CasePrepPlus

November 22, 2019

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

Editor: **Bruce Freeman**

NEW YORK STATE BAR ASSOCIATION
Serving the legal profession and the community since 1876

FIRST DEPARTMENT

ANIMAL LAW, LANDLORD-TENANT.

QUESTION OF FACT WHETHER LANDLORD KNEW OF THE DOG'S PRESENCE IN THE BUILDING AND WAS AWARE OF THE DOG'S VICIOUS PROPENSITIES, COMPLAINT AGAINST THE LANDLORD SHOULD NOT HAVE BEEN DISMISSED.

The First Department, reversing Supreme Court, determined plaintiff's dog-bite complaint against the landlord (New York City Housing Authority [NYCHA]) should not have been dismissed. Plaintiff alleged she was returning to her building after walking her dog when she was bitten by an unleashed pit bull owned by another resident of the building: "To hold a defendant landlord liable for injuries sustained in a dog bite incident, the plaintiff must establish the landlord's knowledge of the dog's presence, and its vicious propensities ... . Knowledge of vicious propensities may be established by proof of prior acts of a similar kind of which the defendant had notice ... . Here, viewing the evidence in the light most favorable to plaintiff as the nonmoving party, the record presents triable issues of fact regarding NYCHA's notice of the dog's presence and its vicious propensities. NYCHA's manager at the subject building testified that NYCHA had no knowledge of prior dog bite incidents. However, NYCHA's internal records show that a dog bite occurred at the building about three months prior to the attack on plaintiff. While that internal document does not identify the dog or its owner involved in the prior attack and NYCHA's manager stated that NYCHA does not keep records of complaints involving vicious animals, plaintiff testified that she had seen third-party defendant with the dog on several prior occasions, and that the dog acted aggressively ...". ***Almodovar v. New York City Hous. Auth.*, 2019 N.Y. Slip Op. 08129, First Dept 11-12-19**

ARBITRATION.

IT IS THE ROLE OF THE COURT, NOT THE ARBITRATOR, TO DETERMINE WHETHER A NON-SIGNATORY IS BOUND BY AN ARBITRATION AGREEMENT.

The First Department, reversing Supreme Court, determined it is the role of the court, not the arbitrator, to rule on whether a non-signatory is bound by an arbitration agreement: "The issue of whether a party is bound by an arbitration provision in an agreement it did not execute is a threshold issue for the court, not the arbitrator, to decide ... . The case is remanded to the IAS court for an evidentiary hearing and further factual development on whether the non-signatory petitioners were bound to the arbitration clause ... . The cases respondent relies upon in opposition do not change the result. Respondent's cases do not involve situations where there was a dispute as to whether the party sought to be bound to arbitrate had signed the agreement containing the arbitration clause ... . While respondent makes extensive arguments as to why the non-signatory petitioners were effectively parties to the agreement and thus bound by the arbitration clause, these arguments are not relevant. The IAS court did not come to a definitive ruling as to whether the non-signatory petitioners were bound by the arbitration agreement, and instead denied the petition without prejudice so that it could be decided by the arbitrator. Absent a ruling on the issue, the only question to be addressed by this Court is whether the IAS court properly declined to do so." ***Matter of 215-219 W. 28th St. Mazal Owner LLC v. Citiscape Bldrs. Group Inc.*, 2019 N.Y. Slip Op. 08281, First Dept 11-14-19**

CIVIL PROCEDURE, EDUCATION-SCHOOL LAW, HUMAN RIGHTS LAW, NEGLIGENCE, DEFAMATION, INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS, IMMUNITY.

WHETHER PLAINTIFFS WILL BE ABLE TO ESTABLISH THE CLAIMS IN A COMPLAINT IS NOT CONSIDERED ON A MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM; HERE THE DEFENDANTS' ARGUMENT THAT PLAINTIFFS WILL NOT BE ABLE TO LEARN AN ESSENTIAL ASPECT OF THEIR CASE IN DISCOVERY BECAUSE OF STATUTORY IMMUNITY WAS NOT RELEVANT TO WHETHER THE COMPLAINT STATED CAUSES OF ACTION.

The First Department determined defendant school's motion to dismiss the complaint was properly denied. Plaintiffs alleged the school retaliated against them after they complained about race-related issues by making a false child neglect report to Child Protective Services (CPS). The school argued the plaintiffs will not be able to learn the identity of the person who reported the alleged neglect because of the immunity provided by the Social Services Law. The Second Department explained that the immunity question is not relevant to whether the complaint states causes of action: "... [P]laintiffs assert

causes of action for intentional infliction of emotional distress, defamation, violations of the New York State and City Human Rights Laws, and negligent hiring, training and supervision ... . Defendants moved to dismiss all of these causes of action on the basis that plaintiffs would be unable to prove any of these claims because they did not know the identity of the CPS reporter and would be unable to learn it in discovery. … [I]n the context of this motion to dismiss, the Court does not assess the relative merits of the complaint's allegations against defendant's contrary assertions or to determine whether or not plaintiffs can produce evidence to support their claims ... . Whether plaintiffs 'can ultimately establish [their] allegations is not a part of the calculus in determining a motion to dismiss' ... . Thus, regardless of whether plaintiffs will be able to obtain disclosure concerning the identity of the CPS reporter (Social Services Law § 422[4][A] ...), defendants have not demonstrated entitlement to dismissal of the well-pleaded complaint for failure to state a cause of action ...". ***M.H.B. v. E.C.F.S.*, 2019 N.Y. Slip Op. 08276, First Dept 11-14-19**

CIVIL PROCEDURE, JUDGES.

JUDGE SHOULD NOT HAVE, SUA SPONTE, GRANTED A MOTION TO AMEND THE COMPLAINT IN THE ABSENCE OF A MOTION AND PROPOSED PLEADINGS.

The First Department, reversing Supreme Court, determined the judges should have, sua sponte, granted plaintiff leave to file a second amended complaint in the absence of a motion and a proposed pleading. The leave to amend was vacated: "The motion court should not have sua sponte granted plaintiff leave to file a second amended complaint to assert an unpleaded negligent misrepresentation claim in the absence of a cross motion and an accompanying proposed pleading (CPLR 3025[b]). The lack of a proposed pleading precludes meaningful review of the sufficiency of the allegations, including defendant's contention that such a claim is time barred ...". ***Sutton Animal Hosp. PLLC v. D&D Dev., Inc.*, 2019 N.Y. Slip Op. 08263, First Dept 11-12-19**

CIVIL PROCEDURE, TRADE SECRETS.

DISCOVERY OF DEFENDANT'S SOURCE CODE, A TRADE SECRET, SHOULD HAVE BEEN ORDERED FOR "ATTORNEYS AND EXPERT EYES ONLY."

The First Department, reversing Supreme Court, determined the discovery-production of defendant's source code, a trade secret, should have been for "attorneys and expert eyes only." "The production of defendants' source code, which is a trade secret ... , should have been ordered to be produced for 'attorneys and expert eyes only' … . Plaintiffs' assertion that they have the expertise to review and opine on the source code and should not be subjected to retaining an expert, does not support unfettered access to defendants' confidential algorithm." ***BEC Capital, LLC v. Bistrovic*, 2019 N.Y. Slip Op. 08144, First Dept 11-12-19**

CRIMINAL LAW, APPEALS.

A JUROR'S ATTEMPT TO DEVELOP A RELATIONSHIP WITH A JAILED COOPERATING PROSECUTION WITNESS DURING DELIBERATIONS EXHIBITED ACTUAL AND IMPLIED BIAS REQUIRING A NEW TRIAL; A HARMLESS ERROR ANALYSIS IS NOT APPLICABLE.

The First Department, reversing defendant's conviction and ordering a new trial, in a full-fledged opinion by Justice Renwick, determined that a juror who attempted to develop a relationship with a jailed cooperating prosecution witness during deliberations exhibited actual and implied bias, thereby depriving defendant of a fair trial. Although the juror and the witness were not able to speak to each other during deliberations, there was a missed call. After the trial the juror developed a serious relationship with the witness through letters and phone calls and expressed a desire to marry the witness. The First Department noted that a harmless error analysis was not appropriate: "Juror misconduct includes both 'actual bias' and 'implied bias.' Despite its name, 'actual' bias merely requires proof of 'a state of mind' that is 'likely' to preclude a juror from rendering an impartial verdict ... . Under CPL 270.20(1)(b), '[a]ctual bias. . . is not limited . . . to situations where a prospective juror has formed an opinion as to the defendant's guilt' ... . It may be demonstrated where a prospective juror's conduct indicates her inability to follow the court's instructions. 'Implied bias' exists where a juror 'bears some ... relationship to any such person [defendant, witness, prosecution] of such nature that it is likely to preclude [the juror] from rendering an impartial verdict' (CPL 270.20[1][c] ...). '[T]he frequency of contact and nature of the parties' relationship are to be considered in determining whether disqualification is necessary' ... . Implied bias 'requires automatic exclusion from jury service regardless of whether the prospective juror declares that the relationship will not affect [his or] her ability to be fair and impartial' ... . Here, there was both actual and implied bias. The misconduct by Juror No. 6 was willful and blatant - the juror was admittedly attracted to the witness, a cooperating witness testifying on behalf of the People, and sought to develop a relationship with him while jury deliberations were still underway - even though she knew this was not permitted. The juror knew during deliberations that the witness had tried to call her back, suggesting that the interest was mutual, and the juror is now in a very serious relationship with the witness and seeks to marry him. Although the juror denied that her feelings about the witness affected her thinking about defendant, she was at least arguably more likely to credit his testimony and could subconsciously have sought to aide the side with which the witness was aligned ...". ***People v. McGregor*, 2019 N.Y. Slip Op. 08283, First Dept 11-14-19**

CRIMINAL LAW, ATTORNEYS.

DEFENDANT DID NOT RECEIVE EFFECTIVE ASSISTANCE OF COUNSEL; DEFENSE COUNSEL PROBABLY COULD HAVE WORKED OUT A PLEA TO AN OFFENSE WHICH DID NOT MANDATE DEPORTATION.

The First Department, reversing Supreme Court, determined defendant did not receive effective assistance of counsel because there was a reasonable possibility a plea to something less than an aggravated felony could have been worked, with no mandatory deportation consequences: "At the hearing, defense counsel candidly admitted that he did not know, at the time of defendant's plea, what an aggravated felony was, and that he mistakenly believed that defendant's prior youthful offender adjudication, which resulted in a violation of probation charge that was disposed of at the same time as the instant plea, already rendered him deportable. However, New York YO adjudications are not considered criminal convictions for purposes of immigration law ... . Accordingly, he did not attempt to obtain a sentence of less than one year on the third-degree conviction, which would have prevented it from being an aggravated felony, subjecting defendant, who is in removal proceedings, to mandatory deportation ... . Counsel admitted that he had no strategic reason for not doing so; he simply did not know that defendant's negotiated sentence of one to three years rendered robbery in the third degree an aggravated felony, or that defendant's youthful offender adjudication did not render him deportable." ***People v. Richards*, 2019 N.Y. Slip Op. 08268, First Dept 11-14-19**

EMINENT DOMAIN, REAL PROPERTY LAW.

CLAIMANT COULD NOT SEEK COMPENSATION FOR PERIODIC FLOODING OF HIS LOT UNDER THE EMINENT DOMAIN PROCEDURE LAW; THERE WAS NO DE JURE TAKING BY THE CITY, AND THE CRITERIA FOR INVERSE CONDEMNATION WERE NOT MET.

The First Department, reversing Supreme Court, determined claimant's action for damages based upon the periodic flooding claimant's lot, over which the city had an easement, should have been dismissed. Claimant alleged the city had appropriated the easement by causing flooding: "... Claimant filed a notice of claim pursuant to Eminent Domain Procedure Law (EDPL) § 503, asserting a claim for appropriation of an easement over its lot. In 2015, claimant alleged for the first time that the bridge construction was causing flooding of its property. In 2017, claimant submitted the appraisal at issue in this appeal, prepared by Cushman & Wakefield, which determined that during a 31-month period from November 2014 through May 2017, claimant's property and the non-exclusive access easement became flooded after rainfall. It attributed the flooding to a drainage pipe in the access easement area that became blocked by cement during construction of the new bridge. The appraisal provides that subsequent to the discovery of the flooding, claimant leased out its property and received rental income. Claimant's alleged flooding damages, as set forth in the appraisal, consist of reduced rental income and the inability to develop residential towers on the property. * * * Because claimant's property was not subject to a de jure taking by the City, it may not pursue a claim to recover just compensation or consequential damages resulting from the flooding in this eminent domain valuation proceeding ... . * * * 'In a modern inverse condemnation action, an owner whose property has been taken de facto may sue the entity that took it to obtain just compensation, and if the action is successful the defendant has no choice in the matter — the compensation must be paid' ... . The claim here for inverse condemnation is legally flawed, since the interference with claimant's property rights, as set forth in its own appraisal report, is not sufficiently permanent to constitute a de facto taking as a matter of law ...". ***Matter of Willis Ave. Bridge Replacement*, 2019 N.Y. Slip Op. 08162, First Dept 11-12-19**

FAMILY LAW.

CHILD SUPPORT ARREARS PROPERLY AWARDED TO MOTHER, BUT THE AMOUNT SHOULD HAVE BEEN CALCULATED THROUGH THE HEARING DATE.

The First Department noted that, although child support arrears were properly awarded to petitioner (mother), the amount of the arrears should have been calculated through the date of the hearing: "By submitting evidence that respondent [father] was delinquent in his support payments ... , petitioner established prima facie that respondent willfully violated his child support obligations. Respondent failed to rebut this prima facie showing by presenting evidence of his inability to pay ... . He testified to a loss of income but failed to provide evidence of either his lost employment or his efforts to find new employment ... . Further, contrary to respondent's contention, whether respondent eventually satisfied his arrears has no bearing on the court's finding of willfulness ... , particularly in light of his previous violations of his support obligations. ... Petitioner correctly argues that child support arrears accrued through the date of the hearing on remand, and should be included in the award of arrears, as required by Family Court Act § 459 and in the children's best interests . Therefore, we remand for recalculation of the amount in arrears ...". ***Matter of Eve S.P. v. Steven N.S.*, 2019 N.Y. Slip Op. 08130, First Dept 11-12-19**

LABOR LAW-CONSTRUCTION LAW, EVIDENCE, PERSONAL INJURY.

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT IN THIS LABOR LAW 240 (1) ACTION SHOULD HAVE BEEN GRANTED, DESPITE PLAINTIFF'S AFFIDAVIT WHICH, IN PART, CONTRADICTED HIS DEPOSITION TESTIMONY.

The First Department, reversing Supreme Court, determined plaintiff's motion for summary judgment in this Labor Law § 240(1) action should have been granted, despite an affidavit from the plaintiff which, in part, contradicted his deposition testimony. Plaintiff was struck from above by the chain in a chain hoist system: "Supreme Court correctly concluded that plaintiff Jose Goncalves's affidavit submitted in support of the motion should not be considered to the extent that it averred that he was struck by the entire chain hoist system, which contradicted his deposition testimony that he was struck only by the chain itself ... . However, the affidavit was consistent with his prior testimony that he was struck by the chain from above, and the record contains no evidence to the contrary. Accordingly, plaintiffs demonstrated that the chain hoist system at issue failed, causing Goncalves to be struck by an object - either the chain hoist system or just the chain itself - from above, and thereby established their prima facie entitlement to summary judgment on the Labor Law § 240(1) claim ...". ***Goncalves v. New 56th & Park (NY) Owner, LLC*, 2019 N.Y. Slip Op. 08265, First Dept 11-14-19**

LANDLORD-TENANT, ADMINISTRATIVE LAW.

CENTURY-OLD ELEVATOR MUST BE REPLACED, DESPITE THE COST AND DESPITE THE APPARENT FACT THAT ONLY ONE OF FOUR TENANTS USED THE ELEVATOR.

The First Department, reversing Supreme Court, in a full-fledged opinion by Justice Tom, determined the ruling by the NYS Department of Housing and Community Renewal (DHCR) ruling requiring the landlord to provide elevator service was not irrational and must be upheld. The century-old elevator needed replacement at a cost of $150,000. Apparently the building has four tenants, and only one used the elevator. The opinion is comprehensive and cannot be fairly summarized here: "DHCR in its 2017 determination interpreted its own regulations to require that if elevator service was required under the Loft Law, it was also required under the Rent Stabilization Code upon the transition of the building to rent stabilization. This interpretation by DHCR of its own regulations should be upheld to the extent it is rational and not an arbitrary and capricious reliance on the facts of the case ... . Certain facts are unclear regarding if and when the elevator broke down, or when the landlord acted on a decision to terminate operations. However ... that would seem not to matter under these circumstances. Since elevator service had been provided while the building was regulated as an interim multiple dwelling, that service had to be continued without regard to the economic ramifications. In this sense, the cost to the landlord is not a factor that would displace the regulatory requirements and would not support setting aside the DHCR determination. * * * ... [W]e cannot conclude that DHCR was arbitrary and capricious in its evaluation of the relevant facts or irrational in concluding that in whatever manner elevator service was terminated, that action in the absence of DHCR's approval was inconsistent with rent stabilization, and that elevator service, as a required service, had to be restored." ***Matter of Leonard St. Props. Group, Ltd. v. New York State Div. of Hous. & Community Renewal*, 2019 N.Y. Slip Op. 08165, First Dept 11-12-19**

SECOND DEPARTMENT

APPEALS, ATTORNEYS.

THE SECOND DEPARTMENT IMPOSED SANCTIONS ON A LAW FIRM FOR FAILING TO IMMEDIATELY NOTIFY THE APPELLATE COURT THAT A MATTER WITH A PENDING APPEAL HAD BEEN SETTLED.

The Second Department imposed a $250 sanction on a law firm which failed to timely notify the appellate court that a matter in a pending appeal had been settled: "Precisely in order to alert counsel that their obligation to give immediate notification of a settlement may not be postponed or delayed, this Court adopted its own local rule of practice which states that, for purposes of 22 NYCRR 1250.2(c), settlement includes 'any oral or written agreement or understanding which may, once memorialized, render a determination of the cause unnecessary' (22 NYCRR 670.2[b]). This local rule took effect March 4, 2019, and is thus applicable to the case at hand. In this case, members of this Court were caused to devote hours of preparation and deliberation on an appeal which, unbeknown to them, had been settled nearly one month earlier. Had this Court been timely advised of the settlement in this case, it could have avoided wasting judicial resources on a settled case and could have redirected those resources to one of the many actual controversies that fill its docket. Since the Fixler firm had an independent obligation to give this Court notice of the settlement and assured the Sim Firm that, as between the attorneys, the Fixler firm would assume responsibility for notification, the imposition of sanctions upon the Fixler firm in the sum of $250 is warranted." ***Guo-Bang Chen v. Caesar & Napoli, P.C.*, 2019 N.Y. Slip Op. 08166, Second Dept 11-13-19**

CRIMINAL LAW, APPEALS.

DEFENDANT WAS NOT INFORMED THAT THE SENTENCE WOULD INCLUDE POSTRELEASE SUPERVISION AT THE TIME OF THE PLEA, ALTHOUGH HE WAS INFORMED THE SENTENCE PROMISE WAS CONDITIONED UPON NO FURTHER ARRESTS; DEFENDANT WAS ARRESTED TWICE BEFORE SENTENCING AND AN ENHANCED SENTENCE, INCLUDING POSTRELEASE SUPERVISION, WAS IMPOSED; PLEA WAS NOT VOLUNTARY; ERROR APPEALABLE DESPITE LACK OF PRESERVATION.

The Second Department, vacating defendant's guilty plea, determined that the plea was not voluntary because defendant was not informed that the sentence would include a period of postrelease supervision. At the time of the plea, defendant was told the 1–3-1/2 year sentence promise was conditioned upon no additional arrests. Defendant was arrested twice before sentencing. The court imposed an enhanced sentence which included a period of postrelease supervision which was not mentioned at the time of the plea. The error was appealable despite the lack of preservation: "Contrary to the People's contention, the defendant was not required to preserve for appellate review his current claim that his plea of guilty was not knowingly, voluntarily, and intelligently entered based on the County Court's failure to mention the postrelease supervision component of his sentence at the plea proceeding, since he had no knowledge of, or opportunity to challenge, that portion of his sentence prior to its imposition ... . [T]he record reflects that the defendant was not made aware at the time he entered his plea that the terms of his sentence would include a period of postrelease supervision ... , nor did he have a sufficient opportunity to move to withdraw his plea on that basis before the court imposed sentence ... . Accordingly, the judgment must be reversed, the plea of guilty vacated ...". ***People v. Walton*, 2019 N.Y. Slip Op. 08230, Second Dept 11-13-19**

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

BURGLARY AS A SEXUALLY MOTIVATED OFFENSE FIRST DEGREE IS NOT A REGISTERABLE OFFENSE UNDER SORA; A SEX OFFENDER CLASSIFICATION IS APPEALABLE WHEN THE ERROR IS NOT PRESERVED.

The Second Department, in a full-fledged opinion by Justice LaSalle, determined that burglary as a sexually motivated felony first degree (Penal Law 140.30[2]) is not a registerable offense under SORA, the result of an apparently unintended omission from the Correction Law. Defendant had attempted to rape the victim after breaking into her house. The court noted that a sex offender classification is appealable even when the alleged error is not preserved: "... [W]hen looking first at the statutory text of Correction Law § 168-a(2)(a), we find that the language employed is clear and unambiguous. As written, subparagraph (iii) of section 168-a(2)(a) specifically defines a sex offense as 'a conviction of or a conviction for an attempt to commit any provisions of the foregoing sections committed or attempted . . . as a sexually motivated felony defined in section 130.91 of such law.' Thus, as the defendant contends, according to the language of the statute as amended, burglary in the first degree as a sexually motivated felony is not a registerable sex offense under SORA. While this may not have been the intent of the Legislature, the omission of a critical grammatical signpost or a parenthetical number preceding 'as a sexually motivated felony' clearly limits the qualifying sexually motivated felony offenses only to those enumerated in subparagraphs (i) and (ii) ... . 'The maxim expressio unius est exclusio alterius is applied in the construction of the statutes, so that where a law expressly describes a particular act, thing or person to which it shall apply, an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted or excluded' ...". ***People v. Buyund*, 2019 N.Y. Slip Op. 08207, Second Dept 11-13-19**

FALSE ARREST, MALICIOUS PROSECUTION, CIVIL PROCEDURE.

COMPLAINT DID NOT STATE CAUSES OF ACTION FOR FALSE ARREST AND MALICIOUS PROSECUTION.

The Second Department, reversing Supreme Court, determined the complaint did not state causes of action for false arrest and malicious prosecution: " 'A civilian defendant who merely furnishes information to law enforcement authorities, who are then free to exercise their own independent judgment as to whether an arrest will be made and criminal charges filed, will not be held liable for false arrest or malicious prosecution' ... . 'To be held liable for false arrest, the defendant must have affirmatively induced the officer to act, such as taking an active part in the arrest and procuring it to be made or showing active, officious and undue zeal, to the point where the officer is not acting of his [or her] own volition' ... . 'Similarly, in order for a civilian defendant to be considered to have initiated the criminal proceeding so as to support a cause of action based on malicious prosecution, it must be shown that defendant played an active role in the prosecution, such as giving advice and encouragement or importuning the authorities to act'… . 'Merely giving false information to the authorities does not constitute initiation of the proceeding without an additional allegation or showing that, at the time the information was provided, the defendant knew it to be false, yet still gave it to the police or District Attorney' ... . Here, the plaintiff's complaint and his affidavit in opposition to the motion merely alleged that the defendants provided false information to the police, and therefore, did not establish that the plaintiff has a cause of action to recover damages for malicious prosecution or false arrest against the defendants ...". ***Williston v. Jack Resnick & Sons, Inc.*, 2019 N.Y. Slip Op. 08247, Second Dept 11-13-19**

FAMILY LAW.

FAMILY COURT SHOULD NOT HAVE MADE RULINGS ON CUSTODY AND MOTHER'S PETITION TO RELOCATE BEFORE COMPLETING THE HEARING.

The Second Department, reversing Family Court, determined Family Court should not have awarded sole custody of daughter to mother and granted mother's petition to relocate without completing the hearing: "The mother commenced this proceeding against the father seeking to modify a prior order of custody so as to award her sole legal and physical custody of the parties' two children and permit her to relocate with both children to the State of Washington. The Family Court commenced a hearing and, prior to the completion of the hearing … modified the prior order so as to award the father sole legal and physical custody of the parties' son and so as to award the mother sole legal and physical custody of the parties' daughter and permit her to relocate with the daughter to the State of Washington. ... Here, where there were many controverted issues, the Family Court should not have awarded the mother sole custody of the parties' daughter and permitted her to relocate with the daughter prior to completing the hearing. The father had not had the opportunity to present a case and was deprived of the opportunity to cross-examine a key witness called by the mother. Moreover, the court failed to give proper consideration to the effect that the daughter's relocation from New York to the State of Washington would have on the relationship between the siblings, especially given the mother's stated willingness to remain in New York ...". ***Matter of Pinto v. Pinto*, 2019 N.Y. Slip Op. 08195, Second Dept 11-13-19**

FAMILY LAW.

MOTHER'S MOTION TO VACATE THE ORDER FINDING SHE HAD NEGLECTED THE CHILDREN SHOULD HAVE BEEN GRANTED; MOTHER DEMONSTRATED SUCCESSFUL EFFORTS TO ADDRESS HER MENTAL HEALTH AND PARENTING SKILLS.

The Second Department, reversing Family Court, determined mother's motion to vacate the order finding she had neglected the children should have been granted: "In May 2018, the mother moved pursuant to Family Court Act § 1061 to vacate so much of the order of fact-finding and disposition as, upon her consent to the entry of an order of fact-finding without admission pursuant to Family Court Act § 1051(a), found that she neglected the children. In support of the motion, the mother submitted, inter alia, (1) letters from her treating clinicians, which established that she had been in psychotherapy since March 2016, she was compliant, and no medication had been ordered, (2) a report from ACS [Administration of Children's Services] indicating that the eldest child particularly enjoyed overnight weekend parental access with the mother, that the mother was compliant with the court-ordered services, and that ACS would not be seeking an extension of supervision for the mother, and (3) a certificate establishing that the mother had completed a parenting skills class. The Family Court denied the mother's motion, and the mother appeals. ... Here, the mother demonstrated good cause to vacate so much of the order of fact-finding and disposition as, upon her consent to the entry of an order of fact-finding without admission pursuant to Family Court Act § 1051(a), found that she neglected the children. The mother demonstrated that she had successfully completed the court-ordered services and programs and that the requested vacatur of the finding of neglect was in the best interests of the children ...". ***Matter of Aaliyah T. (Sheena A. D.)*, 2019 N.Y. Slip Op. 08196, Second Dept 11-13-19**

FAMILY LAW.

ALTHOUGH THE MARRIAGE WAS A NULLITY, DEFENDANT IS ENTITLED TO MAINTENANCE AND EQUITABLE DISTRIBUTION.

The Second Department, reversing Supreme Court, determined that defendant's motion for maintenance and equitable distribution should have been granted, despite the finding that the marriage was a nullity because the plaintiff-husband was not yet legally divorced when he married defendant: "The Supreme Court erred in denying the defendant's request for maintenance and equitable distribution on the ground that the marriage was a nullity. Domestic Relations Law § 236 expressly provides that, '[i]n any action or proceeding brought . . . during the lifetime of both parties to the marriage to . . . declare the nullity of a void marriage, . . . the court may direct either spouse to provide suitably for the support of the other' ... . The statute further provides that 'the court, in an action wherein all or part of the relief granted is . . . declaration of the nullity of a marriage, . . . shall determine the respective rights of the parties in their separate or marital property, and shall provide for the disposition thereof in the final judgment' ...". ***Valente v. Cabral*, 2019 N.Y. Slip Op. 08241, Second Dept 11-13-19**

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

THE BANK DID NOT PRESENT SUFFICIENT PROOF OF COMPLIANCE WITH THE NOTICE OF DEFAULT PROVISIONS OF THE MORTGAGE; THE BANK NEED NOT AFFIRMATIVELY ADDRESS COMPLIANCE WITH RPAPL 1304 NOTICE REQUIREMENTS IF THE ISSUE IS NOT RAISED IN THE ANSWER; REPLY PAPERS CAN PRESENT EVIDENCE FOR THE FIRST TIME IN RESPONSE TO ISSUES FIRST RAISED IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT; BUT REPLY PAPERS MAY NOT PRESENT, FOR THE FIRST TIME, EVIDENCE ADDRESSING AN ISSUE RAISED IN THE DEFENDANT'S ANSWER.

The Second Department, reversing Supreme Court, determined the plaintiff bank (Aurora) did not provide sufficient proof of providing notice of default to defendants. The Second Department noted that the bank need not affirmatively prove compliance with the notice requirements of RPAPL 1304 because the issue was not raised in defendant's answer. The court also noted that evidence submitted in reply papers addressing matters raised for the first time in opposition to plaintiff's motion for summary judgment can be considered, but evidence submitted for the first time in reply papers addressing issues which were raised in the answer should not be considered: "In support of its motion, Aurora submitted two affidavits. The first affidavit was from Laura McCann, Vice President of Aurora, the loan servicer responsible for sending the notices of default. The second affidavit was from A.J. Loll, Vice President of Nationstar Mortgage, LLC, the current plaintiff and loan servicer. While McCann attested that Aurora was responsible for 'providing notices pursuant to the terms of the note and mortgage evidencing the mortgage loan at issue, and specifically for providing notices such as the notice required under Section 22 of the mortgage,' nowhere in her affidavit did she attest to the actual mailing or delivery of those notices. As to the second affidavit, while Loll attested, inter alia, that '[t]he servicing records show that a 30-day letter was mailed to [the] defendants . . . ... , which letter advised Defendants of their default,' and attached a purportedly "true copy" of the 30-day letter as Exhibit I, the affidavit did not contain a statement that the 30-day notice was sent in a manner according with the terms of the mortgage, i.e., 'mailed by first class mail or . . . actually delivered to [borrower's] notice address if sent by other means.' Moreover, Loll's affidavit 'did not contain a statement that [Loll] was familiar with [Aurora's] mailing practices and procedures,' so as to establish 'proof of a standard office practice and procedure designed to ensure that items are properly addressed and mailed' ... . While Loll claimed that servicing records show that a 30-day letter was mailed to the defendants, she did not identify what those records are and did not authenticate them as business records and attach them to her affidavit ...". ***Nationstar Mtge., LLC v. Tamargo*, 2019 N.Y. Slip Op. 08197, Second Dept 11-13-19**

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

BANK DID NOT SUBMIT SUFFICIENT PROOF OF DEFENDANT'S DEFAULT OR COMPLIANCE WITH RPAPL 1304 NOTICE REQUIREMENTS; 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 (Chase's) motion for summary judgment in this foreclosure action should not have been granted, The court held: (1) the conclusory affidavit submitted by the bank to prove defendant's default had no probative value, the business record itself should have been provided; (2) compliance with the mailing provisions of RPAPL 1304 was not proven by the bank; (3) failure to comply with the notice provisions of RPAPL 1304 can be raised as a defense at any time; and (4) by not raising the failure to provide the notice required by the mortgage in the answer or a motion to amend the answer, the defendant waived that defense: "Here, the affidavit of Mimoza Petreska, a vice president of Chase, submitted in support of Chase's motion, inter alia, for summary judgment on the complaint insofar as asserted against the defendant, was insufficient to establish the defendant's default in payment under the note ... . The only business record annexed to Petreska's affidavit with regard to the default was a copy of the notice of default dated May 15, 2012, which merely stated, in conclusory fashion, that the defendant's loan was in default. Conclusory affidavits lacking a factual basis are without evidentiary value ... . Moreover, '[w]hile 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' ... . '[I]t is the business record itself, not the foundational affidavit, that serves as proof of the matter asserted' ...". ***JPMorgan Chase Bank, N.A. v. Akanda*, 2019 N.Y. Slip Op. 08180, Second Dept 11-13-19**

FORECLOSURE, UNIFORM COMMERCIAL CODE (UCC), CIVIL PROCEDURE, EVIDENCE.

THE UCC CRITERIA FOR PROOF OF POSSESSION OF A LOST NOTE WERE NOT MET; PLAINTIFF BANK THEREFORE DID NOT DEMONSTRATE IT HAD STANDING TO BRING THE FORECLOSURE ACTION.

The Second Department, reversing Supreme Court, determined plaintiff bank did not demonstrate it had standing to bring the foreclosure action. The UCC's requirements for demonstrating ownership of a lost note were not met: "... [T]he affidavit of possession of the original note, sworn to by a vice president of loan documentation for the plaintiff, does not contain any details of delivery of the note, except for the claim that it was delivered to the plaintiff sometime after its execution, and that the plaintiff 'had possession of the Promissory Note on or before ... the date that this action was commenced.' The lost

note affidavit of another vice president of loan documentation employed by the plaintiff stated vaguely, and in a conclusory manner, that the note was 'inadvertently lost, misplaced or destroyed,' that the plaintiff had not 'pledged, assigned, transferred, hypothecated or otherwise disposed of the note,' and that the plaintiff had made 'a diligent and extensive search of its records in a good faith effort to discover the lost note in accordance with its procedures for locating the lost note.' The lost note affidavit did not provide any facts as to when the search for the note occurred, who conducted the search, or when or how the note was lost ... . Thus, it 'failed to sufficiently establish the plaintiff's ownership of the note' ... . Since the plaintiff failed to demonstrate its ownership of the lost note (see UCC 3-804), or that it had standing, 'as the lawful holder or assignee of the subject note on the date it commenced this action, to commence the action' ...". ***Wells Fargo Bank, N.A. v. Meisels*, 2019 N.Y. Slip Op. 08243, Second Dept 11-13-19**

INSURANCE LAW, AGENCY, EMPLOYMENT LAW.

THREE AND A HALF MONTH DELAY IN NOTIFYING THE INSURER OF THE LAWSUIT VIOLATED THE POLICY PROVISION REQUIRING NOTICE AS SOON AS PRACTICABLE; THE DISCLAIMER MAILED 29 DAYS AFTER NOTICE OF THE SUIT WAS RECEIVED BY THE INSURER WAS TIMELY AND PRECLUDED SUIT AGAINST THE INSURER.

The Second Department, reversing Supreme Court, determined defendant did not timely notify the insurer of the action and the insurer's disclaimer on that ground was timely. Plaintiff alleged she was sexually assaulted by defendant Braun, an employee of defendant APS. Braun received the summons and complaint on October 31, 2008. Braun was deemed an agent of his employer APS. The insurer was not notified of the suit until February 12, 2009. The disclaimer was mailed on March 16, 2009. The claim was settled with the defendants for more than $3 million. Plaintiff then sued the insurer: "Braun's receipt of the October 31, 2008, letter with the summons and complaint was within the scope of his employment as an officer of APS, and, as an insured under the policies, he had a duty to notify the insurers of the claim ... . Moreover, given that the plaintiff, and not APS, was the victim of Braun's conduct, there is no adversity to negate the imputation of Braun's knowledge to the corporation [i.e., the adverse interest exception did not apply]. ... Since APS had knowledge of the claim against it as of October 31, 2008, but did not give notice to the insurers until February 12, 2009, it failed to provide notice as soon as practicable, in violation of the policy conditions ... . Here, the insurers timely disclaimed coverage following a thorough and diligent investigation. Contrary to the plaintiff's contention, the insurers did not have all the information they needed to disclaim coverage on February 12, 2009, and they properly commenced an investigation to determine the specifics surrounding the incident and to verify when APS first acquired knowledge of the claim ... . Issuance of the disclaimers 29 days after the insurers' receipt of notice was therefore reasonable as a matter of law under the circumstances." ***Plotkin v. Republic-Franklin Ins. Co.*, 2019 N.Y. Slip Op. 08233, Second Dept 11-13-19**

LANDLORD-TENANT, ADMINISTRATIVE LAW, MUNICIPAL LAW.

THE LOFT BOARD PROPERLY REJECTED TENANTS' REQUEST TO WITHDRAW THEIR APPLICATIONS FOR COVERAGE UNDER THE LOFT LAW FOLLOWING A SETTLEMENT AGREEMENT WITH THE LANDLORD; HERE THE LANDLORD HELD COMMERCIAL PROPERTY WHICH INCLUDED THE TENANTS' RESIDENCES IN THE ABSENCE OF A CERTIFICATE OF OCCUPANCY; THE LANDLORD HAD SETTLED WITH THE TENANTS, AGREEING TO OBTAIN A CERTIFICATE OF OCCUPANCY AND CONVERT THE PROPERTY TO RENT STABILIZED RESIDENCES.

The Second Department, reversing (modifying) Supreme Court, determined: (1) the settlement agreement between that landlord and tenants providing that the landlord would take steps to obtain a certificate of occupancy and convert the property into rent stabilized residences should not have been annulled in its entirety; (2) the tenants' attempt, based on the settlement, to withdraw their applications for coverage of the property under the Loft Law was properly denied. The property in question was commercial property which included residences for which no certificate of occupancy had been issued: "The Loft Law is designed to integrate 'uncertain and unregulated residential units, converted from commercial use, into the rent stabilization system in a manner which ensures compliance with the Multiple Dwelling Law and various building codes' ... . The Loft Law was created to regulate the conversion of industrial, manufacturing, and commercial space into residential space. It enables an owner to rent space in a building while the structure is undergoing conversion pursuant to building department, fire department, and other regulatory requirements necessary to obtain a certificate of occupancy for a residential building. The work necessary to legalize a building for residential use is subject to specifically prescribed time periods (see Multiple Dwelling Law § 284[1]), and the Loft Board is specifically charged with determining interim multiple dwelling status and other issues of coverage, including coverage applications (see Multiple Dwelling Law § 282). Here, the Supreme Court should have confirmed the Loft Board's determination rejecting the tenants' proposed withdrawal of their coverage applications and remitting the coverage applications ... for adjudication. Contrary to the tenants' contentions, the Loft Board had jurisdiction over the coverage applications (see Multiple Dwelling Law § 282), and the coverage applications did not become moot upon the tenants' proposed withdrawal with prejudice of the applications. Title 29 of the Rules of the City of New York provides that the Loft Board may review settlement agreements and exercise discretion to reject a proposed settlement and remit matters for further investigation and adjudication (see NY City Loft Board Regulations [29 RCNY] § 1-06[j][5]). There is nothing in that rule that limits the Loft Board's review of settlement agreements or its authority

to re-open and remit a coverage application." ***Matter of Dom Ben Realty Corp. v. New York City Loft Bd.*, 2019 N.Y. Slip Op. 08188, Second Dept 11-13-19**

PERSONAL INJURY.

DEFENDANT DID NOT COME FORWARD WITH A NON-NEGLIGENT EXPLANATION FOR STRIKING THE REAR OF PLAINTFF'S STOPPED CAR; PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined plaintiff was entitled to summary judgment in this rear-end collision case: "... [T]he plaintiff's vehicle struck the rear of the vehicle traveling directly in front of it when that vehicle made a sudden stop in response to the traffic conditions ahead. A few seconds later, the plaintiff's vehicle was struck in the rear by a vehicle operated by the defendant John F. Meehan (hereinafter the defendant driver) ... . A plaintiff in a negligence action moving for summary judgment on the issue of liability must establish, prima facie, that the defendants breached a duty owed to the plaintiff, and that the defendants' negligence was a proximate cause of the alleged injuries ... . 'A driver of a vehicle approaching another vehicle from the rear is required to maintain a reasonably safe distance and rate of speed under the prevailing conditions to avoid colliding with the other vehicle' (,,,see Vehicle and Traffic Law § 1129[a]). Thus, a rear-end collision with a stopped or stopping vehicle establishes a prima facie case of negligence on the part of the operator of the rear vehicle, requiring that operator to come forward with evidence of a nonnegligent explanation for the collision to rebut the inference of negligence ... . Here, in support of her motion, the plaintiff submitted, inter alia, transcripts of the deposition testimony of the parties, which demonstrated that the defendants' vehicle struck the rear of the plaintiff's vehicle. Thus, the plaintiff established, prima facie, that the defendant driver's negligence was a proximate cause of the accident ...". ***Gelo v. Meehan*, 2019 N.Y. Slip Op. 08175, Second Dept 11-13-19**

PERSONAL INJURY, BANKRUPTCY.

BANKRUPTCY TRUSTEE PROPERLY SUBSTITUTED FOR PLAINTIFF IN A PERSONAL INJURY ACTION, DESPITE PLAINTIFF'S FAILURE TO LIST THE ACTION AS AN ASSET IN HIS VOLUNTARY PETITION FOR CHAPTER 7 BANKRUPTCY.

The Second Department determined the bankruptcy trustee was properly substituted, by the Bankruptcy Court, for plaintiff in a personal injury action, despite the fact that the action had not been listed as an asset when plaintiff filed a voluntary petition for chapter 7 bankruptcy: "The rule that a substitution cannot be made is grounded in Reynolds v. Blue Cross of Northeastern N.Y., Inc. (210 AD2d 619). In that case, the plaintiffs commenced an action against the defendants to recover damages for personal injuries. Thereafter, the plaintiffs filed a voluntary petition for chapter 7 bankruptcy, and failed to list the action on the schedule of assets. After the plaintiffs were discharged from bankruptcy, the defendants moved to dismiss the complaint, alleging that the plaintiff lacked the capacity to sue. During the pendency of the motion, the plaintiffs moved in the Bankruptcy Court to reopen the bankruptcy proceeding and to have a successor trustee appointed. A successor trustee was appointed, and both the plaintiffs and the interim trustee opposed the defendants' motion to dismiss. The Appellate Division, Third Department, determined that substitution was not available to cure the deficiency, on the ground that a party with no capacity to sue could not be replaced with one who had the capacity to sue, citing Matter of C & M Plastics (Collins) (168 AD2d 160, 161-162). However, in Matter of C & M Plastics (Collins), the proceeding in the Supreme Court was commenced after a bankruptcy petition was filed; therefore, in that case, the plaintiff did not have capacity to sue at the time of the commencement of the action. Although subsequent cases have held that a substitution of the bankruptcy trustee for the plaintiff cannot be made, even if the plaintiff had the capacity to sue at the time the action or proceedings was commenced (see Rivera v. Markowitz, 71 AD3d 449, 450; Pinto v. Ancona, 262 AD2d 472), other cases have held that where a motion for substitution was made at the direction of a bankruptcy court, the motion should be granted, as a matter of comity (see Berry v. Rampersad, 21 Misc 3d 851 [Sup Ct, Kings County]). ... As a matter of comity, and in deference to the determination of the Bankruptcy Court, we agree with the Supreme Court's determination to grant the plaintiff's cross motion, inter alia, to substitute the bankruptcy trustee as the plaintiff, and to deny the defendants' motion for leave to amend their answer to assert the affirmative defense of lack of capacity to sue, and thereupon, to dismiss the complaint." ***Fausset v. Turner Constr. Co.*, 2019 N.Y. Slip Op. 08173, Second Dept 11-13-19**

PERSONAL INJURY, CONTRACT LAW.

QUESTION OF FACT WHETHER CONTRACTORS WHICH DID SIDEWALK/GRATE WORK LAUNCHED AN INSTRUMENT OF HARM IN THIS SLIP AND FALL CASE; THE CONTRACTORS' MOTIONS FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined that the actions against two contractors (MPM and VRD) which did sidewalk/grate work should not have been dismissed in this slip and fall case. The two contractor defendants did not demonstrate, as a matter of law, that they did not launch an instrument of harm: "In general, a contractual obligation, standing alone, will not give rise to tort liability in favor of a third party (see Espinal v. Melville Snow Contrs., 98 NY2d 136, 138). Nonetheless, the Court of Appeals has recognized three exceptions to this general rule: '(1) where the contracting party, in failing to exercise reasonable care in the performance of his [or her] duties, launches a force or instrument of harm . .

. (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties . . . and (3) where the contracting party has entirely displaced the other's party's duty to maintain the premises safely' ... . Here, the owner, MPM, and VRD failed to establish their prima facie entitlement to judgment as a matter of law by demonstrating that the work performed on the grate and vault did not create the allegedly dangerous condition that caused the plaintiff to trip and fall and, thus, launched a force or instrument of harm ...". ***Randazzo v. Consolidated Edison Co. of N.Y., Inc.*, 2019 N.Y. Slip Op. 08236, Second Dept 11-13-19**

PERSONAL INJURY, EDUCATION-SCHOOL LAW.

PLAINTIFF COLLEGE SOCCER PLAYER ASSUMED THE RISK OF INJURY FROM BEING STRUCK IN THE HEAD BY A SOCCER BALL, SUFFERING A CONCUSSION, AND THEREAFTER BEING LEFT IN THE GAME, ALLEGEDLY EXACERBATING THE INJURY.

The Second Department determined that plaintiff, a college soccer player, assumed the risk of injury caused by being struck in the head by a soccer ball: "As to the Molloy College defendants and the referee defendants, the plaintiff alleged that they were negligent in, among other things, not removing him from the match after he was struck in the head with the soccer ball in the 10th minute of the match. The plaintiff contended that, because he was left in the match after he sustained a concussion on the initial blow to the head, he was exposed to an increased risk of injury, which exacerbated or worsened his injuries or symptoms beyond the initial concussion. * * * Under the circumstances of this case, the doctrine of primary assumption of risk is applicable and bars the plaintiff's recovery against both the Molloy College defendants and the referee defendants. The evidence relied upon in support of the respective motions of the Molloy College defendants and the referee defendants demonstrated, prima facie, that they had no reason to believe that the plaintiff had sustained a concussion and that the plaintiff assumed the risks of any injuries to his head or brain stemming from being hit in the head by a soccer ball during the course of play by voluntarily participating in the soccer match ... . In opposition, the plaintiff failed to raise a triable issue of fact as to whether any actions or inactions on the part of the Molloy College defendants or the referee defendants unreasonably increased the risk of injury normally associated with playing soccer ...". ***Calderone v. College*, 2019 N.Y. Slip Op. 08169, Second Dept 11-13-19**

PERSONAL INJURY, EVIDENCE.

EXPERT'S OPINION THAT DEFENDANT'S IMPROPER INSTALLATION OF A SIDEWALK/MANHOLE CAUSED THE SIDEWALK HEIGHT DIFFERENTIAL IN THIS SLIP AND FALL CASE WAS NOT SUPPORTED BY EVIDENCE IN THE RECORD; THE DEFENSE MOTION TO SET ASIDE THE VERDICT SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court. determined the motion to set aside the verdict in this slip and fall case should have been granted. Although plaintiff's expert was properly qualified, his opinion that defendant's improper installation of the sidewalk/manhole caused the sidewalk height-differential over which plaintiff tripped and fell was not supported by evidence in the record: "... [T]he expert reached his conclusion as to the defendant's negligence by assuming material facts not supported by the evidence and by guessing and speculating in drawing that conclusion ... . For example, the expert testified to having no knowledge of when the sidewalk was constructed, when the manhole had been installed, or the weight and inside dimensions of the manhole structure. Yet, he opined that the defendant was responsible for the settling of the sidewalk flag and manhole due to improper backfilling, simply because the manhole belonged to the defendant at the time of the plaintiff's fall. Contrary to the plaintiff's contention, absent the expert's assumptive and speculative testimony, there was no evidence of the defendant's negligence." ***Ippolito v. Consolidated Edison of N.Y., Inc.*, 2019 N.Y. Slip Op. 08179, Second Dept 11-13-19**

PERSONAL INJURY, EVIDENCE.

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT IN THIS REAR-END TRAFFIC ACCIDENT CASE SHOULD HAVE BEEN GRANTED; THE ABSENCE OF COMPARATIVE FAULT NO LONGER NEED BE SHOWN.

The Second Department, reversing Supreme Court, determined plaintiff's motion for summary judgment in this rear-end collision case should have been granted, noting that a plaintiff need not demonstrate the absence of comparative fault: "A plaintiff is no longer required to show freedom from comparative fault to establish her or his prima facie entitlement to judgment as a matter of law on the issue of liability ... . ' A driver of a vehicle approaching another vehicle from the rear is required to maintain a reasonably safe distance and rate of speed under the prevailing conditions to avoid colliding with the other vehicle' (... see Vehicle and Traffic Law § 1129[a]). A rear-end collision with a stopped or stopping vehicle establishes a prima facie case of negligence on the part of the operator of the rear vehicle, thereby requiring that operator to rebut the inference of negligence by providing a nonnegligent explanation for the collision ... . Although a sudden stop of the lead vehicle may constitute a nonnegligent explanation for a rear-end collision, 'vehicle stops which are foreseeable under the prevailing traffic conditions, even if sudden and frequent, must be anticipated by the driver who follows' ... .Here, the plaintiff testified at his deposition that he was reducing the speed of his vehicle, with his foot on the brake pedal, when his vehicle was struck in the rear by the defendant's vehicle. Likewise, the defendant's testimony at her deposition, a transcript

of which was submitted by the plaintiff in support of his cross motion, was to the effect that her vehicle hit the plaintiff's vehicle in the rear while in 'stop and go' traffic. Thus, the plaintiff established, prima facie, that the defendant's negligence was a proximate cause of the accident ...". ***Xin Fang Xia v. Saft*, 2019 N.Y. Slip Op. 08248, Second Dept 11-13-1**

PERSONAL INJURY, LANDLORD-TENANT.

STACKED BOXES NOT AN OPEN AND OBVIOUS CONDITION AS A MATTER OF LAW IN THIS SLIP AND FALL CASE; TENANT'S MOTION FOR SUMMARY JUDGMENT PROPERLY DENIED; LANDLORD DID NOT DEMONSTRATE IT WAS AN OUT-OF-POSSESSION LANDLORD; HOWEVER, LANDLORD ESTABLISHED IT DID NOT CREATE OR HAVE NOTICE OF THE CONDITION.

The Second Department, reversing (modifying) Supreme Court determined the landlord did not demonstrate it was an out-of-possession landlord in this slip and fall case. But the landlord did demonstrate it did not create of have notice of the stacked boxes which allegedly caused plaintiff's slip and fall. The stacked boxes did not constitute an open and obvious condition as a matter of law: "The evidence submitted by the tenant in support of its motion, including, inter alia, the plaintiff's deposition testimony regarding the accident, failed to eliminate all triable issues of fact as to whether the stacked boxes constituted an open and obvious condition, and whether the stacked boxes constituted an inherently dangerous condition. The evidence likewise failed to establish, prima facie, that the tenant did not create or have notice of the condition. ... [T]he landlord defendants' submissions failed to establish, prima facie, that they were out-of-possession landlords. The copy of the lease the landlord defendants submitted was illegible, and the deposition testimony ... failed to establish, prima facie, that the landlord defendants had relinquished control over the premises to such a degree as to extinguish their duty to maintain the premise ... . [T]he landlord defendants established their prima facie entitlement to judgment as a matter of law by demonstrating that they did not create the alleged hazardous condition or have actual or constructive notice of the condition ...". ***Robbins v. 237 Ave. X, LLC*, 2019 N.Y. Slip Op. 08237, Second Dept 11-13-19**

FOURTH DEPARTMENT

ANIMAL LAW.

DEFENDANT WAS AWARE HER DOG COULD ATTACK ANOTHER DOG AND IT WAS FORESEEABLE A DOG OWNER WOULD TRY TO SEPARATE THE DOGS; DEFENDANT'S MOTION FOR SUMMARY JUDGMENT IN THIS DOG BITE CASE SHOULD NOT HAVE BEEN GRANTED.

The Fourth Department, reversing Supreme Court, determined defendant's motion for summary judgment in this dog-bite case should not have been granted. Defendant was aware that her dog might attack a small dog like plaintiff's and it was foreseeable plaintiff would try to separate the dogs: " 'Vicious propensities include the propensity to do any act that might endanger the safety of the persons and property of others in a given situation' ... . Thus, 'an animal that behaves in a manner that would not necessarily be considered dangerous or ferocious, but nevertheless reflects a proclivity to act in a way that puts others at risk of harm, can be found to have vicious propensities' ... . Even assuming, arguendo, that defendant met her initial burden on the motion, we conclude that plaintiff raised an issue of fact to defeat that motion. Plaintiff submitted her own affidavit, wherein she stated that, after she was bitten, defendant told her that defendant 'was aware of the risk that her dogs would attack small dogs.' It was 'foreseeable that if [defendant's dog] attacked another dog, someone would attempt to pull the dogs apart and be injured in the process' ...". ***Modafferi v. DiMatteo*, 2019 N.Y. Slip Op. 08342, Fourth Dept 11-15-10**

CRIMINAL LAW.

WAIVER OF INDICTMENT JURISDICTIONALLY DEFECTIVE; IT DID NOT INCLUDE THE APPROXIMATE TIME OF THE OFFENSE.

The Fourth Department vacated the plea and waiver of indictment because the approximate of the offense was not included in the waiver: "... [D]efendant contends that her waiver of indictment is jurisdictionally defective because it did not contain the 'approximate time' of the offense (CPL 195.20). We agree. A jurisdictionally valid waiver of indictment must contain, inter alia, the 'approximate time' of each offense charged in the superior court information (SCI) ... . 'The law demands strict and literal compliance with the constitutional and statutory framework for waiving indictment' ... . ' [S]ubstantial compliance [with CPL 195.20] will not be tolerated' … because 'compliance with [its] literal terms . . . is the sine qua non of the voluntariness of an indictment waiver' ... . Here, as the People correctly concede, the waiver of indictment does not contain the approximate time of the offense ... . Moreover, we note that this is not a case ' where the time of the offense is unknown or, perhaps, unknowable' so as to excuse the absence of such information' ...". ***People v. Kerce*, 2019 N.Y. Slip Op. 08310, Fourth Dept 11-15-19**

CRIMINAL LAW.

WAIVER OF INDICTMENT JURISDICTIONALLY DEFECTIVE; APPROXIMATE TIME OF THE OFFENSE NOT INCLUDED.

The Fourth Department determined the waiver of indictment was jurisdictionally defective because it did not include the approximate time of the offense: "A written waiver of indictment must be executed in strict compliance with the requirements of CPL 195.20 ... , which in relevant part provides that such a waiver shall contain the 'approximate time . . . of each offense to be charged in the [SCI]' (CPL 195.20). The People correctly concede that the written waiver of indictment failed to contain the approximate time of each offense and, because strict compliance with CPL 195.20 is required, we agree with defendant that the waiver was defective ... . Contrary to the People's contention, even if we assume, arguendo, that we are able to read an SCI in conjunction with a written waiver of indictment in order to cure a defect therein, that would not cure the defect in the written waiver in this case because the SCI does not state the approximate time of each offense ...". ***People v. Laws*, 2019 N.Y. Slip Op. 08332, Fourth Dept 11-15-19**

CRIMINAL LAW, APPEALS.

SENTENCES MUST RUN CONCURRENTLY, NOT CONSECUTIVELY; ERROR NEED NOT BE PRESERVED.

The Fourth Department determined defendant's sentences should run concurrently, not consecutively, noting that preservation of the error was not required: "... [T]he sentence is illegal insofar as County Court directed that the sentences imposed on the two counts charging criminal possession of a weapon in the second degree run consecutively to the sentence imposed on the count charging assault in the second degree. We note that defendant's contention does not require preservation ... . The People had the burden of establishing that consecutive sentences were legal, i.e., that the crimes were committed through separate acts or omissions (... see generally Penal Law § 70.25 [2]), and they failed to meet that burden. With respect to the count charging criminal possession of a weapon in the second degree under Penal Law § 265.03 (1) (b), 'the People neither alleged nor proved that defendant's possession [of the gun] was marked by an unlawful intent separate and distinct from his intent to shoot the victim[]' ... . With respect to the count charging criminal possession of a weapon in the second degree under Penal Law § 265.03 (3), there was no evidence presented at trial that defendant's act of possessing a loaded firearm 'was separate and distinct from' his act of shooting the victim ... . ***People v. Tripp*, 2019 N.Y. Slip Op. 08339, Second Dept 11-15-19**

CRIMINAL LAW, APPEALS.

FAILURE TO MENTION RESTITUTION IN DEFENDANT'S PRESENCE REQUIRES VACATION OF THE SENTENCE; DISCREPANCY BETWEEN THE AMOUNT OF RESTITUTION IN THE PLEA AGREEMENT AND THE CONFESSION OF JUDGMENT MUST BE REMEDIED UPON RESENTENCING.

The Fourth Department vacated defendant's sentence because the sentencing court did not mention restitution as part of the sentence in defendant's presence. The error survives a lack of preservation and a waiver of appeal. The Fourth Department noted that any discrepancy between the restitution amount in the plea agreement and the amount in the confession of judgment must be remedied upon resentencing: "... [D]efendant contends, and the People concede, that his confession of judgment with respect to restitution must be voided because the amount thereof differs from the amount of restitution contemplated by the plea bargain. Although not raised by the parties, we conclude that defendant's sentence must be vacated in its entirety because County Court failed to pronounce the sentence of restitution in open court ... . 'CPL 380.20 and 380.40 (1) collectively require that courts must pronounce sentence in every case where a conviction is entered' and that—subject to limited exceptions not relevant here— [t]he defendant must be personally present at the time sentence is pronounced' ... . Restitution is a component of the sentence to which CPL 380.20 and CPL 380.40 (1) apply ... . The requirements of CPL 380.20 and CPL 380.40 (1) are 'unyielding' ... , and their violation may be addressed on direct appeal notwithstanding a valid waiver of the right to appeal or the defendant's failure to preserve the issue for appellate review ... . When the sentencing court fails to orally pronounce a component of the sentence, the sentence must be vacated and the matter remitted for resentencing in compliance with the statutory scheme ...". ***People v. Cleveland*, 2019 N.Y. Slip Op. 08308, Fourth Dept 11-15-19**

CRIMINAL LAW, APPEALS, CONTRACT LAW.

TO BE ENFORCEABLE, A WAIVER OF APPEAL MUST BE SUPPORTED BY A SENTENCING COMMITMENT OR OTHER CONSIDERATION.

The Fourth Department noted that a waiver of appeal, to be enforceable, must be supported by a sentence promise as consideration: "Defendant correctly argues in his main brief that his waiver of the right to appeal is invalid because he pleaded guilty to the sole count of the indictment ' without receiving a sentencing commitment or any other consideration' ... . County Court's promise to consider imposing a sentence below the statutory maximum merely restated its preexisting statutory and common-law obligation to impose an appropriate legal sentence ... , and we agree with defendant that such a promise is

the equivalent of no promise at all and cannot supply the consideration necessary to enforce a waiver of the right to appeal . As the Second Circuit explained in invalidating a waiver of the right to appeal under similar circumstances... , such an illusory promise is not consideration for a waiver because it affords the defendant 'no benefit . . . beyond what he would have gotten by pleading guilty without an agreement' ...". ***People v. Schmidinger*, 2019 N.Y. Slip Op. 08324, Fourth Dept 11-15-19**

FALSE ARREST, MALICIOUS PROSECUTION, EMPLOYMENT LAW, CORPORATION LAW.

FALSE ARREST AND MALICIOUS PROSECUTION ACTIONS AGAINST THE RESTAURANT FRANCHISOR PROPERLY DISMISSED IN THE ABSENCE OF EVIDENCE OF CONTROL OVER THE DAY TO DAY OPERATION OF THE RESTAURANT.

The Fourth Department, reversing Supreme Court in this false arrest and malicious prosecution action, determined plaintiff's motion for summary judgment should not have been granted because the video evidence raised questions of fact. The court noted that the action against the franchisor, Denny's, where the confrontation between plaintiff and the restaurant security guards took place, was properly dismissed: "... [T]he court properly granted that part of the cross motion seeking summary judgment dismissing the complaint against Denny's. ' The mere existence of a franchise agreement is insufficient to impose vicarious liability on the franchisor for the acts of its franchisee; there must be a showing that the franchisor exercised control over the day-to-day operations of its franchisee' ... . Defendants established that Denny's did not exercise control over the day-to-day operations of its franchisee or specifically maintain control over the security of the restaurant, and plaintiff failed to raise a triable issue of fact with respect thereto ...". ***Hernandez v. Denny's Corp.*, 2019 N.Y. Slip Op. 08302, Fourth Dept 11-15-19**

FAMILY LAW.

MOTHER'S PETITION FOR AN UPWARD MODIFICATION OF FATHER'S CHILD SUPPORT BASED UPON A CHANGE IN FATHER'S EMPLOYMENT STATUS WAS PROPERLY GRANTED, BUT THE MODIFICATION SHOULD HAVE BEEN MADE RETROACTIVE TO THE DATE OF EMPLOYMENT, NOT THE DATE OF THE PETITION.

The Fourth Department, reversing Family Court, determined mother's petition for an upward modification of father's support obligation should have been granted in its entirety, i.e., retroactive to the date of the change in father's employment status, not to the date of the petition: "The court erroneously concluded that the modification of child support could only be retroactive to the date petitioner filed the petition. Because it is undisputed that the father did not notify the Support Collection Unit of his change in employment status as required by the prior support order, the court had the authority to modify the child support payments retroactive to the date of his employment ...". ***Matter of Oneida County Dept. of Social Servs. v. Abu-Zamaq*, 2019 N.Y. Slip Op. 08341, Fourth Dept 11-15-19**

FAMILY LAW, APPEALS, CONTEMPT.

FATHER WAS ENTITLED TO A HEARING ON WHETHER HE WILLFULLY VIOLATED A CHILD SUPPORT ORDER, ALTHOUGH FATHER COMPLETED THE SENTENCE OF INCARCERATION, THE APPEAL IS NOT MOOT BECAUSE OF THE STIGMA OF A CIVIL CONTEMPT FINDING.

The Fourth Department, reversing Family Court, determined father was entitled to a hearing on whether he willfully violated a child support order. The Fourth Department noted that. although father had completed the sentence of incarceration, the appeal was not moot because of the consequences which could flow from a finding of civil contempt: "We agree with the father ... that the court erred when it determined that the father's alleged violation of the child support order was willful because it did not afford the father with the opportunity to be heard and present witnesses (... see generally Family Ct Act §§ 433, 454 [1]). Although '[n]o specific form of a hearing is required, . . . at a minimum the hearing must consist of an adducement of proof coupled with an opportunity to rebut it' ... . Moreover, '[i]t is well settled that neither a colloquy between a respondent and [the] [c]ourt nor between a respondent's counsel and the court is sufficient to constitute the required hearing' ... . Here, none of the parties' appearances on the violation petition consisted 'of an adducement of proof coupled with an opportunity to rebut it' ... . At most, there was merely 'a colloquy' between the father and Support Magistrate, which is insufficient to constitute the required hearing . Moreover, there is nothing in the record to establish ... petitioner mother provided admissible evidence with respect to the father's alleged willful failure to pay child support, nor is there any admissible evidence submitted by the Support Collection Unit (see generally Family Ct Act § 439 [d] ...). Also, the father was never given the opportunity to present evidence rebutting the allegations in the petition." ***Matter of Green v. Lafler*, 2019 N.Y. Slip Op. 08306, Fourth Dept 11-15-19**

FAMILY LAW, EVIDENCE.

CHILD'S STATEMENT ABOUT AGE-INAPPROPRIATE SEXUAL CONDUCT NOT CORROBORATED; NEGLECT ALLEGATIONS AGAINST MOTHER NOT PROVEN.

The Fourth Department, reversing Family Court, determined that mother's child's statement about age-inappropriate sexual conduct involving mother's child and a non-family child was not corroborated and therefore the neglect allegation against mother was not proven: "Although the testimony of the two caseworkers established that the disclosure reflected age-inappropriate knowledge of sexual matters, petitioner failed to submit '[a]ny other evidence tending to support' the reliability of the youngest child's statements apart from the disclosure itself ... . The two caseworkers who testified on behalf of petitioner asserted that they utilized forensic interviewing techniques to avoid leading the youngest child during their interviews, but petitioner failed to offer any evidence establishing that either caseworker was qualified to give expert validation testimony in such matters ... . An admission by the mother 'that she had heard that the purported prior incident occurred in the manner stated by others . . . is in no sense an admission of any fact pertinent to the issue, but a mere admission of what [she] had heard without adoption or indorsement' ... . [P]etitioner offered no admissible evidence regarding the time frame when the mother became aware of that incident. Absent such evidence, we cannot conclude that the mother had sufficient time to act but failed to appropriately do so. ... We therefore conclude that petitioner failed to establish by a preponderance of the evidence that the mother neglected the subject children by failing to act as ' a reasonable and prudent parent' would have acted under the circumstances ...". ***Matter of Carmellah Z. (Casey V.)*, 2019 N.Y. Slip Op. 08298, Fourth Dept 11-15-19**

FORECLOSURE, BANKRUPTCY, CIVIL PROCEDURE.

THE DISCHARGE IN BANKRUPTCY DID NOT ACCELERATE THE DEBT AND THEREFORE DID NOT START THE STATUTE OF LIMITATIONS RUNNING; THE IN REM FORECLOSURE ACTION REMAINS VIABLE.

The Fourth Department, in a full-fledged opinion by Justice Carni, determined that the mortgage debt was not accelerated by a discharge in bankruptcy, therefore the statute of limitations was not triggered and an in rem foreclosure action remains viable: "... '[O]nce a mortgage debt is accelerated, the entire amount is due and the Statute of Limitations begins to run on the entire debt' ... . 'Where the acceleration . . . is made optional with the holder of the note and mortgage, some affirmative action must be taken evidencing the holder's election to take advantage of the accelerating provision, and until such action has been taken the provision has no operation' ... . Here, the mortgage provided plaintiff the option to accelerate the debt under certain circumstances, but did not state that the debt would be automatically accelerated if defendant obtained a discharge in bankruptcy. We reject defendant's contention that the discharge in bankruptcy automatically accelerated the debt and thus triggered the statute of limitations with respect to the entire debt … . … '[E]ven after the debtor's personal obligations have been extinguished [by chapter 7 discharge], the mortgage holder still retains a right to payment in the form of its right to the proceeds from the sale of the debtor's property,' and a bankruptcy proceeding does not 'impair [the mortgage holder's] right to commence an action against [the debtor] in rem to seek payment from the proceeds of a foreclosure sale' ... . [C]hapter 7 discharge removes the 'mode of enforc[ement]' against the debtor in personam, but the obligation otherwise remains intact and does not impact an action in rem ...". ***Wilmington Sav. Fund Socy., FSB v. Fernandez*, 2019 N.Y. Slip Op. 08290, Fourth Dept 11-15-19**

MEDICAL MALPRACTICE, PERSONAL INJURY, EVIDENCE.

SHIFTING BURDENS OF PROOF AT THE SUMMARY JUDGMENT STAGE IN MEDICAL MALPRACTICE ACTIONS CLARIFIED; PRECEDENT TO THE CONTRARY SHOULD NO LONGER BE FOLLOWED.

The Fourth Department, reversing and modifying Supreme Court in three related appeals, clarified the respective burdens to be met at the summary judgment stage in a medical malpractice action. Applying those burdens, the Fourth Department found that summary judgment should have been awarded to the defendants in two of the three appeals. The facts are too complex to fairly summarize here. With respect to the burdens of proof, the court explained: "We note at the outset that the facts of this case provide the opportunity for this Court to review the appropriate standard for burden-shifting in medical malpractice cases. It is well settled that a defendant moving for summary judgment in a medical malpractice action 'has the burden of establishing the absence of any departure from good and accepted medical practice or that the plaintiff was not injured thereby' (O'Shea v. Buffalo Med. Group, P.C., 64 AD3d 1140, 1140 [4th Dept 2009] ...). As stated in O'Shea, once a defendant meets that prima facie burden, '[t]he burden then shift[s] to [the] plaintiff[] to raise triable issues of fact by submitting a physician's affidavit both attesting to a departure from accepted practice and containing the attesting [physician's] opinion that the defendant's omissions or departures were a competent producing cause of the injury' ... . . Upon review, we conclude that the burden that O'Shea places on a plaintiff opposing a summary judgment motion with respect to a medical malpractice claim is inconsistent with the law applicable to summary judgment motions in general ... . We therefore conclude that, when a defendant moves for summary judgment dismissing a medical malpractice claim, '[t]he burden shifts to

the plaintiff to demonstrate the existence of a triable issue of fact only after the defendant physician meets the initial burden . . . , and only as to the elements on which the defendant met the prima facie burden' ... . To the extent that O'Shea and its progeny state otherwise, those cases should no longer be followed." ***Bubar v. Brodman*, 2019 N.Y. Slip Op. 08294, Fourth Dept 11-15-19**

PERSONAL INJURY, EVIDENCE.

QUESTIONS OF FACT ABOUT THE EXISTENCE OF A DANGEROUS CONDITION, WHETHER THE ALLEGED DEFECT WAS TRIVIAL, AND PROXIMATE CAUSE PRECLUDED SUMMARY JUDGMENT IN THIS SLIP AND FALL CASE.
The Fourth Department, reversing Supreme Court, determined there were questions of fact about the existence of a dangerous condition. whether the defect was trivial, and proximate cause in this slip and fall case. Plaintiff allegedly fell after stepping on a loose piece of asphalt from the driveway outside her apartment: "Plaintiff testified at her deposition that she 'stepped on a piece of the driveway' that was 'maybe the size of a tennis ball if you were to cut it in half and it was flat.' Plaintiff did not photograph or preserve the piece of asphalt that allegedly caused her to fall, however, and we conclude that her testimony created an issue of fact whether the alleged defect on the property was 'trivial and nonactionable as a matter of law' ... . Inasmuch as plaintiff failed to establish that defendant was negligent in permitting a dangerous or defective condition to exist on the premises, she also 'failed to establish as a matter of law that [defendant's negligence] was the sole proximate cause of the accident' ... . [Plaintiff 's own] deposition testimony that she 'didn't really pay attention' to the driveway or the surrounding area prior to the accident raised an issue of fact whether plaintiff's conduct was a proximate cause of the accident inasmuch as she walked down the porch stairway onto uneven ground in the middle of the night without using due care ...". ***Jackson v. Rumpf*, 2019 N.Y. Slip Op. 08291, Fourth Dept 11-15-19**

PERSONAL INJURY, EVIDENCE, CIVIL PROCEDURE, APPEALS.

THE FAILURE TO AWARD DAMAGES FOR FUTURE PAIN AND SUFFERING AND FUTURE ECONOMIC LOSS WAS AGAINST THE WEIGHT OF THE EVIDENCE; THE MOTION TO SET ASIDE THOSE ASPECTS OF THE VERDICT SHOULD HAVE BEEN GRANTED; THE FUTURE ECONOMIC LOSS ISSUE WAS NOT ABANDONED ON APPEAL.
The Fourth Department, over a two-justice dissent, determined that the failure to award damages for future pain and suffering and future economic loss in this back-injury case was against the weight of the evidence. The motion to set aside those aspects of the verdict should have been granted. A new trial was ordered on those elements of damages. The dissenters argued the future economic law issue was abandoned on appeal: "... [T]he jury's failure to award any damages for future pain and suffering is ' contrary to a fair interpretation of the evidence and deviates materially from what would be reasonable compensation' ... . Although the evidence at trial established that plaintiff was permitted to return to work with no restrictions, the evidence also established that the injuries she sustained in the accident severely affected her ability to perform the same sorts of tasks that she had performed with ease prior to the accident. Moreover, as noted, the parties' experts agreed that the injury to plaintiff's lumbar spine was caused by the accident, and plaintiff presented uncontroverted medical testimony at trial establishing that she continues to experience pain as a result of that injury ... . We also agree with plaintiff that the jury's failure to award damages for future economic loss is against the weight of the evidence. Initially, we disagree with our dissenting colleagues that the contention was abandoned on appeal ... and conclude that plaintiff adequately raised that specific contention in her brief ... ". ***Mast v. DeSimone*, 2019 N.Y. Slip Op. 08288, Fourth Dept 11-15-19**

PERSONAL INJURY, WORKERS' COMPENSATION, CIVIL PROCEDURE, APPEALS.

ALTHOUGH THE ISSUE WAS NOT RAISED BY THE PARTIES, SUPREME COURT SHOULD NOT HAVE DISMISSED PLAINTIFF'S NEGLIGENCE ACTION BEFORE THE WORKERS' COMPENSATION BOARD RULED ON WHETHER PLAINTIFF WAS INJURED WITHIN THE SCOPE OF HIS EMPLOYMENT.
The Fourth Department, reversing Supreme Court and reinstating the negligence action, determined Supreme Court did not have jurisdiction over the matter because the Workers' Compensation Board had not yet ruled whether plaintiff was injured when acting in the scope of his employment. The parties did not raise this issue: "Although not raised by the parties, we conclude that Supreme Court erred in entertaining defendant's motion. 'It is well settled that primary jurisdiction with respect to determinations as to the applicability of the Workers' Compensation Law has been vested in the Workers' Compensation Board [(Board)] . . . [I]t is therefore inappropriate for the courts to express views with respect thereto pending determination by' the Board' ... . Whether plaintiff was injured within the scope of his employment 'must in the first instance be determined by the [B]oard' ... , and the court thus should not have entertained defendant's motion at this juncture. Rather, the case should have been referred to the Board for a determination of plaintiffs' eligibility for workers' compensation benefits ...". ***Warren v. E.J. Militello Concrete, Inc.*, 2019 N.Y. Slip Op. 08300, Fourth Dept 11-15-19**

TRUSTS AND ESTATES, ATTORNEYS, PRIVILEGE, EVIDENCE.

THE EXECUTOR PROPERLY WAIVED THE ATTORNEY-CLIENT PRIVILEGE ON DECEDENT'S BEHALF TO DEMONSTRATE THROUGH DECEDENT'S ATTORNEY'S TESTIMONY THAT SHARES OF STOCK HAD BEEN TRANSFERRED TO THE EXECUTOR WELL BEFORE DECEDENT'S DEATH.

The Fourth Department determined the executor of the estate (respondent) properly waived the attorney-client privilege on decedent's (Anthony's) behalf and demonstrated. through the decedent's attorney's testimony, that decedent's shares in the corporation (NYSFC) had been transferred to the executor well before decedent's death. Therefore the shares were properly excluded from the estate. Despite the absence of stock certificates and corporate records, there was no showing that the executor destroyed evidence: "... [T]he Surrogate held a nonjury trial during which respondent, in his capacity as executor, waived decedents' attorney-client privilege, and decedents' former counsel thereafter testified that she did not include a specific bequest with respect to Anthony's NYSFC shares in his most recent will because Anthony had already transferred those shares to respondent. After the trial, the Surrogate concluded that respondent had in fact satisfied his burden and specifically established that the shares of NYSFC were sold and transferred to respondent prior to Anthony's death. * * * On appeal, petitioners contend that Mayorga [302 AD2d 11] and Johnson [7 AD3d 959] support waiver of the attorney-client privilege by an executor only if the waiver benefits the estate. Petitioners assert that excluding an asset from the estate would not benefit the estate or its beneficiaries and that those cases therefore do not support a waiver of the attorney-client privilege here inasmuch as any waiver would only benefit the executor respondent. The Second Department, however, has permitted the waiver of the attorney-client privilege under circumstances similar to those presented here ... . [W]e ... reject petitioners' contention that respondent should not have been allowed to waive the attorney-client privilege on decedents' behalf as executor due to his own self-interest in the testimony of the decedents' former counsel. Thus, we hereby join the Second and Third Departments in concluding that the attorney-client privilege may be waived by an executor." ***Matter of Thomas*, 2019 N.Y. Slip Op. 08293, Fourth Dept 11-15-19**