November 29, 2019

CasePrepPlus

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Editor: **Bruce Freeman**

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COURT OF APPEALS

CIVIL PROCEDURE, INSURANCE LAW.

PUBLIC HEALTH LAW § 230 DOES NOT CREATE A PRIVATE RIGHT OF ACTION FOR MALICIOUS REPORTING OF INSURANCE FRAUD BY A PHYSICIAN TO THE OFFICE OF PROFESSIONAL MEDICAL CONDUCT.

The Court of Appeals, in a full-fledged opinion by Judge Stein, determined that Public Health Law § 230(11)(b) does not create a private right of action. Plaintiff surgeon provided medical care to four patients injured in an automobile accident and submitted claims for payment to the defendant insurer. The insurer fully or partially denied the claims and then filed complaints against plaintiff with the Office of Professional Medical Conduct (OPMC) alleging insurance fraud. The OPMC declined to discipline plaintiff. Plaintiff then sued defendant insurer for bad-faith and malicious reporting in violation of Public Health Law § 230(11)(b). The Court of Appeals noted a split of authority in the First and Second Departments re: whether a violation of this statute give rise to a private right of action: "Public Health Law § 230 (11) (b) does not expressly create a cause of action authorizing licensees to commence civil litigation against a complainant that files an allegedly bad-faith and/or malicious report with OPMC (compare Public Health Law § 230 [10] [j] [creating an express right to commence a CPLR article 78 proceeding in certain instances]). Consequently, 'recovery may be had . . . only if a legislative intent to create such a right of action is fairly implied in the statutory provision[] and [its] legislative history' ... . We have consistently identified three 'essential factors' to be considered in determining whether a private right of action can be fairly implied from the statutory text and legislative history: '(1) whether the plaintiff is one of the class for whose particular benefit the statute was enacted; (2) whether recognition of a private right of action would promote the legislative purpose; and (3) whether creation of such a right would be consistent with the legislative scheme'... . Critically, all three factors must be satisfied before an implied private right of action will be recognized ... . Applying these factors here, we conclude that the legislature did not intend to create a right of action under Public Health Law § 230 (11) (b)." ***Haar v. Nationwide Mut. Fire Ins. Co.*, 2019 N.Y. Slip Op. 08445, CtApp 11-21-19**

CONSTITUTIONAL LAW, ZONING, LAND USE.

ZONING LAWS WHICH PROHIBITED DEFENDANT FROM USING HIS RURAL-DISTRICT LAND TO HOST A LARGE, THREE-DAY MUSIC AND CAMPING EVENT DID NOT VIOLATE HIS FIRST AMENDMENT RIGHTS AND WERE NOT VOID FOR VAGUENESS.

The Court of Appeals, in a full-fledged opinion by Judge DiFiore, determined that the town zoning laws which prohibited a landowner from holding a three-day music and camping on his rural property did not unconstitutionally restrict his First Amendment rights and were not void for vagueness: "Defendant Ian Leifer owns a 68-acre property containing a single-family home and undeveloped land within the boundaries of plaintiff Town of Delaware. In 2016, he planned to sponsor on the property a three-day event named 'The Camping Trip' — which he had hosted twice before in previous years — over the course of an August weekend. ... Meals would be provided at the site through food truck vendors and a religious nonprofit organization would lead in Jewish religious ceremonies. ... [P]reparations included off-site parking at a local school and rental of shuttle buses to transport attendees to the event site, a party tent for inclement weather, security at both the parking lot and event, $2,000,000 event insurance, 16 portable toilets, a 30-cubic-yard dumpster, EMTs on site and an ambulance on standby. * * * None of the principal or accessory uses specifically permitted in the Rural District encompass defendant's three-day outdoor music and camping festival. Such an event cannot reasonably be characterized as a customary accessory use associated with defendant's single-family residence. ... [U]nless the provisions are unconstitutional, his proposed use is clearly prohibited in the Rural District under the Town of Delaware Zoning Law and the Town was entitled to enjoin the event ... . * * * Defendant's constitutional challenges ... largely focus on a single land use defined in the Zoning Law that is prohibited in the Rural District but permitted in other zoning districts: the 'theater' land use. This approach misses the mark because the Town did not rely exclusively on the theater provision but cited the Zoning Law as a whole to show that certain uses are prohibited in a Rural District but expressive aspects of the event, such as the musical presentations, are permitted in other districts. Considering this context, neither the theater provision, nor the Zoning Law as a whole, violates defendant's constitutional rights." ***Town of Del. v. Leifer*, 2019 N.Y. Slip Op. 08446, CtApp 11-21-19**

CRIMINAL LAW, INSURANCE LAW.

SUPREME COURT PROPERLY DETERMINED THE COLLATERAL SUPPORTING A POSTED BAIL BOND WAS INSUFFICIENT TO ENSURE THE ACCUSED'S RETURN TO COURT, APPELLATE DIVISION REVERSED.

The Court of Appeals, in a full-fledged opinion by Judge Feinman, reversing the Appellate Division, determined that Supreme Court did not abuse its discretion when it reviewed the collateral for a bail bond which had been posted by an insurer and found the collateral insufficient: " 'Following the posting of a bail bond,' CPL 520.30 (1) permits a court to 'conduct an inquiry for the purpose of determining,' among other things, 'the value and sufficiency of any security offered[] and whether any feature of the undertaking contravenes public policy.' The statute also allows inquiry 'into other matters appropriate to the determination, which include but are not limited to' six enumerated factors (CPL 520.30 [1]). For instance, the court has broad discretion to examine '[t]he background, character and reputation of any person who has indemnified or agreed to indemnify an obligor upon the bond' (CPL 520.30 [1] [d]) and the source of any property that will be used as indemnification as well as 'whether any such money or property constitutes the fruits of criminal or unlawful conduct' ... . * * * The insurance company ... has a financial incentive in obtaining a defendant's release on bail so that it may retain its premium. This incentive is separate from the insurance company's interest in securing the defendant's return to court to avoid forfeiting its pledged security. The court, on the other hand, is concerned only with the defendant's continued appearances. Supreme Court ... correctly interpreted the statute and did not abuse its discretion when it disapproved the insurance company bail bond package on public policy grounds, specifically that the limited collateral pledged failed to adequately ensure [the accused's] return to court ...". ***People ex rel. Prieston v. Nassau County Sheriff's Dept.*, 2019 N.Y. Slip Op. 08447, CtApp 11-21-19**

PERSONAL INJURY, LANDLORD-TENANT.

THE LANDLORD DEMONSTRATED THE ASSAILANT IN THIS THIRD-PARTY ASSAULT CASE WAS NOT AN INTRUDER AND PLAINTIFF WAS NOT ABLE TO RAISE A QUESTION OF FACT ON THAT ISSUE, THE LANDLORD'S MOTION FOR SUMMARY JUDGMENT PROPERLY GRANTED, ONE JUDGE DISSENTED.

The Court of Appeals, in a brief memorandum with no discussion of the facts, over a dissent, determined the landlord's (NYC Housing Authority's) motion for summary judgment in this third-party assault case was properly granted. The dissenter argued the Housing Authority did not demonstrate the assailant was not an intruder: "... [T]he New York City Housing Authority met its initial burden of demonstrating that no material triable issues of fact exist through its showing that plaintiff's assailant was likely not an intruder. In response, plaintiff failed to adduce any admissible evidence from which a jury could conclude, without engaging in speculation, that her assailant was an intruder and, concomitantly, whether defendant's alleged negligence was a proximate cause of her injuries ...". ***Laniox v. City of New York*, 2019 N.Y. Slip Op. 08448, CtApp 11-21-19**

FIRST DEPARTMENT

ARBITRATION, CONTRACT LAW.

THE TERMS OF THE CONTRACT CONTROL WHETHER THE COURT OR THE ARBITRATOR DETERMINES THE MATTER IS ARBITRABLE; HERE THAT DETERMINATION HAS BEEN DELEGATED TO THE ARBITRATOR BY THE CONTRACT.

The First Department, in a full-fledged opinion by Justice Manzanet-Daniels, determined that the contract controls and the arbitrator, not the court, must rule on whether the matter is arbitrable: "The motion court correctly declined to enjoin the arbitration proceeding filed by respondent Baltimore Orioles with the American Arbitration Association [AAA]. The duty to arbitrate arises from contract ... . Pursuant to section 19.3 of the partnership agreement, the Orioles and the Nationals agreed to arbitrate 'any disputes' before the AAA when MLB has ... a financial interest, and to do so pursuant to AAA Commercial Rules. Those rules include Rule 7(a), pursuant to which an 'arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim.' These provisions evince a clear and unmistakable intent to delegate the threshold arbitrability question of whether MLB had a financial interest in the Nationals to the AAA ... . 'When the parties' contract delegates the arbitrability question to an arbitrator, a court may not override the contract. In those circumstances, a court possesses no power to decide the arbitrability issue. That is true even if the court thinks that the argument that the arbitration agreement applies to a particular dispute is wholly groundless' ...". ***Matter of WN Partner, LLC v. Baltimore Orioles Ltd. Partnership*, 2019 N.Y. Slip Op. 08383, First Dept 11-19-19**

CIVIL PROCEDURE, ATTORNEYS.

LAW OFFICE FAILURE WAS AN ADEQUATE EXCUSE FOR A TWO-WEEK DELAY IN FILING PAPERS OPPOSING SUMMARY JUDGMENT, SUPREME COURT REVERSED.

The First Department, reversing Supreme Court, determined law office failure was an adequate excuse for failing to timely response to summary judgment motions: "We disagree with the motion court that plaintiff failed to demonstrate both a reasonable excuse for her default and a meritorious cause of action ... . We find that the law office failure that resulted in plaintiff's two-week delay in filing opposition to defendants' motions was not willful and that a meritorious cause of action as to both incidents has been set forth ...". ***Knight v. Acacia Network, Inc.*, 2019 N.Y. Slip Op. 08365. First Dept 11-19-19**

CRIMINAL LAW.

THE ATTEMPTED GANG ASSAULT CHARGE WAS A LEGAL IMPOSSIBILITY FOR TRIAL PURPOSES.

The First Department, vacating defendant's conviction, determined the charged crime was a legal impossibility: " '[A] ttempted gang assault in the second degree is a legal impossibility for trial purposes' ... . 'One cannot attempt to create an unintended result' ...". ***People v. Delacruz*, 2019 N.Y. Slip Op. 08498, First Dept 11-21-19**

CRIMINAL LAW, ATTORNEYS, IMMIGRATION.

DEFENDANT WAS DEPRIVED OF EFFECTIVE ASSISTANCE WHEN DEFENSE COUNSEL TOLD HIM HE "MOST LIKELY" WOULD BE DEPORTED WHEN DEPORTATION WAS MANDATORY; APPEAL HELD IN ABEYANCE TO ALLOW DEFENDANT TO MOVE TO VACATE HIS PLEA; ONE DISSENT.

The First Department, over a dissent, determined defendant did not receive effective assistance of counsel because his attorney told him he would "most likely" be deported when deportation was mandatory. The dissenter argued the record was not sufficient to conclude, as a matter of law, defense counsel was ineffective and a CPL § 440 motion should be brought to flesh out the facts: "Defendant was deprived of effective assistance when his counsel advised his client that because of his plea, he 'will most likely be deported[']'since it is clear that defendant's drug-related conviction would trigger mandatory deportation under 8 USC § 1227 (a)(2)(B)(i) ... . The remarks made by counsel on the record to the judge, as to what he advised his client with regard to the immigration consequences of his plea, are sufficient to permit review on direct appeal ... . Thus, we hold this matter in abeyance to afford defendant the opportunity to move to vacate his plea upon a showing that there is a reasonable probability that he would not have pleaded guilty had he been made aware of the deportation consequences of his plea." ***People v. Johnson*, 2019 N.Y. Slip Op. 08348, First Dept 11-19-19**

CRIMINAL LAW, JUDGES.

JUDGE SHOULD NOT HAVE REFUSED TO CONSIDER THE PEOPLE'S LATE RESPONSE TO DEFENDANT'S MOTION TO DISMISS ON SPEEDY TRIAL GROUNDS, NOTWITHSTANDING THE PEOPLE'S FAILURE TO ADHERE TO THE COURT'S MOTION TIMETABLE.

The First Department, reversing Supreme Court, over a two-justice dissent, determined the trial judge should not have refused to consider a late response to the defense motion to dismiss on speedy trial grounds (CPL § 30.30): "Clearly, trial courts have considerable discretion in administering litigation and managing their dockets ... . We agree with the dissent that parties are obligated to honor court-imposed deadlines. However, it is also axiomatic that justice is best served when cases are decided on the merits. ... Here, the People sought to file their opposition papers on the decision date, some 15 days after the due date. This was not the situation in People v. Cole, 73 NY2d 957 [1989], which was cited by the motion court, where the People failed to submit any opposition papers. Further, there is nothing in the record to suggest that there was any history of dilatory conduct or a blatant disregard of court directives on the part of the People. Rather, this appears to be an isolated lapse. While we are certainly cognizant of the frustration occasioned by the failure of the People to adhere to the motion schedule, summarily granting the defense motion to dismiss without considering the merits of the response the People had prepared was improper. As the People argue, the charges here are serious. Defendant was indicted on numerous weapons possession charges. Dismissal of those charges without a full and complete determination of the motion to dismiss on its merits was unduly harsh. Less drastic remedies, including charging the People for the 15-day delay, were available ...". ***People v. Lora*, 2019 N.Y. Slip Op. 08478, First Dept 11-21-19**

FAMILY LAW, CRIMINAL LAW.

MOTHER WAS NOT ADVISED OF THE RIGHTS HER SON WAS GIVING UP BY ADMITTING TO THE OFFENSE IN THIS JUVENILE DELINQUENCY PROCEEDING, NEW FACT-FINDING ORDERED.

The First Department, reversing Family Court in this juvenile delinquency proceeding, determined appellant's mother was not advised of the rights appellant was giving up by admitting to the offense: "Family Court ... adjudicated appellant a juvenile delinquent ... upon his admission that he committed an act that, if committed by an adult, would constitute criminal facilitation in the fourth degree, and placed him on probation for a period of 12 months ... . As the presentment agency concedes, appellant's admission was defective because the court's allocution of appellant's mother failed to advise her of the

rights appellant was waiving as a result of his admission and the dispositional consequences of appellant's admission (see Family Ct Act § 321.3[1]). However, because appellant violated his probation, which was extended and remains in effect, we agree with the presentment agency that the petition should not be dismissed, and that the matter should be remanded for a new fact-finding determination on both petitions covered by the disposition ...". ***Matter of Kwesi P.*, 2019 N.Y. Slip Op. 08359, First Dept 11-19-19**

PERSONAL INJURY.

SIDEWALK DEFECT WAS NOT TRIVIAL AS A MATTER OF LAW, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT IN THIS SLIP AND FALL CASE SHOULD NOT HAVE BEEN GRANTED.

The First Department, reversing Supreme Court, determined there was a question of fact whether the condition of the sidewalk was a trivial defect in this slip and fall case. The edge of the sidewalk was raised less than an inch. But there was evidence the defendants themselves considered the condition of the sidewalk dangerous: "Defendants moved for summary judgment, arguing that the condition was trivial, open and obvious, and not inherently dangerous. Defendants submitted an expert affidavit, photographs, and deposition testimony. The expert concluded that the height differential in the sidewalk caused by the raised flag ranged between 7/16 of an inch and 13/16 of an inch. In opposition, plaintiff pointed to a map of the property, a budget report, her photographs, and deposition testimony. ... Plaintiff noted that defendants' maintenance manager had marked blue dots on a map during his inspection of the property months before her accident. The map appears to depict two blue dots in the vicinity of her fall. Plaintiff stressed that the maintenance manager testified that he marked the map with blue dots to indicate the areas where he expected that concrete repairs would be made. Plaintiff also pointed to the property's budget report, which referred to, months before her fall, the 'High' priority need to repair large deteriorated sections of 'Concrete Walks and Curbs.' She further noted that some of her photographs depict a circle of white paint on the raised portion of the sidewalk, which she noticed immediately after her fall ... . A finding that a condition is a trivial defect must 'be based on all the specific facts and circumstances of the case, not size alone' ... . The issue is generally a jury question because it is a fact-intensive inquiry ...". ***McCabe v. Avalon Bay Communities, Inc.*, 2019 N.Y. Slip Op. 08350, First Dept 11-19-19**

PERSONAL INJURY.

THE ALLEGATION THAT PLAINTIFF STOPPED FOR A YELLOW LIGHT WAS NOT A NON-NEGLIGENT EXPLANATION FOR A REAR-END COLLISION; DEFENSE VERDICT SHOULD HAVE BEEN SET ASIDE.

The First Department, reversing Supreme Court, determined that plaintiff's motion to set aside the defense verdict in this rear-end traffic accident case should have been granted. Plaintiff was stopped when the collision occurred: "There is no valid line of reasoning and permissible inferences that could possibly support the jury's verdict based on the evidence presented at trial ... . Defendant Tracy Murphy acknowledged that plaintiff's vehicle was stopped when she struck plaintiff's vehicle in the rear. Murphy's claim that plaintiff had stopped at a yellow light does not constitute a nonnegligent explanation for the accident ...". ***Smyth v. Murphy*, 2019 N.Y. Slip Op. 08353, First Dept 11-19-19**

PERSONAL INJURY.

PLAINTIFF'S JUMPING FROM A STALLED ELEVATOR WAS AN UNFORESEEABLE CONSEQUENCE OF THE ELEVATOR MALFUNCTION; DEFENDANT'S SUMMARY JUDGMENT MOTION SHOULD HAVE BEEN GRANTED.

The First Department, reversing Supreme Court, determined the plaintiff's jumping out of a stalled elevator was an unforeseeable consequence of the elevator malfunction: "Plaintiff was injured when she attempted to exit a service elevator in the building where she worked after the elevator stalled near the top floor of the building. A coworker testified that the elevator shook and the lights went out for a few seconds. Plaintiff testified that she used the intercom in the elevator to contact the building's doorman, who said he would call the elevator mechanic. A few minutes later, another coworker, who was also in the stalled elevator, pried the door open. Plaintiff saw that the elevator was about 2–1/2 feet above the floor level, and decided to jump out, believing she could do so safely. Under these circumstances, plaintiff's act of jumping from the stalled elevator was an unforeseeable, superseding cause of her accident, which terminates any potential liability of defendant elevator maintenance company for negligent maintenance or repair of the elevator ... . Given the evidence that the elevator had been stalled for only a few minutes and that the doorman had been contacted, there was no emergency situation necessitating plaintiff's jump from the elevator ...". ***Estrella v. Fujitec Am., Inc.*, 2019 N.Y. Slip Op. 08501, First Dept 11-21-19**

PERSONAL INJURY, CIVIL PROCEDURE, EVIDENCE.

DEFENSE MOTION TO PRECLUDE PLAINTIFF FROM PRESENTING EXPERT EVIDENCE BECAUSE OF LATE DISCLOSURE AND DEMANDING THE MATERIAL RELIED UPON BY THE EXPERT PROPERLY DENIED IN THIS STAIRWAY SLIP AND FALL CASE.

The First Department determined defendant's motion to preclude plaintiff from offering his expert's report and to turn over the materials relied upon by the expert was properly denied in this stairway slip and fall case: " 'Preclusion of expert

evidence on the ground of failure to give timely disclosure, as called for in CPLR 3101(d)(1)(i), is generally unwarranted without a showing that the noncompliance was willful or prejudicial to the party seeking preclusion'... . 'Prejudice can be shown where the expert is testifying as to new theories, or where the opposing side has no time to prepare a rebuttal' ... . * * * Here plaintiff withheld information about an expert he retained and who performed a comprehensive inspection and report before the demand for expert disclosure was served, failed to disclose this in response to such demand, and continued to withhold such information over the course of many court conferences and the years that the case was pending. He offers no excuse for his delay or for having served a response to defendant's expert disclosure demand that was arguably misleading. However, when plaintiff eventually did disclose the expert, it was not on the eve of trial ... . His disclosure was made on or about March 9, 2018, about six weeks before the originally-scheduled trial date of April 30, 2018, a lead time further expanded with the court's 60-day adjournment ... . Moreover, notwithstanding defendant's claims to the contrary, plaintiff's expert did not advance a different theory of liability from that which plaintiff had previously advanced. * * * Defendant also fails to show grounds to disturb the court's denial of its motion to direct plaintiff to turn over materials relied on by his expert. Defendant claims it is entitled to these materials because, given the passage of time, any expert it would retain now would not be inspecting premises that resemble the premises at the time of the accident. However, defendant does not adequately explain its failure to timely retain an expert of its own." ***Rivera v. New York City Hous. Auth.*, 2019 N.Y. Slip Op. 08366, First Dept 11-19-19**

SECOND DEPARTMENT

CIVIL PROCEDURE, CONTRACT LAW, EVIDENCE.

FORMAL ADMISSIONS, INFORMAL ADMISSIONS AND JUDICIAL ESTOPPEL EXPLAINED.

The Second Department explained the nature of an admission and the doctrine of judicial estoppel in this action to determine whether defendant, Weber, was a shareholder of plaintiff RMNY: "Weber's prior admissions made in other actions that he was not a shareholder of RMNY did not constitute formal judicial admissions entitling RMNY to summary judgment. Formal judicial admissions are facts admitted by a party's pleadings ... , and are conclusive of the facts admitted in the action in which they are made ... . The admissions relied upon here were not made in this action. Furthermore, RMNY failed to establish that the doctrine of judicial estoppel applies. Under the doctrine of judicial estoppel, also known as estoppel against inconsistent positions, a party may not take a position in a legal proceeding that is contrary to a position he or she took in a prior proceeding, simply because his or her interests have changed ... . The doctrine applies only where the party secured a judgment in his or her favor in the prior proceeding ... . This doctrine 'rests upon the principle that a litigant should not be permitted . . . to lead a court to find a fact one way and then contend in another judicial proceeding that the same fact should be found otherwise' ... . 'The doctrine is invoked to estop parties from adopting such contrary positions because the judicial system cannot tolerate this playing fast and loose with the courts' ... .Here, since RMNY failed to show that Weber secured any formal grant of relief in the other actions based upon his prior statements, they do not implicate the doctrine of inconsistent positions ... . Rather, the statements constitute informal judicial admissions that are not conclusive but are 'merely evidence of the fact or facts admitted' ... , 'the circumstances of which may be explained at trial' ...". ***Re/Max of N.Y., Inc. v. Weber*, 2019 N.Y. Slip Op. 08432, Second Dept 11-20-19**

CIVIL PROCEDURE, LABOR LAW, EMPLOYMENT LAW.

STATUTE OF LIMITATIONS TOLLED BY THE FILING OF SIMILAR ACTIONS ALLEGING THE UNDERPAYMENT OF WAGES TO HOME HEALTH AIDES.

The Second Department determined defendants' motion to dismiss these "wage-underpayment" actions as time-barred to the extent they seek damages for underpayment more than six years before the suits were brought was properly denied. The Second Department held that, pursuant to *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, the statute of limitations was tolled based upon the filing of prior similar actions: "The plaintiffs, home health aides who were employed by the defendants Americare Certified Special Services, Inc., and Americare, Inc. (hereinafter together Americare), and who often worked 24-hour 'live in' shifts, seek to recover damages for underpayment of minimum, overtime, and 'spread of hours' wages in violation of the Labor Law and New York State Department of Labor wage orders and regulations. * * * We find that ... applying American Pipe tolling under the circumstances, where a court has not previously addressed the impropriety of class certification, is consistent with the policies underlying the tolling doctrine: avoiding multiplicity of suits and vexatious litigation ... . Accordingly, we agree with the Supreme Court's denial of the defendants' motion to dismiss ...". ***Badzio v. Americare Certified Special Servs., Inc.*, 2019 N.Y. Slip Op. 08389, Second Dept 11-20-19**

CRIMINAL LAW.

PROBATION ONLY IS NOT A LEGAL SENTENCE FOR ASSAULT SECOND; ORDER OF PROTECTION SHOULD NOT HAVE BEEN ISSUED IN FAVOR OF A PERSON WHO WAS NOT A VICTIM OR WITNESS.

The Second Department determined the defendant could not be sentenced to probation only for assault and Supreme Court should not have issue an order of protection in favor of a person who was not a victim or a witness: "Penal Law § 60.05(5) mandates that a person convicted of the class D violent felony offense of assault in the second degree be sentenced to a term of imprisonment ... . Such a sentence could consist of a determinate term of imprisonment of at least two years and no more than seven years ... , or alternatively, a definite term of imprisonment of one year or less under Penal Law § 70.00(4) or an intermittent term of imprisonment under Penal Law § 85.00 ... . Moreover, a split sentence of imprisonment and probation is also authorized ... . Consequently, as the defendant argues and the People concede, the defendant's sentence of a term of probation only with respect to his conviction of assault in the second degree was illegal, and the sentence must be vacated and the matter remitted to the Supreme Court, Richmond County for resentencing or to allow the defendant to withdraw his plea of guilty ... . The defendant, a first time felony offender, requests that his sentence be equivalent to the amount of time that he has already served in connection with this conviction. Such a sentence would be a legal sentence if the sentencing court, in considering the circumstances of the crime and the defendant's character, deems such a sentence to be proper ... . Further, as the defendant argues and the People concede, the Supreme Court had no authority to issue an order of protection in favor of an individual who was neither a victim of nor a witness to the crime to which the defendant pleaded guilty ...". ***People v. Ferguson*, 2019 N.Y. Slip Op. 08424, Second Dept 11-20-19**

CRIMINAL LAW.

PLEA TO ASSAULT FIRST WAS DEFECTIVE BECAUSE THE INTENT TO INFLICT SERIOUS PHYSICAL INJURY WAS NOT STATED IN THE ALLOCUTION.

The Second Department, reversing the judgment, determined the plea to assault first was defective because the intent to inflict serious physical injury was not stated in the allocution: "During the plea colloquy, the Supreme Court stated, and the defendant admitted, the elements of assault in the first degree as including an intent to inflict physical injury and conduct which in fact causes physical injury. However, the crime of assault in the first degree, as defined in Penal Law § 120.10(1), requires an intent to inflict serious physical injury and conduct which in fact causes serious physical injury. Under the circumstances, since the defendant admitted harboring an intent and inflicting an injury other than those required for the commission of assault in the first degree, the defendant's plea of guilty must be vacated, as her allocution failed to make out the requisite elements of that crime ...". ***People v. Steele-Warrick*, 2019 N.Y. Slip Op. 08428, Second Dept 11-20-19**

FORECLOSURE, JUDGES.

JUDGE SHOULD NOT HAVE DENIED, SUA SPONTE, PLAINTIFF'S MOTION FOR A JUDGMENT OF FORECLOSURE ON A GROUND NOT RAISED BY ANY PARTY.

The Second Department, reversing Supreme Court, determined the judge should not have, sua sponte, denied plaintiff's motion for a judgment of foreclosure on a ground not raised by the parties: "... [T]he Supreme Court should not have denied its motion for a judgment of foreclosure and sale upon finding that DLJ [plaintiff] failed to show that the defendants were properly served. The defendants did not oppose DLJ's motion on any ground, including lack of personal jurisdiction. Therefore, the court should not have, sua sponte, raised the issue of the propriety of service ... . Moreover, DLJ demonstrated its entitlement to a judgment of foreclosure and sale by submitting evidence establishing the merits of its unopposed motion and the referee's findings and report ...". ***DLJ Mtge. Capital, Inc. v. Ramnarine*, 2019 N.Y. Slip Op. 08392, Second Dept 11-20-19**

FREEDOM OF INFORMATION LAW (FOIL), CRIMINAL LAW.

REPORTS BY THE DISTRICT ATTORNEY'S CONVICTION REVIEW UNIT (CRU) EXONERATING CONVICTED PERSONS ARE EXEMPT FROM DISCLOSURE UNDER THE FREEDOM OF INFORMATION LAW (FOIL); AN EXONERATED PERSON MAY WAIVE THE SEALING REQUIREMENT (CPL § 160.50) AND CONSENT TO D ISCLOSURE OF A REPORT; THE RELEASED REPORT HERE IS SUBJECT TO REDACTION DETERMINED IN AN IN CAMERA REVIEW BY A JUDGE.

The Second Department, in a full-fledged opinion by Justice Connolly, determined: (1) the redacted report of the District Attorney's Conviction Review Unit (CRU) concerning the exoneration of Jabbar Washington was properly made available to the New York Times because Washington consented to the unsealing of the document (CPL § 160.50(a)(d)); (2) absent such consent, the CRU reports are exempt from disclosure under FOIL; and (3) the redaction of the Washington report should be reviewed by a judge (in camerao review): "CPL 160.50 does not define what constitutes an official record relating to an arrest or prosecution, and the Court of Appeals has held that 'bright line rules are not wholly appropriate in this area' ... . [T]he CRU's final reports constitute official records created in connection with the arrest and prosecution of the persons whose convictions were ultimately vacated through the conviction review process. At the time the reports were created, the

subjects of the reports stood convicted as the result of prosecutorial action. The reports are 'official records' in that they were created by the DA's office itself for the purpose of scrutinizing the propriety of each of the subject convictions. ... [T]hat the CRU's reports might serve a broader public purpose in leading to reform of police agencies or prosecutors' offices, is not a basis to overlook the protections endowed by CPL 160.50 to the individuals exonerated through the CRU's work." ***Matter of New York Times Co. v. District Attorney of Kings County*, 2019 N.Y. Slip Op. 08410, Second Dept 11-20-19**

PERSONAL INJURY, EVIDENCE.

$13,000,000 VERDICT IS AGAINST WEIGHT OF THE EVIDENCE IN THIS TRAFFIC ACCIDENT BACK-INJURY CASE, NEW TRIAL ORDERED UNLESS PLAINTIFFS STIPULATE TO A SUBSTANTIALLY REDUCED VERDICT.

The Second Department, reversing Supreme Court, determined the over $13,000,000 verdict was against the weight of the evidence and ordered a new trial unless the defendants (the Tarpleys) stipulated to substantially reduced damages in this traffic accident back-injury case: " 'The amount of damages to be awarded to a plaintiff for personal injuries is a question for the jury, and its determination will not be disturbed unless the award deviates materially from what would be reasonable compensation' (... see CPLR 5501[c]). ' The reasonableness of compensation must be measured against relevant precedent of comparable cases' ... . Considering the nature and extent of the injuries sustained by Tarpley, the awards for past and future pain and suffering and past and future loss of services deviate materially from what would be reasonable compensation ... (see CPLR 5501[c] ...). ... 'A party claiming lost earnings has the burden of proving the amount of actual past earnings with reasonable certainty, by means of tax returns or other documentation' ... . 'Unsubstantiated testimony, without documentation, is insufficient to establish lost earnings' ... . Here, the award for lost earnings was speculative to the extent that it exceeded the income Tarpley could have expected to earn based on his 2008 and 2009 W2 forms submitted into evidence, since no documentation or expert testimony was presented to establish that Tarpley's income was likely to increase in future years ... . Tarpley's treating physician provided an uncontroverted opinion that Tarpley would require a future lumbar fusion surgery, with an estimated cost of $100,000, due to his ongoing symptoms following the prior laminectomy. However, the verdict awarding damages for future medical expenses in excess of $100,000 was speculative, and we reduce it accordingly ...". ***Tarpley v. New York City Tr. Auth.*, 2019 N.Y. Slip Op. 08440, Second Dept 11-20-19**

PERSONAL JURY, EVIDENCE, EDUCATION-SCHOOL LAW.

SCHOOL DID NOT DEMONSTRATE IT DID NOT HAVE CONSTRUCTIVE KNOWLEDGE OF WATER ON THE FLOOR IN THIS SLIP AND FALL CASE; SCHOOL'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined defendant school did not demonstrate it did not have constructive knowledge of water on the floor of the cafeteria where plaintiff slipped and fell: "... [T]he School District failed to demonstrate, prima facie, that it did not have constructive notice of the alleged water condition that caused the plaintiff to fall. The deposition testimony of the School District's head custodian merely referred to the general cleaning and inspection practices of the custodial staff in relation to the south cafeteria of the school, but provided no evidence regarding any specific cleaning or inspection of the area in question relative to the time when the plaintiff's accident occurred ...". ***Williams v. Island Trees Union Free Sch. Dist.*, 2019 N.Y. Slip Op. 08443, Second Dept 11-20-19**

PERSONAL INJURY, MUNICIPAL LAW.

ALTHOUGH THE TOWN DEMONSTRATED THE DEPARTMENT OF PUBLIC WORKS DID NOT HAVE NOTICE OF THE ALLEGED SIDEWALK DEFECT IN THIS SLIP AND FALL CASE, IT DID NOT DEMONSTRATE THE TOWN CLERK'S RECORDS WERE SEARCHED; TOWN'S MOTION FOR SUMMARY JUDGMENT PROPERLY DENIED.

The Second Department determined the town did not demonstrate that it did not receive written notice of the alleged sidewalk defect in this slip and fall case. The town's motion for summary judgment was therefore properly denied: "In support of its motion for summary judgment, the Town submitted the deposition testimony of a project supervisor for the Town's Department of Public Works, who testified that he directed an administrative aide to perform a record search of 'the Town's complaint database.' The Town also submitted an affidavit from the administrative aide for the Department of Public Works who conducted the search. The administrative aide stated that her duties included 'searching the official records of the Department of Public Works' to determine 'whether the Department of Public Works ha[d] been provided with any prior written notice' of any defects in the area where the incident occurred. The administrative aide stated that her search revealed that 'the Town was not in receipt of any written notice or written complaints.' While this evidence established, prima facie, that the Town's Department of Public Works did not have prior written notice of the alleged defect in the sidewalk, neither the deposition testimony nor the affidavit state specifically that the Town Clerk's records were searched for prior written notice of the alleged defect ... . The Town's failure to provide specific evidence that the records of both the Department of Public Works and the Town Clerk were searched for prior written notice constitutes a failure to demonstrate its prima facie entitlement to judgment as a matter of law." ***Otto v. Miller*, 2019 N.Y. Slip Op. 08417, Second Dept 11-20-19**

THIRD DEPARTMENT

CONTRACT LAW.

DEFENDANTS DID NOT DEMONSTRATE THAT THE DOCTRINE OF ECONOMIC DISTRESS VOIDED THE PURCHASE AGREEMENT; DEFENDANTS' MOTION FOR SUMMARY JUDGMENT IN THIS BREACH OF CONTRACT ACTION SHOULD NOT HAVE BEEN GRANTED.

The Third Department, reversing (modifying) Supreme Court, determined that the criteria for the doctrine of economic duress to void a contract were not met by the defendants. The defendants had entered an agreement to purchase four McDonald's restaurants from plaintiffs. The defendants alleged they agreed to an amendment of the contract because of the actions of the plaintiffs which amounted to economic distress: "A party seeking to void a contract on the basis of economic duress must show that he or she was compelled to agree to it because of a wrongful threat precluding the exercise of his or her free will ... . 'The existence of economic duress is demonstrated by proof that one party to a contract has threatened to breach the agreement by withholding performance unless the other party agrees to some further demand' ... . A mere threat to breach a contract, however, does not amount to economic duress if the party who has been threatened can obtain performance of the contract from another source and pursue normal legal remedies for a breach of contract ... . As the parties relying on economic duress, defendants bore the burden of proving that the agreement could not have been performed by another party. Defendants, however, failed to tender any proof in this regard. ... The record also fails to establish that other legal remedies were not available to defendants. Indeed, [one defendant] testified that, before agreeing to the amendment, [defendants] weighed whether to take possession of the restaurants and then sue to have the original agreement enforced or not to take possession and then sue plaintiffs for specific performance. The fact that neither of those options was ultimately desirable does not mean that defendants did not have available legal remedies. Because defendants could resort to legal recourse, they cannot claim economic duress ...". ***CRG at Arnot Mall, Inc. v. Feehan*, 2019 N.Y. Slip Op. 08467, Third Dept 11-21-19**

CRIMINAL LAW.

PROBATION SENTENCE WHICH EFFECTIVELY EXTENDED THE PROBATION-PERIOD TO SIX YEARS WAS ILLEGAL.

The Third Department determined that defendant's probation sentence was illegal because it exceeded five years. Defendant's probation was continued after the violation: "When a probation violation is sustained and the court continues the sentence, the court may extend the sentence for a period constituting the time from when a defendant is declared delinquent to when a determination is made on such delinquency, which in this case was from September 2016 to September 2017 (see CPL 410.70 [5]). The record reflects that defendant was originally sentenced to the maximum term of probation of five years (see Penal Law § 65.00 [3] [a] [i]), and County Court continued that sentence. Although the court was authorized to extend the sentence to account for the time between September 2016 and September 2017 (see CPL 410.70 [5]), by doing so in this case and having defendant's probation end in 2022, it impermissibly expanded the term of probation beyond the statutory maximum. In other words, assuming that defendant served the whole term of probation, he would have been on probation from September 2015 to September 2016 and then again from September 2017 to September 2022, which is six years total. Given that the sentence imposed was illegal, the matter must be remitted for resentencing." ***People v. Vanhyning*, 2019 N.Y. Slip Op. 08451, Third Dept 11-21-19**

CRIMINAL LAW, EVIDENCE.

MOTION FOR SEVERANCE SHOULD HAVE BEEN GRANTED; DEFENDANT AND CO-DEFENDANT EACH CLAIMED THE OTHER POSSESSED THE COCAINE FOUND IN THE CAR AFTER A TRAFFIC STOP.

The Third Department, reversing defendant's conviction, determined defendant's (Maldonaldo's) trial should have been severed from the co-defendant's trial: "... [W]e agree with defendant that his motion for a separate trial should have been granted (see CPL 200.40 [1]). '[S]everance is compelled where the core of each defense is in irreconcilable conflict with the other and where there is a significant danger, as both defenses are portrayed to the trial court, that the conflict alone would lead the jury to infer [the] defendant's guilt' ... . Through counsel and by testifying on his own behalf, Maldonado denied knowledge of the cocaine's existence in his car and instead pointed the finger at defendant. Specifically, he testified that defendant had brought the Bugles chip bag into the car, that he did not know the contents of that bag, that he would not have allowed the bag in his car if he did and that defendant had his hands in the area where the bag was later discovered when the traffic stop was initiated. In contrast, defendant argued — through counsel and without testifying — that he lacked knowledge of the cocaine's presence in the car and that the cocaine must have belonged to Maldonado, given that it was found in Maldonado's car and that he had a criminal history involving drug possession and distribution — a subject brought out during cross-examination of Maldonado. By seeking to implicate each other, defendant's and Maldonado's defenses were clearly antagonistic, mutually exclusive and irreconcilable, and created 'a significant possibility that the jury unjustifiably concluded by virtue of the conflict itself that both defenses were incredible and gave undue weight to the [People's] evidence' ...". ***People v. Colon*, 2019 N.Y. Slip Op. 08449,Third Dept 11-21-19**

CRIMINAL LAW, EVIDENCE.

SANDOVAL RULING THAT DEFENDANT COULD BE CROSS-EXAMINED ABOUT A 1991 BURGLARY WAS ERROR; DEFENDANT HAD AN UNBLEMISHED RECORD FOR THE LAST 23 YEARS; ERROR DEEMED HARMLESS.

The Third Department determined County Court should not have ruled defendant could be cross-examined about a 1991 burglary conviction in this assault, DWI and reckless driving case arising from a single car accident. The defendant's record had been unblemished for 23 years, when he was released from prison. The defendant argued that, but for the Sandoval ruling, he would have testified. The Third Department found the error harmless, however: "In gauging whether a conviction is too remote, courts often consider the period of time during which the defendant was incarcerated, as County Court did here. For instance, in People v. Wright (38 AD3d 1004 [2007], lv denied 9 NY3d 853 [2007]), this Court allowed inquiry about 20-year-old rape and robbery convictions where the defendant had been released from prison 'only nine months prior to the present offense' ... . By comparison, here, defendant had been released from prison for 23 years, with an unblemished record leading up to this event. Under these circumstances, we conclude that County Court abused its discretion in allowing inquiry into the 1991 conviction, which was simply too remote ...". ***People v. Cole*, 2019 N.Y. Slip Op. 08452, Third Dept 11-21-19**

CRIMINAL LAW, MUNICIPAL LAW.

BASED UPON EXECUTIVE LAW § 63 AND TWO EXECUTIVE ORDERS ISSUED BY GOVERNOR CUOMO, THE ATTORNEY GENERAL HAS THE AUTHORITY TO INVESTIGATE AND CHARGE PERJURY ALLEGEDLY COMMITTED BY A DISTRICT ATTORNEY BEFORE A GRAND JURY CONVENED BY THE ATTORNEY GENERAL TO INVESTIGATE THE POLICE SHOOTING OF AN UNARMED CIVILIAN.

The Third Department, in a full-fledged opinion by Justice Mulvey, reversing Supreme Court, determined that defendant, a district attorney, could be prosecuted by the Attorney General (OAG) for perjury allegedly committed by the district attorney before a grand jury convened by the Attorney General. The grand jury was convened to investigate whether the district attorney had engaged in misconduct when investigating the police shooting of an unarmed civilian. The authority of the Attorney General's investigation and indictment is Executive Law § 63 and two Executive Orders issued by Gov. Cuomo: "Executive Law § 63 (13) provides that the Attorney General 'shall . . . [p]rosecute any person for perjury committed during the course of any investigation conducted by the [A]ttorney[][G]eneral pursuant to statute . . . [and] [i]n all such proceedings, the [A]ttorney[][G]eneral may appear . . . before any court or any grand jury and exercise all the powers and perform all the duties necessary or required to be exercised or performed in prosecuting any such person for such offense.'" * * * Although Executive Law § 63 (2) permits and requires the Governor to define — in the pertinent executive order — the scope of OAG's authority regarding a particular investigation or prosecution ... , the investigation is still conducted pursuant to that statute, albeit within a scope defined by the executive order. The Legislature, by enacting Executive Law § 63 (2), statutorily gave power to the Governor to call upon OAG to conduct investigations. That the statute and executive order must necessarily work in tandem does not diminish or eliminate the statute as a source of authority for OAG to conduct the investigation. Here, as typical under these situations, OAG obtained authority to conduct the 2017 grand jury investigation through a combination of Executive Law § 63 (2) and EO163. The statute gives OAG power, but only when the Governor 'require[s]' OAG to act ... . Relatedly, the Governor would have no authority to give powers to the Attorney General — through an executive order or otherwise — without the Legislature having granted the Governor that ability. Indeed, the Court of Appeals has noted 'that the Attorney[]General has no general authority to conduct [criminal] prosecutions and is without any prosecutorial power except when specifically authorized by statute' ... . Therefore, we reject the conclusion that the phrase 'pursuant to statute' excludes investigations conducted by OAG pursuant to an executive order issued by the Governor under the authority granted to him by statute, namely, Executive Law § 63 (2). OAG's authority to investigate defendant was derived from that statute, at least indirectly through the conduit of an executive order issued thereunder." ***People v. Abelove*, 2019 N.Y. Slip Op. 08453, Third Dept 11-21-19**

ENVIRONMENTAL LAW, CIVIL PROCEDURE, TOXIC TORTS, NEGLIGENCE, REAL ESTATE.

FOUR CLASSES PROPERLY CERTIFIED TO BRING CLASS ACTION SUITS BASED UPON THE CONTAMINATION OF AIR, WATER, REAL PROPERTY AND PEOPLE WITH TOXIC CHEMICALS.

The Third Department, in a full-fledged opinion by Justice Lynch, determined that Supreme Court properly certified four classes bring class action suits against a manufacturer alleging the contamination of water, air, real property and people with toxic chemicals, PFOA and PFOS: "Plaintiffs, residents of the Town, commenced this action as a proposed class action, alleging that defendant's use and improper disposal of PFOA and PFOS caused personal injury and property damage. In their complaint, plaintiffs proposed four classes: (1) a public water property damage class; (2) a private well water property damage class; (3) a private well nuisance class; and (4) a PFOA invasion injury class. Generally, the putative class members were individuals who owned or leased property in the Town or who ingested contaminated municipal or well water or inhaled PFOA or PFOS particulates in the Town and had demonstrable evidence of elevated levels of the chemical in their blood system. * * * We agree with Supreme Court's determination that, in addition to those questions common to the property classes, the answers to certain additional common questions will be applicable to all members of the invasion injury class, for example: (1) whether medical monitoring is an available remedy; (2) the extent of the health hazard presented by

exposure to PFOA; and (3) whether the members of the class are at significant increased risk for disease based on the excess accumulation of PFOA in their bodies. Although defendant contends that there are myriad factual questions that are not common to the class, we do not agree that those predominate. Importantly, this is not a case where there is an issue of fact regarding exposure — rather, each class member must establish exposure and accumulation through blood work ...". ***Burdick v. Tonoga, Inc.*, 2019 N.Y. Slip Op. 08461, Third Dept 11-21-19**

FAMILY LAW, CIVIL PROCEDURE.

NEW YORK DID NOT HAVE JURISDICTION OVER FATHER, A KENTUCKY RESIDENT, IN THIS DIVORCE ACTION; THE COUPLE HAD NOT LIVED TOGETHER IN NEW YORK STATE FOR 23 YEARS.

The Third Department, reversing Supreme Court, determined New York did not have jurisdiction over father, a Kentucky resident, in this divorce action. The couple had last lived in New York in 1995 and had resided in Kentucky from 2003 to 2015: "Assuming, without deciding, that the wife established one of the predicates for jurisdiction under CPLR 302 (b), we find that the quality and nature of the husband's activities in New York were such that it would be unreasonable and unfair to require him to defend an action in this state. Although the parties married in New York in 1991 and resided here until 1995, they have not resided together in this state in over 23 years. From 2003 until 2015, the parties resided together in Kentucky, where, at the time of commencement of this action, the husband was employed as a university professor and the parties owned real property. With the husband's consent, the wife moved to New York with the parties' son in August 2015 and, as vaguely asserted by the wife, the husband has visited them in New York. The parties have not rented or purchased a home in New York. Rather, the wife and the son have lived rent-free with the wife's parents, with the husband providing additional financial support. In our view, the husband's contacts with New York are insufficient to warrant the exercise of personal jurisdiction over him ... .Accordingly, Supreme Court should have granted the husband's motion to dismiss the complaint for lack of personal jurisdiction." ***Crosby v. Crosby*, 2019 N.Y. Slip Op. 08469, Third Dept 11-21-19**

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

A PERSON NOT NAMED ON THE NOTE AND MORTGAGE IS NOT ENTITLED TO RPAPL 1304 NOTICE OF THE FORECLOSURE ACTION, NOTWITHSTANDING CORRESPONDENCE REQUESTING THAT HE BE ADDED TO THE DOCUMENTS AS A BORROWER.

The Third Department, reversing Supreme, determined that a person who was not named as a borrower on the note and mortgage was not entitled to notice of the foreclosure action pursuant to RPAPL 1304. The plaintiff mortgage company's motion for summary judgment should have been granted: "The record contains correspondence that reveals that a representative from Monroe Title, the title insurer for PHH Mortgage, recognized that Robert Johnson, not Brad Johnson, was the party making all payments on the mortgage. ... The record also contains two letters ... , on Robert Johnson's behalf, to PHH Mortgage representative ..., wherein [the writer] requests that the mortgage be modified to list Robert Johnson as the borrower. However, despite these communications, the modification did not occur and Brad Johnson continued to be the sole signatory on both instruments. Inasmuch as it is evident from the record that Brad Johnson is the only individual listed as a borrower on all relevant documents, including the note and mortgage, Robert Johnson was not a borrower and was not entitled to RPAPL 1304 notices ...". ***Federal Natl. Mtge. Assn. v. Johnson*, 2019 N.Y. Slip Op. 08472. Third Dept 11-21-19**

HUMAN RIGHTS LAW, EMPLOYMENT LAW, ADMINISTRATIVE LAW.

THIS EMPLOYMENT DISCRIMINATION ACTION SHOULD NOT HAVE BEEN DISMISSED WITHOUT A HEARING.

The Third Department, reversing Supreme Court, determined petitioner's employment discrimination claim should not have been dismissed without a hearing by the State Division of Human Rights (SDHR): "SDHR is free to dismiss a complaint without conducting a formal hearing where it finds no probable cause to conclude that an employer engaged in discriminatory practices, and we will only disturb that determination 'if it is arbitrary, capricious or lacks a rational basis' ... . Those flaws are present in a determination that stems from 'an inadequate or abbreviated investigation' by SDHR ... , such as one in which the agency does not afford the complainant 'a full and fair opportunity to present evidence on his [or her] behalf and to rebut the evidence presented by the employer' ... . Petitioner argues, among other things, that she was deprived of that opportunity when SDHR refused to consider her response to the notes of a one-party conference at which various individuals associated with [the employer] gave their accounts of her tenure with the firm. We agree. ... [T]he determination must be annulled and the matter remitted so that SDHR may conduct an investigation that is 'neither abbreviated nor one-sided' and affords petitioner 'a full and fair opportunity to . . . rebut the submissions of [the employer] in opposition to her complaint' ...". ***Matter of Hong Wang v. New York State Div. of Human Rights*, 2019 N.Y. Slip Op. 08463, Third Dept 11-21-19**

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