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COURT OF APPEALS

CIVIL PROCEDURE.

ALTHOUGH THE INITIAL COMPLAINT WAS FILED BUT NEVER SERVED, THE CAUSES OF ACTION IN THE COMPLAINT WERE TIMELY INTERPOSED AND THERE WAS NO NEED TO APPLY THE RELATION-BACK DOCTRINE TO THE AMENDED COMPLAINT.

The Court of Appeals, over an extensive dissenting opinion, held, in a brief memorandum, that the claims were timely asserted in a complaint which was filed but never served. The amended complaint included the same claims. Therefore the relation-back doctrine therefore did not apply. The claims should not have been dismissed under CPLR 306-b because the defendants waived that objection: "... [W]e ... conclude that plaintiff's first and second causes of action should be reinstated. Those claims, asserted in identical form in both the original and amended complaints, were timely interposed when plaintiff filed the original summons and complaint, i.e., 'when the action [was] commenced' (see CPLR 203 [c]; 304 [a]). The relation-back doctrine is therefore inapplicable (see CPLR 203 [f]). Although plaintiff failed to serve the original complaint, on this record, the claims should not have been dismissed under CPLR 306-b because defendants did not properly raise such an objection and thus waived it (see CPLR 320 [b]; 3211 [e]). **From the dissent:** Defendants each moved to dismiss the complaint—referring to the amended complaint—under CPLR 3211 (a) (5) and (7), claiming, amongst other things, that the first and second causes of action are untimely ... . Plaintiff opposed the motion, asserting that these causes of action were timely interposed based on the filing of the unserved complaint. In its reply, the [defendant] requested dismissal of the unserved complaint pursuant to CPLR 306-b for lack of service within the statutory time period. ... [P]laintiff responded by filing a motion under CPLR 306-b to extend the time to file the unserved complaint and deem it timely served nunc pro tunc. * * * Supreme Court, ... denied plaintiff's CPLR 306-b motion, and ... granted defendants' motions to dismiss and dismissed "the complaint" with prejudice. The Appellate Division affirmed ... .. The dispositive point of contention ... was whether the first two causes of action were timely ...". ***Vanyo v. Buffalo Police Benevolent Assn., Inc.*, 2019 N.Y. Slip Op. 08980, CtApp 12-17-19**

CIVIL PROCEDURE, ADMINISTRATIVE LAW.

CPLR 3122 DOES NOT REQUIRE THE STATE COMPTROLLER TO ACQUIRE PATIENT AUTHORIZATIONS BEFORE SUBMITTING SUBPOENAS FOR MEDICAL RECORDS IN CONNECTION WITH AUDITS OF PRIVATE HEALTHCARE PROVIDERS.

The Court of Appeals, in a full-fledged opinion by Judge Fahey, determined that the Comptroller of the State of New York, in auditing private health care providers, has the power to subpoena medical records without patient authorizations: "The Comptroller of the State of New York has a constitutional and statutory duty to audit payments of state money, including payments to private companies that provide health care to beneficiaries of a state insurance program. Here, the Comptroller carried out that obligation by means of investigatory subpoenas duces tecum directed to a medical provider, seeking patients' records. We hold that CPLR 3122 (a) (2) does not require that the Comptroller's subpoenas be accompanied by written patient authorizations, as the requirements set out in that paragraph apply only to subpoenas duces tecum served after commencement of an action." ***Matter of Plastic Surgery Group, P.C. v. Comptroller of the State of N.Y.*, 2019 N.Y. Slip Op. 08979, CtApp 12-17-19**

CONTRACT LAW, DEBTOR-CREDITOR.

LOAN FUNDED BY THE PROCEEDS OF ILLEGAL GAMBLING IS ENFORCEABLE.

The Court of Appeals determined that the loan agreement between plaintiff and defendant was enforceable despite the fact that the loan was funded by illegal gambling: "Neither the terms of the agreement nor plaintiff's performance — i.e., loaning money to a friend — was intrinsically corrupt or illegal. Although the loan was funded by the parties' illegal gambling operation (for which both were criminally prosecuted), the record does not support a characterization of their conduct as 'malum in se, or evil in itself' ... and the source of funds used for a loan is not typically a factor in determining its validity. Defendant argues the agreement should be deemed unenforceable because the courts should not assist a party in profiting from ill-gotten gains. But, here, where both parties were involved in the underlying illegality, neither enforcement nor in-

validation of the contract would avoid that result. Indeed, if the loan is not enforced, defendant receives a windfall despite his participation in the criminal acquisition of the funds. We have been reluctant to reward 'a defaulting party [who] seeks to raise illegality as a sword for personal gain rather than a shield for the public good' ... . Although we do not condone plaintiff's illegal bookmaking business, for which he was prosecuted and fined, the circumstances presented here do not warrant a departure from this tenet." ***Centi v. McGillin*, 2019 N.Y. Slip Op. 09058, CtApp 12-19-19**

CORPORATION LAW, ADMINISTRATIVE LAW, MUNICIPAL LAW, ENVIRONMENTAL LAW, ATTORNEYS.

AN ATTORNEY, A PRINCIPAL IN THE CORPORATIONS OWNING SEVERAL BUILDINGS, WAS PROPERLY FOUND TO BE IN THE "OUTDOOR ADVERTISING BUSINESS" WITHOUT A LICENSE BECAUSE HE ADVERTISED HIS LAW PRACTICE IN SIGNS ON THE BUILDINGS.

The Court of Appeals, in a full-fledged opinion by Judge Wilson, determined the corporations which owned the buildings were separate from the attorney, a principal in the corporations, who advertised his law office in signs on the buildings. Therefore the attorney was making space available for outdoor advertising to "others" within the meaning of the NYC Administrative Code regulating outdoor advertising. The code requires "outdoor advertising companies" engaged in the "outdoor advertising business" to be licensed. The attorney (Ciafone) was fined for outdoor advertising without a license: "Contrary to the position of the Appellate Division dissent, preserving the distinction between the corporate entities and Mr. Ciafone does not 'penalize him for forming corporate entities to own the buildings for tax and liability purposes'... . Myriad statutes and regulations apply to corporations, but not natural persons; those are not 'penalties' for creating a corporate legal entity, but consequences of choosing that form of ownership. The New York City Council could rationally conclude that a corporation engaged in the provision of advertising to others, even others who have an ownership interest in the corporation, should be subjected to greater financial disincentives for violating signage laws than natural persons who are advertising themselves." ***Matter of Franklin St. Realty Corp. v. NYC Envtl. Control Bd.*, 2019 N.Y. Slip Op. 08976, CtApp 12-17-19**

CRIMINAL LAW.

HARMLESS ERROR ANALYSIS APPLIES TO A JUDGE'S FAILURE TO CHARGE THE JURY IN ACCORDANCE WITH A RULING MADE PRIOR TO SUMMATION, CONVICTIONS AFFIRMED IN THE FACE OF OVERWHELMING EVIDENCE.

The Court of Appeals, in a full-fledged opinion by Judge Stein, over a concurring opinion and an extensive two-judge dissenting opinion, determined that, in the two cases before the court, the trial court's reversing, after summation, its pre-summation position on a jury instruction was error, but in both cases was harmless error. The opinion is fact-specific and cannot be fairly summarized here. In *Mairena* the judge, after agreeing to do so before summation, failed to charge the jury that defendant could not be convicted of manslaughter unless the jury found the fatal injury was caused by a box cutter or a knife. And in *Altamirano*, after denying the defense request for a jury charge on the innocent possession of a weapon prior to summation, the judge so charged the jury after summation: "In short, Miller [70 NY2d 903], Greene [75 NY2d 875] and Smalling [29 NY3d 981] have consistently been applied by the appellate courts of this state and continue to be entitled to full precedential force. In those decisions, this Court meant what it expressly stated: a trial court's error in reversing a prior charging decision after summations have been completed is subject to harmless error analysis. ... We conclude that the evidence of guilt in both of the instant cases was overwhelming. Thus, as in Miller, Greene and Smalling, whether the error was harmless turns on the question of whether defendants were prejudiced. Although those cases do not clarify whether the constitutional or nonconstitutional standard applies in evaluating prejudice, we need not resolve that question today because, under either standard, the error in each case was harmless." ***People v. Mairena*, 2019 N.Y. Slip Op. 08978, CtApp 12-17-19**

CRIMINAL LAW.

FOR CAUSE CHALLENGE TO A PROSPECTIVE JUROR WAS HANDLED PROPERLY, THERE WAS NO NEED FOR FURTHER INQUIRY OF THE JUROR TO OBTAIN AN UNEQUIVOCAL ASSURANCE THE JUROR COULD BE FAIR.

The Court of Appeals, in a brief memorandum, over a three-judge partial dissent, determined the trial court properly handled a for cause challenge to a prospective juror: "The trial court did not abuse its discretion in denying defendant's challenge for cause to a prospective juror pursuant to CPL 270 (1) (b). When defense counsel directly asked the prospective juror, 'if you don't hear from [defendant], you don't hear him speak, are you going to hold that against him,' she responded, 'I don't believe that I would.' This response directly refuted any notion that the prospective juror would 'hold' defendant's failure to testify 'against him,' i.e., that she would be biased in rendering a decision. Viewing this statement 'in totality and in context' ... , the exchange did not, in the first instance, demonstrate 'preexisting opinions that might indicate bias' ... . Thus, the trial court was not required to inquire further 'to obtain unequivocal assurance that [the juror] could be fair and impartial' ...". ***People v. Patterson*, 2019 N.Y. Slip Op. 08982, CtApp 12-17-19**

CRIMINAL LAW, EVIDENCE.

THE SUPPRESSION COURT DID NOT ABUSE ITS DISCRETION BY REOPENING THE SUPPRESSION HEARING AFTER THE PEOPLE HAD RESTED TO ALLOW THE PEOPLE TO PRESENT AN ADDITIONAL WITNESS; THE "ONE FULL OPPORTUNITY" DOCTRINE DOES NOT APPLY IN THE "PRE-RULING" STAGE OF A SUPPRESSION HEARING.

The Court of Appeals, in a full-fledged opinion by Judge Garcia, over a two-judge dissenting opinion, held the suppression court did not abuse its discretion by allowing the People to reopen the suppression hearing to present another witness after the People had rested. The court subsequently denied the motion to suppress. The Court of Appeals framed the issue around the "one full opportunity" rule which precludes reopening a hearing in other contexts and decided not to extend the rule to the ""pre-ruling" stage of a suppression hearing: "In Havelka [45 NY2d 636], we applied the 'one full opportunity' rule to a holding by an appellate court overturning the decision of the suppression court. In Kevin W [22 NY3d 287}. we applied the same rule to the suppression court's decision to reopen the hearing after its ruling on the merits of the motion. Defendant now asks us to apply the rule at a point still earlier in the process, similarly restricting the suppression court's discretion before any decision is made. This we decline to do. A basic concern underlying both Havelka and Kevin W. is finality, described as the 'haunt[ing] . . . specter of renewed proceedings' after the defendant initially has prevailed ... . We explained in Havelka that allowing the People to present additional evidence at a new hearing would render success at the original suppression hearing 'nearly meaningless' … . The People, we said, should not get 'a second chance to succeed where once they tried and failed' ... . However, that concern is absent where no decision on the motion has been rendered by the hearing court: no victory will be rendered 'nearly meaningless.' The second issue of concern weighing in favor of the 'one full opportunity' rule — the risk of improperly tailored testimony at the reopened proceedings — is significantly lower where the People do not have a formal decision from either an appellate court or the hearing court." ***People v. Cook*, 2019 N.Y. Slip Op. 09059, CtApp 12-19-19**

CRIMINAL LAW, EVIDENCE.

DEFENDANT WAS PROPERLY PURSUED AND DETAINED BASED UPON HIS DRINKING FROM A CONTAINER IN A PAPER BAG AND RUNNING INSIDE A NEARBY BUILDING; THE INTENT TO DEFRAUD WAS PROPERLY INFERRED FROM DEFENDANT'S POSSESSION OF BOTH REAL AND COUNTERFEIT BILLS, KEPT SEPARATELY ON HIS PERSON.

The Court of Appeals, in a full-fledged opinion by Judge Fahey, over an extensive two-judge dissent, determined defendant was properly pursued and detained after a police officer saw him on the street drinking from a container inside a paper bag and then saw him run inside a nearby building as the officer approached. The Court further determined the intent to defraud could be inferred from the defendant's possession of counterfeit bills. The defendant had both counterfeit and real money on his person, kept separately. The issues were succinctly described in the dissent: **From the dissent:** "The majority lauds the hot pursuit and forcible detention of Clinton Britt, a man drinking a Lime-A-Rita[™] wrapped in a brown paper bag in Times Square shortly before midnight, and his subsequent conviction for intending to spend counterfeit money absent any indication that he attempted or planned to use it, simply because it was found rubber-banded separately from his real money when he was searched upon arrest. Both are mistakes. The first — let's chase and physically detain people drinking from unseen containers in brown paper bags — is perhaps understandable because of the tremendous difficulty inherent in the mis-application of our De Bour test in many real-world situations. The sad consequence of that mistake is a regression from the legislative and prosecutorial progress eschewing policing based on stereotypes, returning us to the world of broken windows — where police pursue quality of life violations that disproportionately affect the poor (not merely those committing the infractions, but their families, neighbors and communities). The second — let's equate the separation of real from counterfeit money with the intent to defraud — is inexplicable. It overturns our clear holding in People v. Bailey (13 NY3d 67 [2009]), by contravening the most fundamental proposition of evidence: a fact is not evidence unless it makes the disputed issue more likely to be true than it otherwise would be. Put simply, if you knew you had counterfeit money on your person and did not want to use it, you would keep it separate from your real money. That [defendant] kept his real and fake money separate says nothing about his intent to use it to defraud, deceive or injure anyone, which is a statutory requirement under Penal Law § 170.30." ***People v. Britt*, 2019 N.Y. Slip Op. 09060, CtApp 12-19-19**

CRIMINAL LAW, IMMIGRATION LAW, APPEALS.

DEFENDANT, A NONCITIZEN, WAS TOLD DURING HIS PLEA COLLOQUY THAT HE DID NOT HAVE THE RIGHT TO A JURY TRIAL ON THE DEPORTATION-ELIGIBLE B MISDEMEANOR; WHILE THE LEAVE APPLICATION WAS PENDING THE LAW WAS CHANGED TO AFFORD A PERSON IN DEFENDANT'S POSITION THE RIGHT TO A JURY TRIAL; THE MAJORITY UPHELD THE GUILTY PLEA; THE DISSENT ARGUED THE PLEA SHOULD NOT STAND.

The Court of Appeals, in a brief memorandum, over an extensive dissenting opinion, determined the accusatory instrument accusing defendant of criminal contempt was sufficient and defendant's guilty plea was voluntary. During the plea colloquy defendant, an noncitizen, was told he did not have the right to a jury trial on the deportation-eligible B misdemeanor. While defendant's leave application to the Court of Appeals was pending, the court decided *People v. Suazo*, 32 NY3d 491,

affording persons in defendant's position the right to a jury trial. The dissent argued the guilty plea should be vacated: **From the dissent:** "In accordance with the law at the time of defendant Sixtus Udeke's plea allocution, the trial court told defendant, a noncitizen, that he had no right to a trial by jury for a deportation-eligible Class B misdemeanor. While defendant's leave application to this Court was pending, we issued a new rule in People v. Suazo (32 NY3d 491 [2018]), recognizing precisely the right defendant was told he did not have during the plea colloquy: that noncitizens like defendant have the right to a trial by jury for crimes carrying the potential penalty of deportation. That rule applies retroactively to defendant's appeal, and it leads to the conclusion that his guilty plea is invalid because he could not have knowingly and intelligently waived a right the court said he did not have. Therefore, I dissent from the majority decision that the guilty plea should stand." ***People v. Udeke*, 2019 N.Y. Slip Op. 09057, CtApp 12-19-19**

FIRST DEPARTMENT

CIVIL PROCEDURE, FORECLOSURE.

NEW YORK COURTS DO NOT HAVE THE AUTHORITY TO ENJOIN A TENNESSEE MORTGAGE FORECLOSURE ACTION.

The First Department, reversing Supreme Court, determined New York did not have the authority to decide issues affecting title to real property in another state, here Tennessee: "Plaintiff financed its purchase of the property in 2007 with a note secured by a deed of trust. In 2015, plaintiff and defendant trustee entered into a loan modification agreement (LMA) that, inter alia, bifurcated the original loan and allowed Note B to be forgiven if a subsequent sale or refinancing was insufficient to pay the principal and interest thereon. The LMA is governed by Tennessee law but requires plaintiff to submit to the jurisdiction of the courts of this State. It does not similarly require defendant-appellants to submit to the jurisdiction of this State. Defendant trustee advertised a nonjudicial foreclosure sale (Tenn Code Ann 35-5-101) based on plaintiff's apparent failure to pay the entire amount due upon maturity, and its failure to cause all rents to be deposited into a lockbox. Plaintiff sued, alleging, among other things, breach of the LMA provision prohibiting the trustee from unreasonably withholding consent to refinancing. " '[T]he courts of one State may not decide issues directly affecting title to real property located in another State' ... . Although a court with personal jurisdiction over the parties may adjudicate their rights with respect to foreign realty ... , plaintiffs cite no authority allowing an out-of-state foreclosure sale to be enjoined ... . Contrary to plaintiff's argument, its one-sided agreement to submit to personal jurisdiction in New York does not confer upon the New York courts a contractual right to enjoin an out-of-state foreclosure sale." ***Clark Tower, LLC v. Wells Fargo Bank, N.A.*, 2019 N.Y. Slip Op. 08975, First Dept 12-17-19**

CRIMINAL LAW, EVIDENCE.

FAILURE TO INFORM THE DEFENSE ABOUT A SECOND EYEWITNESS TO THE SHOOTING WAS A REVERSIBLE *BRADY* VIOLATION, THE MOTION TO VACATE SHOULD HAVE BEEN GRANTED; NEW TRIAL ORDERED.

The First Department, in a full-fledged opinion by Justice Mazzarelli, reversing Supreme Court, over a dissent, granted defendant's motion to vacate his conviction and ordered a new trial, based upon the People's failure to notify the defense of a second eyewitness to the shooting (a *Brady* violation). The opinion is too detailed factually and too comprehensive legally to fully summarize here: "Several months after the trial concluded, the assistant district attorney who tried the case received an inter-office email attaching a report from a detective who had interviewed an eyewitness to the shooting. The ADA and another prosecutor had themselves interviewed the witness before the trial, having learned that a man who had been arrested for a drug sale near the Polo Grounds told a detective that he had seen the Philips shooting. The prosecutors spoke to the eyewitness in the detective's presence, and no one took notes. Both prosecutors recalled only that the witness said he saw a man in brown clothes go down the 110 step-staircase, shoot Phillips, and go back up the steps. The ADA concluded that the statement was 'cumulative' and did not disclose it to the defense. However, after receiving the email, he notified defendant's trial counsel about the witness, and attached the report, which he stated he had not known had ever been created. * * * Defendant moved pursuant to CPL 440.10 to vacate the judgment of conviction on the ground that it was obtained in violation of his state and federal constitutional rights, including his rights under Brady. Defendant noted that the prosecution failed to disclose that it had interviewed a second eyewitness two years before trial and failed to disclose the report. Defendant's trial lawyer submitted an affirmation in which he explained how timely disclosure of the information would have affected his preparation of the defense, including a misidentification defense. His investigator also submitted an affidavit in which he stated that timely disclosure would have been valuable because the statement contained 'several strong leads.' For example, he would have spoken to the eyewitness before his memory faded or he became uncooperative, and he would have located the other two people who were sitting with the eyewitness. In addition, the rumor that Phillips robbed Social Security recipients was another lead that would have caused the investigator to seek out people not otherwise on the defense 'radar' for potential leads about Phillips or those who wanted to kill him." ***People v. McGhee*, 2019 N.Y. Slip Op. 09116, First Dept 12-19-19**

FAMILY LAW, ATTORNEYS.

RESPONDENT IN THIS CUSTODY AND VISITATION PROCEEDING TO DETERMINE WHETHER SHE HAS STANDING TO ASSERT PARENTAL RIGHTS IS ENTITLED, PURSUANT TO DOMESTIC RELATIONS LAW § 237, TO ATTORNEY'S FEES PAID BY THE "MORE MONIED" PETITIONER; RESPONDENT WAS PROPERLY CONSIDERED TO BE A "PARENT" WITHIN THE MEANING OF DOMESTIC RELATIONS LAW § 237 FOR THE NARROW PURPOSE OF ENTITLEMENT TO ATTORNEY'S FEES AT THIS PRELIMINARY STAGE OF THE PROCEEDINGS.

The First Department, in a matter of first impression, held that respondent in this custody proceeding was properly considered to be a parent for the narrow purpose of awarding attorney's fees to be paid by the "more monied" party pursuant to Domestic Relations Law § 237. The issue whether respondent has standing to assert parental rights was the purpose of the underlying proceeding: "This case raises an issue of first impression for this Court, that is, whether in a proceeding to establish standing to assert parental rights in seeking visitation and custody under Domestic Relations Law § 70 ... , the court has discretion to direct the 'more monied' party to pay the other party's counsel and expert fees under Domestic Relations Law § 237 before that party has been adjudicated a parent. We find that it does. Domestic Relations Law § 237(b), which is a statutory exception to the general rule that each party is responsible for her own legal fees ... , provides, in relevant part, that 'upon any application . . . concerning custody, visitation or maintenance of a child, the court may direct a spouse or parent to pay counsel fees and fees and expenses of experts directly to the attorney of the other spouse or parent to enable the other party to carry on or defend the application or proceeding by the other spouse or parent as, in the court's discretion, justice requires . . . .' This statute, like Domestic Relations Law § 70, does not define the term 'parent.' * * * ... [W]e conclude that highly inequitable results would flow in this case from permitting the party with far greater resources to seek custody as against the child's primary parent without allowing that parent to seek counsel fees. Without determining that she is a parent for purposes beyond the application of Domestic Relations Law § 237(b), we find that Domestic Relations Law § 237(b) must be read to permit the court to direct petitioner to pay respondent's counsel fees as necessary 'to enable [her] to ... defend the application . . . as, in the court's discretion, justice requires, having regard to the circumstances of the case and of the respective parties.' " ***Matter of Kelly G. v. Circe H.*, 2019 N.Y. Slip Op. 08961, First Dept 12-17-19**

PERSONAL INJURY, ENGINEERING MALPRACTICE, CIVIL PROCEDURE.

CONTINUOUS REPRESENTATION DOCTRINE APPLIED TO AN ENGINEERING FIRM HIRED TO OVERSEE AN HVAC INSTALLATION PROJECT; THE THREE-YEAR NEGLIGENCE STATUTE OF LIMITATIONS WAS TOLLED BY THE CONTINUOUS REPRESENTATION DOCTRINE AND THE ACTION WAS TIMELY.

The First Department determined the negligence action against Skyline, an engineering firm hired to inspect an on-going HVAC (heating, ventilation, air conditioning) installation, was not time-barred because the continuous representation doctrine applied to toll the accrual of the limitations period: "Plaintiff commenced this action in 2016 alleging that it retained Skyline, an engineering firm, to perform 'special inspection' services for 'Phase I' of an HVAC installation project, and that Skyline negligently performed those services and breached the contract. In support of its motion for summary judgment, Skyline demonstrated prima facie that it completed Phase I work under the contract in 2012 and that it was serving in a professional capacity as an engineering firm when it performed those services, so that the three-year limitations period applied (CPLR 214[6] ...). ... [P]laintiff demonstrated that the action is not time-barred because the continuous representation doctrine is applicable and tolled the accrual of the limitations period until 2014 ... . Plaintiff submitted evidence showing Skyline provided special and progress inspection and testing services for 'Remediation of Phase I' of the project, pursuant to a 2014 agreement. Although this work was completed under a separate agreement, Skyline rendered these services to correct the engineering and construction defects that it failed to identify during its Phase 1 inspection in 2012. Since Skyline continued to provide services in connection with Phase I in 2014, the action commenced in 2016 is timely under CPLR 214(6) ...". ***Mutual Redevelopment Houses, Inc. v. Skyline Eng'g, L.L.C*, 2019 N.Y. Slip Op. 09112, First Dept 12-19-19**

PERSONAL INJURY, EVIDENCE.

THERE WAS A QUESTION OF FACT WHETHER PLAINTIFF'S DECEDENT, WHO WAS IN A VEGETATIVE STATE, EXPERIENCED PAIN; THE DEFENDANT HOSPITALS' MOTION TO DISMISS THE CONSCIOUS PAIN AND SUFFERING CLAIM SHOULD NOT HAVE BEEN GRANTED.

The First Department, reversing Supreme Court, determined the hospital's motion to dismiss the conscious pain and suffering claim should not have been granted. Plaintiff's decedent was in a vegetative state, but there was evidence she was aware of pain: "... [A]lthough she was in a vegetative state, the decedent was generally responsive to pain, and sometimes followed commands or responded to verbal stimuli ... . Although defendants' experts opined that reflex responses to pain, such as grimacing or withdrawing, are not signs of conscious awareness, at least some of the behaviors recorded in the medical records transcend such reflex responses. The medical records also reflect that the decedent was administered pain medication in at least one of defendant facilities. Although not dispositive, this fact suggests that the decedent's doctors believed that she might be able to experience pain. In addition, plaintiff testified that, while at defendants' facilities, the

decedent made expressions of pain or emotion, such as moaning, crying, or smiling, and communicated with her by blinking ... . Plaintiff's belief that the decedent blinked in response to questions was reflected in the medical records, although the phenomenon was not itself observed by others. ... Plaintiff's expert also opined that the decedent 'had a sufficient level of awareness to enable her to feel pain,' as evidenced by the fact that she 'made facial expressions, smiled, ... grimaced, moaned, blinked, responded to simple questions, responded to verbal and tactile stimuli, and retracted to pain,' all of which were 'indicators of some level of awareness and conscious pain.' " ***Estreich v. Jewish Home Lifecare*, 2019 N.Y. Slip Op. 08970, First Dept 12-17-1**

PERSONAL INJURY, VEHICLE AND TRAFFIC LAW.

DEFENDANT DRIVER WAS ENTITLED TO SUMMARY JUDGMENT IN THIS BICYCLE-CAR TRAFFIC ACCIDENT CASE; PLAINTIFF BICYCLIST WAS TRAVELING THE WRONG WAY ON A ONE-WAY STREET AND DID NOT SLOW DOWN APPROACHING THE INTERSECTION WHERE HE COLLIDED WITH THE SIDE OF DEFENDANT'S CAR.

The First Department, reversing Supreme Court, determined defendant driver was entitled to summary judgment in this bicycle-car collision case. Plaintiff was bicycling in the wrong direction on a one-way street. Defendant pulled out into the intersection after checking the traffic in the appropriate direction and plaintiff ran into the side of defendant's car: "Pursuant to Vehicle and Traffic Law § 1231, a person riding a bicycle on a roadway has the same rights and responsibilities as a driver of a motor vehicle. Therefore, a bicyclist is required to use reasonable care for his or her own safety, to keep a reasonably vigilant lookout for vehicles, and to avoid placing himself or herself into a dangerous position ... . Vehicle and Traffic Law § 1142(b) states that a 'driver of a vehicle approaching a yield sign shall . . . slow down to a speed reasonable for existing conditions, or shall stop if necessary,' and 'yield the right of way . . . to any vehicle in the intersection or approaching on another highway so closely as to constitute an immediate hazard during the time such driver is moving across or within the intersection.' In addition, Vehicle and Traffic Law § 1146(a) requires motorists to 'exercise due care to avoid colliding with any bicyclist, pedestrian, or domestic animal' on the roadway and to 'give warning by sounding the horn when necessary.' The undisputed testimony was that plaintiff was traveling in the opposite direction of traffic, in clear violation of Vehicle and Traffic Law § 1231, and traveled into the intersection without stopping or yielding to defendant's vehicle which was clearly already in the intersection. Admittedly, plaintiff made no attempt to stop, or to alert defendant of his presence. Although a driver of a motor vehicle has a duty to see what is there to be seen, defendant was not required to look in the opposite direction of the intersecting one-way street to see if someone was traveling in the wrong direction and at a speed indicating no intent to stop." ***Felix v. Polakoff*, 2019 N.Y. Slip Op. 09100, First Dept 12-19-19**

SECOND DEPARTMENT

ANIMAL LAW.

DOG OWNERS' MOTION FOR SUMMARY JUDGMENT IN THIS DOG-BITE CASE SHOULD NOT HAVE BEEN GRANTED,

The Second Department, reversing (modifying) Supreme Court, determined the dog owners' (Hoffmans') motion for summary judgment in this dog-bite case should not have been granted. However the landlord's and property manager's motions for summary judgment were properly granted because they demonstrated no knowledge of the dog's vicious propensities. Plaintiffs' child was bitten when visiting the Hoffmans' apartment: "The sole means of recovery of damages for injuries caused by a dog bite or attack is upon a theory of strict liability, whereby 'a plaintiff must establish that the dog had vicious propensities and that the owner knew or should have known of the dog's vicious propensities' ... . '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' ... . 'Evidence tending to prove that a dog has vicious propensities includes a prior attack, the dog's tendency to growl, snap, or bare its teeth, the manner in which the dog was restrained, and a proclivity to act in a way that puts others at risk of harm' ... . The record shows, inter alia, that prior to this incident, the dog was often restrained within the Hoffman defendants' apartment, particularly when visitors were present, but also, while only family members were present. By itself, the fact that a dog has been customarily confined cannot serve as the predicate for liability where '[t]here [is] no evidence that [the dog] was confined because the owners feared [it] would do any harm to their visitors' ... Here, however, the record contains evidence that the Hoffman defendants attempted to limit interaction between the dog and visitors. The record shows that [Hoffman's child] attempted to secure the dog prior to letting [plaintiff's child] into the apartment on the date of the incident. The record also shows that the Hoffman defendants acquired the dog partly to provide 'security' for the family. In addition, viewing the evidence in the light most favorable to the nonmovants ... , the record shows that approximately two months prior to the incident, this dog allegedly attempted to bite the plaintiff, tearing his pants leg. Further, the evidence of the 'intensity and ferocity' of the attack tends to establish the Hoffman defendants' knowledge of the dog's vicious propensities ...". ***King v. Hoffman*, 2019 N.Y. Slip Op. 08994, Second Dept 12-18-19**

CIVIL PROCEDURE.

PLAINTIFF WAS ENTITLED TO A SECOND EXTENSION OF TIME TO SERVE THE SUMMONS AND COMPLAINT IN THE INTEREST OF JUSTICE; DEFENDANT WAS ESTOPPED FROM CLAIMING HE RESIDED AT AN ADDRESS DIFFERENT FROM THE ADDRESS ON FILE WITH THE DEPARTMENT OF MOTOR VEHICLES.

The Second Department determined plaintiff was properly granted a second extension of time, in the interest of justice, to serve the summons and complaint. The court noted that defendant Ewing was estopped from contending his address was different from the address indicated in the Department of Motor Vehicles; (DMV's) records: "Ewing maintains that he should have been served at an address which differed from the Strauss Street address listed on the police report, as well as the Atlantic Avenue address and the Georgia address. However, a search of the DMV records conducted on June 23, 2017, more than six weeks after the traverse hearing, reflected that the Atlantic Avenue address, where the plaintiff had attempted to effectuate service, was the current documented address for Ewing. Since the record demonstrates that Ewing failed to notify the DMV of his change of residence, as required by Vehicle and Traffic Law § 505(5), he was estopped from raising a claim of defective service ... . Furthermore, we note that 'the more flexible interest of justice' standard accommodates late service that might be due to mistake, confusion, or oversight, so long as there is no prejudice to the defendant' ... Here, the plaintiff demonstrated that there was no demonstrable prejudice to Ewing, particularly in light of evidence that he had actual notice of the action ... . Indeed, the record indicates that Ewing served an answer to the complaint in April 2015, shortly after the expiration of the 120-day period for service ...". ***Mighty v. Deshommes*, 2019 N.Y. Slip Op. 08996, Second Dept 12-18-19**

CIVIL PROCEDURE, CONTRACT LAW.

THE CRITERIA FOR PRE-ANSWER DISMISSAL OF THE COMPLAINT BASED UPON DOCUMENTARY EVIDENCE AND IN THE INTEREST OF JUDICIAL ECONOMY WERE NOT MET.

The Second Department, reversing Supreme Court, determined the defendant's pre-answer motion to dismiss the complaint alleging the breach of a letter of intent (LOI) should not have been granted. The evidence submitted by the defendant was not "documentary" evidence within the meaning of CPLR 3211 and the defendant did not demonstrate the complaint should be dismissed in the interest of judicial economy: "... [T]he emails and the unsigned documents relied on by the Supreme Court to conclude that the LOI was an unenforceable agreement to agree were not essentially undeniable, and did not constitute documentary evidence ... . Furthermore, the LOI itself contained all the essential elements of a lease, including the area to be leased, the duration of the lease, and the price to be paid ... . Moreover, nothing in the LOI stated that it was not binding, and its language did not conclusively establish that the parties did not intend to be bound by it ... . Accordingly, the court should have denied that branch of the defendant's motion which was pursuant to CPLR 3211(a)(1) to dismiss the complaint. … A court is permitted to consider evidentiary material submitted by a defendant in support of a motion to dismiss pursuant to CPLR 3211(a)(7), and then the question becomes whether the plaintiff has a cause of action, not simply whether a cause of action is stated ... . Unless the defendant can demonstrate that there is no factual issue as claimed by the plaintiff, the motion to dismiss should be denied ... . Here, the defendant failed to demonstrate that there was no factual issue regarding whether the LOI can be construed as a binding contract. Accordingly, that branch of the defendant's motion which was to dismiss the complaint pursuant to CPLR 3211(a)(7) should have been denied." ***S & J Serv. Ctr., Inc. v. Commerce Commercial Group, Inc.*, 2019 N.Y. Slip Op. 09049, Second Dept 12-18-19**

CONTRACT LAW, REAL ESTATE, CORPORATION LAW.

THE DEMAND FOR THE RETURN OF THE DEPOSIT UNDER A REAL ESTATE PURCHASE CONTRACT WAS AN ANTICIPATORY BREACH OF THE CONTRACT AND PLAINTIFF WAS ENTITLED TO KEEP THE DEPOSIT AS LIQUIDATED DAMAGES.

The Second Department determined defendant's demand for the return of its deposit in a real estate transaction was an anticipatory breach of the purchase agreement entitling plaintiff to retain the deposit as liquidated damages. Plaintiff, Lamarche Food, had represented that it was a New York corporation authorized to do business in New York. The corporation had been dissolved in 1992. For that reason defendant claimed plaintiff had breached the contract and demanded the return of the deposit. However, pursuant to Business Corporation Law 1006, a dissolved corporation may continue to function for the purpose of winding up affairs. Apparently defendant acknowledged the "winding up affairs" issue and argued only that its demand for a return of the deposit was not an anticipatory breach: "By letter dated June 23, 2017, a new attorney for the defendant informed the plaintiffs' attorney that Lamarche Food had defaulted on its obligations under the contract of sale inasmuch as it had represented therein that it was a New York corporation authorized to carry on its business in New York, with all the power and authority to enter into and perform the contract, and yet Lamarche Food was dissolved on June 24, 1992, and, therefore, was not a registered corporation in New York capable of engaging in new business. The defendant's attorney further stated that in light of the breach, the defendant demanded a refund of its deposit within 10 days. * * * On appeal, the defendant does not dispute that Lamarche Food could continue to function for the purpose of selling the subject property as part of its winding up of the corporation's affairs. Rather, the defendant contends that its June 23, 2017, letter to

the plaintiffs' attorney did not constitute an anticipatory breach of the contract of sale. 'An anticipatory breach of contract by a promisor is a repudiation of [a] contractual duty before the time fixed in the contract for . . . performance has arrived' ... . 'For an anticipatory repudiation to be deemed to have occurred, the expression of intent not to perform by the repudiator must be positive and unequivocal' ... . We agree with the Supreme Court's determination that the June 23, 2017, letter reflected a positive and unequivocal repudiation of the contract by the defendant ... , thereby, under the terms of the contract, entitling the plaintiffs to retain the deposit as liquidated damages for the defendant's anticipatory breach." ***Lamarche Food Prods. Corp. v. 438 Union, LLC*, 2019 N.Y. Slip Op. 08995, Second Dept 12-18-19**

CRIMINAL LAW, EVIDENCE.

MATTER REMITTED FOR A REOPENED SUPPRESSION HEARING BASED UPON NEW EVIDENCE THAT THE VEHICLE STOP MAY HAVE BEEN BASED UPON INFORMATION FROM AN ANONYMOUS BYSTANDER.

The Second Department, remitting the matter for a reopened suppression hearing, determined the hearing was warranted by new information that the stop of defendant's vehicle may have been based on information from an anonymous source. The defendant had already been convicted of attempted robbery twice after a reversal: "We agree with the defendant that the Supreme Court should have granted his motion to reopen the suppression hearing on those branches of his omnibus motion which were to suppress physical evidence recovered as a result of the stop of the livery car and the identification evidence that followed the stop pursuant to CPL 710.40(4). CPL 710.40(4) permits a court to reopen a suppression hearing if additional pertinent facts have been discovered which the defendant could not have discovered with reasonable diligence before the determination of the original suppression motion ... . The additional facts discovered need not necessarily be 'outcome-determinative or essential'; instead, they must be 'pertinent' in that they 'would materially affect or have affected' the earlier suppression ruling ... . Here, the revelation that the livery car description may have come from an anonymous bystander who interjected while translating between the complainant and the sergeant at the scene was previously unknown, and because the sergeant did not previously testify in the case, could not have been discovered with due diligence by the defendant. The information that the livery car description came from an unidentified and anonymous bystander would have affected the earlier suppression determination by placing squarely before the court questions regarding the identity and reliability of the person who described the livery car ...". ***People v. Dunbar*, 2019 N.Y. Slip Op. 09018, Second Dept 12-18-19**

CRIMINAL LAW, EVIDENCE, ATTORNEYS.

IRRELEVANT PHOTOGRAPHS WERE ADMITTED SOLELY TO AROUSE THE EMOTIONS OF THE JURY; THE PROSECUTOR'S REMARKS IN SUMMATION WERE SIMILARLY IMPROPER; NEW TRIAL ORDERED.

The Second Department, reversing defendant's conviction and ordering a new trial, determined the photographs of the complainant's genitals and anus were irrelevant and should not have been admitted in this sex-offense case. In addition, the court criticized the prosecutor's remarks in summation (unpreserved errors): " 'Photographic evidence should be excluded only if its sole purpose is to arouse the emotions of the jury and to prejudice the defendant' ... . Here, the complainant's pediatrician, who was called as a witness by the prosecutor, testified that there were no injuries to the complainant's genitals or anus, and that she did not expect to see any injury based upon the complainant's report. Nevertheless, the prosecutor then asked the pediatrician to approach the jurors and display the photographs to them. Under the circumstances of this case, the photographs were irrelevant, and served no purpose other than to inflame the emotions of the jury and to introduce into the trial an impermissible sympathy factor ... . The error was then compounded when the prosecutor argued in summation that the complainant had to 'get on a table and open up her legs and have her genitals photographed to be shown to 15 strangers . . . What did she gain out of this? Nothing.' The improper admission of the photographs cannot be deemed harmless under the circumstances of this case ... . Since there must be a new trial, we note that, although the issue is unpreserved for appellate review, the prosecutor engaged in multiple instances of improper conduct during summation ... . For instance, the prosecutor attempted to arouse the sympathies of the jurors ... . Additionally, while discussing the character of the defendant, who was a church pastor at the time of trial, the prosecutor referenced the sexual abuse scandals involving the Catholic Church and Orthodox Jewish communities. The prosecutor also pointed out that during jury selection, a prospective juror expressed that she did not feel comfortable sitting on this case because of all the priests who have gotten away with child abuse, and that another prospective juror stated that a family member was raped by a member of the clergy. '[I]n summing up to the jury, counsel must stay within the four corners of the evidence and avoid irrelevant and inflammatory comments which have a tendency to prejudice the jury against the accused' ...". ***People v. Lewis*, 2019 N.Y. Slip Op. 09023, Second Dept 12-18-19**

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA).

DEFENDANT'S CONVICTION OF ATTEMPTED ENDANGERING THE WELFARE OF A CHILD DID NOT MEET THE CRITERIA FOR THE ASSESSMENT OF 30 POINTS UNDER RISK FACTOR 9; DEFENDANT WAS THEREFORE A PRESUMPTIVE LEVEL ONE; HAD THE PEOPLE KNOWN DEFENDANT WAS PRESUMPTIVE LEVEL ONE THEY WOULD HAVE SOUGHT AN UPWARD DEPARTURE; MATTER REMITTED FOR A NEW DETERMINATION.

The Second Department determined defendant's conviction of attempted endangering the welfare of a child did not meet the criteria for assessing 30 points under risk factor 9, and therefore defendant should have been assessed at a presumptive level one. The People argued that had the defendant been assessed at a presumptive level one they would have sought an upward department based on aggravating factors. The matter was remitted for a new determination: "Risk factor 9 requires the assessment of 30 points where '[t]he offender has a prior criminal history that includes a conviction or adjudication for the class A felonies of Murder, Kidnaping or Arson, a violent felony, a misdemeanor sex crime, or endangering the welfare of a child, or any adjudication for a sex offense' (Sex Offender Registration Act: Risk Assessment Guidelines and Commentary [hereinafter Guidelines], risk factor 9 [2006]). Here, as the defendant contends, the Supreme Court should not have assessed 30 points under risk factor 9 based on his prior conviction for attempted endangering the welfare of a child inasmuch as that conviction was neither for a felony, nor for a 'sex offense' (Correction Law § 168-a[2]), 'nor a conviction for actually endangering the welfare of a child' ... . Accordingly, only 5 points could be assigned under risk factor 9 for '[p]rior history/no sex crimes or felonies,' resulting in a total score of less than 70 points, a presumptive risk level one ...". ***People v. Lewis*, 2019 N.Y. Slip Op. 09045, Second Dept 12-18-19**

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

PROOF OF MULTIPLE INSTANCES OF SEXUAL CONTACT INSUFFICIENT; RISK ASSESSMENT REDUCED TO LEVEL ONE.

The Second Department, reducing defendant's risk assessment to level one, determined the proof of multiple instances of sexual contact was insufficient: "... [T]he People failed to meet their burden of proof with respect to risk factor 4. Although the People submitted evidence, in the form of the defendant's statements, that he engaged in sexual contact with the victim on three or four occasions, they failed to submit any evidence as to when these instances of sexual contact occurred relative to one another, so as to demonstrate that such instances were separated in time by at least 24 hours, as the People claimed ... . Accordingly, the Supreme Court should not have assessed 20 points under risk factor 4." ***People v. Jarama*, 2019 N.Y. Slip Op. 09044, Second Dept 12-18-19**

DEBTOR-CREDITOR, CIVIL PROCEDURE, FAMILY LAW, APPEALS.

ALTHOUGH THE JUDGMENTS WERE DOCKETED, THE DEBTOR'S NAME WAS MISSPELLED RENDERING THE LIEN INVALID; ALTHOUGH THE ISSUE WAS NOT RAISED BELOW, THE APPELLATE COURT CAN CONSIDER AN ISSUE OF LAW WHICH COULD NOT BE AVOIDED IF IT HAD BEEN RAISED.

The Second Department, reversing Supreme Court, determined the judgment creditor, Fischer, was not entitled to priority over the respondent wife, Mayrav, who had been awarded real property owned with her husband, Julius, in divorce proceedings. Although Fisher's judgments were docketed, Julius's surname was spelled incorrectly, rendering the lien invalid. Although this issue had not been raised below, the appellate court can address it because it is a question of law which could not have been avoided if it had been raised: " 'CPLR 5203(a) gives priority to a judgment creditor over subsequent transferees with regard to the debtor's real property in a county where the judgment has been docketed with the clerk of that county' (... see CPLR 5203[a]). Pursuant to CPLR 5018(c), a judgment is docketed when the clerk makes an entry 'under the surname of the judgment debtor . . . consist[ing] of . . . the name and last known address of [the] judgment debtor' ... . ' A judgment is not docketed against any particular property, but solely against a name' ... . 'Once docketed, a judgment becomes a lien on the real property of the debtor in that county' ... . [I]t is undisputed that when the judgments were docketed, Julius's surname was spelled incorrectly. Because the judgments were not docketed under the correct surname, no valid lien against Julius's interest in the subject property was created ... . Therefore, Fischer was not entitled to a determination that his interest in the subject property was superior to that of Mayrav, whose interest 'vest[ed] upon the judgment of divorce' ... . Although Mayrav failed to argue in the Supreme Court that Fischer did not have a valid lien on the subject property in light of the undisputed fact that Julius's surname was misspelled, that issue can be raised for the first time on appeal because it is one of law which appears on the face of the record and could not have been avoided if it had been raised at the proper juncture ... . Accordingly, that branch of the petition which sought a determination that Fischer's interest in the subject property was superior to that of Mayrav should have been denied." ***Matter of Fischer v. Chabbott*, 2019 N.Y. Slip Op. 09002, Second Dept 12-18-19**

DISCIPLINARY HEARINGS (INMATES), EVIDENCE.

EVIDENCE PETITIONER HAD MADE A THREAT TO A PRISON EMPLOYEE WAS INSUFFICIENT, DETERMINATION ANNULLED.

The Second Department, annulling the determination, held that the evidence petitioner had made a threat was insufficient: "... [W]e agree with the petitioner that the determination that he was guilty of violating prison disciplinary rule 102.10 was not supported by substantial evidence. In reviewing a prison disciplinary determination, a court's review of the factual findings is limited to ascertaining whether the determination is supported by substantial evidence (see CPLR 7803[4] ...). Substantial evidence is 'such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact' ... . Prison disciplinary rule 102.10 provides that '[a]n inmate shall not, under any circumstances, make any threat, spoken, in writing, or by gesture' (7 NYCRR 270.2[B][3][i]). Here, the misbehavior report and the hearing testimony merely demonstrated that the petitioner 'became loud and argumentative' when he was denied permission to hold a certain event in his capacity as the president of a certain prison inmate organization. The evidence merely showed that the petitioner was upset, and the statement by the prison's Deputy Superintendent of Programs that she felt 'intimidated,' and that the petitioner 'stared at [her] and in a threatening manner left the area,' without more, was insufficient to establish that the petitioner actually made a threat against her." ***Matter of Mays v. Early*, 2019 N.Y. Slip Op. 09004, Second Dept 12-18-19**

FAMILY LAW, EVIDENCE.

MOTHER ALLEGED SHE MADE PAYMENTS TO THIRD PARTIES IN THIS SUPPORT ENFORCEMENT PROCEEDING; FATHER SHOULD NOT HAVE BEEN ORDERED TO REIMBURSE MOTHER WITHOUT PROOF THE PAYMENTS WERE IN FACT MADE BY MOTHER.

The Second Department, reversing Family Court, determined, in this support proceeding, father's objections should have been granted. Although mother alleged she made payments to third parties, she presented no proof of the payments. Therefore mother did not prove father owed those amounts to her: "At a support violation hearing, the petitioner has the initial burden of presenting prima facie evidence of nonpayment of child support ... . Here, the father's concession of failure to pay child support constituted prima facie evidence of a violation ... . However, a party seeking reimbursement must show that he or she actually paid the sums for which reimbursement is sought ... . Since the amount of child support arrears awarded included amounts that the mother claimed to have paid to third parties, and the father did not concede those amounts, the mother was not entitled to a money judgment in the absence of proof that she paid the subject sums, which would demonstrate that the father was indebted to her for those expenses ...". ***Matter of Barletta v. Faden*, 2019 N.Y. Slip Op. 08998, Second Dept 12-18-19**

FAMILY LAW, EVIDENCE, ATTORNEYS.

COURT-APPROVED CUSTODY AND PARENTAL ACCESS STIPULATION SHOULD NOT HAVE BEEN MODIFIED WITHOUT A HEARING; UPON REMITTAL AN ATTORNEY FOR THE CHILD SHOULD BE APPOINTED.

The Second Department, reversing Supreme Court, determined the court should not have modified a court-approved stipulation relating to custody and parental access without a hearing. And the Second Department ordered that an attorney for the child be appointed upon remittal: "Modification of a court-approved stipulation setting forth terms of custody or [parental access] is permissible only upon a s 'howing that there has been a change in circumstances such that a modification is necessary to ensure the best interests and welfare of the child' ... . The best interests of the child are determined by a review of the totality of the circumstances ... . 'Where . . . facts essential to the best interests analysis, and the circumstances surrounding such facts, remain in dispute, a hearing is required' ... . In view of the parties' disputed factual allegations in this case, the Supreme Court improvidently exercised its discretion in granting that branch of the plaintiff's motion which was to modify the stipulation of custody so as to award him final decision-making authority with respect to the child without a hearing to determine whether an award of final decision-making authority to the plaintiff was in the best interests of the child ... . Furthermore, under the circumstances of this case, the interests of the child should be independently represented ...". ***Walter v. Walter*, 2019 N.Y. Slip Op. 09056, Second Dept 12-18-19**

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

MORTGAGE COMPANY'S PROOF OF STANDING AND MAILING OF RPAPL 1304 NOTICE INSUFFICIENT IN THIS FORECLOSURE ACTION.

The Second Department, reversing Supreme Court, determined plaintiff bank did not provide sufficient evidence of standing and mailing of the RPAPL 1304 notice in this foreclosure proceeding: "... [T]he plaintiff failed to meet its prima facie burden of establishing that it had standing to commence this action. In support of its motion, the plaintiff relied on the affidavit of its Document Execution Specialist, Jerrell Menyweather, who attested that the plaintiff received physical delivery of the original note on July 6, 2007, and was in possession and the holder of the note, prior to commencement of the action ... . While Menyweather attested that his knowledge was based on business records maintained by the plaintiff, he failed

to annex the business records that he referred to in his affidavit. Thus, his affidavit constituted inadmissible hearsay and lacked probative value on this issue of the plaintiff's standing ... . [T]he plaintiff failed to establish, prima facie, that it complied with RPAPL 1304. Although Menyweather stated in the affidavit that the RPAPL 1304 notices were sent to certain of the defendants via certified and first-class mail, the plaintiff failed to provide any documents to prove that the mailing actually took place. Moreover, '[w]hile mailing may be proved by documents meeting the requirements of the business records exception to the rule against hearsay,' Menyweather 'did not make the requisite showing that he was familiar with the plaintiff's mailing practices and procedures, and therefore did not establish proof of a standard office practice and procedure designed to ensure that items are properly addressed and mailed' ...". ***Nationstar Mtge., LLC v. Jean-Baptiste*, 2019 N.Y. Slip Op. 09011, Second Dept 12-18-19**

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

PLAINTIFF BANK IN THIS FORECLOSURE ACTION DID NOT DEMONSTRATE THE NOTICE REQUIREMENTS OF RPAPL 1304 DID NOT APPLY AND DID NOT PRESENT SUFFICIENT EVIDENCE OF THE MAILING OF THE NOTICE.

The Second Department, reversing Supreme Court, determined plaintiff bank did not demonstrate the notice requirements of RPAPL 1304 did not apply and did not demonstrate compliance with RPAPL 1304 in this foreclosure action. The bank did not show that the underlying loan was not a "home loan," and the proof of mailing of the notice was insufficient: "... [T]he plaintiff failed to show, prima facie, that the RPAPL 1304 90-day notice requirement was inapplicable because the loan was not a 'home loan' ... . RPAPL 1304 requires the 90-day notice to be sent by registered or certified mail, and also by first-class mail, to the last known address of the borrower (see RPAPL 1304[2]). 'By requiring the lender or mortgage loan servicer to send the RPAPL 1304 notice by registered or certified mail and also by first-class mail, the Legislature implicitly provided the means for the plaintiff to demonstrate its compliance with the statute, i.e., by proof of the requisite mailing, which can be established with proof of the actual mailings, such as affidavits of mailing or domestic return receipts with attendant signatures, or proof of a standard office mailing procedure designed to ensure that items are properly addressed and mailed, sworn to by someone with personal knowledge of the procedure' ... . Here, the plaintiff failed to provide proof of the actual mailing, or proof of a standard office mailing procedure designed to ensure that items are properly addressed and mailed, sworn to by an individual with personal knowledge of that procedure." ***U.S. Bank Trust, N.A. v. Sadique*, 2019 N.Y. Slip Op. 09054, Second Dept 12-18-19**

INSURANCE LAW, CIVIL PROCEDURE, APPEALS.

THE INSURANCE LAW REQUIRED SUBMITTING THE DISPUTE BETWEEN TWO CARRIERS TO ARBITRATION; THEREFORE SUPREME COURT DID NOT HAVE SUBJECT MATTER JURISDICTION OVER THE MATTER; THE LACK OF SUBJECT MATTER JURISDICTION CAN BE RAISED AT ANYTIME.

The Second Department, reversing Supreme Court in this traffic accident case, determined the Insurance Law required that the matter involving a coverage dispute between two insurance carriers (Repwest and Hereford) be submitted to arbitration. Therefore Supreme Court did not have subject matter jurisdiction: "The defendants ... were passengers in the livery vehicle and no-fault benefits were paid on their behalf by Hereford. Repwest alleged that there is no coverage for the subject incident because it was not an accident, but rather the result of an intentional act/fraudulent scheme. Thereafter, Hereford interposed an answer to the complaint and asserted a counterclaim against Repwest, among others, for loss transfer pursuant to Insurance Law § 5105(a) ... . Pursuant to Insurance Law § 5105(b), '[t]he sole remedy of any insurer or compensation provider to recover on a claim arising pursuant to subsection (a) hereof, shall be the submission of the controversy to mandatory arbitration pursuant to procedures promulgated or approved by the superintendent' ... . Contrary to Hereford's contention, since its counterclaim is for loss transfer pursuant to section 5105(a), the counterclaim is subject to mandatory arbitration and the Supreme Court had no subject matter jurisdiction over the counterclaim ... . Although Repwest did not seek dismissal of the counterclaim in the Supreme Court, 'a court's lack of subject matter jurisdiction is not waivable, but may be [raised] at any stage of the action, and the court may, ex mero motu [on its own motion], at any time, when its attention is called to the facts, refuse to proceed further and dismiss the action' ... " ***Repwest Ins. Co. v. Hanif*, 2019 N.Y. Slip Op. 09047, Second Dept 12-18-19**

INSURANCE LAW, CIVIL PROCEDURE, PERSONAL INJURY.

THE INSURER IN THIS PERSONAL INJURY CASE DID NOT MEET ITS HEAVY BURDEN TO DEMONSTRATE ITS INSURED'S NON-COOPERATION SUCH THAT THE INSURER WAS NOT OBLIGATED TO INDEMNIFY THE INSURED; CRITERIA EXPLAINED.

The Second Department determined the defendant insurer, Utica. did not meet its heavy burden to demonstrate its insured's (J & R's) non-cooperation such that the insurer was entitled to a default judgment declaring that it is not obligated to indemnify J & R in the underlying personal injury action in which the injured plaintiff was awarded nearly $700,000. Despite numerous scheduled depositions, J & R's principal, Singh, never appeared to be deposed and his answer was ultimately stricken: " 'To effectively deny coverage based upon lack of cooperation, an insurance carrier must demonstrate (1) that it acted diligently in seeking to bring about the insured's cooperation, (2) that the efforts employed by the insured were

reasonably calculated to obtain the insured's cooperation, and (3) that the attitude of the insured, after his or her cooperation was sought, was one of willful and avowed obstruction' ... . '[M]ere efforts by the insurer and mere inaction on the part of the insured, without more, are insufficient to establish non-cooperation' ... . Here, Utica failed to meet its 'heavy' burden of demonstrating J & R's non-cooperatin ... . In support of its motion, Utica established that between January 2009 and April 2009, more than one year before J & R's answer was stricken, it made diligent efforts, through written correspondence, numerous telephone calls, and visits to Singh's home, that were reasonably calculated to bring about J & R's cooperation. Utica's submissions, however, failed to demonstrate that the conduct of J & R constituted 'willful and avowed obstruction' ...". ***Foddrell v. Utica First Ins. Co.*, 2019 N.Y. Slip Op. 08991, Second Dept 12-18-19**

PERSONAL INJURY, CIVIL PROCEDURE.

DAMAGES IN THIS TRAFFIC ACCIDENT CASE FOR A TORN MENISCUS AND IRREPARABLE DAMAGE TO PLAINTIFF'S DOMINANT HAND ($25,000 FOR PAST PAIN AND SUFFERING AND $0 FOR FUTURE PAIN AND SUFFERING) WERE INADEQUATE; PLAINTIFF'S MOTION TO SET ASIDE THE VERDICT PURSUANT TO CPLR 4404(a) SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined plaintiff's motion to set aside the verdict as inadequate in this traffic accident case should have been granted. Plaintiff sustained a torn meniscus in his right knee and irreparable damage to his thumb on his dominant hand. The jury awarded $25,000 for past pain and suffering and $0 for future pain and suffering. The Second Department held that the past pain and suffering amount should be $100,000 and the future pain and suffering amount should be $50,000: " 'While the amount of damages to be awarded for personal injuries is a question for the jury, and the jury's determination is entitled to great deference, it may be set aside if the award deviates materially from what would be reasonable compensation' ... . Prior damage awards in cases involving similar injuries are not binding upon the courts, but serve to guide and enlighten them in determining whether a verdict in a given case constitutes reasonable compensation ... . However, consideration should also be given to other factors, including the nature and extent of the injuries ... . Under the circumstances of this case, the jury's award for past pain and suffering was inadequate to the extent indicated herein (see CPLR 5501[c] ...). Furthermore, the jury's failure to award any damages for future pain and suffering was not based upon a fair interpretation of the evidence ... , and was inadequate to the extent indicated herein ...". ***Cullen v. Thumser*, 2019 N.Y. Slip Op. 08988, Second Dept 12-18-19**

PERSONAL INJURY, EVIDENCE.

PROOF OF GENERAL INSPECTION PRACTICES DOES NOT DEMONSTRATE THE ABSENCE OF CONSTRUCTIVE NOTICE; DEFENDANT'S MOTION FOR SUMMARY JUDGMENT IN THIS ICE-ON-SIDEWALK SLIP AND FALL CASE SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined defendant property-owner's (Colonial's) motion for summary judgment should not have been granted in this ice-on-sidewalk slip and fall case: " 'To meet its initial burden on the issue of lack of constructive notice, [a] defendant must offer some evidence as to when the area in question was last cleaned or inspected relative to the time when the plaintiff fell' ... . Here, Colonial failed to establish, prima facie, that it did not have constructive notice of the alleged patch of ice. The deposition testimony of the president of its board of managers merely referred to general inspection practices, and provided no evidence regarding any specific inspection of the subject area prior to the plaintiff's fall ...". ***Carro v. Colonial Woods Condominiums*, 2019 N.Y. Slip Op. 08986, Second Dept 12-18-19**

NEGLIGENCE, EVIDENCE, CIVIL PROCEDURE, PRIVILEGE.

PLAINTIFF WAS ASSAULTED BY ANOTHER PATIENT IN DEFENDANT LONG-TERM CARE FACILITY; THE MEDICAL RECORDS OF THE ASSAILANT, WHO WAS NOT A PARTY, WERE PRIVILEGED AND NOT DISCOVERABLE; THE INCIDENT REPORTS PERTAINING TO THE ASSAULT WERE NOT SHOWN BY THE DEFENDANT TO BE PRIVILEGED PURSUANT TO THE PUBLIC HEALTH LAW AND WERE THEREFORE DISCOVERABLE.

The Second Department, reversing (modifying) Supreme Court, determined that the assailant's medical records were privileged, but any incident reports pertaining to the assault were not. Plaintiff alleged she was attacked while a long-term resident of defendant long-term health care facility. The assailant in this third-party assault action was not made a party: "We agree with the Supreme Court's determination denying that branch of the plaintiffs' motion which sought disclosure of the assailant's admission chart. The assailant is not a party to the action, his medical records were subject to the physician-patient privilege, and he has not waived that privilege ... . However, the Supreme Court should have granted that branch of the plaintiffs' motion which sought disclosure of all incident reports related to the assault. Pursuant to Education Law § 6527(3), certain documents generated in connection with the 'performance of a medical or a quality assurance review function,' or which are 'required by the Department of Health pursuant to Public Health Law § 2805-l,' are generally not discoverable ... . The defendant, as the party seeking to invoke the privilege, has the burden of demonstrating that the

documents sought were prepared in accordance with the relevant statutes ... . Here, the defendant merely asserted that a privilege applied to the requested documents without making any showing as to why the privilege attached. Accordingly, the incident reports related to the assault were subject to disclosure." ***DeLeon v. Nassau Health Care Corp.*, 2019 N.Y. Slip Op. 08989, Second Dept 12-18-19**

THIRD DEPARTMENT

CRIMINAL LAW, APPEALS.

AN APPLICATION FOR A WRIT OF HABEAS CORPUS IS NOT A VEHICLE FOR ISSUES WHICH COULD HAVE BEEN RAISED IN A DIRECT APPEAL OR A MOTION TO VACATE THE JUDGMENT OF CONVICTION PURSUANT TO CPL 44O.

The Third Department determined petitioner's application for a writ of habeas corpus was properly denied because the issues could have been raised in a direct appeal or in a CPL 440 motion to vacate the conviction: "With regard to petitioner's claim that, pursuant to Penal Law § 70.35, his one-year jail sentences merged with and should have been ordered to run concurrently with his indeterminate sentence, '[h]abeas corpus is not the appropriate remedy for raising claims that could have been raised on direct appeal or in the context of a CPL article 440 motion, even if they are jurisdictional in nature' ... . Petitioner's contentions regarding his sentences, including their legality and whether they merged under Penal Law § 70.35, could have been raised on direct appeal or in a motion pursuant to CPL 440.20 ... . As we perceive no basis to depart from traditional orderly procedure, we conclude that Supreme Court properly denied petitioner's application." ***People ex rel. McCray v. Favro*, 2019 N.Y. Slip Op. 09065, Third Dept 12-19-19**

UNEMPLOYMENT INSURANCE.

INSPECTORS HIRED TO ASSESS DAMAGE TO PROPERTY CAUSED BY HURRICANE SANDY WERE EMPLOYEES ENTITLED TO UNEMPLOYMENT INSURANCEBENEFITS.

The Third Department determined inspectors hired by Partnership for Response and Recovery (PaRR) to inspect damage to property caused by Hurricane Sandy were employees entitled to Unemployment Insurance benefits: "Before the inspectors were deployed to a particular disaster area, PaRR set up a field operation near the site where it distributed FEMA-issued computers and cameras to the inspectors. In addition, for the inspectors' convenience, it provided them with invoice forms containing the information required by FEMA to be used to receive payment. PaRR also supplied them with an identifi-cation badge bearing its logo and offered them training on how to utilize the FEMA computer system and comply with FEMA's requirements. PaRR set the rate of pay at $62.50 per inspection, paid inspectors even if it had not yet received pay-ment from FEMA, reimbursed them for travel to the site of the assignment and provided compensation for prepositioning to the site. Moreover, it conducted a quality review of 3% of the inspection reports and encouraged inspectors to complete their reports within three days as requested by FEMA. PaRR also provided field support to the inspectors to assist them with completing their inspection reports and using the FEMA computer system. Although claimant and the other inspec-tors worked independently and without any supervision from PaRR in conducting the actual inspections, the evidence demonstrates that PaRR retained overall control over many important aspects of their work. Although some of this control emanated from the regulatory requirements imposed by FEMA, this was not to such an extent as to negate the existence of an employment relationship ... . ***Matter of Jensen (Partnership for Response & Recovery, LLP--Commissioner of Labor)*, 2019 N.Y. Slip Op. 09073, Third Dept 12-19-19**

FOURTH DEPARTMENT

ANIMAL LAW.

DEFENDANTS' DEPOSITION TESTIMONY IN THIS DOG-BITE CASE RAISED QUESTIONS OF FACT ABOUT DEFENDANTS' PRIOR KNOWLEDGE OF THE DOG'S VICIOUS PROPENSITIES, SUPREME COURT REVERSED.

The Fourth Department, reversing Supreme Court, determined defendants' motion for summary judgment in this dog-bite case should not have been granted: "We conclude that defendants failed to meet their initial burden of establishing that they neither knew nor should have known that the dog had any vicious propensities ... . In support of their motion, defendants submitted their deposition testimony. Defendant Ron Bush admitted at his deposition that defendants had purchased the dog in part for protection and that he considered a dog's bark to act like an 'alarm.' Moreover, defendant Patricia Bush tes-tified that, when the dog was running toward plaintiff at the time of the incident, she directed plaintiff to '[s]tand still.' Both defendants admitted that there were three 'Beware of Dog' signs posted on their premises. Thus, taken together, defendants'

own submissions raise a triable issue of fact whether defendants had prior knowledge of the dog's vicious propensities ...". ***Opderbeck v. Bush*, 2019 N.Y. Slip Op. 09224, Fourth Dept 12-20-19**

CIVIL PROCEDURE, APPEALS.

AN ORDER ADDRESSING WHETHER DOCUMENTS SOUGHT IN DISCOVERY ARE PRIVILEGED IS APPEALABLE AS OF RIGHT.

The Fourth Department, reversing (modifying) an order concerning whether documents sought in discovery were privileged, noted that the order was appealable as of right: "During discovery, a dispute arose over allegedly privileged documents that plaintiff withheld or redacted. In its privilege logs, plaintiff asserted that many of the documents were protected from disclosure on three grounds, i.e., that they were material prepared in anticipation of litigation (see CPLR 3101 [d] [2]), attorney work product (see CPLR 3101 [c]), or protected by the attorney-client privilege (see CPLR 4503 [1]). Plaintiff asserted that a few documents were not discoverable on the sole basis that they were materials prepared in anticipation of litigation. Campany and the Travelers defendants separately moved, inter alia, to compel plaintiff's disclosure of various documents or, in the alternative, for an in camera review of the documents. Plaintiff moved for, among other things, a protective order, contending that all communications involving attorneys or litigation experts on and after October 24, 2016 were presumptively privileged because the Travelers defendants and plaintiff contemplated litigation at that time. Supreme Court denied the Travelers defendants' motion, denied in part Campany's motion, and granted plaintiff's motion by, as relevant here, ordering that all documents of plaintiff created on and after October 24, 2016 were not discoverable because they were material prepared in anticipation of litigation. Campany and the Travelers defendants appeal. Initially, we reject plaintiff's contention that the order is not appealable. CPLR 5701 (a) (2) (v) provides that, with limited exceptions, which are not applicable here, an appeal may be taken to this Court as of right from an order where the motion it decided was made upon notice and it 'affects a substantial right.' An order granting a protective order and precluding discovery of numerous documents affects a substantial right of Campany and the Travelers defendants, and the order is thus appealable as of right ...". ***John Mezzalingua Assoc., LLC v. Travelers Indem. Co.*, 2019 N.Y. Slip Op. 09157, Fourth Dept 12-20-19**

CIVIL PROCEDURE, MUNICIPAL LAW, ENVIRONMENTAL LAW.

VENUE FOR THIS HYBRID ARTICLE 78/DECLARATORY JUDGMENT ACTION SEEKING TO ANNUL A TOWN LOCAL LAW WHICH CREATED A WILDLIFE OVERLAY DISTRICT IS THE COUNTY IN WHICH THE TOWN IS LOCATED PURSUANT TO TOWN LAW SECTION 66 (1).

The Fourth Department, in a full-fledged opinion by Justice DeJoseph, determined Supreme Court properly found that Orleans County, not Niagara County, was the correct venue for this hybrid Article 78/declaratory judgment action seeking to invalidate a Town of Shelby Local Law creating a wildlife refuge overlay district, and further seeking to annul the Town Board's negative declaration under the State Environmental Quality Review Act (SEQRA). The legal analysis is too detailed to be fully summarized here: "The primary issue raised on this appeal involves the interplay between three statutory provisions concerning venue, i.e., CPLR 504 (2), CPLR 506 (b), and Town Law § 66 (1) and, ultimately, whether Supreme Court properly granted the motion of respondents-defendants (respondents) to transfer venue of this hybrid CPLR article 78 proceeding and declaratory judgment action from Niagara County to Orleans County. We conclude that the court properly transferred venue pursuant to Town Law § 66 (1). ... Town Law § 66 (1) provides that '[t]he place of trial of all actions and proceedings against a town or any of its officers or boards shall be the county in which the town is situated.' We conclude that Town Law § 66 applies and, as such, the proper venue in the instant action is Orleans County rather than Niagara County." **Matter of Zelazny Family Enters., LLC v. Town of Shelby, 2019 N.Y. Slip Op. 09124, Fourth Dept 12-20-19**

CRIMINAL LAW, JUDGES.

IT IS REVERSIBLE ERROR FOR A JUDGE TO NEGOTIATE A PLEA DEAL WITH A CODEFENDANT IN EXCHANGE FOR TESTIMONY AGAINST THE DEFENDANT.

The Fourth Department, reversing defendant's conviction, determined the trial judge should not have negotiated a plea deal with a codefendant in exchange for testimony against the defendant: "... [T]he court committed reversible error when it 'negotiated and entered into a [plea] agreement with a codefendant[,] requiring that individual to testify against defendant in exchange for a more favorable sentence' ... . Here, 'by assuming the function of an interested party and deviating from its own role as a neutral arbiter, the trial court denied defendant his due process right to [a] fair trial in a fair tribunal' ' … . We therefore reverse the judgment and grant a new trial before a different justice on counts one and two of the indictment ...". ***People v. Lawhorn*, 2019 N.Y. Slip Op. 09223, Fourth Dept 12-20-19**

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

SPANISH-LANGUAGE CONVICTION RECORDS FROM PUERTO RICO, WHICH WERE NOT TRANSLATED, WERE INSUFFICIENT TO PROVE DEFENDANT TO BE A SEX OFFENDER.

The Fourth Department, vacating the risk level determination, determined the proof defendant was a sex offender was insufficient. The documents relating to a conviction in Puerto Rico were in Spanish and were not translated: "We agree with defendant that, in making its determination that defendant is a sex offender, the Board erred in relying on documents in Spanish that were not accompanied by an English translation (see generally CPLR 2101 [b]). Upon defendant's objection during the SORA hearing to the Board's determination, no additional documents were submitted to support the Board's determination. Thus, there is no English-translated document stating the offense of which defendant was convicted in Puerto Rico, and therefore there is no competent evidence to support the Board's determination that defendant was convicted of a felony offense in another jurisdiction ... . In addition, the purported sex offender registration form showing that defendant was required to register in Puerto Rico is entirely in Spanish, and thus there is no competent evidence to support the Board's determination that defendant was required to register as a sex offender in Puerto Rico ...". ***People v. Ramos*, 2019 N.Y. Slip Op. 09153, Fourth Dept 12-20-19**

FAMILY LAW.

MOTHER'S PETITION FOR PERMISSION TO RELOCATE WITH THE CHILD SHOULD NOT HAVE BEEN DISMISSED WITHOUT A HEARING.

The Fourth Department, reversing Family Court, determined mother's petition for permission to relocate with the child should not have been dismissed without a hearing: "In this proceeding pursuant to Family Court Act article 6, we agree with petitioner mother that Family Court erred in summarily granting respondent father's motion to dismiss her petition to relocate with the parties' child to the Honeoye Falls-Lima Central School District or Livingston County. A prior custody order entered upon the consent of the parties provided that the mother and the father had joint custody of the child with primary physical residence with the mother, and restricted the mother's residency to certain towns within Monroe County. 'Generally, [d]eterminations affecting custody and visitation should be made following a full evidentiary hearing' ' ... , and we conclude that the allegations in the mother's petition 'established the need for a hearing on the issue whether [her] relocation is in the best interests of the child' ... . The mother was not required to demonstrate a change of circumstances inasmuch as she sought permission to relocate with the subject child ... . Further, the mother adequately alleged in her petition that relocation was in the best interests of the child inasmuch as she alleged that the cost of housing would be lower in Livingston County, that the child's maternal grandfather would be able to assist the mother with childcare upon her relocation allowing her to return to work, and that the relocation would not interfere with the father's visitation schedule. The court was therefore required to determine whether the proposed relocation was in the child's best interests by analyzing the factors set forth in Matter of Tropea v. Tropea (87 NY2d 727, 739-741 [1996] ...)." ***Matter of Johnston v. Dickes*, 2019 N.Y. Slip Op. 09208, Fourth Dept 12-20-19**

FAMILY LAW, CONTRACT LAW.

FAMILY COURT EXCEEDED ITS JURISDICTION WHEN IT SUSPENDED MAINTENANCE PAYMENTS; THE PAYMENTS WERE GOVERNED BY THE PARTIES' SEPARATION AGREEMENT, AN INDEPENDENT CONTRACT.

The Fourth Department, reversing (modifying) Family Court, determined Family Court exceeded its jurisdiction in suspending maintenance payments to mother because the maintenance was provided for in the parties' separation agreement: " … [W]e agree with the mother and the AFC [attorney for the child] that the court exceeded its jurisdiction in suspending maintenance payments to the mother inasmuch as the parties' separation agreement setting forth that obligation is an independent contract ... . Family Court is a court of limited jurisdiction and cannot exercise powers beyond those granted to it by statute ... , and '[i]t generally has no subject matter jurisdiction to reform, set aside or modify the terms of a valid separation agreement'... . We therefore modify the order by vacating the tenth provision of the second ordering paragraph insofar as it relates to the suspension of maintenance payments, and we remit the matter to Family Court for a determination of the amount of any maintenance arrears ...". ***Matter of Krier v. Krier*, 2019 N.Y. Slip Op. 09129, Fourth Dept 12-20-19**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

PLAINTIFF WAS ENTITLED TO SUMMARY JUDGMENT ON HIS LABOR LAW §§ 240(1) AND 241(6) CAUSES OF ACTION IN THIS SCAFFOLD COLLAPSE CASE; DEFENDANTS NOT ENTITLED TO THE HOMEOWNERS' EXEMPTION BECAUSE THE PROPERTY WAS TO HAVE A COMMERCIAL USE.

The Fourth Department, reversing Supreme Court, determined plaintiff's motion for summary judgment on his Labor Law §§ 240(1) and 241(6) causes of action should have been granted in this scaffold-collapse case. Defendant did not raise a question of fact about the application of exemption for homeowners. Although the defendants used the structure plaintiff

was working on for personal storage, the plaintiff's work was preparation for a commercial use of the property: "Where a structure serves a mixed residential and commercial use purpose, the applicable test is whether the work performed 'directly relates to the residential use of the [building], even if the work also serves a commercial purpose' ... . Although defendants submitted the affidavit of defendants Josue Romero and James Newell, who stated that they reside on the property and that they use the barn partly for personal storage, the work that plaintiff was hired to perform related directly to the preparation of the structure for commercial use rather than any incidental residential use ... . The fact that commercial use had not yet begun is of no moment because 'the use and purpose test must be employed on the basis of the [ ]owners' intentions at the time of the injury underlying the action' ... " ***Gonzalez v. Romero*, 2019 N.Y. Slip Op. 09149, Fourth Dept 12-20-19**

LANDLORD-TENANT, REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL), CORPORATION LAW.

CORPORATE OFFICER MAY BE PERSONALLY LIABLE FOR WRONGFUL EVICTION PURSUANT TO REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL) 853.

The Fourth Department, reversing Supreme Court, determined that the landlord's (Huntress's) motion for summary judgment dismissing the tenant's (Kingsbury's) action for wrongful eviction (RPAPL 853) should not have been granted: "The sole contention raised by Huntress in support of his motion with respect to the first cross claim was that he could not be personally liable inasmuch as he was acting as an agent of a disclosed principal. We conclude that Huntress failed to establish his entitlement to judgment as a matter of law with respect to that cross claim and, as a result, the burden never shifted to Kingsbury to raise a triable issue of fact ... . 'It is well established that [a] corporate officer may be held personally liable for a tort of the corporation if he or she committed or participated in its commission, whether or not his or her acts are also by or for the corporation' ... . A cause of action under RPAPL 853 sounds in tort ... . Here, Huntress failed to establish that he did not participate in the eviction of Kingsbury, and he therefore failed to establish as a matter of law that he cannot be held personally liable if the eviction violated RPAPL 853 ...". ***Canandaigua Natl. Bank & Trust Co. v. Acquest S. Park, LLC*, 2019 N.Y. Slip Op. 09130, Fourth Dept 12-20-19**

PERSONAL INJURY, MUNICIPAL LAW.

PORTIONS OF CITY SIDEWALK ELEVATED BY TREE ROOTS AND "REPAIRED" WITH COLD PATCH; QUESTIONS OF FACT WHETHER THE ABUTTING PROPERTY OWNERS AND CITY ARE LIABLE IN THIS SLIP AND FALL CASE.

The Fourth Department, reversing (modifying) Supreme Court determined: (1) there are questions of fact concerning whether the abutting property owners are liable for this sidewalk slip and fall; (2) there are questions of fact whether the city created the dangerous condition by patching the sidewalk. Plaintiff tripped and fell in an area where the sidewalk had been elevated by tree roots: "... [T]he Charter of the City of Buffalo (Charter) § 413-50 (A) specifically imposes on 'owner[s] or occupant[s] of any lands fronting or abutting on any street,' i.e., the property defendants, a duty to maintain and repair the sidewalk and provides that their failure to do so will result in liability for injuries to users of the sidewalk. Contrary to the property defendants' contention, that duty to maintain and repair extends to damage caused by the roots of a tree owned by the City where, as here, 'the local ordinance contains no exceptions to the duty imposed on abutting landowners to maintain the sidewalk, even if the allegedly dangerous condition was created by a root extending from [City] property' ... . [T]he evidence submitted by the property defendants in support of their motion, which was then incorporated into the City's cross motion, raised triable issues of fact whether the City performed the 'cold patch' repair to the area sometime before plaintiff's accident and whether the condition of the sidewalk on the day of plaintiff's accident was the same as when the 'cold patch' was first applied. We thus conclude that the City failed to establish as a matter of law that it did not affirmatively create a dangerous condition or that the dangerous condition was due solely to conditions that developed over time ...". ***Beagle v. City of Buffalo*, 2019 N.Y. Slip Op. 09126, Fourth Dept 12-20-19**

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