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CasePrepPlus

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

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FIRST DEPARTMENT

CIVIL PROCEDURE, CONTRACT LAW.

OHIO TRUSTEE'S REQUEST FOR PAYMENT PURSUANT TO A ROYALTY AGREEMENT WITH THE NEW YORK PLAINTIFF DID NOT CONFER JURISDICTION UPON NEW YORK, DESPITE A NEW YORK CHOICE OF LAW PROVISION.

The First Department, reversing Supreme Court, determined the Ohio trustee's request for payment under a 1986 royalty agreement with the New York plaintiff did not confer jurisdiction upon New York, even though the contract included a New York choice of law provision: "The trustee's requests from Ohio, by letter, telephone, and/or email, to plaintiff in New York to send him monies due under the royalty agreement that plaintiff had entered into in 1986 with nonparty Denise Somerville ...— which would merely continue plaintiff's previous practice of sending royalties to Somerville in Ohio — do not constitute the transaction of business under CPLR 302(a)(1) ... . [N]egotiating a contract from outside New York 'is insufficient to constitute the transaction of business in New York' ... . The fact that the contract chooses New York law does not 'constitute a voluntary submission to personal jurisdiction in New York' ...". ***ABKCO Music, Inc. v. McMahon*, 2019 N.Y. Slip Op. 06721, First Dept 9-24-19**

CRIMINAL LAW, EVIDENCE.

DEFENDANT REQUESTED AN ATTORNEY IN NEVADA AND DID NOT WAIVE HIS RIGHT TO COUNSEL BEFORE HE WAS QUESTIONED IN NEW YORK, HIS STATEMENTS SHOULD HAVE BEEN SUPPRESSED.

The First Department, reversing defendant's conviction and ordering a new trial, determined defendant had requested an attorney in Nevada and, upon being returned to New York, was questioned without waiving his right to counsel in the presence of counsel. Therefore the statements should have been suppressed: "Defendant's motion to suppress his incriminating written and videotaped statements should have been granted. Several days before defendant made the contested statements, he was taken into custody by the Las Vegas Police Department. While in custody, defendant requested to speak with the detective from the Regional Fugitive Task Force who had located defendant in Las Vegas and was about to bring him back to New York. The detective met defendant in a conference room and asked him if he wanted to talk. Defendant responded, 'I would like to tell you what happened, but I think I want to talk to an attorney.' The detective, who responded by saying 'okay,' and did not ask defendant any questions about the homicide, testified that he understood that defendant 'wanted an attorney.' Upon returning to New York, defendant met with the investigating detective and made incriminating written and video statements. Defendant moved to suppress his statements, which was denied, and the statements were admitted at trial. 'When a defendant in custody unequivocally requests the assistance of counsel, any purported waiver of that right obtained in the absence of counsel is ineffective' ...". ***People v. Roman*, 2019 N.Y. Slip Op. 06719, First Dept 9-24-19**

HUMAN RIGHTS LAW, EMPLOYMENT LAW.

AN INDIVIDUAL CORPORATE OFFICER, AS OPPOSED TO THE CORPORATION, CAN NOT BE HELD STRICTLY LIABLE FOR SEXUAL HARASSMENT UNDER THE NYC HUMAN RIGHTS LAW UNLESS THE OFFICER ENCOURAGED, CONDONED OR APPROVED THE SPECIFIC DISCRIMINATORY CONDUCT; COMPLAINT AGAINST THE CORPORATE OFFICER DISMISSED.

The First Department, in full-fledged opinion by Justice Kern, over a two-justice dissent, reversing Supreme Court, determined that an individual corporate officer cannot be held strictly liable under the New York City Human Rights Law (HRL) for sexual discrimination unless the officer encouraged, condoned or approved the conduct. Here the plaintiff did not demonstrate the officer, Michael Bloomberg, was aware of the conduct by plaintiff's supervisor (Ferris). The complaint against the officer was dismissed: "With respect to Mr. Bloomberg, the allegations in the complaint are as follows. Following Mr. Bloomberg's example and leadership, Bloomberg L.P. bred a hostile work environment that led to the type of discrimination plaintiff experienced. Mr. Bloomberg was sued in a class action brought by female employees who alleged sexual harassment and creation of a hostile work environment while he was CEO of Bloomberg L.P. Mr. Bloomberg was also accused of condoning systemic top-down discrimination against female employees in a sexual harassment suit brought by the US Equal Employment Opportunity Commission on behalf of 58 female employees, not including the plaintiff. The complaint

also cites various magazine articles and statements by public figures describing unsavory conduct and comments made by Mr. Bloomberg, directed at or regarding women other than plaintiff. * * * .. [W]we find that plaintiff's City HRL claims must be dismissed as against Mr. Bloomberg because plaintiff has failed to sufficiently allege that Mr. Bloomberg is her employer for purposes of the City HRL. She has failed to allege that Mr. Bloomberg encouraged, condoned or approved the specific discriminatory conduct allegedly committed by Mr. Ferris." ***Doe v. Bloomberg, L.P.*, 2019 N.Y. Slip Op. 06728, First Dept 9-24-19**

SECOND DEPARTMENT

CIVIL PROCEDURE.

NEITHER A CERTIFICATION ORDER NOR A STIPULATION EXTENDING THE DATE FOR FILING A NOTE OF ISSUE MET THE REQUIREMENTS OF A 90-DAY NOTICE; THE DISMISSAL OF THE ACTION WAS INVALID; THE MOTION TO RESTORE SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined the action was not properly dismissed pursuant to CPLR 3216 and plaintiff's motion to restore the action to the calendar should have been granted: "... [T]he Supreme Court issued a certification order which ... certified the matter for trial and directed the plaintiff to file a note of issue within 90 days. The order provided that '[i]f plaintiff does not file a note of issue within 90 days this action may be dismissed. (CPLR 3216).' Thereafter, the parties executed a stipulation dated June 15, 2017, extending the date by which the note of issue must be filed to September 7, 2017. The action was ministerially dismissed on June 21, 2017, without further notice to the parties. ... An action cannot be dismissed pursuant to CPLR 3216(a) 'unless a written demand is served upon the party against whom such relief is sought' in accordance with the statutory requirements, along with a statement that the default by the party upon whom such notice is served in complying with such demand within said ninety day period will serve as a basis for a motion by the party serving said demand for dismissal as against him for unreasonably neglecting to proceed' ... . The certification order, which purported to serve as a 90-day notice pursuant to CPLR 3216, was defective as it did not state that the plaintiff's failure to comply with the demand would serve as a basis for the court, on its own motion, to dismiss the action for failure to prosecute ... . Furthermore, contrary to the determination of the Supreme Court, the subsequent stipulation ... , which purported to extend the plaintiff's deadline for filing a note of issue ... , did not constitute a valid 90-day demand ... . Moreover, it is evident from the record that the action was ministerially dismissed without a motion or notice to the parties, and there was no order of the court dismissing the action ...". ***Rosenfeld v. Schneider Mitola LLP*, 2019 N.Y. Slip Op. 06813, Second Dept 9-25-19**

CIVIL PROCEDURE, NEGLIGENCE, EVIDENCE.

THE DEFENDANT IN THIS SLIP AND FALL CASE, WHOSE ANSWER HAD BEEN STRUCK, SHOULD HAVE BEEN ALLOWED TO PRESENT EVIDENCE ON DAMAGES.

The Second Department, reversing Supreme Court, determined that, although defendant's answer in this slip and fall case had been struck, the defendant should not have been precluded from presenting evidence on damages: "... Supreme Court ... struck the answer and scheduled an inquest on the issue of damages. At the inquest, following direct testimony by the plaintiff, the court denied defense counsel's request to cross-examine the plaintiff, since the defendant's answer had been stricken. The court awarded the plaintiff damages in the principal sum of $267,221.77. ... '[A] defendant whose answer is stricken as a result of a default admits all traversable allegations in the complaint, including the basic allegation of liability, but does not admit the plaintiff's conclusion as to damages' ... . 'Accordingly, where a judgment against a defaulting defendant is sought by motion to the court, the defendant is entitled, at an inquest to determine damages, to cross-examine witnesses, give testimony, and offer proof in mitigation of damages' ... . Here, since the Supreme Court did not provide such an opportunity to the defendant, we remit the matter to the Supreme Court, Queens County, for a new inquest on the issue of damages ...". ***Dejesus v. H.E. Broadway, Inc.*, 2019 N.Y. Slip Op. 06743, First Dept 9-25-19**

CRIMINAL LAW, APPEALS, EVIDENCE.

WAIVER OF APPEAL INVALID; MATTER REMITTED FOR THE STATUTORILY REQUIRED FINDINGS FOR THE DENIAL OF DEFENDANT'S SUPPRESSION MOTION; APPEAL HELD IN ABEYANCE.

The Second Department determined defendant's waiver of appeal was invalid. He therefore could challenge the denial of his suppression motion on appeal. However, Supreme Court did not make the statutorily required findings of fact and conclusions of law. The matter was remitted for findings on all the issues raised by the suppression motion, and the appeal is held in abeyance: "When the Supreme Court attempted to explain to the defendant the waiver of the right to appeal, it improperly conflated the right to appeal with rights automatically forfeited by a plea of guilty ... . As such, the record does not demonstrate that the defendant understood the nature of the right he was being asked to waive or the distinction between the right to appeal and the other trial rights which are forfeited incident to a plea of guilty ... . Moreover, although the record of the proceedings reflects that the defendant executed a written waiver of his right to appeal, the court did not

ascertain on the record whether the defendant had read the waiver or discussed it with defense counsel ... . '[T]he CPL article 710 suppression procedure involves an adjudication based on mixed questions of law and fact'... . 'The suppression court must make findings of fact, often requiring it to assess the credibility of witnesses' ... . 'Regardless of whether a hearing was conducted, the court, upon determining [an article 710] motion, must set forth on the record its findings of fact, its conclusions of law and the reasons for its determination' (CPL 710.60[6] ...) ." ***People v. Harris*, 2019 N.Y. Slip Op. 06795, Second Dept 9-25-19**

FORECLOSURE, EVIDENCE.

BANK'S EVIDENCE OF DEFENDANT'S DEFAULT WAS INADMISSIBLE HEARSAY, BANK'S MOTION FOR SUMMARY JUDGMENT IN THIS FORECLOSURE ACTION SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined that the bank's proof that defendant (Bazigos) defaulted on the loan was inadmissible hearsay: " 'In order to establish prima facie entitlement to judgment as a matter of law in a foreclosure action, a plaintiff must submit the mortgage and unpaid note, along with evidence of the default' ... . 'A plaintiff may establish a payment default by an admission made in response to a notice to admit (see CPLR 3212[b]; 3123), by an affidavit from a person having [personal] knowledge of the facts' (CPLR 3212[b]), or by other evidence in admissible form' ... . Here, Bluford (a bank vice-president), whose knowledge was based on business records, did not actually attach or otherwise incorporate into her affidavit any business records showing that Bazigos had defaulted on the note. Thus, her affidavit constituted inadmissible hearsay and lacked probative value on the issue of Bazigos's default ...". ***HSBC Bank USA, N.A. v. Bazigos*, 2019 N.Y. Slip Op. 06757, Second Dept 9-25-19**

FORECLOSURE, EVIDENCE, UNIFORM COMMERCIAL CODE (UCC).

BANK'S EVIDENCE OF DEFAULT WAS INADMISSIBLE HEARSAY; INSUFFICIENT PROOF THE NOTE WAS ENDORSED IN BLANK; THE BANK'S MOTION FOR SUMMARY JUDGMENT IN THIS FORECLOSURE ACTION SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined the bank's motion for summary judgment in this foreclosure action should not have been granted. There was insufficient evidence the note was endorsed in blank and there was insufficient evident of defendant's default: "... [I]t is undisputed that a copy of the underlying note was annexed to the complaint. However, notwithstanding the plaintiff's assertion in its appellate brief that '[t]he note, as attached to the complaint, was indorsed in blank on the reverse side of the signature page (and not a separate allonge),' it cannot be ascertained from the copy of the note annexed to the complaint whether the separate page that bears the endorsement in blank was stamped on the back of the note, as alleged by the plaintiff, or on an allonge, in which case the plaintiff would have to prove that the endorsement was 'so firmly affixed thereto as to become a part thereof,' as required under UCC 3-202(2). ... [W]hile Panganiban's [plaintiff bank's vice president's] affidavit was sufficient to establish a proper foundation for the admission of a business record pursuant to CPLR 4518(a) ... , the plaintiff failed to submit copies of the business records themselves. '[T]he business record exception to the hearsay rule applies to a writing or record' (CPLR 4518[a]) . . . [and] it is the business record itself, not the foundational affidavit, that serves as proof of the matter asserted' ... . 'While a witness may read into the record from the contents of a document which has been admitted into evidence , ... a witness's description of a document not admitted into evidence is hearsay' ...". ***JPMorgan Chase Bank, N.A. v. Grennan*, 2019 N.Y. Slip Op. 06761, Second Dept 9-25-19**

INSURANCE LAW, ARBITRATION.

A FRAMED ISSUE HEARING IS REQUIRED TO DETERMINE IF THE CARRIER PROPERLY DISCLAIMED COVERAGE IN THIS TRAFFIC ACCIDENT CASE ON THE GROUND THAT ITS INSURED'S CAR HAD BEEN STOLEN; THE UNINSURED MOTORIST CARRIER'S PETITION FOR A TEMPORARY STAY OF ARBITRATION SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined that a framed-issue hearing was required to determine if the insurer, National General, properly disclaimed coverage in this traffic accident case. The insured vehicle, owned by Singh, left the scene of the accident. National General disclaimed coverage alleging the vehicle had been stolen at the time of the accident. Santos, the driver of the car struck by the Singh car, then made a demand for arbitration of uninsured motorist against his insurer, Country-Wide. Country-Wide then brought the underlying petition to stay arbitration which was denied. Country-Wide appealed: " 'The party seeking a stay of arbitration has the burden of showing the existence of sufficient evidentiary facts to establish a preliminary issue which would justify the stay' ... . 'Thereafter, the burden is on the party opposing the stay to rebut the prima facie showing' ... . 'Where a triable issue of fact is raised, the Supreme Court, not the arbitrator, must determine it in a framed-issue hearing, and the appropriate procedure under such circumstances is to temporarily stay arbitration pending a determination of the issue' ... ... [T]he petitioner met its initial burden by submitting evidence establishing that at the time of the accident the Singh vehicle was covered by a policy of insurance issued by National General ... . National General's disclaimer letter, submitted by Country-Wide in support of its petition, constituted prima facie evidence as to the existence of a policy of insurance covering Singh's vehicle at the time of the accident. That

same letter was sufficient to raise a triable issue of fact as to the validity of National General's disclaimer ... . 'Vehicle and Traffic Law § 388 creates a strong presumption that the driver of a vehicle is operating it with the owner's consent, which can only be rebutted by substantial evidence demonstrating that the vehicle was not operated with the owner's permission' ... . '[E]vidence that a vehicle was stolen at the time of the accident may overcome the presumption of permissive use' ... . Under these circumstances, a framed-issue hearing is necessary to determine whether National General properly disclaimed coverage of Singh's vehicle ...". ***Matter of Country-Wide Ins. Co. v. Santos*, 2019 N.Y. Slip Op. 06767, Second Dept 9-25-19**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

PLAINTIFF'S INJURY DID NOT INVOLVE THE TYPE OF ELEVATION HAZARD CONTEMPLATED BY LABOR LAW § 240(1) AND DEFENDANTS DID NOT EXERCISE A LEVEL OF SUPERVISORY CONTROL SUFFICIENT TO TRIGGER LIABILITY UNDER LABOR LAW § 200.

The Second Department, reversing Supreme Court, determined plaintiff's injury did not involve the type of elevation hazard covered by Labor Law § 240 (1) and defendants did not exercise the level of supervisory control necessary for liability under Labor Law 200: "The plaintiff allegedly was injured when a metal plate, which was used to cover an excavated trench located on the roadway, struck the plaintiff as it was being removed from the roadway surface. * * * ... [T]he defendants established their prima facie entitlement to judgment as a matter of law dismissing the Labor Law § 200 and common-law negligence causes of action by their submissions, which demonstrated that they only had general supervisory authority over the plaintiff's work ... . 'The contemplated hazards [of Labor Law § 240(1)] are those related to the effects of gravity where protective devices are called for either because of a difference between the elevation level of the required work and a lower level or a difference between the elevation level where the worker is positioned and the higher level of the materials or load being hoisted or secured' ... . The defendants established, prima facie, that the plaintiff's injury did not result from the type of elevation-related hazard contemplated by Labor Law § 240(1) ...". ***Lombardi v. City of New York*, 2019 N.Y. Slip Op. 06763, Second Dept 9-25-19**

PERSONAL INJURY, EMPLOYMENT LAW.

PLAINTIFF WAS NOT INJURED BY THE CONDITION HE WAS HIRED TO FIX IN THIS SLIP AND FALL CASE; DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined defendant's motion for summary judgment in this slip and fall case should not have been granted. Plaintiff, a cleaner employed by a nonparty to clean a NYC school, tripped and fell as he was walking across the auditorium stage to turn on the lights. The defendant argued it could not be liable because plaintiff was injured by the condition he was responsible to fix: "A plaintiff cannot recover against a defendant for common-law negligence if he or she was injured by the dangerous condition which he or she had been hired to remedy ... . Here, the evidence submitted by the defendants established that the plaintiff was merely walking to the rear of the stage in order to turn on the lights in the auditorium. Thus, the plaintiff was not engaged in the type of cleaning activity aimed at eliminating the risk presented by the test board that had been left on the floor ... . Additionally, the plaintiff's duty to clean visible debris off the floor had not yet arisen, because the plaintiff testified that due to the dim lighting condition in the auditorium, he had not observed the test board before his fall." ***Torres v. Board of Educ. of the City of New York*, 2019 N.Y. Slip Op. 06818, Second Dept 9-25-19**

PERSONAL INJURY, EVIDENCE.

THE ISSUE OF PLAINTIFF'S COMPARATIVE NEGLIGENCE IN THIS BICYCLE-VEHICLE ACCIDENT CASE CAN BE CONSIDERED BECAUSE PLAINTIFF ARGUED HE WAS NOT COMPARATIVELY NEGLIGENT IN HIS MOTION FOR SUMMARY JUDGMENT; PLAINTIFF DID NOT ELIMINATE ALL QUESTIONS OF FACT ABOUT WHETHER HE WAS COMPARATIVELY NEGLIGENT; PLAINTIFF RAN INTO THE DOOR OF DEFENDANT'S CAR AS IT WAS BEING OPENED.

The Second Department determined, because plaintiff in this bicycle-vehicle traffic accident case affirmatively argued he was not comparatively negligent, the issue of comparative negligence was properly considered on plaintiff's summary judgment motion. Plaintiff ran into the door of defendant's car as it was being opened. The plaintiff did not eliminate all triable issue of fact concerning his comparative negligence: " 'Although a plaintiff need not demonstrate the absence of his or her own comparative negligence to be entitled to partial summary judgment as to a defendant's liability'... , the issue of a plaintiff's comparative negligence may be decided where, as here, 'the plaintiff specifically argued the absence of comparative fault in support of his [or her] motion' ... . Here, the plaintiff failed to establish, prima facie, that he was not comparatively at fault in the happening of the accident ... . 'A bicyclist is required to use reasonable care for his or her own safety, to keep a reasonably vigilant lookout for vehicles, and to avoid placing himself or herself in a dangerous position' ... . In support of his motion, the plaintiff submitted, inter alia, the deposition testimony of the parties, which failed to eliminate all triable issues of fact as to whether the plaintiff exercised reasonable care while riding his bicycle. Further, although the plaintiff was not required to demonstrate his freedom from comparative fault to establish his entitlement to summary

judgment on the issue of liability ... , the plaintiff failed to eliminate triable issues of fact as to whether the defendant was negligent and, if so, whether any such negligence caused or contributed to the accident ...". ***Flores v. Rubenstein*, 2019 N.Y. Slip Op. 06747, Second Dept 9-25-19**

PERSONAL INJURY, EVIDENCE.

ALTHOUGH PLAINTIFF HERSELF MAY NOT HAVE BEEN ABLE TO IDENTIFY THE CAUSE OF HER SLIP AND FALL, HER DAUGHTER, WHO WITNESSED THE FALL, PROVIDED SUFFICIENT EVIDENCE TO WARRANT DENIAL OF DEFENDANT'S SUMMARY JUDGMENT MOTION.

The Second Department, reversing Supreme Court, determined defendant's (New York City Housing Authority's, NYCHA's) motion for summary judgment in this slip and fall case should not have been granted. Plaintiff's daughter, who witnessed the fall, provided sufficient evidence of the sidewalk defect: " 'If a plaintiff is unable to identify the cause of a fall, any finding of negligence would be based upon speculation' ... . 'That does not mean that a plaintiff must have personal knowledge of the cause of his or her fall' ... . 'It only means that a plaintiff's inability to establish the cause of his or her fall — whether by personal knowledge or by other admissible proof — is fatal to a cause of action based on negligence' ... . In support of its motion, NYCHA submitted a transcript of the deposition testimony of the plaintiff's daughter, Galina Moiseyeva (hereinafter Galina), who testified that she saw the plaintiff fall because of a 'crack' or 'gap' in the sidewalk, which made the sidewalk a 'different level.' Further, Galina, who lived with the plaintiff in the premises abutting the sidewalk, testified that she walked along the sidewalk while traveling to and from work, and was previously aware of the alleged crack in the sidewalk. Contrary to NYCHA's contentions, the alleged failure of the plaintiff and Galina to identify the exact location of the plaintiff's alleged fall on a photograph shown at their depositions and hearings pursuant to General Municipal Law § 50-h, which photograph was taken the day after the alleged accident occurred and after NYCHA had allegedly covered the subject part of the sidewalk with plywood, did not establish, prima facie, that the plaintiff is unable to identify the cause of her fall. Under the circumstances, NYCHA failed to eliminate triable issues of fact as to whether the plaintiff fell due to the alleged defective condition of the sidewalk ...". ***Moiseyeva v. New York City Hous. Auth.*, 2019 N.Y. Slip Op. 06766, Second Dept 9-25-19**

PERSONAL INJURY, LANDLORD-TENANT.

LANDLORD DID NOT SUBMIT SUFFICIENT PROOF THAT THE LEASE REQUIRED THE TENANT TO REMOVE ICE AND SNOW, THEREFORE THE OUT-OF-POSSESSION LANDLORD'S MOTION FOR SUMMARY JUDGMENT IN THIS SLIP AND FALL CASE SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined that the out-of-possession landlord's motion for summary judgment in this slip and fall case should not have been granted. The landlord did not submit a copy of the (expired) lease: " 'Generally, when a tenant remains in possession [of the leased premises] after the expiration of a lease, pursuant to common law, there is implied a continua[tion] of the tenancy on the same terms and subject to the same covenants as those contained in the original instrument'... . By failing to submit a copy of the expired lease in support of their motion, the defendants failed to establish, prima facie, that they had no contractual obligation to remove snow and ice from the property ... . Even assuming that neither the plaintiff nor the defendants have a copy of the expired lease in their possession, the defendants inexplicably failed to submit a copy of a lease entered into between them and other tenants of the property, notwithstanding the deposition testimony of the defendant ... that he has rented the property since he purchased it in 1996, that he entered into a lease with each tenant, and that the leases specifically provided that it was the tenants' responsibility to remove snow and ice." ***Miske v. Selvaggi*, 2019 N.Y. Slip Op. 06765, Second Dept 9-25-19**

PERSONAL INJURY, MUNICIPAL LAW.

THE PETITION FOR LEAVE TO FILE A LATE NOTICE OF CLAIM IN THIS SIDEWALK SLIP AND FALL CASE SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined the petition for leave to file a late notice of claim in this sidewalk slip and fall case should not have been granted: "Although the photographs submitted in support of the petition may have demonstrated that the City had prior knowledge of the defect in the asphalt, 'actual knowledge of the defect is not tantamount to actual knowledge of the facts constituting the claim, since the City was not aware of the petitioner's accident, her injuries, and the facts underlying her theory of liability' ... . A lack of due diligence in determining the identity of the owner of the property upon which the subject accident occurred is not a reasonable excuse for the failure to serve a timely notice of claim ... . In addition, the petitioner failed to satisfy her initial burden of showing that the City would not be substantially prejudiced in maintaining a defense on the merits as a result of the delay ...". ***Matter of Perez v. City of New York*, 2019 N.Y. Slip Op. 06774, Second Dept 9-25-19**

THIRD DEPARTMENT

FAMILY LAW.

FATHER'S SUSPENDED JAIL SENTENCE FOR FAILURE TO PAY CHILD SUPPORT ARREARS SHOULD NOT HAVE BEEN REVOKED WITHOUT PROVIDING FATHER THE OPPORTUNITY TO PRESENT EVIDENCE RE: HIS INABILITY TO PAY.

The Third Department, reversing Family Court, determined father's suspended jail sentence should not have been revoked without an inquiry into father's inability to pay the child support arrears: "... [T]he Warren County Department of Social Services, acting on behalf of the mother, submitted a request for an order of commitment based upon the father's failure to comply with the support order or pay the arrears. The father ... filed a petition seeking modification of the support order based upon his ongoing medical issues. During a hearing on the modification petition, it was revealed that the father's child support obligation had ended and that he was seeking an adjustment to pay the arrears until he could return to work. It was also disclosed that the proceedings on the order of commitment had been adjourned pending the father's sale of certain real property. ... When these proceedings resumed, the father indicated that he did not have a contract to sell the real property or any means to pay the child support arrears. Family Court adjourned the proceedings to enable the father to undergo surgery, but directed him to return to court with a certified check for the child support arrears in the amount of $12,467.57. When the father did not appear in court on the adjourned date, Family Court issued a warrant and an order of commitment directing respondent's confinement in jail for 60 days. ... We agree with the father that Family Court erred in revoking the suspension of his jail sentence without first affording him the opportunity to present evidence on his inability to pay the arrears (see Family Ct Act § 433 [a] ...). ... [T]he record does not reflect that Family Court conducted the necessary evidentiary hearing or undertook a sufficient inquiry as to the father's inability to pay the child support arrears." ***Matter of Eddy v. Eddy*, 2019 N.Y. Slip Op. 06825, Third Dept 9-26-19**

WORKERS' COMPENSATION.

THE WORKER'S COMPENSATION AWARD SHOULD NOT HAVE BEEN APPORTIONED BETWEEN THE COMPENSABLE INJURY AND A PREEXISTING CONDITION WHICH DID NOT AFFECT CLAIMANT'S ABILITY TO WORK.

The Third Department, reversing the Workers' Compensation Board, determined the award should not have been apportioned between claimant's compensable injury and his preexisting MS condition: " 'As a general rule, apportionment is not applicable as a matter of law where the preexisting condition was not the result of a compensable injury and the claimant was able to effectively perform his or her job duties at the time of the work-related accident despite the preexisting condition' ... . 'Significantly, degeneration and infirmities which have not previously produced disability are not a proper basis for reduction of compensation' ... . [C]laimant's MS, although not diagnosed until after the work-related accident, was a preexisting condition. There is no evidence whatsoever that claimant's MS precluded him from performing the duties of his employment. As there is no evidence of an apportionable disability prior to the ... accident, apportionment of claimant's award is, as a matter of law, inappropriate ...". ***Matter of Whitney v. Pregis Corp.*, 2019 N.Y. Slip Op. 06828, Third Dept 9-26-19**

FOURTH DEPARTMENT

CRIMINAL LAW, EVIDENCE.

THERE WAS SUFFICIENT EVIDENCE DEFENDANT INTENTIONALLY AIDED THE PRINCIPALS IN THE KIDNAPPING; THE EVIDENCE THAT DEFENDANT CONSTRUCTIVELY POSSESSED A WEAPON, HOWEVER, WAS LEGALLY INSUFFICIENT.

The Fourth Department affirmed defendant's kidnapping conviction but reversed the weapons-related counts because the evidence she constructively possessed a weapon found in the house was legally insufficient: "... [T]he evidence is legally sufficient to support [defendant's] conviction of kidnapping in the second degree. Viewing the evidence in the light most favorable to the People ... , we conclude that there is a valid line of reasoning and permissible inferences to support the conclusion that defendant had 'a shared intent, or community of purpose' with the principal[s]' ... . Defendant was present in a house when the police raided it and rescued two victims who were being held captive there, and the identification of one of the victims was found in a backpack that defendant was wearing when the police entered the house. It could be readily inferred from the evidence that defendant was aware that the victims were being held there and that she intentionally aided the principals by providing them and the victims with food ... . [The weapons-related] counts were based on her possession of a rifle that was found in the house after the police entered. To establish constructive possession of the weapon, the People had to establish that defendant 'exercised dominion or control over [the weapon] by a sufficient level of control over the area in which [it was] found' ... . Here, the evidence established that, prior to the arrival of the police, defendant was

sitting in the living room of the house, the rifle was on a table in the living room, and one of the other perpetrators in the kidnapping put on a mask, grabbed the rifle, went to the room where the victims were being held, then came back to the living room and put the rifle back on the table. Contrary to the People's contention, that evidence is insufficient to establish that defendant had constructive possession of the weapon. A defendant's mere presence in the house where the weapon is found is insufficient to establish constructive possession ... , and there was no evidence establishing that defendant exercised dominion or control over the weapon ...". ***People v. Rolldan*, 2019 N.Y. Slip Op. 06913, Fourth Dept 9-27-19**

CRIMINAL LAW, EVIDENCE.

THE WARRANTLESS SEARCH OF DEFENDANT'S VEHICLE WAS NOT JUSTIFIED UNDER THE AUTOMOBILE EXCEPTION OR AS A LIMITED SAFETY SEARCH, MOTION TO SUPPRESS PROPERLY GRANTED.

The Fourth Department determined defendant's motion to suppress a handgun found in his vehicle and a post-seizure statement was properly granted: "... [O]fficers responded to the complainant's home after receiving a call that he had been threatened by defendant. The complainant told an officer that defendant threatened to shoot him and that he believed the threat was serious because defendant had been in possession of a black handgun prior to the instant incident. Defendant, who was seated in his truck, which was parked in front of the complainant's home, acknowledged that he had previously said he would shoot the complainant if the complainant entered defendant's property. Based on that information and defendant's admissions that he owned a rifle, which was at his home, and that he had a Virginia pistol permit but no New York pistol permit, the officers searched defendant's person but recovered no weapons. The officers then searched the area near the driver's seat of defendant's truck, from which they recovered a loaded handgun. ... The automobile exception to the warrant requirement permits a police officer to 'search a vehicle without a warrant when [the officer has] probable cause to believe that evidence or contraband will be found there' ... . [T]he police did not have probable cause to search defendant's vehicle after they searched him and determined that there was no immediate threat to their safety ... , inasmuch as defendant was not alleged to have brandished a gun at the scene, there was inconclusive evidence that he actually threatened the complainant at the scene, defendant did not engage in any suspicious or furtive movements, and the officers did not observe any weapons or related contraband in the vehicle or on defendant's person ... . [T]he officers' search of defendant's vehicle was not justifiable as a limited safety search. Probable cause is not required for a limited search of a vehicle ' where, following a lawful stop, facts revealed during a proper inquiry or other information gathered during the course of the encounter lead to the conclusion that a weapon located within the vehicle presents an actual and specific danger to the officers' safety sufficient to justify a further intrusion' ... . However, the Court of Appeals has 'emphasized . . . that a reasonable suspicion alone will not suffice' and that 'the likelihood of a weapon in the [vehicle] must be substantial and the danger to the officer's safety actual and specific' ...". ***People v. Pastore*, 2019 N.Y. Slip Op. 06930, Fourth Dept 9-27-19**

CRIMINAL LAW, JUDGES, ATTORNEYS.

RAPE THIRD IS NOT AN INCLUSORY CONCURRENT COUNT OF RAPE FIRST; THE VERDICT SHEET INCLUDED AN IMPERMISSIBLE ANNOTATION, MATTER REMITTED TO DETERMINE WHETHER DEFENSE COUNSEL CONSENTED TO THE ANNOTATION.

The Fourth Department determined: (1) rape third is not an inclusory concurrent count of rape first; and (2) the verdict sheet included an impermissible annotation. The matter was remitted to determine whether defense counsel consented to the annotation: "... [T]he verdict sheet, which states in relevant part 'Fourth Count: Rape in the Third Degree (lack of consent/totality of circumstances),' contains an impermissible annotation. Specifically, the 'totality of circumstances' language is impermissible because it is not 'statutory language' (CPL 310.20 [2]; see Penal Law § 130.25 [3]). Rather, it is language from the pattern jury instructions (see CJI 2d[NY] Penal Law § 130.25 [3]). Supreme Court was therefore required to obtain defense counsel's consent prior to submitting the annotated verdict sheet to the jury ... . Although 'consent to the submission of an annotated verdict sheet may be implied where defense counsel fail[s] to object to the verdict sheet after having an opportunity to review it' ... , here, the record does not reflect whether defense counsel had that opportunity. We therefore hold the case, reserve decision and remit the matter to Supreme Court to determine, following a hearing if necessary, whether defense counsel consented to the annotated verdict sheet ...". ***People v. Wilson*, 2019 N.Y. Slip Op. 06900, Fourth Dept 9-27-19**

PERSONAL INJURY, CONTRACT LAW.

NO ESPINAL EXCEPTIONS WERE PLED SO THE SNOW REMOVAL CONTRACTOR'S MOTION FOR SUMMARY JUDGMENT IN THIS SLIP AND FALL CASE WAS PROPERLY GRANTED; QUESTIONS OF FACT WERE RAISED ABOUT WHETHER THE STORM IN PROGRESS RULE APPLIED AND WHETHER THE AREA WAS SLIPPERY BEFORE THE STORM, PRECLUDING SUMMARY JUDGMENT IN FAVOR OF THE OTHER DEFENDANTS.

The Fourth Department, modifying Supreme Court, in this slip and fall case, determined: (1) the snow removal contractor's (Fitzgerald's) motion for summary judgment was properly granted because no Espinal exception was pled; and (2) there were questions of fact whether there was a storm in progress at the time of the fall and whether there were slippery areas prior to the storm: " '[A] contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party' (Espinal v. Melville Snow Contrs., 98 NY2d 136, 138 [2002]). Although there are three well-established exceptions to

that rule (see id. at 140), plaintiff did not allege facts in his complaint or bill of particulars that would establish the applicability of any of those exceptions, and thus Fitzgerald was not required to affirmatively negate the possible application of any of them in order to meet her initial burden ... . Instead, Fitzgerald had to demonstrate only that plaintiff was not a party to the snow removal contract and that she therefore owed no duty to him, which she accomplished by submitting a copy of the contract ... . [D]efendants submitted the deposition testimony of plaintiff, who testified that snow and rain had been predicted that day, but during the time leading up to his fall it was merely overcast. Thus, defendants' own submissions raise an issue of fact whether there was a storm in progress at the time of the fall .... Furthermore, defendants submitted the deposition testimony of an assistant store manager, who testified that there were 'a few' 'different' 'slippery spots' in the parking lot when she arrived for her shift at 2:00 p.m. on the day of plaintiff's fall, thus raising issues of fact whether the slippery condition preexisted the alleged storm ... , and whether defendants had actual or constructive notice of the slippery condition ...". Govenettio v. Dolgencorp of N.Y., Inc., 2019 N.Y. Slip Op. 06907, Fourth Dept 9-27-19

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