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FIRST DEPARTMENT

CIVIL PROCEDURE, ATTORNEYS, PRIVILEGE.

NEW YORK CITY HOUSING AUTHORITY COULD NOT AVOID DISCLOSURE OF RELEVANT DOCUMENTS BY RELYING ON ATTORNEY-CLIENT PRIVILEGE BECAUSE THE IT HAD PLACED THE KNOWLEDGE OF ITS LAW DEPARTMENT AT ISSUE, MOTION TO COMPEL WAS PROPERLY GRANTED, MONETARY SANCTIONS WERE PROPERLY ORDERED, WILLFUL AND CONTUMACIOUS BEHAVIOR NEED NOT BE SHOWN UNLESS A DRASTIC REMEDY LIKE STRIKING THE PLEADINGS IS IMPOSED.

The First Department, over a dissent, determined Supreme Court properly sanctioned the defendant, the New York City Housing Authority (NYCHA), for failure to turn over documents in the discovery phase of a contract action. NYCHA alleged that third party defendants "engaged in [a] conspiracy to defraud NYCHA by submitting fraudulent certifications attesting that plaintiff's former owners had not been charged or convicted of a crime. Third-party defendants maintain that they informed NYCHA that the charges ... had been terminated with a conditional discharge based upon the payment of less than $200 in court costs. They assert that NYCHA extended all three of the contracts ... while having full knowledge of these facts." NYCHA alleged the contested documents were protected by attorney-client privilege: "[Supreme Court] granted plaintiff and third-party defendants' motion to compel [NYCHA] to comply with discovery orders to the extent of ordering NYCHA to produce discovery material previously redacted on the ground of attorney-client privilege ... and ... to pay $3,000 as a sanction for its behavior during discovery and for violation of prior court orders, and to certify that it did not possess additional documents responsive to the discovery demands or court orders ... . * * * The court correctly found that having placed the knowledge of its law department at issue, NYCHA waived attorney-client privilege with respect to the subject documents. NYCHA cannot seek to prevent the disclosure of evidence showing that its attorneys — the very individuals who performed the bid review function for NYCHA — recommended that NYCHA award the contracts to plaintiff despite knowledge of the operative facts ... . Further, NYCHA may not rely on attorney-client privilege while selectively disclosing other self-serving privileged communications ... . The motion court providently exercised its discretion in finding that NYCHA's conduct during discovery warranted sanctions. ... [I]t is unnecessary to demonstrate willful and contumacious behavior in order to impose a sanction like a monetary sanction or preclusion, as opposed to a more drastic sanction such as the striking of a pleading ...". ***Metropolitan Bridge & Scaffolds Corp. v. New York City Hous. Auth.*, 2019 N.Y. Slip Op. 00526, First Dept 1-24-19**

CIVIL PROCEDURE, PERSONAL INJURY, EVIDENCE.

MOTION TO COMPEL ACCESS TO PLAINTIFF'S DEVICES, EMAIL ACCOUNTS AND SOCIAL MEDIA ACCOUNTS TO OBTAIN EVIDENCE OF PLAINTIFF'S PHYSICAL ACTIVITIES SINCE THE TRAFFIC ACCIDENT SHOULD HAVE BEEN GRANTED.

The First Department, reversing Supreme Court, determined that the motion to compel "access by a third-party data mining company to plaintiff's devices, email accounts, and social media accounts, so as to obtain photographs and other evidence of plaintiff engaging in physical activities" should have been granted: "Private social media information can be discoverable to the extent it 'contradicts or conflicts with [a] plaintiff's alleged restrictions, disabilities, and losses, and other claims' ... . Here, plaintiff, who at one time was a semi-professional basketball player, claims that he has become disabled as the result of the automobile accident at issue, such that he can no longer play basketball. Although plaintiff testified that pictures depicting him playing basketball, which were posted on social media after the accident, were in games played before the accident, defendant is entitled to discovery to rebut such claims and defend against plaintiff's claims of injury. That plaintiff did not take the pictures himself is of no import. He was 'tagged,' thus allowing him access to them, and others were sent to his phone. Plaintiff's response to prior court orders, which consisted of a HIPAA authorization refused by Facebook, some obviously immaterial postings, and a vague affidavit claiming to no longer have the photographs, did not comply with his discovery obligations. The access to plaintiff's accounts and devices, however, is appropriately limited in time, i.e., only those items posted or sent after the accident, and in subject matter, i.e., those items discussing or showing defendant engaging in basketball or other similar physical activities ...". ***Vasquez-Santos v. Mathew*, 2019 N.Y. Slip Op. 00541, First Dept 1-24-19**

CIVIL RIGHTS LAW, CRIMINAL LAW, CONSTITUTIONAL LAW, MUNICIPAL LAW.

ALTHOUGH THERE WAS PROBABLE CAUSE TO ARREST PLAINTIFF ON A SUBWAY FOR A TRANSIT VIOLATION, THE CONCURRENCE CALLED INTO QUESTION THE 'TRANSIT DATABASE' WHICH PROBABLY INCLUDES PERSONS WHOSE CRIMINAL CHARGES WERE SEALED AND DISMISSED, THE DATABASE DOES NOT PROVIDE A DISTINCT BASIS FOR ARREST.

The First Department, over a concurrence, determined that there was probable cause to arrest the plaintiff based on the transit offense of passing between two subway cars on a moving train. Because there was probable cause, the majority did not reach the issue of the fairness or constitutionality of a so-called "transit database" which encompasses so-called "transit recidivists." The concurrence made it clear that plaintiff's designation as a "transit recidivist" did not provide the police with a separate basis to arrest plaintiff: **From the concurrence:** "It must be said that plaintiff's designation as a transit recidivist did not give the officers a separate basis to arrest plaintiff … . The definition of 'transit recidivist' at the time of plaintiff's arrest encompassed not only persons convicted of crimes, but those with prior arrests in the transit system or prior felony arrests within New York City ... . This overbroad classification subverted the presumption of innocence and likely violated state sealing laws. ... ... [T]he database was likely contaminated by sealed arrests and summons histories and, as such, ran afoul of provisions of the Criminal Procedure Law that require that the records of any criminal prosecution terminating in a person's favor or by way of noncriminal conviction be sealed ... Statistics ... indicate that in 2016 alone, over 50% of all criminal cases arraigned in New York City Criminal Court were terminated in favor of the accused, and accordingly entitled to sealing ... . From 2007 through 2015 an average of 23% of all criminal summonses were dismissed for facial insufficiency ... . Unless otherwise permitted by law, no one, including a private or public agency, can access a sealed record, except with a court order upon a showing that justice so requires. The presence of arrest and summons data in the database also undercut the presumption of innocence insofar as persons were threatened with punishment on account of allegations that may have been unsubstantiated or dismissed. ...[T]his is not the first NYPD database to have included unlawfully broad data. NYPD previously recorded the name of every individual stopped and frisked as recently as 2010, until forced by a federal lawsuit to discontinue the practice. Finally, there is little doubt that the 'transit recidivist' database had a disproportionately negative effect on black and Hispanic communities, perpetuating this City's history of overpolicing communities of color." ***Vargas v. City of New York*, 2019 N.Y. Slip Op. 00370, First Dept 1-22-19**

CRIMINAL LAW.

APPELLATE DIVISION REDUCED DEFENDANT'S SENTENCE USING ITS PLENARY POWER, DESPITE THE FACTS THAT (1) THE SENTENCE WAS WITHIN PERMISSIBLE LIMITS, (2) THE SENTENCING COURT DID NOT ABUSE ITS DISCRETION, AND (3) DEFENDANT HAD AN EXTENSIVE CRIMINAL HISTORY.

The First Department, over a dissent, exercised its power to modify an unduly harsh or severe sentence that is within the permissible range. Defendant, who was homeless, attempted to buy toothpaste with a counterfeit $20 bill. The sentence was reduced from 4 to 8 years to 3 to 6 years: "The Appellate Division has 'broad plenary power to modify a sentence that is unduly harsh or severe under the circumstances, even though the sentence may be within the permissible statutory range' ... . A trial court need not abuse its discretion for the Appellate Division to substitute its own discretion ... . We may 'reduce a sentence in the interests of justice, taking into account factors such as defendant's age, physical and mental health, and remorse' ... . The immediate object of defendant's crime was to purchase basic human necessities, including food and toothpaste. In consideration of the fact that he was a 53 year-old, unemployed homeless man, with longstanding medical and substance abuse issues, a reduction of his sentence to 3 to 6 years is appropriate. Defendant's extensive criminal history does not preclude a determination that his sentence is excessive ...". ***People v. Mitchell*, 2019 N.Y. Slip Op. 00371, First Dept 1-22-19**

CRIMINAL LAW.

PRIOR FLORIDA CONVICTION WAS NOT THE EQUIVALENT OF A NEW YORK FELONY, DEFENDANT SHOULD NOT HAVE BEEN SENTENCED AS A SECOND FELONY OFFENDER.

The First Department determined defendant should not have been sentenced as a second felony offender because the prior Florida conviction was not the equivalent of a New York felony. The defendant was convicted of attempted murder and attempted robbery: "The knowledge element of the Florida statute at the time of defendant's Florida offense was that a defendant 'knew of the illicit nature of the items in his possession' ... . This was broader than the knowledge requirement under Penal Law § 220.16, which demands proof of 'knowledge that the item at issue was, in fact, the controlled substance the defendant is charged with selling or possessing' ... . Contrary to the trial court's analysis, the dispositive difference between the knowledge requirements of the Florida and New York statutes was in place at the time of defendant's 1998 Florida conviction. Florida's alteration of its knowledge requirement in 2002 (see Fla Stat Ann § 893.101) has no bearing on our analysis." ***People v. Muhammad*, 2019 N.Y. Slip Op. 00386, First Dept 1-22-19**

CRIMINAL LAW.

DEFENDANT SHOULD NOT HAVE BEEN ARRAIGNED ON A SPECIAL INFORMATION CONCERNING A PRIOR CONVICTION PRIOR TO JURY SELECTION, THE STATUTE REQUIRES ARRAIGNMENT AFTER JURY SELECTION, THE ERROR WAS DEEMED HARMLESS HOWEVER.

The First Department, over a dissent, determined defendant should not have been arraigned on a special information pursuant to Criminal Procedure Law § 200.60 before jury selection. The procedure avoids the presentation of proof of a prior conviction at trial. The error was deemed harmless by the majority. The dissent argued the error was not harmless and would have ordered a new trial: "A court cannot disregard plain statutory language simply because it concludes that an alternate procedure would be consonant with the policy underlying the statute. Courts do not possess the power to ignore the legislature ... . It may well be that the legislature's general purpose in enacting CPL 200.60 was to avoid the prejudicial effect of having the prior offense proven before the jury. However, such a purpose does not support reading the timing requirement out of the statute. Allowing a defendant to wait until after the commencement of the trial ensures that he will have as much information as possible when forced to make the choice of admitting his prior conviction and relieving the People of its burden to prove it beyond a reasonable doubt; or denying the conviction and allowing the jury to learn about it. ... Despite the court's error, however, we are obliged to affirm because defendant has not shown any prejudice arising from the fact that he was required to decide whether to contest the prior conviction earlier than necessary. Defendant does not assert that he would have contested the conviction if he had been asked after jury selection. Thus, defendant's claims of prejudice are speculative." ***People v. Alston*, 2019 N.Y. Slip Op. 00410, First Dept 1-22-19**

DEBTOR-CREDITOR, CIVIL PROCEDURE, BANKING LAW.

THE CONTENTS OF A SAFE DEPOSIT BOX CONSTITUTED THE PROPERTY OF JOINT TENANTS WITH RIGHTS OF SURVIVORSHIP, THEREFORE THE CONTENTS ARE AVAILABLE TO SATISFY A JUDGMENT AGAINST ONLY ONE OF THE JOINT TENANTS.

The First Department, in a full-fledged opinion by Justice Gische, in a matter of first impression, determined the presumption of joint tenancy with rights of survivorship applied to the contents of a safe deposit box. The judgment debtor NYCB was owed $11 million by one of two persons (Rachel and Ari) who signed rental agreements for a safe deposit box. The First Department held that Supreme Court properly ordered the safe deposit box opened the the contents turned over to satisfy the judgment against Ari: "CPLR 5225(b) provides for an expedited special proceeding by which a judgment creditor can recover 'money or other personal property' belonging to a judgment debtor 'against a person in possession or custody of money or other personal property in which the judgment debtor has an interest' in order to satisfy a judgment ... . When two or more persons open a bank account, making a deposit of cash, securities, or other property, a presumption of joint tenancy with right of survivorship arises (Banking Law § 675[b] ...). If the presumption is applied, each named tenant 'is possessed of the whole of the account so as to make the account vulnerable to the levy of a money judgment by the judgment creditor of one of the joint tenants' ... . By relying on the terms of the rental agreement, NYCB met its burden of establishing Ari and Rachel as joint tenants with rights of survivorship of the safe deposit box account. The safe deposit box is controlled by each of them, each of them has access to the box at all times, and each of them can deposit property into the box or remove property from it without each other's permission. Should either one of them die, the survivor would have access to the box and could remove all its contents ...". ***Matter of New York Community Bank v. Bank of Am., N.A.*, 2019 N.Y. Slip Op. 00544, First Dept 1-24-19**

PERSONAL INJURY.

DEFENDANT'S UNATTENDED TOW TRUCK MOVED BACKWARDS INTO PLAINTIFF'S CAR, PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED.

The First Department, reversing Supreme Court, determined plaintiff's motion for summary judgment in this traffic accident case should have been granted. Defendant's tow truck was left running and unattended when it moved backwards into plaintiff's car: "Plaintiff established entitlement to judgment as a matter of law in this action where he was injured when defendants' tow truck was left unattended by its driver, defendant Millar, and rolled backwards into plaintiff's car, which was stopped behind the tow truck. When a driver fails to secure an unattended vehicle sufficiently to prevent it from starting to move on its own, the driver is negligent ... In opposition, defendants did not raise a triable issue of fact as they failed to offer a non-negligent explanation for the collision... . Defendants' speculation that, even though Millar left the gear in 'park' before exiting the tow truck, the gear must have slipped into reverse on its own due to some mechanical failure is insufficient to raise an issue of fact ... . Defendants present no evidence of any type of mechanical failure or defect in the tow truck, which Millar was able to drive back to the depot after the accident without incident." ***Franco v. City of New York*, 2019 N.Y. Slip Op. 00377, First Dept 1-22-19**

PERSONAL INJURY, LANDLORD-TENANT.

THE LANDOWNER AND THE TENANT TAXI COMPANY HAD THE SAME PRINCIPAL, A HOSE WAS USED BY INDEPENDENT CONTRACTORS TO WASH THE TAXIS, PLAINTIFF ALLEGEDLY SLIPPED ON THE WATER FROM THE HOSE WHICH FROZE, THE LANDOWNER DID NOT ESTABLISH IT WAS AN OUT OF POSSESSION LANDLORD, THE LANDOWNER'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The First Department, over a dissent, reversing Supreme Court, determined the landowner was not entitled to summary judgment in this slip and fall case. The principal of the property owner, 514 West, is also the principal of the tenant, Style, a taxi company. Independent contractors used a hose to wash the cars. Water from the hose froze and plaintiff allegedly slipped and fell on the ice. The First Department noted the close connection between 514 West and Style and found that 514 West did not establish it was on out-of-possession landlord: "514 West, which owns the building adjacent to the roadway in which plaintiff slipped and fell on ice, failed to make a prima facie showing of its entitlement to summary judgment, since the evidence it submitted raises genuine issues of fact about whether it created the dangerous condition ... . For example, its principal, who is also the principal of codefendant Style Management Co., Inc. (Style), the taxi company housed at the building owned by 514 West, admitted that there is a hose attached to the building, which the independent contractors who work for the taxi company would use to wash the cars. It is water from this hose, which pooled in the street and then froze, that plaintiff allegedly slipped on. 'It is . . . a general rule that an abutting owner is liable if, by artificial means . . . water from the property is permitted to flow onto the public sidewalk where it freezes'... . 514 West asserts that Style operated the hose, not it, thus absolving it of liability. However, 514 West fails to establish that it is an out-of-possession landlord; indeed, given the very close connection between 514 West and Style, which, again, have the same principal, it is not possible on this record to determine, as a matter of law, that the former is without liability as a landowner." ***Malik v. Style Mgt. Co. Inc.*, 2019 N.Y. Slip Op. 00372, First Dept 1-22-19**

SECOND DEPARTMENT

CIVIL PROCEDURE.

FAILURE TO COMPLY WITH THE SERVICE DIRECTIONS IN THE ORDER TO SHOW CAUSE DEPRIVED SUPREME COURT OF JURISDICTION TO ENTERTAIN THE ORDER TO SHOW CAUSE.

The Second Department, reversing Supreme Court, determined plaintiff's failure to comply with the service directions in an order to show cause required the denial of the motion to hold defendant in contempt: "... [T]he service requirements set forth in the order to show cause ... , were jurisdictional in nature. The plaintiff's undisputed failure to comply with these requirements by serving the order to show cause pursuant to CPLR 308(4), instead of CPLR 311-a, deprived the Supreme Court of jurisdiction to entertain the plaintiff's order to show cause ... . Contrary to the plaintiff's contention, the defendant may challenge the validity of the [subsequent] order ... , on the ground that the court was without jurisdiction to enter the order ... . Accordingly, the plaintiff's motion to hold the defendant in contempt for failure to comply with the order ... , should have been denied." ***Boucan NYC Café, LLC v. 467 Rogers, LLC*, 2019 N.Y. Slip Op. 00416, Second Dept 1-23-19**

CIVIL PROCEDURE, CORPORATION LAW, PRODUCTS LIABILITY, NEGLIGENCE.

A CORPORATION'S REGISTRATION WITH THE DEPARTMENT OF STATE IS NO LONGER DEEMED CONSENT TO BE SUED IN NEW YORK, FORD'S AND GOODYEAR'S MOTIONS TO DISMISS FOR LACK OF PERSONAL JURISDICTION SHOULD HAVE BEEN GRANTED, THE SUIT STEMMED FROM A ROLLOVER ACCIDENT IN VIRGINIA.

The Second Department, in full-fledged opinion by Justice Brathwaite-Nelson, determined that a products liability case (stemming from a traffic accident in Virginia) against Ford, the manufacturer of the vehicle which rolled over, and Goodyear, the manufacturer of a tire which allegedly failed, could not be brought in New York. The plaintiffs alleged general jurisdiction over both companies based upon business done generally in New York and registration with the NY Department of State. The plaintiffs did not allege long-arm jurisdiction. Neither the vehicle nor the tire was manufactured or purchased from the defendants in New York. The plaintiff had purchased the vehicle from a New York nonparty and had used the vehicle in New York. "We consider on these appeals whether, following the United States Supreme Court decision in Daimler AG v. Bauman (571 US 117), a foreign corporation may still be deemed to have consented to the general jurisdiction of New York courts by virtue of having registered to do business in New York and appointed a local agent for the service of process. We conclude that it may not. * * * We agree with those courts that asserting jurisdiction over a foreign corporation based on the mere registration and the accompanying appointment of an in-state agent by the foreign corporation, without the express consent of the foreign corporation to general jurisdiction, would be 'unacceptably grasping' under Daimler (Daimler AG v. Bauman, 571 US at 138). The Court of Appeals does not appear to have ... relied upon its consent-by-registration theory since International Shoe was decided. We think that this is a strong indicator that its rationale is confined to that era ... and that it no longer holds in the post-Daimler landscape. We conclude that a corporate defendant's registration to do business in New York and designation of the secretary of state to accept service of process in New York does not constitute

consent by the corporation to submit to the general jurisdiction of New York for causes of action that are unrelated to the corporation's affiliations with New York." ***Aybar v. Aybar*, 2019 N.Y. Slip Op. 00412, Second Dept 1-23-19**

CIVIL PROCEDURE, JUDGES, FAMILY LAW.

JUDGE SHOULD NOT HAVE, SUA SPONTE, DISMISSED THIS DIVORCE ACTION ON A GROUND NOT RAISED BY THE PARTIES.

The Second Department determined Supreme Court should not have dismissed the complaint in this divorce action, sua sponte, on a ground not raised by the parties: "The Supreme Court should not have granted the defendant's motion for summary judgment on a ground not raised in the defendant's motion ... . '[O]n a motion for summary judgment, the court is limited to the issues or defenses that are the subject of the motion before the court'... . The plaintiff had no opportunity to address the issue regarding the allegedly defective summons, and this 'lack of notice and opportunity to be heard implicates the fundamental issue of fairness that is the cornerstone of due process' ... . Since the Supreme Court did not consider the merits of the motion and cross motion, the matter must be remitted to the Supreme Court, Richmond County, for a determination of the motion and cross motion on the merits ...". ***Patel v. Sharma*, 2019 N.Y. Slip Op. 00452, Second Dept 1-23-19**

CIVIL PROCEDURE, MUNICIPAL LAW, ZONING. LAND USE , ENVIRONMENTAL LAW, JUDGES.

IN THIS HYBRID ARTICLE 78-DECLARATORY JUDGMENT ACTION, THE PORTIONS OF THE PETITION WHICH SOUGHT A DECLARATION THAT AMENDMENTS TO THE ZONING CODE ARE ILLEGAL AND RELATED DAMAGES SHOULD NOT HAVE BEEN DISMISSED, SUA SPONTE, IN THE ABSENCE OF A SPECIFIC DEMAND FOR DISMISSAL.

The Second Department determined that the zoning code provisions enacted by the village board of trustees, which concerned the maximum floor space and coverage on residential lots, were consistent with the village's comprehensive plan and properly enacted. The Second Department further found that the requirements of the State Environmental Quality Review Act (SEQRA) were met. However, the portions of the petition which sought declaratory relief and related damages should not have been summarily dismissed along with the portions which sought Article 78 relief because no demand for dismissal of the declaratory relief portions had been made: "... [I]n the absence of a dispositive motion addressed to the fifth, sixth, seventh, and eighth causes of action, which sought declaratory relief and damages not in the nature of CPLR article 78 relief, the Supreme Court should not have, in effect, dismissed those causes of action. 'In a hybrid proceeding and action, separate procedural rules apply to those causes of action which are asserted pursuant to CPLR article 78, on the one hand, and those to recover damages and for declaratory relief, on the other hand. The Supreme Court may not employ the summary procedure applicable to a CPLR article 78 cause of action to dispose of causes of action to recover damages or seeking a declaratory judgment' ... . 'Thus, where no party makes a request for a summary determination of the causes of action which seek to recover damages or declaratory relief, it is error for the Supreme Court to summarily dispose of those causes of action' ...". ***Matter of Bonacker Prop., LLC v. Village of E. Hampton Bd. of Trustees*, 2019 N.Y. Slip Op. 00432, Second Dept 1-23-19**

CRIMINAL LAW, APPEALS.

THE WAIVER OF APPEAL WAS INVALID, THE STATUTORY REQUIREMENTS FOR THE ORDER OF PROTECTION ISSUED AT SENTENCING WERE NOT MET.

The Second Department, vacating an order of protection issued at sentencing and affirming the conviction, determined defendant's waiver of his right to appeal was invalid: "... [T]he record does not demonstrate that the defendant understood the nature of the right to appeal and the consequences of waiving it ... . The Supreme Court did not provide the defendant with an adequate explanation of the nature of the right to appeal or the consequences of waiving that right ... . The court's explanation was little more than a tautology: '[Y]ou have given up your right to appeal. Which means there will be no appeal with regards to anything in your case, and the only exception to that would be an illegal sentence or some constitutional issue. But basically you have given up your right to appeal. Do you understand?' ... . Furthermore, the court's statements at the plea allocution suggested that waiving the right to appeal was mandatory rather than a right which the defendant was being asked to voluntarily relinquish, and the court never elicited an acknowledgment that the defendant was voluntarily waiving his right to appeal... . Although the record on appeal reflects that the defendant signed a written appeal waiver form, a written waiver 'is not a complete substitute for an on-the-record explanation of the nature of the right to appeal' ... . * * * ... [T]the Supreme Court failed to state on the record the reasons for issuing the order of protection at the time of sentencing ... Furthermore, ... the court failed to fix the duration of the order of protection ... . Under these circumstances, we vacate the order of protection issued at the time of sentencing ...". ***People v. Moncrieft*, 2019 N.Y. Slip Op. 00466, Second Dept 1-23-19**

CRIMINAL LAW, EVIDENCE.

BASED ON THE SUBMITTED EVIDENCE OF THIRD PARTY CULPABILITY IN THIS RAPE AND MURDER CASE, DEFENDANT WAS ENTITLED TO A HEARING ON HIS MOTION TO VACATE THE JUDGMENT OF CONVICTION.

The Second Department determined defendant was entitled to a hearing on his motion to vacate his murder conviction. The defendant and his codefendant, DiPippo, were convicted of the 1995 rape and murder of a 12-year-old girl. At DiPippo's third trial DiPippo was allowed to present evidence of third culpability. The third party, Gombert, had allegedly confessed to a fellow inmate. After DiPippo's acquittal, defendant moved to vacate his conviction based upon the newly discovered evidence of third party culpability. The motion was denied without a hearing. The matter was remitted for a hearing: "The court which entered a judgment of conviction may, on motion of the defendant, vacate the judgment on the ground that '[n]ew evidence has been discovered since the entry of a judgment based upon a verdict of guilty after trial, which could not have been produced by the defendant at the trial even with due diligence on his part and which is of such character as to create a probability that had such evidence been received at the trial the verdict would have been more favorable to the defendant; provided that a motion based upon such ground must be made with due diligence after the discovery of such alleged new evidence'... . 'Once the parties have filed papers and all documentary evidence or information has been submitted, the court is obligated to consider the submitted material for the purpose of ascertaining whether the motion is determinable without a hearing to resolve questions of fact'... . '[W]hether a defendant is entitled to a hearing on a CPL 440.10 motion is a discretionary determination' ... . Under the circumstances of this case, the County Court improvidently exercised its discretion in denying, without conducting an evidentiary hearing, the defendant's motion pursuant to CPL 440.10 to vacate his judgment of conviction. In view of the parties' submissions, particularly the third-party culpability evidence relating to Gombert, a hearing is necessary to promote justice ... . Following a full evidentiary hearing, the court will be in a position to 'make its final decision based upon the likely cumulative effect of the new evidence had it been presented at trial' ...". ***People v. Krivak*, 2019 N.Y. Slip Op. 00464, Second Dept 1-23-19**

CRIMINAL LAW, EVIDENCE, ATTORNEYS, APPEALS.

UNWARNED STATEMENTS MADE DURING CUSTODIAL INTERROGATION AND STATEMENTS MADE IN THE ABSENCE OF COUNSEL SHOULD HAVE BEEN SUPPRESSED, DEFENSE COUNSEL'S FAILURE TO OBJECT CONSTITUTED INEFFECTIVE ASSISTANCE, SOME UNPRESERVED APPELLATE ISSUES CONSIDERED IN THE INTEREST OF JUSTICE.

The Second Department, over a partial dissent, reversed defendant's bribery and falsely reporting an incident convictions, in the interest of justice, and ordered a new trial. The facts are too complex to fairly summarize here. Defendant was accused of assault by her husband. The police called her to the station where she was interviewed. After she was told she would be placed under arrest she allegedly offered sex and money to the interviewing officer (Officer Persaud) to make the charges go away. The officer wore a wire to record further conversations about the bribery. After defendant was arraigned and represented by counsel, defendant was again interviewed in the back of a police car (by Sargeant Klein and her partner) concerning the alleged bribery. That conversation was also recorded. Statements made during custodial interrogation that were not preceded by Miranda warnings and statements made to police officers in the absence of counsel should not have been admitted. Defense counsel was ineffective for failing to object: "Officer Persaud should have known that in telling the defendant that she needed to come to the precinct station house in connection with his investigation into the allegations her husband had made against her, allegations about which she had already been told she would be arrested, placing her in an interview room, and then confronting her with the allegations and the evidence against her, including the existence of the order of protection, he was reasonably likely to elicit from the defendant an incriminating response ... . * * *... [T]the defendant's alleged bribery of Officer Persaud and her allegedly false reporting of his sexual misconduct during that same encounter were 'so inextricably interwoven in terms of both their temporal proximity and factual interrelationship' as to render unavoidable the conclusion that any interrogation concerning the allegedly false report would inevitably elicit incriminating responses regarding the matter in which there had been an entry of counsel... . Furthermore, the police were aware that the defendant was actually represented by an attorney and the interrogation actually entailed an infringement of her constitutional right to counsel by impermissible questioning on the represented crimes ... . * * * ... [T]he defendant demonstrated the absence of 'a reasonable and legitimate strategy under the circumstances and evidence presented' ... for defense counsel's stipulation to admission of a recording of the entire interview between the defendant and Sergeant Klein and her partner, and his failure to object to Sergeant Klein's testimony recounting the same interview, or Officer Persaud's testimony in which he recounted numerous statements made by the defendant, of which the People failed to provide notice as required by CPL 710.30(1)(a)." ***People v. Stephans*, 2019 N.Y. Slip Op. 00473, Second Dept 1-23-19**

CRIMINAL LAW, EVIDENCE, CORPORATION LAW.

PROVIDING ILLEGAL HIV MEDICATIONS TO A PHARMACY FOR RESALE: (1) DID NOT CONSTITUTE GRAND LARCENY BECAUSE THE AGENT OF THE PHARMACY TO WHOM THE DRUGS WERE PROVIDED KNEW THE DRUGS WERE ILLEGAL AND THAT KNOWLEDGE IS IMPUTED TO THE CORPORATION; AND (2) DID NOT CONSTITUTE CRIMINAL DIVERSION OF PRESCRIPTION DRUGS BECAUSE THE DRUGS WERE PROVIDED TO A CORPORATION, NOT TO A PERSON WHO HAD NO MEDICAL NEED FOR THEM. AN UNSEALED COMPILATION OF WIRETAP RECORDINGS CONSTRUCTED FROM SEALED ORIGINALS WAS ADMISSIBLE.

The Second Department, in a full-fledged opinion by Justice Sgroi, reversing defendant's grand larceny and criminal diversion of prescription medications convictions, determined that: (1) the knowledge of the agent of the pharmacy to whom the illegal HIV drugs were provided must be imputed to the corporation, therefore the corporation was deemed to know it was receiving and selling illegal drugs; (2) the statute prohibiting criminal diversion of prescription drugs is aimed at street sales of prescription drugs to those who have no medical need for them, therefore the statute does not apply to supplying illegal drugs to a pharmacy for resale; (3) the moneylaundering convictions and related sentences should be affirmed; and (4) a compilation of wiretap recordings, although not sealed, was made from properly sealed recordings and was properly authenticated, therefore the compilation was admissible: "... [T]here is no statutory requirement that a properly authenticated composite recording be compared against the sealed original recording. Three simultaneous original recordings of the intercepted communications were created in this case. The composite recording was compared against an original version of the recordings, and [a witness] testified that the composite recording was a true and accurate reflection of the content of the original. ,,, [A] sealed version of the original recording existed to deter alteration of, and permit challenge to, the composite, thus satisfying the statute. * * * [Re; Grand Larceny:] The People's theory in this case was that the defendant ... wrongfully took money from [the pharmacy] by falsely representing that the medications they were selling were lawful to sell, transfer, and dispense. The defendant argues ... that the People failed to prove that such a false representation of past or existing fact was made to [the pharmacy] because [the agent] , a high managerial employee of [the pharmacy], knew that the medications were not lawful to sell, transfer, and dispense, and thus, [the pharmacy], by imputation, also knew this fact. We agree. * * * [Re: Criminal Diversion of Prescription Medications Penal Law § 178.25:] The defendant does not challenge the People's premises that (1) the medications had left the legitimate stream of commerce rendered them 'adulterated,' and (2) one cannot have a 'medical need' for adulterated medications, as the term 'medical need' is used in the statute. Thus, we do not address the validity of these premises. However, the defendant challenges the applicability of this statute to his alleged conduct on the basis that, by its terms, the statute cannot apply to a transfer of prescription medications to a corporation, as opposed to a person capable of having medical needs. Again, we agree." ***People v. Gross*, 2019 N.Y. Slip Op. 00461, Second Dept 1-23-19**

CRIMINAL LAW, EVIDENCE, JUDGES.

OFFICER DID NOT HAVE PROBABLE CAUSE TO SEARCH THE VAN AFTER HE LEARNED THAT DEFENDANT, WHO WAS SITTING IN THE PASSENGER SEAT, WAS SMOKING A CIGAR, NOT MARIJUANA, SUPREME COURT'S SUA SPONTE FINDING THAT DEFENDANT DID NOT HAVE STANDING TO CONTEST THE SEARCH WAS ERROR, THERE WAS UNCONTRADICTED EVIDENCE THE VAN WAS DEFENDANT'S WORK VEHICLE.

The Second Department, reversing defendant's possession of a weapon conviction and dismissing the indictment, determined that the police officer did not have probable cause to search the van where the weapon was found. The defendant was sitting in the passenger seat smoking a cigar when the officer approached and removed him from the van, apparently because the officer thought defendant was smoking marijuana. At the time the officer searched the van, he know defendant was smoking a cigar. Although defendant was sitting in the passenger seat, there was no evidence to contradict his claim that the van was his work vehicle. Contrary to Supreme Court's contrary finding (made sua sponte), the defendant had standing to contest the search: "The officer testified that he removed the defendant from the minivan and frisked him out of a fear for the officer's own safety; no weapon was recovered. The officer further testified that, at that time, he realized that the two men were smoking cigars, not marijuana. Nevertheless, the officer went around the minivan to the driver's side and opened the sliding door on that side, whereupon he observed a firearm sticking out of a bag behind the driver's seat. We disagree with the hearing court's determination, sua sponte, that the defendant lacked standing to challenge the search of the minivan. The defendant, who had told the police at the police station that the minivan was his work van, had standing to challenge the search. Although the defendant had been sitting in the front passenger seat of the minivan, no evidence was presented to contradict his statements that it was his work van. The defendant's statements were sufficient to establish that he exercised sufficient dominion and control over the minivan to demonstrate his own legitimate expectation of privacy therein... . '[A]bsent probable cause, it is unlawful for a police officer to invade the interior of a stopped vehicle once the suspects have been removed and patted down without incident, as any immediate threat to the officers' safety has consequently been eliminated' ... . Contrary to the People's contention, under the circumstances here, where the defendant already had been removed from the minivan and no one else was in the minivan, the police lacked probable cause to con-

duct a warrantless search by opening the sliding door of the minivan, and the weapon found as a result of the unlawful search should have been suppressed ...". ***People v. Dessasau*, 2019 N.Y. Slip Op. 00456, Second Dept 1-23-19**

FAMILY LAW.

MOTHER'S APPLICATION FOR RETURN OF THE CHILD AFTER TEMPORARY REMOVAL OF THE CHILD IN THIS DERIVATIVE NEGLECT AND ABUSE PROCEEDING SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Family Court, determined that mother's application for return of the child who had been temporarily removed from the home should not have been granted: "... [T]he Family Court's determination granting the mother's application for the return of the subject child lacked a sound and substantial basis in the record. At the hearing, the mother admitted to hitting Sincere G. with an extension cord, leaving welts on his skin, because he would not clean his room and she wanted to get 'control' over him. Although the mother testified that she only hit Sincere G. on his arms and legs, photographs admitted into evidence at the hearing clearly show welts across his chest as well. Since that incident, and as of the time of the hearing, the mother had failed to sufficiently address the mental health issues that led to the incident ... . Accordingly, we cannot agree that the return of the subject child to the mother's custody, notwithstanding the conditions that were imposed, would not present an imminent risk to the child's life or health. The mother's application for the return of the child should have been denied, and we remit the matter to the Family Court, Kings County, for further proceedings on the petition. Pending those further proceedings, the subject child shall remain in the care and custody of the father, with supervised parental access to the mother, pursuant to the terms and conditions of an order of the Family Court ...". ***Matter of Tatih E. (Keisha T.)*, 2019 N.Y. Slip Op. 00434, Second Dept 1-23-19**

FORECLOSURE, CIVIL PROCEDURE.

MERE DENIAL OF THE ALLEGATIONS IN A FORECLOSURE COMPLAINT THAT THE PLAINTIFF IS THE OWNER AND HOLDER OF THE NOTE AND MORTGAGE IS NOT SUFFICIENT TO ASSERT THE DEFENSE THAT THE PLAINTIFF LACKS STANDING, PRECEDENT TO THE CONTRARY OVERRULED.

The Second Department, in a full-fledged opinion by Justice Castro, over an extensive dissenting opinion, determined that a denial of the allegations in a foreclosure complaint that the plaintiff is the owner and holder of the note and mortgage is not sufficient to assert that plaintiff lacks standing, a defense that is waived if not asserted: "[T]he issue of standing is waived absent some affirmative statement on the part of a mortgage foreclosure defendant, which need not invoke magic words or strictly adhere to any ritualistic formulation, but which must clearly, unequivocally, and expressly place the defense of lack of standing in issue by specifically identifying it in the answer or in a pre-answer motion to dismiss. A mere denial of factual allegations will not suffice for this purpose. * * * Taken to its logical conclusion, the ... defendants' position would mean that their denials preserve all conceivable affirmative defenses that can be parsed from reading the factual allegations of the complaint in conjunction with their corresponding and conclusory denials, so that these defenses may be raised at some subsequent point in the case. Such a result would render the obligation under CPLR 3018(b) to specifically plead affirmative defenses in the answer meaningless, delay the legislatively favored prompt adjudication of the defenses at an early point in the litigation, and cause prejudice and surprise to plaintiffs. Moreover, the practical realities of mortgage foreclosure litigation are that foreclosure complaints invariably allege that the plaintiff is the holder and/or assignee of the note, and answering defendants reflexively deny (or deny knowledge as to the truth of) most or all of the allegations in their responsive pleadings. Were such denials by themselves sufficient to place standing in issue, then standing would effectively become a prima facie element of the plaintiffs' claims in all contested foreclosure actions, an unwarranted consequence. Rather, if a defendant in a foreclosure action genuinely believes that she or he has a basis upon which to contest standing, it is not too much to ask her or him to specifically and affirmatively assert that position in the answer as the CPLR requires. To the extent that some decisions of our Court have strayed from the foregoing principles by indicating that a mere denial in the answer of factual allegations set forth in the complaint will suffice to place standing in issue, thereby injecting uncertainty into this formerly settled area ...". ***US Bank N.A. v. Nelson*, 2019 N.Y. Slip Op. 00494, Second Dept 1-23-19**

PERSONAL INJURY, CIVIL PROCEDURE.

DEFENSE VERDICT IN THIS SLIP AND FALL CASES SHOULD HAVE BEEN SET ASIDE, THE JURY FOUND DEFENDANT NEGLIGENT BUT FURTHER FOUND THE NEGLIGENCE WAS NOT THE PROXIMATE CAUSE OF THE FALL, HOWEVER, THE NEGLIGENCE AND PROXIMATE CAUSE WERE INEXTRICABLY INTERTWINED.

The Second Department, reversing Supreme Court, determined that plaintiff's motion to set aside the verdict in this slip and fall case should have been granted: "The plaintiff alleged that after entering the auditorium to attend the showing of a movie at the defendant's multiplex theater, she entered a row of seats, slipped on what she believed to be popcorn oil, and fell. After the movie ended, the plaintiff realized that she was injured when she had difficulty rising from her seat. ... [T]he jury rendered a verdict finding that the defendant was negligent, but that such negligence was not a substantial factor in causing the plaintiff's injuries. Where, as here, the issues of negligence and proximate cause were inextricably interwoven, the jury's finding that the defendant was negligent, but that such negligence was not a substantial factor in causing the plaintiff's injuries, was not supported by a fair interpretation of the evidence ... . The plaintiff, and her friend who accompanied her on

the day of the accident, both consistently testified that the plaintiff slipped and fell on an oily substance on the floor of the auditorium. The defendants failed to submit any evidence to refute this testimony. Thus, the plaintiff's motion pursuant to CPLR 4404(a) to set aside the jury verdict should have been granted." ***Mitchell v. Quincy Amusements, Inc.*, 2019 N.Y. Slip Op. 00430, Second Dept 1-23-19**

PERSONAL INJURY.

THE DEFECT, A PROTRUDING BOLT UNDER THE HANDRAIL IN A STAIRWAY, WAS TRIVIAL AND NONACTIONABLE, THE $650,000 VERDICT SHOULD HAVE BEEN SET ASIDE.

The Second Department determined defendant's motion to set aside the verdict in this slip and fall case should have been granted. The defect, a protruding bolt, was deemed trivial and nonactionable: "... [T]he plaintiff's evidence at trial included her own testimony, the testimony of her expert engineer, as well as photographs identified and marked by the plaintiff showing the alleged defect as it existed at the time of the subject accident. Accepting such evidence as true, and affording the plaintiff every favorable inference that may be properly drawn from the facts presented ... , the alleged defect was not actionable. Considering the appearance and dimensions of the protruding bolt, as well as its location on the sidewall of the staircase, directly underneath a handrail and away from the walking surface of the stairway... , the defect was trivial as a matter of law. Accordingly, the defendant's motion pursuant to CPLR 4401 for judgment as a matter of law dismissing the complaint should have been granted ...". ***Rambarran v. New York City Tr. Auth.*, 2019 N.Y. Slip Op. 00484, Second Dept 1-23-19**

PERSONAL INJURY, EVIDENCE.

ALTHOUGH THE FREIGHT ELEVATOR WAS IN COMPLIANCE WITH ALL RULES, REGULATIONS AND CODES, THERE WAS A QUESTION OF FACT WHETHER THE ABSENCE OF A GATE CREATED A DANGEROUS CONDITION OF WHICH THE BUILDING OWNERS WERE AWARE, THE OWNERS' MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined the building owners' motion for summary judgment in this elevator accident case should not have been granted. Although the freight elevator was in compliance with all applicable rules, regulations and codes, there was a question of fact whether the absence of a gate constituted a dangerous condition of which the defendants were aware: "... [T]he plaintiff raised a triable issue of fact as to whether the ... defendants were negligent. The plaintiff submitted evidence demonstrating that prior to the accident, the Waterfront defendants were on notice of the dangerous condition of the elevator when they were provided with proposals from their own elevator service company, which proposals stated that because there was no gate on the inside of the elevator platform, an extremely dangerous condition existed ...". ***Romero v. Waterfront N.Y.*, 2019 N.Y. Slip Op. 00486, Second Dept 1-23-19**

REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL), BANKING LAW, LIEN LAW.

BANK WAS ENTITLED TO A LIEN ON THE SUBJECT PROPERTY PURSUANT TO THE DOCTRINE OF EQUITABLE SUBROGATION.

The Second Department, reversing Supreme Court, in this action to quiet title, determined that HSBC Bank was entitled to summary judgment on its counterclaim to impose an equitable lien on the subject property: "Under the doctrine of equitable subrogation, where the 'premises of one person is used in discharging an obligation owed by another or a lien upon the premises of another, under such circumstances that the other would be unjustly enriched by the retention of the benefit thus conferred, the former is entitled to be subrogated to the position of the obligee or lien-holder' ... . [The] submissions established that HSBC, as assignee of the FA mortgage, which secured the loan proceeds used to satisfy the Berkshire mortgage, which secured the loan proceeds used to satisfy the plaintiff's mortgage obligation to Ocwen, was entitled to be put in the place of Ocwen as holder of the mortgage lien in the sum of $207,566.25 ...". ***Lombard v. Yacoob*, 2019 N.Y. Slip Op. 00427, Second Dept 1-23-19**

ZONING, LAND USE.

IN DENYING THE PETITION FOR AN AREA VARIANCE THE ZONING BOARD DID NOT ADDRESS ALL OF THE FACTORS THAT IT MUST CONSIDER, THE DETERMINATION WAS ANNULLED AND THE MATTER REMITTED FOR RECONSIDERATION OF THE PETITION.

The Second Department annulled the zoning board's determination and remitted the matter for reconsideration of the petition seeking an area variance allowing a two-family home in a single-family zone: "In determining whether to grant an application for an area variance, a zoning board must engage in a balancing test weighing 'the benefit to the applicant if the variance is granted . . . against the detriment to the health, safety and welfare of the neighborhood or community by such grant' (... see Town Law § 267-b[3][b]...). The zoning board must also consider: '(i) whether an undesirable change will be produced in the character of the neighborhood or a detriment to nearby properties will be created by the granting of the area variance; (ii) whether the benefit sought by the applicant can be achieved by some method feasible for the applicant to pursue, other than an area variance; (iii) whether the requested area variance is substantial; (iv) whether the proposed

variance will have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district; and (v) whether the alleged difficulty was self-created, which consideration shall be relevant to the decision of the board of appeals, but shall not necessarily preclude the granting of the area variance' ... . We agree with the Supreme Court that, although the Board engaged in the required balancing test, the Board failed to meaningfully consider the relevant statutory factors. While the proposed variances were clearly substantial and the alleged difficulty was self-created, the Board's failure to cite to particular evidence as to whether granting the variances would have an undesirable effect on the character of the neighborhood, adversely impact physical and environmental conditions, or otherwise result in a detriment to the health, safety, and welfare of the neighborhood or community requires reconsideration of the application, weighing all of these factors ...". ***Matter of Mengisopolous v. Board of Zoning Appeals of the City of Glen Cove*, 2019 N.Y. Slip Op. 00440, Second Dept 1-23-19**

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