficient to establish the requisite degree of control necessary for the imposition of liability with respect to an out-of-possession landlord' ... . '[A]n out-of-possession landlord who reserves that right may be held liable for injuries to a third party only where a specific statutory violation exists' ... , and plaintiff failed to allege a specific statutory violation pertaining to the metal strip ...". ***Addeo v. Clarit Realty, Ltd.*, 2019 N.Y. Slip Op. 07163, Fourth Dept 10-4-19**

ZONING, LAND USE, CIVIL RIGHTS LAW.

THE ZONING BOARD OF APPEALS' RULING THAT A BREAKWALL AND RETAINING WALLS ON LAKEFRONT PROPERTY WERE FENCES WHICH VIOLATED THE CODE WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE AND WAS ANNULLED.

The Fourth Department, reversing Supreme Court, determined that the Zoning Board of Appeals' (ZBA's) ruling that the breakwall and retaining walls on lakefront property were fences which violated the code was not supported by substantial evidence. The matter was brought as a hybrid CPLR article 78 proceeding and action under 42 U.S.C. §§ 1983, 1985, and 1988: "... [T]he undisputed relevant evidence establishes that the walls do not fall within the plain meaning of fences as defined by Code former § 77-1 inasmuch as they were not erected for the purpose of enclosing or dividing a piece of land

.... Instead, the breakwall was constructed to maintain the shoreline of the lake in light of the future construction of a house on petitioner's property, the septic system retaining wall was constructed to secure the integrity of the proposed leach field, and the north side retaining wall was constructed to provide better drainage and avoid soil erosion. We thus conclude that the ZBA's determination affirming the order to remedy with respect to the violations of the Code that depend on the walls being considered fences lacks a rational basis and is not supported by substantial evidence." ***Matter of Fox v. Town of Geneva Zoning Bd. of Appeals*, 2019 N.Y. Slip Op. 07160**

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