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COURT OF APPEALS

CIVIL PROCEDURE, LANDLORD-TENANT.

CLASS ACTION CLAIM BY TENANTS ALLEGING VARIOUS FORMS OF RENT OVERCHARGES PROPERLY SURVIVED A PRE-ANSWER MOTION TO DISMISS AND SHOULD PROCEED TO THE CERTIFICATION STAGE PURSUANT TO CPLR 902.

The Court of Appeals, in a full-fledged opinion by Judge Fahey, over a three-judge dissent, determined the pre-answer motion to dismiss a class action claim by tenants alleging various forms of rent overcharges was properly denied and the matter should move on for a ruling on whether the prerequisites for a class action under CPLR 902 are met: "... [T]here is an element of truth to defendants' suggestion that the class claims — particularly those based on the alleged misrepresentation and inflation of the costs of IAIs [individual apartment improvements]— may require separate proof with respect to each plaintiff. Along those lines, defendants note that the operative complaint 'alleges overcharges for inflated IAI increases of [various] amounts' — 136%, 97%, 82%, 104%, 113%, 33%, or 254% for various apartments — which they contend supports the idea that the alleged overcharges are separate wrongs to separate persons that do not form the basis for a class action ... . That leads to the friction point on this appeal: are we to look at the common basis for a damages claim or the degree of damage alleged? On the one hand, if, as defendants suggest, the differences in the specific means of harm is considered — that is, if at this stage the Court contemplates nuances of how those overcharges allegedly were accomplished — then plaintiffs may struggle to satisfy the factual component of CPLR 901 (a) (2). On the other hand, as plaintiffs note, to focus on potential idiosyncrasies within the class claims — distinctions that speak to damages, not to liability — at this juncture would potentially be to reward bad actors who execute a common method to damage in slightly different ways. * * * Here the complaint addresses harm effectuated through a variety of approaches but within a common systematic plan ... , and its class claims should not be dismissed at this juncture." ***Maddicks v. Big City Props., LLC*, 2019 N.Y. Slip Op. 07519, CtApp 10-22-19**

CRIMINAL LAW.

JUROR MISCONDUCT WARRANTED A NEW TRIAL IN THIS MURDER CASE.

The Court of Appeals, in a full-fledged opinion by Judge Wilson, affirming the Appellate Division, determined juror misconduct deprived defendant [Dr. Neulander] of a fair trial: "The Appellate Division concluded that the trial court abused its discretion by denying [defendant's] CPL 330.30 motion to set aside the verdict against him based on that juror misconduct. ... [H]e is entitled to a new trial. 'Nothing is more basic to the criminal process than the right of an accused to a trial by an impartial jury' ... . [A] jury convicted Dr. Neulander of murdering his wife and tampering with physical evidence. Throughout the trial, one of the jurors, Juror 12, sent and received hundreds of text messages about the case. Certain text messages sent and received by Juror 12 were troublesome and inconsistent with the trial court's repeated instructions not to discuss the case with any person and to report any attempts by anyone to discuss the case with a juror. Juror 12 also accessed local media websites that were covering the trial extensively. In order to hide her misconduct, Juror 12 lied under oath to the court, deceived the People and the court by providing a false affidavit and tendering doctored text message exchanges in support of that affidavit, selectively deleted other text messages she deemed 'problematic,' and deleted her now-irretrievable internet browsing history. The cumulative effect of Juror 12's extreme deception and dishonesty compels us to conclude that her 'improper conduct . . . may have affected a substantial right of defendant' (CPL 330.30[2])." ***People v. Neulander*, 2019 N.Y. Slip Op. 07521, CtApp 10-22-19**

CRIMINAL LAW, APPEALS.

THE APPEAL OF AN UNPRESERVED ISSUE DID NOT PRESENT A QUESTION OF LAW REVIEWABLE BY THE COURT OF APPEALS, THREE JUDGES DISSENTED.

The Court of Appeals, over an extensive two-judge dissenting opinion, and another dissent, determined that the modification by the Appellate Division could not be appealed: " '[A]n Appellate Division reversal [or modification] based on an unpreserved error is considered an exercise of the Appellate Division's interest of justice power' ... . Moreover, the Appellate Division's characterization of its own holding (i.e., 'on the law' or 'on the facts') is not binding; in determining jurisdiction, we look behind that characterization to discern the basis of the ruling ... . … Here, it is undisputed that, in vacating the

first-degree robbery count (without disturbing the second-degree robbery convictions ...), the Appellate Division relied upon an unpreserved argument concerning the proper interpretation of and minimum proof required to establish the weapon display element of the first-degree offense ... . As we have repeatedly recognized, for jurisdictional purposes an unpreserved issue of this nature does not present a question of law. Thus, the Appellate Division determination — the basis of the order of modification — was not 'on the law alone' but was necessarily made as a matter of discretion in the interest of justice ...". ***People v. Allende*, 2019 N.Y. Slip Op. 07523, Ct App 10-22-19**

CRIMINAL LAW, EVIDENCE.

PROOF PRESENTED TO THE GRAND JURY DID NOT SUPPORT ATTEMPTED THIRD OR FOURTH DEGREE LARCENY, APPELLATE DIVISION REVERSED.

The Court of Appeals, reversing (modifying) the Appellate Division, determined the evidence presented to the grand jury was not sufficient to support attempted third or fourth degree larceny. Apparently defendant used a sticky object to "fish" mail out of a mailbox. Although there were money orders in the mailbox, the money orders were not stuck to the object: "Viewed in the light most favorable to the People, the evidence presented to the grand jury was insufficient to demonstrate that defendant came dangerously close to taking property valued in excess of $3,000 or $1,000. There was no evidence that the items attached to defendant's mailbox fishing apparatus had any monetary value, no evidence of the volume of the mail contained in the mailbox or whether it was physically possible for defendant to procure the two money orders deposited in the mailbox by the government investigators amidst the other mail, no evidence as to whether the fishing device was immediately reusable, and no evidence that defendant intended to make successive attempts at fishing out the contents of the mailbox in question. Furthermore, the fact that defendant stated he would be paid $100 for each mailbox fished does not establish that he came dangerously close to stealing property valued at more than $3,000 or $1,000." ***People v. Deleon*, 2019 N.Y. Slip Op. 07522, CtApp 10-22-19**

ENVIRONMENTAL LAW, ADMINISTRATIVE LAW.

DEPARTMENT OF ENVIRONMENTAL CONSERVATION'S (DEC'S) RULING ALLOWING SNOWMOBILES TO USE A ROADWAY IN THE ADIRONDACK PARK UPHELD,

The Court of Appeals, in a full-fledged opinion by Judge DiFiore, over two dissenting opinions (three judges) held that the determination by the Department of Environmental Conservation (DEC) to allow snowmobiles to use an existing roadway in the Adirondack Park was not irrational and should stand: "Our state's constitutional commitment to conservation for more than a century has ensured the continued protection of the region's iconic landscapes while providing extraordinary outdoor recreational experiences to citizens of this state and tourists from around the world. Agencies charged with managing park property must balance, within applicable constitutional, statutory and regulatory constraints, the preeminent interest in maintaining the character of pristine vistas with ensuring appropriate access to remote areas for visitors of varied interests and physical abilities. In this appeal, we review a challenge brought by environmental groups to a determination of the New York State Department of Environmental Conservation ('DEC') made in consultation with the Adirondack Park Agency ('APA') that, among other things, permits seasonal snowmobile use on an existing roadway on property recently acquired by the State and added to the Adirondack Forest Preserve. Because we are unpersuaded by petitioners' contention that the determination either contravenes controlling motor vehicle use restrictions in the Adirondack Park State Land Master Plan ('Master Plan') and Wild, Scenic and Recreational Rivers System Act (ECL 15-2701 et seq. ['Rivers Act']) or is otherwise irrational, we affirm the challenged portion of the Appellate Division order." ***Matter of Adirondack Wild: Friends of the Forest Preserve v. New York State Adirondack Park Agency*, 2019 N.Y. Slip Op. 07520, CtApp 10-22-19**

PERSONAL INJURY, LANDLORD-TENANT, CONTRACT LAW.

A REGULATORY AGREEMENT ENTERED INTO BY THE OUT-OF-POSSESSION LANDLORD IN CONNECTION WITH AN FHA MORTGAGE, WHICH REQUIRED THAT THE LANDLORD KEEP THE PROPERTY IN GOOD REPAIR, DID NOT CHANGE THE TERMS OF THE LEASE WHICH MADE THE TENANT RESPONSIBLE FOR REPAIRS; THE OUT-OF-POSSESSION LANDLORD THEREFORE IS NOT LIABLE FOR A SLIP AND FALL CAUSED BY A ROOF LEAK.

The Court of Appeals, in a full-fledged opinion by Judge Stein, over a two-judge dissenting opinion, determined the owner of a nursing home, Hamilton Inc., as an out-of-possession landlord, was not liable to plaintiff who slipped and fell on the premises. It was alleged the pool of water which caused plaintiff to slip and fall was the result of a leak in the roof. The lease had made the tenant, Grand Manor, responsible for repairs. However a HUD regulatory agreement subsequently entered into by Hamilton Inc. in connection with an FHA mortgage required that the property be kept in good repair by Hamilton. The Court of Appeals held that the regulatory agreement did change the terms of the lease: "... [T]he HUD regulatory agreement, as incorporated into the 1978 amendment to the lease, did not alter the contractual relationship between the Hamilton defendants and Grand Manor regarding control of the premises or replace Grand Manor's contractual duty to perform maintenance and repairs at the facility. Although the terms of the HUD agreement were to supersede all other requirements in conflict therewith, the regulatory agreement did not conflict with, or absolve Grand Manor of, its responsibilities under the original lease. Indeed, as previously noted, the amendment continued all terms from the lease that did not conflict with

the regulatory agreement. Given the absence of a conflict on the issue of Grand Manor's duties to make repairs, the HUD agreement, as incorporated into the lease amendment, was not a covenant that could be said to displace Grand Manor's duties or alter the relationship between landlord and tenant ... . * * * ... [T]he 'exception to the general rule' set forth in Putnam is inapplicable to the regulatory agreement, and the general rule applies — that is, the "landlord is not liable for conditions upon the land after the transfer of possession" (38 NY2d at 617). Indeed, adoption of plaintiff's proposed rule — that would require us to extend the exception set forth in Putnam to any agreement made by the lessor to make repairs — would mean that lessees could assume the sole obligation in a lease to maintain premises in good repair but avoid making repairs in reliance on a covenant later discovered between the land owner and a third party, a result not intended or supported by Putnam." ***Henry v. Hamilton Equities, Inc.*, 2019 N.Y. Slip Op. 07642, CtApp 10-24-19**

PERSONAL INJURY, LANDLORD-TENANT, MUNICIPAL LAW.

PURSUANT TO THE NYC ADMINISTRATIVE CODE, OUT-OF-POSSESSION LANDLORDS ARE RESPONSIBLE FOR THE REMOVAL OF ICE AND SNOW FROM THE ABUTTING CITY SIDEWALKS, NOTWITHSTANDING AN AGREEMENT MAKING THE TENANT RESPONSIBLE; THE OUT-POSSESSION-LANDLORDS' MOTION FOR SUMMARY JUDGMENT IN THIS SLIP AND FALL CASE SHOULD NOT HAVE BEEN GRANTED BY THE APPELLATE DIVISION.

The Court of Appeals, in a full-fledged opinion by Judge Rivera, reversing the Appellate Division, determined that the NYC Administrative Code provision which requires the abutting landowners to maintain the city sidewalks applies to out-of-possession landlords, even where the tenant is responsible for maintaining the sidewalks under the lease: "Section 7-210 of the Administrative Code of the City of New York unambiguously imposes a nondelegable duty on certain real property owners to maintain City sidewalks abutting their land in a reasonably safe condition. Under this duty of care, a subject owner is liable for personal injury claims arising from the owner's negligent failure to remove snow and ice from the sidewalk (id. § 7-210 [b]). The Code makes no exception for out-of-possession landowners and so we hold that the duty applies with full force notwithstanding an owner's transfer of possession to a lessee or maintenance agreement with a nonowner. Thus, defendants are not entitled to summary judgment as a matter of law due solely to the owners' out-of-possession status." ***Xiang Fu He v. Troon Mgt., Inc.*, 2019 N.Y. Slip Op. 07643, CtApp 10-24-19**

FIRST DEPARTMENT

CIVIL PROCEDURE, CIVIL RIGHTS LAW.

PLAINTIFF'S 'DENIAL OF A FAIR TRIAL' ACTION PURSUANT TO 42 U.S.C. § 1983 SHOULD NOT HAVE BEEN DISMISSED BEFORE PLAINTIFF'S CASE WAS CLOSED; THE MOTION FOR A DIRECTED VERDICT WAS PREMATURE AND SHOULD NOT HAVE BEEN GRANTED, EVEN IF PLAINTIFF'S ULTIMATE SUCCESS WAS UNLIKELY; NEW TRIAL ORDERED.

The First Department, reversing Supreme Court, setting aside the verdict, and ordering a new trial, determined that the motion for a directed verdict should not have been granted prior to the close the plaintiff's case. Plaintiff had brought an action against the City of New York pursuant to 42 U.S.C. § 1983 alleging he had not received a fair trial: "The denial of a fair trial claim is a stand alone cause of action (see e.g. Garnett v. Undercover Officer C0039, 838 F3d 265, 278-279 [2d Cir 2016]), which should not have been dismissed prior to the conclusion of plaintiff's case in chief. CPLR 4401 permits a party to move for a directed verdict 'after the close of the evidence presented by an opposing party with respect to such cause of action or issue.' '[I]t is reversible error to grant a motion for a directed verdict prior to the close of the party's case against whom a directed verdict is sought' ... , even if the ultimate success of a plaintiff's cause of action is unlikely ...". ***Cromedy v. City of New York*, 2019 N.Y. Slip Op. 07527, First Dept 10-22-19**

CRIMINAL LAW, EVIDENCE.

DEFENDANT HAD A RIGHT TO BE PRESENT WHEN THE PROSECUTOR SUCCESSFULLY ARGUED ADDITIONAL MOLINEUX EVIDENCE SHOULD BE ADMITTED AT TRIAL, NEW TRIAL ORDERED.

The First Department, reversing defendant's conviction, determined defendant's absence from the judge's ruling on whether Molineux evidence was admissible violated his right to be present at material stages of the trial. Although defendant was present when the Molineux arguments were made, the prosecutor made further arguments at the time of the ruling, which led to additional Molineux evidence being presented at trial: "... [T]he trial court conducted an initial Ventimiglia hearing with defendant present to address the prosecution's Molineux application, which sought to admit evidence of defendant's alleged prior assault on his then-girlfriend. After the parties made their arguments, the trial court postponed the issuance of its ruling. On the date the trial court intended to issue its ruling, it noted that defendant had not yet been produced, and defense counsel stated that he would prefer if the court issued its ruling with defendant present. The court stated that defendant's presence was not required since it was merely issuing a legal ruling and began ruling on the application. The People then sought to include new factual details of the prior assault not mentioned at the earlier proceeding where defen-

dant was present (i.e. that defendant choked his then-girlfriend to the point that she almost lost consciousness). The trial court advised the prosecutor to leave out any testimony regarding these new details since these facts were not included in the original application. However, the prosecutor stressed that these new facts were 'critical' for the jury to understand why the victim feared defendant, and the trial court allowed the prosecutor to elicit testimony from the witness. Defendant should have been afforded the opportunity to be present given that the prosecutor's introduction of these new facts, in effect, expanded the original Molineux application and involved factual matters of which defendant may have had peculiar knowledge. Defendant was in the best position to either deny the new factual details, point out errors in the prosecutor's account of the details, or provide defense counsel with details that would have been useful in advancing his position ...". ***People v. Calderon*, 2019 N.Y. Slip Op. 07707, First Dept 10-24-19**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

INSTALLING WINDOW SHADES IS NOT 'ALTERING' WITHIN THE MEANING OF LABOR LAW § 240(1) AND WAS NOT PART OF THE GENERAL CONTRACTOR'S RESPONSIBILITIES.

The First Department, reversing Supreme Court, determined that defendants' motion for summary judgment on the Labor Law §§ 240(1), 241(6) and 200 causes of action should have been dismissed. Plaintiff's work was not "altering" within the meaning of Labor Law § 240(1) and was not part of the general contractor's (Greenlight's) contract with the apartment owners (the Dixons): "Because plaintiff Martin Topoli's work installing window shades at the time of the accident does not constitute 'altering' within the meaning of Labor Law § 240(1), that claim is dismissed ... . The Labor Law § 241(6) claim is also dismissed, since plaintiff's work is separate and distinct from the larger construction project … . Third-party defendants and apartment owners, Rebecca Dixon and Adam Dixon, modified the contract with general contractor Greenlight Construction Management Corp. to remove the provision and installation of window treatments from the scope of its work. The Dixons directly contracted with plaintiff's employer for the installation of the window shades after the construction work was completed and they had moved in to the apartment. Greenlight's return to the work site after the completion of construction, done to accommodate the Dixons' new desire for larger window valances, was limited in nature and separate from plaintiff's work." ***Topoli v. 77 Bleecker St. Corp.*, 2019 N.Y. Slip Op. 07537, First Dept 10-22-19**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

UNLOADING A HEAVY AIR CONDITIONING COIL FROM A TRUCK IS AN ACTIVITY COVERED BY LABOR LAW § 240(1).

The First Department, reversing (modifying) Supreme Court, determined that unloading a heavy coil from and truck was an activity covered by Labor Law § 240(1): "Plaintiff was injured when an air conditioning system coil that weighed at least 300 pounds and was being transported secured to two dollies fell on his leg as he and three coworkers unloaded it from a truck. After plaintiff and his coworkers had brought the coil to ground level on the truck's lift gate and were attempting to move it off the lift gate, a wheel of a dolly became caught in a gap on the lift gate, and the coil tipped over. In view of the weight of the coil and the amount of force it was able to generate, even in falling a relatively short distance, plaintiff's injury resulted from a failure to provide protection required by Labor Law § 240(1) against a risk arising from a significant elevation differential ... . Moving the coil safely required either hoisting equipment or a device designed to secure the coil against tipping or falling over ..". ***Ali v. Sloan-Kettering Inst. for Cancer Research*, 2019 N.Y. Slip Op. 07544, First Dept 10-22-19**

SECOND DEPARTMENT

ARBITRATION, CIVIL PROCEDURE.

THE ARBITRATION AWARD WAS INDEFINITE AND NONFINAL AND SHOULD NOT HAVE BEEN CONFIRMED.

The Second Department, reversing Supreme Court, determined the arbitration award should not have been confirmed because it was indefinite and nonfinal: "Although judicial review of arbitration awards is limited ..., an award will be vacated when the arbitrator making the award 'so imperfectly executed it that a final and definite award upon the subject matter submitted was not made' (CPLR 7511[b][1][iii] ...). An arbitration award will be vacated as indefinite or nonfinal for purposes of CPLR 7511 if it does not 'dispose of a particular issue raised by the parties' ... , or 'if it leaves the parties unable to determine their rights and obligations, if it does not resolve the controversy submitted or if it creates a new controversy' ... . Here, the appellant established that the arbitration award was indefinite and nonfinal inasmuch as it did not clearly define how the accounts receivable that were incurred prior to the date of the award were to be distributed. Moreover, the provision at issue created a new controversy between the parties with respect to the distribution of those funds. Accordingly, that portion of the award should have been vacated and the matter remitted ...". ***Matter of Rosenberg v. Schwartz*, 2019 N.Y. Slip Op. 07587, Second Dept 10-23-19**

CRIMINAL LAW, APPEALS.

A DEFENDANT WHO PLEADS GUILTY FORFEITS THE RIGHT TO APPEAL THE DENIAL OF A SPEEDY TRIAL MOTION; HERE, BECAUSE THE COURT ERRONEOUSLY TOLD DEFENDANT HE WOULD BE ABLE TO APPEAL, THE DEFENDANT MUST BE GIVEN THE OPPORTUNITY TO WITHDRAW HIS PLEA.

The Second Department, reversing defendant's conviction, determined that the court was wrong when it informed defendant he retained the right to appeal the ruling on the speedy trial motion (CPL § 30.30) after his guilty plea. Therefore defendant was entitled to the opportunity to withdraw his plea in this attempted murder case: "A defendant who has entered a plea of guilty 'forfeit[s] his [or her] right to claim that he [or she] was deprived of a speedy trial under CPL 30.30' ... . However, where a defendant's plea is predicated upon a false assurance that, notwithstanding the plea, the defendant can nonetheless contest the denial of a CPL 30.30 motion, the defendant is entitled, if he or she wishes, to withdraw the plea of guilty ... . Here, it is clear from the record that the defendant pleaded guilty in reliance upon a promise from the Supreme Court that, upon his plea of guilty, he would retain the right to appeal the denial of his motion pursuant to CPL 30.30 to dismiss the indictment. However, that promise cannot be fulfilled ... . Therefore, as the People concede, the defendant is entitled to withdraw his plea of guilty ...". ***People v. Hernandez*, 2019 N.Y. Slip Op. 07605, Second Dept 10-23-19**

CRIMINAL LAW, ATTORNEYS, APPEALS.

DEFENDANT WAS DEPRIVED OF HIS RIGHT TO COUNSEL WHEN THE JUDGE TOLD HIM NOT TO DISCUSS HIS TRIAL TESTIMONY WITH DEFENSE COUNSEL DURING A TWO-DAY ADJOURNMENT; ALTHOUGH THE LEGAL-SUFFICIENCY AND RIGHT-TO-COUNSEL ISSUES WERE NOT PRESERVED, THE APPEAL WAS HEARD IN THE INTEREST OF JUSTICE.

The Second Department, reversing defendant's convictions on several counts in the interest of justice because the evidence was legally insufficient, noted that a new trial was required on the remaining counts because defendant was deprived of his right to counsel. The trial judge told the defendant he could not discuss his trial testimony with his counsel during a two-day adjournment: "With regard to the third and seventeenth through twenty-third counts of the indictment, the defendant's convictions must be reversed because he was deprived of the right to counsel when the County Court instructed him not to discuss his trial testimony with his attorney during a two-day adjournment ... . Although the defendant failed to preserve this issue for appellate review, we reach the issue as a matter of discretion in the interest of justice ...". ***People v. Peloso*, 2019 N.Y. Slip Op. 07614, Second Dept 10-23-19**

CRIMINAL LAW, CONSTITUTIONAL LAW.

THE SECOND TRIAL VIOLATED THE DOUBLE JEOPARDY PROHIBITION; THE FIRST TRIAL COULD HAVE CONTINUED WITH ELEVEN JURORS AFTER A JUROR WAS DISQUALIFIED DURING DELIBERATIONS.

The Second Department, after the second trial was finished, determined that the second trial violated the double jeopardy prohibition. In the first trial, a juror talked to an attorney about the evidence and, during deliberations, told the other jurors what the attorney said. That juror was disqualified. The People moved for a mistrial. The defendant opposed and was willing to proceed with eleven jurors. The judge declared a mistrial: "When a mistrial is declared without the consent of or over the objection of a defendant, a retrial is precluded unless 'there was manifest necessity for the mistrial or the ends of public justice would be defeated' ... . [T]he People have not met their burden of demonstrating that the declaration of a mistrial was manifestly necessary. While it is undisputed that juror number 11 was grossly unqualified to continue serving, the Supreme Court abused its discretion in declaring a mistrial without considering other alternatives. The defendant specifically indicated his desire to waive trial by a jury of 12 individuals and proceed with the remaining 11 jurors, an option that has been endorsed by the Court of Appeals ... . Under the circumstances presented, as urged by defense counsel, it would have been appropriate to poll the remainder of the jurors to ascertain whether they could render an impartial verdict ... . Moreover, as the improper information imparted to the jurors did not significantly prejudice the People, the court should have considered whether a specific curative instruction could have clarified what constituted 'evidence' and whether such an instruction could have cured the impropriety ... . Accordingly, there was an insufficient basis in the record for the declaration of a mistrial, and thus, a retrial was precluded." ***People v. Smith*, 2019 N.Y. Slip Op. 07622, Second Dept 10-23-19**

CRIMINAL LAW, EVIDENCE.

THE SEARCH WARRANT WAS IMPROPERLY ADDRESSED TO CORRECTIONS OFFICERS, WHO ARE NOT POLICE OFFICERS, AS WELL AS POLICES OFFICERS, AND THE SEARCH WAS CONDUCTED BY BOTH POLICE OFFICERS AND CORRECTIONS OFFICERS; NEITHER THE SEARCH WARRANT NOR THE SEARCH WERE THEREBY RENDERED INVALID.

The Second Department determined defendant's motion to suppress on the ground that corrections officers, who are not police officers, participated in the search of his property was properly denied: "The defendant is correct that the search warrant was improperly addressed to the Special Operations Group, since it includes members who are not police officers

within the meaning of the statute (see CPL 690.25[1]; see also CPL 2.10[25]). However, '[s]earch warrants should be tested in a commonsense and realistic manner with minor omissions and inaccuracies not affecting an otherwise valid warrant' ... . Indeed, the fact that a search warrant is partially but not wholly invalid does not necessarily require suppression of the evidence that was recovered pursuant to such a warrant . Under the circumstances of this case, including the fact that the search warrant here was ... otherwise properly addressed to sworn police officers in conformity with CPL 690.25(1), the additional inclusion of the members of the Special Operation Group who were not police officers was 'analogous to a clerical omission which did not invalidate the warrant' ... . Furthermore, under the circumstances of this case, we conclude that the participation by members of the Special Operations Group in the execution of the search warrant did not invalidate the search or otherwise require suppression of the physical evidence at issue. Although the Criminal Procedure Law only authorizes '[a] police officer" to execute a search warrant ... , the participation by an individual who does not meet this statutory definition "is not inherently improper'... . Indeed, courts have upheld the validity of a search where civilians participated in the execution of a search warrant ... . Under such circumstances, 'civilians who act at the behest of the State are treated as police agents, subject to the same controls and restrictions of the Fourth Amendment as the police themselves' ...". ***People v. Ward*, 2019 N.Y. Slip Op. 07624, Second Dept 10-23-19**

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

PROOF OF AN UNCHARGED SEXUAL OFFENSE RELIED UPON FOR AN UPWARD DEPARTURE WAS INSUFFICIENT; LEVEL THREE ASSESSMENT REDUCED TO LEVEL TWO.

The Second Department reduced the defendant's sex offender level from three to two because the evidence of an uncharged sexual offense was not sufficient: "... [A]lthough the defendant's presumptive risk level was level two, the People contended that an upward departure was warranted based upon evidence that, approximately three months before the charged crime was committed, the defendant committed an uncharged sex offense against a different victim who allegedly was 15 years old at the time. While the People presented DNA evidence establishing that the defendant had sexual contact with the second alleged victim, the only evidence of that alleged victim's age was a statement in a police report that she was 15 years old, and, since the police report stated that the alleged victim's sexual contact with the defendant was willing, the bare notation of the victim's age was the only proof of the crime on which the People relied. Thus, the Supreme Court should not have granted an upward departure since the evidence of the alleged victim's age was not supported by a 'detailed victim statement[ ]' ... or otherwise corroborated ...". ***People v. Torres*, 2019 N.Y. Slip Op. 07629, Second Dept 10-23-19**

FAMILY LAW.

MOTHER'S CUSTODY PETITION SHOULD NOT HAVE BEEN DISMISSED WITHOUT A HEARING; CUSTODY PETITION MAY BE HEARD JOINTLY WITH A PERMANENCY HEARING.

The Second Department, reversing Family Court, determined than mother's petition for custody should not have been dismissed without a hearing and noted that a custody petition may be heard jointly with a permanency hearing: "The appeal from the order dated September 27, 2018, has not been rendered academic by the permanency hearing order dated November 13, 2018, which apparently changed the permanency goal from working toward legal guardianship by the maternal grandmother to guardianship by a different relative. The order appealed from denied the mother's petition for custody, and the issue of whether that order was proper will continue to affect the mother's rights ... . Custody determinations should '[g]enerally be made only after a full and plenary hearing and inquiry' ... . Here, the record does not reveal the existence of circumstances that would bring this case within the narrow exception to the general right to a hearing ... . However, the petition for custody may be heard jointly with any permanency hearing held pursuant to Family Court Act article 10-A (see Family Ct Act § 1089-a[a] ...)." ***Matter of Barcene v. Parrilla*, 2019 N.Y. Slip Op. 07575, Second Dept 10-23-19**

FAMILY LAW, EVIDENCE, CIVIL PROCEDURE.

TRANSCRIPT OF FAMILY COURT ACT § 1028 HEARING SHOULD NOT HAVE BEEN USED AS A REPLACEMENT FOR AN ABUSE-NEGLECT FACT-FINDING HEARING BECAUSE THE PROOF REQUIREMENTS ARE DIFFERENT AND BECAUSE THERE WAS NO FINDING THAT THE WITNESS AT THE § 1028 HEARING WAS UNAVAILABLE.

The Second Department, reversing Family Court, determined the transcript of the Family Court Act § 1028 hearing (seeking the quick return of a child temporarily removed pending a fact-finding hearing) should not have been used to replace the abuse/neglect fact-finding hearing because the proof requirements are different: "Family Court Act § 1028 permits a parent to apply for the return of a child who has been temporarily removed from the custody of the parent pending the fact-finding hearing on the issue of abuse or neglect ... . … Section 1028 hearings … were not intended to replace fact-finding hearings, as the evidentiary standards are different. Family Court Act § 1046 provides that 'only competent, material and relevant evidence may be admitted' at a fact-finding hearing, whereas evidence '[i]n a dispositional hearing and during all other stages of a proceeding under' Family Court Act article 10 need only be 'material and relevant' ... . A determination on an application pursuant to section 1028 'should not be taken as any indication of what ultimate determination should be made by the Family Court as to [a] petition alleging abuse and neglect' ... . 'At a fact-finding hearing, any determination that a child is an abused or neglected child must be based on a preponderance of the evidence' ... . CPLR 4517, which governs the

admissibility of prior testimony in a civil action, is applicable here ... , as the Family Court Act does not prescribe the issue of whether testimony from a prior hearing pursuant to Family Court Act article 10 may be admitted into evidence on the petitioner's direct case in a fact-finding hearing. Pursuant to CPLR 4517(a)(3), prior trial testimony of a witness may be used by any party for any purpose against another party if the court finds that such witness is dead or otherwise unavailable. In this matter, the Family Court made no such finding. Here, the Family Court should not have admitted into evidence at the fact-finding hearing transcripts of testimony from the hearing conducted pursuant to Family Court Act § 1028. As ACS now correctly concedes, the caseworker's testimony at the prior hearing, which included hearsay statements, actually formed the basis of the court's neglect finding at the subsequent fact-finding hearing." ***Matter of Louie L. V. (Virzhiniya T. V.)*, 2019 N.Y. Slip Op. 07592, Second Dept 10-23-19**

FORECLOSURE, EVIDENCE.

DEFENDANTS PRESENTED EVIDENCE THE BANK ACCEPTED PAYMENTS IN LESS THAN THE REQUIRED AMOUNT AFTER THE ALLEGED DEFAULT; THE BANK'S MOTION FOR SUMMARY JUDGMENT 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 because defendants presented evidence the bank had accepted payments after the alleged default: "... [T]he defendants presented evidence demonstrating that, subsequent to their alleged default in September 2008, the plaintiff accepted mortgage payments in a lesser amount than originally required, which raises triable issues of fact as to whether the parties entered into a modification agreement subsequent to the defendants' alleged default in September 2008, and whether there was a continuing default by the defendants from 2008 ...". ***U.S. Bank N.A. v. McEntee*, 2019 N.Y. Slip Op. 07636, Second Dept 10-23-19**

INSURANCE LAW.

THE INSURED, WHO WAS SEEKING UNINSURED MOTORIST BENEFITS, DID NOT TIMELY NOTIFY HER INSURER OF THE TRAFFIC ACCIDENT; THEREFORE THE INSURER'S PETITION TO PERMANENTLY STAY ARBITRATION SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined the insurer's petition to permanently stay arbitration in this rear-end collision should have been granted. The insured sought to recover uninsured motorist benefits but did not timely notify the insurer of the accident: "The respondent, Irina Ostapenko, allegedly was injured when the vehicle she was driving was struck in the rear by another vehicle that then left the scene. The vehicle Ostapenko was driving was insured by the petitioner. Ostapenko filed a request for uninsured motorist arbitration. The petitioner commenced this proceeding, inter alia, to permanently stay arbitration. In an order … , the Supreme Court, among other things, in effect, denied that branch of the petition which was to permanently stay arbitration. The petitioner appeals. The Supreme Court should have granted that branch of the petition which was to permanently stay arbitration. The subject insurance policy required the insured or someone acting on the insured's behalf to report the collision within 24 hours or as soon as reasonably possible to a 'police, peace or judicial officer or to the Commissioner of Motor Vehicles.' Ostapenko's failure to comply with this requirement in the absence of a valid excuse vitiates coverage ...". ***Matter of Progressive Direct Ins. Co. v. Ostapenko*, 2019 N.Y. Slip Op. 07586, Second Dept 10-23-19**

PERSONAL INJURY, EDUCATION-SCHOOL LAW, MUNICIPAL LAW.

THE ZONE OF DANGER THEORY OF LIABILITY IS AVAILABLE ONLY TO THE IMMEDIATE RELATIVES OF THE INJURED PARTY; PETITIONERS' CHILDREN WITNESSED THE FATAL INJURY TO ANOTHER STUDENT WHO WAS NOT RELATED; PETITIONERS' REQUEST FOR LEAVE TO FILE A LATE NOTICE OF CLAIM AGAINST THE SCHOOL DISTRICT ALLEGING INTENTIONAL AND NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined the petition for leave to file a late notice of claim against the school district should not have been granted. The petitioners are the parents of students who were participating in football training when the pole or log they were carrying dropped and fatally injured another student. The late notice of claim asserted intentional and negligent infliction of emotional distress based upon the petitioners' children being in the "zone of danger." However, the "zone of danger" theory can be raised only by the immediate relatives of the injured party: " The zone-of-danger rule . . . allows one who is himself or herself threatened with bodily harm in consequence of the defendant's negligence to recover for emotional distress resulting from viewing the death or serious physical injury of a member of his or her immediate family' ... . Here, the petitioners's children were not immediate f'amily members of the decedent. Thus, they have no legally cognizable claim to recover damages for emotional distress they allegedly sustained from witnessing the accident ... , or based upon the District's alleged refusal to provide continued counseling and maintain the coaching staff support system, as such damages are a financial consequence of their emotional trauma ... . Moreover, the District demonstrated that, under the circumstances presented, it was not authorized to pay for continued outside counseling services for the petitioners' children, and the record reflects that the District provided ongoing counseling from mental health profes-

sionals employed by the District. Under the circumstances, the proposed claim against the District is patently meritless ...". ***Matter of Kmiotek v. Sachem Cent. Sch. Dist.*, 2019 N.Y. Slip Op. 07583, Second Dept 10-23-19**

PERSONAL INJURY, MUNICIPAL LAW.

THE COMPLAINT IN THIS SLIP AND FALL CASE WAS BASED UPON A THEORY NOT DESCRIBED IN THE NOTICE OF CLAIM; THE COMPLAINT WAS PROPERLY DISMISSED.

The Second Department determined the complaint in this slip and fall case was properly dismissed. The complaint alleged a theory of liability which was not described in the notice of claim: " 'A notice of claim which, inter alia, sufficiently identifies the claimant, states the nature of the claim and describes the time when, the place where, and the manner in which the claim arose, is a condition precedent to asserting a tort claim against a municipality' ... . Although 'the statute does not require those things to be stated with literal nicety or exactness' ... , a notice of claim must provide 'information sufficient to enable the city to investigate' ... and 'must at least adequately apprise the defendant that the claimant would seek to impose liability under a cognizable theory of recovery' ... . A plaintiff may not later add a new theory of liability that was not included in the notice of claim ... . Here, the City established its prima facie entitlement to summary judgment dismissing the complaint by submitting evidence that the notice of claim contained no allegation that the City caused or created the icy condition where the accident occurred by negligently maintaining a nearby sewer and failing to repair an alleged 'recurring flooding condition from the sewer backup' ...". ***Rubenstein v. City of New York*, 2019 N.Y. Slip Op. 07633, Second Dept 10-23-19**

NEGLIGENCE, MUNICIPAL LAW.

ALLEGATION THAT FIREFIGHTERS TOLD PLAINTIFFS THE FIRE WAS EXTINGUISHED AND IT WAS SAFE TO REENTER WAS SUFFICIENT TO DEMONSTRATE A SPECIAL RELATIONSHIP BETWEEN PLAINTIFFS AND THE FIRE DEPARTMENT; THE COMPLAINT ALLEGED THE FIREFIGHTERS TURNED OFF THE WATER AND LEFT, AFTER WHICH THE BUILDING BURNED TO THE GROUND.

The Second Department determined the complaint sufficiently alleged the formation of a special relationship with plaintiffs by the Fire District of New York (FDNY): "When they arrived, FDNY personnel observed a fire on storage shelves approximately 50 feet into the building. Upon concluding that the fire was being controlled by the building's sprinkler system, FDNY personnel wet down the debris, then turned off the main water valve that controlled the flow of water to the entire sprinkler system, rendering it inoperable. After certifying to warehouse personnel that the building was safe to re-enter, FDNY personnel left the premises. Within minutes, a warehouse employee observed an orange glow toward the center of the warehouse, and a second fire alarm was activated at 6:32 a.m. However, because the sprinkler system had been disabled by FDNY personnel, the fire spread quickly and destroyed the entire building and its contents. * * * A municipality may not be held liable for the negligent performance of a governmental function, such as police and fire protection, absent a duty born of a special relationship between the injured plaintiff and the defendant municipality ... . A special relationship may arise in three situations: (1) when the municipality violates a statutory duty enacted for the benefit of a particular class of person; (2) when it voluntarily assumes a duty that generates justifiable reliance by the person who benefits from the duty; or (3) when it assumes positive direction and control in the face of a known, blatant, and dangerous safety violation ... . Here, the plaintiffs' allegations that FDNY personnel, upon arriving at the scene and assuming control over the ongoing fire, shut off the main water supply valve to the warehouse's sprinkler systems, then certified to warehouse employees that it was safe to reenter the building when in fact the fire was still at risk of rekindling—which it did within minutes after FDNY personnel left the premises—are sufficient to establish a special relationship ... " ***Zurich Am. Ins. Co. v. City of New York*, 2019 N.Y. Slip Op. 07640, Second Dept 10-23-10**

THIRD DEPARTMENT

CONTRACT LAW, CIVIL PROCEDURE, INSURANCE LAW.

PLAINTIFF'S ACTION WAS NOT TIME-BARRED BECAUSE THE SIX-MONTH LIMITATION PERIOD IN THE SUBCONTRACT EXPIRED BEFORE SUIT COULD BE BROUGHT; THE TERMS OF THE ONE-YEAR LIMITATION PERIOD IN THE LABOR AND MATERIAL BOND CONFLICTED WITH THE REQUIREMENTS OF THE STATE FINANCE LAW; THE STATE FINANCE LAW CONTROLS.

The Third Department, reversing Supreme Court, determined plaintiff-subcontractor's breach of contract action against the general contractor and the insurance company (Liberty Mutual) which issued the labor and material payment bond for the construction work should not have been dismissed, and plaintiff was entitled to summary judgment on its action against the general contractor. The Third Department held that the six-month statute of limitations in the subcontract and the one-year statute of limitations in the bond did not render the actions time-barred: " 'A 'limitation period' that expires before suit can be brought is not really a limitation period at all, but simply a nullification of the claim'"... . The conflict in the subcontractor agreement between the limitation period and the payment provisions had the effect of nullifying plaintiff's breach of contract claim; thus, the six-month limitation period is unreasonable and unenforceable, and Supreme Court should not have dismissed plaintiff's complaint as time-barred ... . * * * State Finance Law § 137 (4) (b) sets forth a later accrual date

than the payment bond, providing that "no action on a payment bond furnished pursuant to [State Finance Law § 137] shall be commenced after the expiration of one year from the date on which the public improvement has been completed and accepted by the public owner" (emphasis added). The provisions of State Finance Law § 137 govern bonds furnished pursuant to that statute, and, although parties may agree to expand the statute's protections, they may not limit them ... . As the accrual date set forth in the first part of the contractual limitation provision conflicts with State Finance Law § 137 (4) (b), the second part of the provision must be given effect, and the bond agreement must be deemed to be amended to provide for the accrual date set forth in the statute ... . The record does not reveal the date on which the project was accepted … for this purpose. Accordingly, there are issues of fact as to when plaintiff's cause of action against Liberty Mutual accrued and whether it is time-barred, and summary judgment dismissing the complaint against Liberty should not have been granted ...". ***Digesare Mech., Inc. v. U.W. Marx, Inc.*, 2019 N.Y. Slip Op. 07668, Third Dept 10-24-19**

CRIMINAL LAW, CONSTITUTIONAL LAW.

TRIAL JUDGE PROPERLY REFUSED TO COMPEL THE WITNESS WHO ASSERTED HIS FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION TO TESTIFY OR TO ASSERT THE PRIVILEGE IN FRONT OF THE JURY.
The Third Department determined the trial judge properly refused to compel a witness (Chandler, an accomplice in the defendant's offenses) who asserted his Fifth Amendment privilege against self-incrimination to testify or to assert the privilege in the presence of the jury: "Chandler — who had entered a guilty plea, but was awaiting sentencing — was produced in court. Outside the presence of the jury, Chandler's counsel indicated that Chandler intended to exercise his privilege against self-incrimination based on the possibility that he could further incriminate himself, expose himself to perjury charges and/or provide testimony that could adversely impact his upcoming sentencing proceeding. Chandler confirmed under oath that he would invoke the privilege if called as a witness and, when questioned by defendant in the context of that inquiry, did in fact invoke the privilege. Supreme Court acknowledged that Chandler's plea agreement was contingent upon 'no information coming to the [c]ourt's attention about prior criminal conduct that the [c]ourt did not know about.' Such unknown prior criminal conduct could potentially include crimes relating to defendant's claim that Chandler coerced him into participating in the schemes to defraud. There was no basis for Supreme Court to conclude that Chandler's 'invocation of the privilege was clearly contumacious, nor was it patently clear that [Chandler's testimony] could not subject him to prosecution' ... . Accordingly, we discern no abuse of discretion in Supreme Court's refusal to compel Chandler to testify or to require him to assert the privilege in the presence of the jury ... . Although defendant certainly had the right to call witnesses and present a defense, he had 'no right to compel testimony over a claim of recognized privilege' ...". ***People v. Jones*, 2019 N.Y. Slip Op. 07647, Third Dept 10-24-19**

CRIMINAL LAW, EVIDENCE.

ALLOWING THE INTRODUCTION OF A WITNESS'S GRAND JURY TESTIMONY AS A PRIOR CONSISTENT STATEMENT WAS (HARMLESS) ERROR.
The Third Department determined it was (harmless) error to allow the People to introduce a witness's grand jury testimony as a prior consistent statement to counter the implication of recent fabrication raised on cross-examination: " 'A witness'[s] trial testimony ordinarily may not be bolstered with pretrial statements' ... . Prior consistent statements, however, may be used to rebut a claim of recent fabrication to the extent that such a statement predated the motive to falsify ... . [W]e conclude that Supreme Court erred in allowing the People to utilize her grand jury testimony. That said, given that the admission of bolstering testimony constitutes nonconstitutional error ... , we find that the error is harmless and there is not a significant probability that the jury would have acquitted defendant but for this error ... . The inconsistency speaks to which direction the shooter dispersed during what was described as a chaotic scene, not to the key issue of identification. As recited above, four witnesses identified defendant as the shooter. As such, we find that the error here is of no moment." ***People v. Johnson*, 2019 N.Y. Slip Op. 07646, Third Dept 10-24-19**

EMPLOYMENT LAW.

STATE MUST COLLECTIVELY BARGAIN WITH THE UNION FOR THE PUBLIC EMPLOYEES (PEF) BEFORE REQUIRING DOCUMENTATION TO SUPPORT SICK LEAVE.
The Third Department determined that the state (petitioner) was required to collectively bargain with the union (PEF) representing state employees before requiring a doctor's note explaining absences. No such documentation had been required since 1982: "... [T]he record reveals that, since 1982, it was not the policy of RPC to routinely require an employee to submit a doctor's certificate for each instance of unscheduled absence. Although the policy included certain exceptions where documentation could be required, none of these exceptions related to the new restrictions that petitioner imposed. The testimony of Karen Spotford, who has been employed at RPC since September 1982 and had served as the Council Leader for PEF since 2003, confirmed this course of conduct, and no evidence was adduced that the policy was applied other than as written. Accordingly, the new restrictions presented an altered policy from the one that had been consistently applied uninterrupted for at least 30 years. Petitioner has not proffered any evidence demonstrating that it negotiated with PEF prior to altering this policy. Therefore, substantial evidence supports PERB's [Public Employment Relations Board's] determination

that a past practice existed and that petitioner engaged in an improper practice by failing to engage in collective bargaining prior to altering the past practice to require medical documentation for individual days of sick leave ...". ***Matter of State of New York v. New York State Pub. Empl. Relations Bd.*, 2019 N.Y. Slip Op. 07670, Third Dept 10-24-19**

ENVIRONMENTAL LAW.

PETITIONERS VIOLATED THE ENVIRONMENTAL CONSERVATION LAW BY FILLING BELOW THE HIGH WATER MARK OF A POND; THE POND MET THE DEFINITION OF 'NAVIGABLE WATERS' AND WAS THEREFORE SUBJECT TO THE STATUTORY PROHIBITION.

The Third Department determined the petitioners had violated the Environmental Conservation Law by filling below the high water mark of a pond and were properly fined $10,000. With respect to whether the pond constituted "navigable waters" (to which the relevant statute applies) the court explained: "... '[N]o person . . . shall excavate or place fill below the mean high water level in any of the navigable waters of the state . . . without a permit' (ECL 15-0505 [1]). Petitioners argue that the evidence failed to show that South Long Pond was a navigable water. We disagree. Under the common law, a water is navigable in fact if it provides 'practical utility to the public as a means for transportation' ... . Furthermore, 'while the purpose or type of use remains important, of paramount concern is the capacity of the [water] for transport, whether for trade or travel' ... . Petitioners' neighbor testified at the hearing that she observed other individuals use boats or canoes on South Long Pond and that she had personally accessed South Long Pond by boat from Dyken Pond. A biologist with respondent's Bureau of Fisheries likewise testified that he was able to navigate between South Long Pond and Dyken Pond by boat and that there was a boat launch on Dyken Pond. He further testified that navigable waters do not include those waters that are 'surrounded by land [and] held in a single private ownership at every point in their total area.' Accordingly, we conclude that substantial evidence supports the Commissioner's determination that South Long Pond was a navigable water To that end, petitioners' related claim that respondent lacked subject matter jurisdiction because South Long Pond was not a navigable water is without merit." ***Matter of Stasack v. New York State Dept. of Envtl. Conservation*, 2019 N.Y. Slip Op. 07669, Third Dept 10-23-19**

MUNICIPAL LAW, ENVIRONMENTAL LAW, LAND USE, CIVIL PROCEDURE, CONSTITUTIONAL LAW.

PLAINTIFF DID NOT HAVE STANDING TO CONTEST THE TOWN'S NEGATIVE DECLARATION PURSUANT TO SEQRA RE THE PROPOSED SEWER DISTRICT; PLAINTIFF'S ACTION SHOULD HAVE BEEN BROUGHT AS AN ARTICLE 78 AND WAS THEREFORE TIME-BARRED; PLAINTIFF DID NOT HAVE A FIRST AMENDMENT RIGHT TO A RESPONSE TO HIS COMPLAINT TO THE TOWN RE THE SEWER DISTRICT.

The Third Department determined plaintiff did not have standing to contest the negative declaration issued by the town under the State Environmental Quality Review Act (SEQRA) because the sewer construction approved by the town was 15 miles from plaintiff's property. The Third Department further found that plaintiff's actions should have been brought as an Article 78 and therefore was time-barred, and his First Amendment arguments, alleging the town should have responded to his "Petition for the Redress of Grievances Regarding the Proposed [sewer district]." were meritless: "Plaintiff does not have standing to raise the SEQRA claims. 'In land use matters especially, [the Court of Appeals] ha[s] long imposed the limitation that the plaintiff, for standing purposes, must show that [he or she] would suffer direct harm, injury that is in some way different from that of the public at large [and] [t]his requirement applies whether the challenge to governmental action is based on a SEQRA violation, or other grounds' ... .Plaintiff does not reside in the Town. Although his homestead apparently straddles the Town line such that 1.2 acres of his land is situated in the Town, his property is located outside of — and approximately 15 miles away from — the sewer district. Moreover, plaintiff's status as a taxpayer, by itself, does not grant him standing to challenge the establishment of the sewer district ... . Plaintiff's SEQRA challenge is also time-barred. Regardless of how a plaintiff may label or style his or her claim, courts must look to the core of the underlying claim and the relief sought and, if the claim could have been properly addressed in the context of a CPLR article 78 proceeding, a four-month statute of limitations will apply ... . * * * ... [T]he First Amendment does not 'guarantee[] a citizen's right to receive a government response to or official consideration of a petition for redress of grievances' ...". ***Schulz v. Town Bd. of the Town of Queensbury*, 2019 N.Y. Slip Op. 07667, Third Dept 10-24-19**

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