CasePrepPlus

February 15, 2019

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

Editor: **Bruce Freeman**

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

FIRST DEPARTMENT

CRIMINAL LAW, EVIDENCE.

DETECTIVE'S TESTIMONY DEMONSTRATED THE WITNESS'S IDENTIFICATION OF DEFENDANT WAS CONFIRMATORY, HEARSAY IS ADMISSIBLE AT A *RODRIGUEZ* HEARING.

The First Department determined that the detective's testimony at the *Rodriguez* hearing established that the witness's identification of defendant was confirmatory and noted that the witness need not testify at the hearing because hearsay is admissible: "At a Rodriguez hearing (see People v. Rodriguez, 79 NY2d 445 [1992]), a detective's testimony established that a witness was sufficiently familiar with defendant so that his identification of defendant was confirmatory. The People were not obligated to call the identifying witness ... , because the detective gave detailed testimony about the witness's relationship with defendant. The witness knew defendant, a frequent customer in the witness's store, by his first name, and saw him several times a week over a period of three years. Defendant's request that the witness testify at the Rodriguez hearing was insufficient to preserve his present claim that such testimony was constitutionally required under the Confrontation Clause, and we decline to review it in the interest of justice. As an alternative holding, we reject this claim on the merits, in light of the fundamental difference between a suppression hearing, where hearsay is generally admissible, and a trial ...". ***People v. Lee*, 2019 N.Y. Slip Op. 00824, First Dept 2-5-19**

EDUCATION-SCHOOL LAW, CONTRACT LAW.

NURSING SCHOOL BREACHED ITS IMPLIED CONTRACT WITH GRADUATED STUDENTS WHO WERE DEEMED INELIGIBLE FOR THE LICENSE EXAMINATION AND WERE NOT PERMITTED TO ENROLL IN A COLLEGE PROGRAM.

The First Department determined defendant nursing school, AUA, breached an implied contract with the graduated students. but not with the students who withdrew from the program: "In a prior decision in this action, this Court expressly recognized that there were specific promises which established the existence of an implied contract between plaintiffs and defendant AUA when it stated that 'AUA's fact book' aimed at prospective students promised, inter alia, that AUA graduates would be eligible to take the NCLEX [National Council License Examination for Registered Nurses], and, upon passing that exam, automatically matriculate' into Lehman College's one-year RN to BSN program' ... . The record clearly establishes that defendant AUA breached these promises with regard to the graduated plaintiffs as it showed that they were (1) not eligible to take the NCLEX exam until after December 13, 2011 (when the New York State Education Department [NYSED] admitted the mistake and permitted AUA graduates to sit for the exam), and (2) were not permitted to enroll in Lehman College until 2011 when they enrolled in a standard BSN program (not the ASN to BSN program AUA had promised). Supreme Court properly found that a reasonable period of time should be inferred following graduation … . However, because the graduated plaintiffs did not have the opportunity to take the NCLEX exam or enroll in Lehman College's ASN to BSN program in a timely fashion after graduation from AUA, AUA breached the implied contract. The graduated students also established the element of damages by submitting affidavits wherein each averred that they graduated from AUA and shortly thereafter, applied to take the NCLEX but were denied because all AUA students were 'ineligible' to take the exam preventing them from obtaining their nursing license and begin their profession." ***Jeffers v. American Univ. of Antigua*, 2019 N.Y. Slip Op. 00987, First Dept 2-7-19**

FRAUD.

COMPLAINT ALLEGING FRAUD AND RELATED CAUSES OF ACTION SHOULD NOT HAVE BEEN DISMISSED, CERTAIN CLAIMS WERE NOT TIME-BARRED AND PLAINTIFF'S RELIANCE UPON MISREPRESENTATIONS WAS SUFFICIENTLY ALLEGED.

The First Department, in a full-fledged opinion by Justice Singh, over a two-justice dissenting opinion, determined that the complaint alleging fraud and related causes of action should not have been dismissed. The lawsuit arose after a divorce. Wendy, the wife, was the executive director of Epiphany Community Nursery School, the plaintiff. The husband, defendant Hugh, an investment banker, handled certain financial transactions involving Epiphany: "There are two central issues on this appeal. The first involves the application of the statute of limitations. The second is whether plaintiff has pleaded the

element of justifiable reliance to support its cause of action sounding in fraud pertaining to unauthorized bank transfers made by defendants between 2007 and 2013. We find the fraud claim relating to the bank transfers is not time-barred and that justifiable reliance has been sufficiently pleaded. Accordingly, we reinstate plaintiff's fraud claims relating to the bank transfers. * * * In determining whether justifiable reliance is sufficiently alleged, we consider two relevant circumstances: first, the existence of a relationship of trust or confidence and second, the superior knowledge or means of knowledge on the part of the person making the representation. ... [T]he complaint alleges that Hugh went to great lengths to conceal the unauthorized transfers and therefore, Epiphany - and Wendy, in her capacity as Executive Director of Epiphany - could not have discovered the alleged fraud with reasonable due diligence ... . In particular, Hugh 'caused [Epiphany's] bank statements to be diverted to the offices of Gruppo Levy and GLH' so that his fraudulent scheme would not be discovered. He also allegedly initiated these transfers at meetings with the employees of Gruppo Levy and GLH, not Epiphany. Additionally, he recorded the transfers as loans on the books and records, before offsetting them by services that were allegedly not provided so that Epiphany would not be alerted to the transfers. The complaint alleges that Hugh and Davie Kaplan's actions prevented the public and government regulators from uncovering the fraud." ***Epiphany Community Nursery Sch. v. Levey*, 2019 N.Y. Slip Op. 00842, First Dept 2-5-19**

PERSONAL INURY.

PLAINTIFF ASSUMED THE RISK OF INJURY CAUSED BY AN OPEN AND OBVIOUS CRACK IN A BASKETBALL COURT.

The First Department determined plaintiff assumed the risk of injury from a crack in an outdoor basketball court: "Defendant made a prima facie showing of its entitlement to judgment as a matter of law, by submitting evidence that plaintiff frequently played basketball on the subject outdoor basketball court, which has an open and obvious crack which runs the length of the court and has a marked tar surface ... . The court correctly rejected plaintiff's contention that grass growing out of the crack concealed its depth, finding instead that the grass served to highlight the defect, which was also one of the risks assumed by plaintiff when he chose to play basketball at this location ...". ***Alvarado v. City of New York*, 2019 N.Y. Slip Op. 00962, First Dept 2-7-19**

PERSONAL INJURY, COOPERATIVES.

MANAGER OF COOPERATIVE DID NOT HAVE A DUTY TO PROVIDE SECURITY IN EXTERIOR PUBLIC AREAS IN THIS THIRD PARTY ASSAULT CASE.

The First Department, reversing Supreme Court, determined that the manager of a cooperative complex could not be liable for a third party assault occurring in exterior public areas: "Plaintiff Sander Palaj, and his wife suing derivatively, commenced this action to recover for personal injuries he allegedly sustained when he was shot outdoors in the co-operative complex known as Co-op City, which was managed by defendant Marion Scott Real Estate, Inc. at the time. However, a landowner's duty to take minimal security precautions does not extend to exterior public areas, such as walkways and vestibules ...". ***Palaj v. Marion Scott Real Estate, Inc.*, 2019 N.Y. Slip Op. 00958, First Dept 2-7-19**

PERSONAL INJURY, EVIDENCE.

PLAINTIFF'S DEPOSITION TESTIMONY DEEMED INCREDIBLE AS A MATTER OF LAW IN THIS TRAFFIC ACCIDENT CASE, DEFENDANT'S SUMMARY JUDGMENT MOTION SHOULD HAVE BEEN GRANTED,

The First Department, reversing Supreme Court, over a two-justice dissent, made the unusual finding that certain testimony did not raise a question of fact in this traffic accident case because it was incredible as a matter of law. Defendant's motion for summary judgment should have been granted: "Although we agree with the dissent that as a general premise 'the contradictions in the testimony of the respective parties raise issues of credibility for the trier of fact to resolve,' there are rare instances where credibility is properly determined as a matter of law ... . This Court is not 'required to shut its eyes to the patent falsity of a claim]' ... . Here, … we conclude that plaintiff's deposition testimony was demonstrably false and should be rejected as incredible as a matter of law, permitting summary judgment in favor of defendant." ***Carthen v. Sherman*, 2019 N.Y. Slip Op. 00954, First Dept 2-7-19**

SECOND DEPARTMENT

CRIMINAL LAW, APPEALS.

SENTENCING COURT MUST CONSIDER YOUTHFUL OFFENDER STATUS EVEN WHERE IT IS NOT REQUESTED OR WHERE DEFENDANT AGREES TO FORGO IT AS PART OF A PLEA BARGAIN.

The Second Department, vacating defendant's sentence, determined defendant's waiver of appeal was invalid and the sentencing court was required to consider youthful offender status, even when not requested: "The defendant's purported waiver of his right to appeal was invalid ... . Although the defendant signed a written waiver, the Supreme Court provided the defendant with no explanation as to the nature of the right to appeal and the consequences of waiving it ... , nor did the

court ask the defendant whether he read the waiver form before signing it ... . Moreover, the court conflated the trial rights the defendant waived automatically by pleading guilty with the right to appeal ... . In any event, the defendant's contention that the court failed to consider whether to afford him youthful offender treatment would not have been barred by the defendant's general waiver of the right to appeal ... . CPL 720.20(1) requires that the sentencing court 'must' determine whether an eligible defendant is to be treated as a youthful offender, even where the defendant fails to request it, or agrees to forgo it as part of a plea bargain ...". ***People v. Alleyne*, 2019 N.Y. Slip Op. 00895, Second Dept 2-6-19**

CRIMINAL LAW, EVIDENCE.

THE JURY SHOULD HAVE BEEN INSTRUCTED NOT TO CONSIDER LESSER INCLUDED OFFENSES IF THEY FOUND DEFENDANT NOT GUILTY OF THE HIGHER OFFENSE ON THE BASIS OF JUSTIFICATION, NEW TRIAL ORDERED.

The Second Department, reversing defendant's conviction, determined that the jury should have been instructed not to consider lesser offenses if it found defendant was not guilty of the greater charge on the basis of justification. The court noted that, on retrial, the jury should be instructed on two categories of assault third as lesser included offenses. Defendant was charged with attempted murder by stabbing and slashing the victim: " 'This Court has held that, in a case involving a claim of self-defense, it is error for the trial court not to instruct the jurors that, if they find the defendant not guilty of a greater charge on the basis of justification, they were not to consider any lesser counts'... . Such failure constitutes reversible error ... . Here, neither the jury instructions nor the verdict sheet on the whole adequately conveyed the principle that, if the jury found the defendant not guilty of the greater charge of attempted murder in the second degree on the basis of justification, it was not to consider any lesser counts ... . On this record, it is impossible to discern whether acquittal of the top count of attempted murder in the second degree was based on the jurors' finding of justification so as to mandate acquittal on the five lesser counts ...". ***People v. Akbar*, 2019 N.Y. Slip Op. 00894, Second Dept 2-6-19**

CRIMINAL LAW, EVIDENCE, APPEALS.

DEFENDANT'S KIDNAPPING CONVICTIONS VACATED PURSUANT TO THE DOCTRINE OF MERGER, DEFENDANT WAS ALSO CONVICTED OF MURDER, BURGLARY AND ROBBERY, APPEAL CONSIDERED IN THE INTEREST OF JUSTICE.

The Second Department, noting the outcome of the appeal by a co-defendant, in the interest of justice, determined defendant's kidnapping convictions should be vacated pursuant to the merger doctrine. Defendant was convicted of murder, kidnapping, burglary and robbery: "The defendant and Domingo Mateo were indicted on charges of murder in the second degree, kidnapping in the first and second degrees, burglary in the first degree, and robbery in the first and second degrees in connection with a home invasion, which occurred on May 3, 2011, and resulted in the death of one of the occupants of the home. Mateo was tried separately and convicted on all counts. Thereafter, the defendant was tried and convicted on all counts. On Mateo's appeal, this Court found that his conviction of kidnapping in the second degree was precluded by the merger doctrine and modified the judgment of conviction by vacating the conviction of kidnapping in the second degree and the sentence imposed thereon, and dismissing that count of the indictment as to that defendant (see People v. Mateo, 148 AD3d 727). The defendant now contends that his conviction of kidnapping in the second degree was precluded by the merger doctrine. Although his contention is unpreserved for appellate review (see CPL 470.05[2]), we nevertheless reach the issue in the exercise of our interest of justice jurisdiction, vacate the defendant's conviction of kidnapping in the second degree and the sentence imposed thereon, and dismiss that count of the indictment as to the defendant ...". ***People v. Mejia*, 2019 N.Y. Slip Op. 00903, Second Dept 2-6-19**

CRIMINAL LAW, IMMIGRATION LAW.

DEFENDANT WAS NOT INFORMED OF THE POSSIBILITY OF DEPORTATION BASED UPON HIS GUILTY PLEA, MATTER REMITTED TO ALLOW A MOTION TO VACATE THE PLEA.

The Second Department determined the record supported defendant's contention that Supreme Court did not inform him of the deportation consequences of his guilty plea. The matter was sent back to allow defendant to move to vacate his plea: "[W]e remit the matter to the Supreme Court, Queens County, to afford the defendant an opportunity to move to vacate his plea, and for a report by the Supreme Court thereafter. Any such motion shall be made by the defendant within 60 days after the date of this decision and order ... and, upon such motion, the defendant will have the burden of establishing that there is a 'reasonable probability' that he would not have pleaded guilty had the court advised him of the possibility of deportation... . In its report to this Court, the Supreme Court shall state whether the defendant has now moved to vacate his plea of guilty, and if so, shall set forth its finding as to whether the defendant made the requisite showing or failed to make the requisite showing to entitle him to vacatur of the plea ...". ***People v. Hor*, 2019 N.Y. Slip Op. 00899, Second Dept 2-6-19**

FAMILY LAW, CRIMINAL LAW.

FAMILY COURT ABUSED ITS DISCRETION BY DENYING THE APPLICATION FOR AN ADJOURNMENT IN CONTEMPLATION OF DISMISSAL IN THIS JUVENILE DELINQUENCY PROCEEDING.

The Second Department, reversing Family Court, determined the court abused its discretion by denying the application for an adjournment in contemplation of dismissal in this juvenile delinquency proceeding: "[T]he Family Court improvidently exercised its discretion in denying the appellant's application pursuant to Family Court Act § 315.3 for an adjournment in contemplation of dismissal. This proceeding constituted the appellant's first contact with the court system, he took responsibility for his actions, and the record demonstrates that he learned from his mistakes. During the pendency of the proceeding, the appellant readily complied with the supervision imposed by the court and his father's supervision in the home, and he garnered praise from the Probation Department and school officials. Under the circumstances, including the appellant's commendable academic and school attendance record, his mentoring of fellow students at his school, and the minimal risk that he poses to the community, an adjournment in contemplation of dismissal was warranted ...". ***Matter of Nijuel J.*, 2019 N.Y. Slip Op. 00876, Second Dept 2-6-19**

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

IN THIS ACTION TO CANCEL AND DISCHARGE A MORTGAGE BASED UPON THE RUNNING OF THE STATUTE OF LIMITATIONS FOR A FORECLOSURE ACTION, THE BANK RAISED A QUESTION OF FACT WHETHER THE BANK WHICH SERVED THE 2008 COMPLAINT SEEKING FORECLOSURE HAD STANDING AND, THEREFORE, WHETHER THE DEBT WAS ACCELERATED IN 2008.

The Second Department, reversing Supreme Court, determined the bank had raised a question of fact about whether the mortgage had been accelerated such that the six-year statute of limitations for bringing a foreclosure action had run: "Pursuant to RPAPL 1501(4), a person having an estate or an interest in real property subject to a mortgage can seek to cancel and discharge that encumbrance where the period allowed by the applicable statute of limitations for the commencement of an action to foreclose the mortgage has expired, provided that the mortgagee or its successor was not in possession of the subject real property at the time the action to cancel and discharge the mortgage was commenced ... . An action to foreclose a mortgage is governed by a six-year statute of limitations (see CPLR 213[4] ....). '[E]ven if a mortgage is payable in installments, once a mortgage debt is accelerated, the entire amount is due and the Statute of Limitations begins to run on the entire debt' ... . The defendants raised a triable issue of fact as to whether Greenpoint had standing to commence the 2008 foreclosure action and, therefore, whether the service of the 2008 complaint was effective to constitute a valid exercise of the option to accelerate the debt ... . The affidavits submitted by the defendants were sufficient to raise a triable issue of fact as to whether the note was physically delivered to the defendant U.S. Bank, National Association (hereinafter US Bank), on September 27, 2006, two years before US Bank's assignor, Greenpoint, commenced the 2008 foreclosure action ...". ***Halfon v. U.S. Bank, Natl. Assn.*, 2019 N.Y. Slip Op. 00860, Second Dept 2-6-19**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

PLAINTIFF, WHO WAS SWEEPING THE FLOOR WHEN HE WAS STRUCK BY A PIECE OF A SKIDLOADER USED TO HOIST A MOTOR, WAS NOT ENGAGED IN AN ACTIVITY COVERED BY LABOR LAW §§ 240(1), 241(6) OR COMMON LAW NEGLIGENCE.

The Second Department determined that plaintiff's Labor Law §§ 240(1), 241(6) and common law negligence causes of action were properly dismissed. Plaintiff was sweeping the floor at an auto wrecking ship when "a piece of a skidloader being used to hoist a car engine broke and fell onto him:" "Labor Law § 240(1) is applicable to 'the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure.' The dismantling of a vehicle unrelated to a building or a structure is not a protected activity under that statute ... . Further, the sweeping being performed by the plaintiff at the time of the accident cannot be characterized as 'cleaning' within the meaning of the statute, as it was the type of routine maintenance that occurs in any type of premises, did not require specialized tools, and could be accomplished 'using tools commonly found in a domestic setting'... . Thus, the defendant established its prima facie entitlement to judgment as a matter of law dismissing the Labor Law § 240(1) cause of action. In opposition, the plaintiff failed to raise a triable issue of fact. Labor Law § 241(6) only provides protection 'to persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed'... . The plaintiff was not engaged in construction or excavation at the time of the accident, and the 'the mere act of dismantling a vehicle, whether a boat, a car or otherwise, unrelated to any other project, is not the sort of demolition intended to be covered by Labor Law § 241 (6)' ... . Thus, the defendant established its prima facie entitlement to judgment as a matter of law dismissing the Labor Law § 241(6) cause of action. In opposition, the plaintiff failed to raise a triable issue of fact. The defendant also established its prima facie entitlement to judgment as a matter of law dismissing the common-law negligence cause of action. The defendant's submissions demonstrated, prima facie, that the defendant did not supervise or control the work, and the injury-causing defect was the result of the methods being used by Jet to remove and transport a car engine ...". ***Guevarra v. Wreckers Realty*, LLC, 2019 N.Y. Slip Op. 00859, Second Dept 2-6-19**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

PLAINTIFF WAS STRUCK BY A PIECE OF UNSECURED PLYWOOD WHICH FELL, PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON HIS LABOR LAW § 240(1) CAUSE OF ACTION SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined plaintiff's motion for summary judgment on his Labor Law § 240(1) cause of action should have been granted. Plaintiff was struck a a piece of plywood after the supporting vertical post was removed: "Labor Law § 240(1) imposes upon owners, general contractors, and their agents a nondelegable duty to provide safety devices necessary to protect workers from risks inherent in elevated work sites ... . To prevail on a motion for summary judgment in a Labor Law § 240(1) 'falling object' case, the plaintiff must demonstrate that at the time the object fell, it either was being hoisted or secured, or required securing for the purposes of the undertaking ... . Labor Law § 240(1) does not automatically apply simply because an object fell and injured a worker; a plaintiff must show that the object fell because of the absence or inadequacy of a safety device of the kind enumerated in the statute ... . Here, the plaintiff established his prima facie entitlement to judgment as a matter of law through the submission of his deposition testimony and the affidavit of a coworker who witnessed the accident. These submissions established that the plaintiff was hit by an unsecured four-by-eight-foot plywood sheet that fell from the first floor ceiling onto the plaintiff as he was walking underneath ...". ***Passos v. Noble Constr. Group, LLC*, 2019 N.Y. Slip Op. 00893, Second Dept 2-6-19**

PERSONAL INJURY.

ONE INCH GAP AT THE TOP OF EXTERIOR STEPS ALLEGEDLY CAUSED PLAINTIFF'S SLIP AND FALL, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT PROPERLY DENIED.

The Second Department determined this slip and fall case properly survived summary judgment. Plaintiff alleged her foot was caught in a one-inch gap at the top of exterior steps: "While testifying at her deposition, the plaintiff identified photographs that demonstrated that the gap was at least one inch wide and at least one inch deep and three feet long, and ran the entire length of the steps. The defendants' witness, Monsignor Jamie Gigantiello, testified that he had been assigned and came to the defendant St. Bernard Church in January 2013. Gigantiello testified that upon his arrival, he found that the church building and rectory needed work, and his focus was on renovating those buildings. He further testified that, despite being on the site daily and making regular observations and inspections as he traversed the area, he did not notice thegap before the plaintiff's accident, but noticed it every time he traversed the area thereafter. He also identified the same photographs of the gap that were identified by the plaintiff, and agreed that they accurately depicted the condition that he observed following the accident. Thus, we agree with the Supreme Court's determination that the defendants failed to establish, prima facie, that the subject steps were not in a defective condition and that the defendants did not have constructive notice, as a reasonable inspection would have revealed the defective condition ...". ***Fasano v. St. Bernard Church*, 2019 N.Y. Slip Op. 00856, Second Dept 2-6-19**

PERSONAL INJURY.

OWNERS OF A RESTAURANT-BAR NOT LIABLE FOR AN ATTACK ON PLAINTIFF IN THE ADJACENT PARKING LOT IN THIS THIRD-PARTY ASSAULT CASE, THE ATTACK WAS NOT FORESEEABLE.

The Second Department determined the owners of a restaurant/bar were not liable for an attack on plaintiff int the adjacent parking lot: " 'Landowners, as a general rule, have a duty to exercise reasonable care to prevent harm to patrons on their property' ... . 'However, an owner's duty to control the conduct of persons on its premises arises only when it has the opportunity to control such conduct, and is reasonably aware of the need for such control' ... . 'Thus, the owner of a public establishment has no duty to protect patrons against unforeseeable and unexpected assaults' ... . Here, the defendants established their prima facie entitlement to judgment as a matter of law by submitting evidence demonstrating that the attack on the plaintiff was unforeseeable and unexpected ...". ***Oblatore v. 67 W. Main St., LLC*, 2019 N.Y. Slip Op. 00892, Second Dept 2-6-19**

PERSONAL INJURY, EDUCATION-SCHOOL LAW, CIVIL PROCEDURE, EVIDENCE.

EVIDENCE SUBMITTED WITH REPLY PAPERS SHOULD HAVE BEEN CONSIDERED, NEGLIGENT MAINTENANCE CAUSE OF ACTION PROPERLY SURVIVED SUMMARY JUDGMENT IN THIS PLAYGROUND INJURY CASE.

The Second Department determined Supreme Court should have considered evidence submitted by the defendant in its reply papers and further determined that the negligent maintenance cause of action properly survived summary judgment in this playground injury case. Infant plaintiff was injured when she fell from playground equipment during recess. The negligent supervision cause of action was dismissed. But there was evidence the area beneath the playground equipment was dangerous: "[W]e disagree with the Supreme Court's decision to not consider the evidence submitted by the defendant in its reply papers. 'The function of reply papers is to address arguments made in opposition to the position taken by the movant, not to introduce new arguments or new grounds for the requested relief' ... . The evidence submitted by the defendant in its reply papers addressed arguments made by the plaintiff and the plaintiff's expert in opposition to its

motion. Thus, the court should have considered the evidence. ... The defendant also established its prima facie entitlement to judgment as a matter of law dismissing so much of the complaint as alleged negligent maintenance of its premises by submitting evidence which demonstrated that it adequately maintained the playground, and that it did not create an unsafe or defective condition ... . In opposition, however, the plaintiff raised a triable issue of fact by the submission of her expert's affidavit which opined, in part, that the ground cover beneath the apparatus from which the plaintiff fell was inherently dangerous as installed and/or maintained, because it did not meet standards established by the Consumer Product Safety Commission (see General Business Law § 399-dd)." ***Boland v. North Bellmore Union Free Sch. Dist.*, 2019 N.Y. Slip Op. 00849, Second Dept 2-6-19**

PERSONAL INJURY, EDUCATION-SCHOOL LAW, MUNICIPAL LAW.

ALTHOUGH THE CITY OWED A SPECIAL DUTY TO A STUDENT WHO WAS STRUCK BY A CAR ATTEMPTING TO CROSS THE ROAD, THAT DUTY WAS FULFILLED WHEN THE CROSSING GUARD TOLD THE STUDENT TO WALK TO THE NEXT AVAILABLE CROSSWALK, THE STUDENT, HOWEVER, THEN ATTEMPTED TO CROSS WHERE THERE WAS NO CROSSWALK.

The Second Department determined the city's motion for summary judgment in this traffic accident case involving a student who had just left school was properly granted. The city owed a special duty to the student-plaintiff. A school crossing guard had stopped the plaintiff from crossing the street where there was no crosswalk and told her to walk to the next crosswalk. The plaintiff, however, attempted to cross where there was no crosswalk and was hit by a car. Any alleged negligent supervision was not the proximate cause of the student's injury: "[A] special duty existed between the City defendants' crossing guard and the infant plaintiff ... . Nevertheless, given that the crossing guard, inter alia, told the infant plaintiff to not cross 7th Avenue at an unsafe location and pointed the infant plaintiff to the crosswalk at 19th Street, the City defendants established, prima facie, that its employees did not breach their duty to the infant plaintiff. Moreover, the City defendants, while under a duty to adequately supervise the students in their charge, are not insurers of their safety ... . The evidence submitted by the City defendants established, prima facie, that the infant plaintiff crossed 7th Avenue in the middle of the block where there was no intersection or crosswalk, and no traffic device affording her a right-of-way. Additionally, the infant plaintiff admitted that she attempted to cross the road 'fast,' and that she did not look for oncoming traffic. Where an accident occurs so quickly that even the most intense supervision could not have prevented it, any lack of supervision is not a proximate cause of the injury ...". ***K.A. v. City of New York*, 2019 N.Y. Slip Op. 00861, Second Dept 2-6-19**

PERSONAL INJURY, EVIDENCE.

DEFENDANTS DID NOT DEMONSTRATE THEY LACKED CONSTRUCTIVE NOTICE OF CRUMBLING ASPHALT, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT IN THIS SLIP AND FALL CASE SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined defendants did not demonstrate they lacked constructive notice of the crumbling asphalt around a sewer grate in this slip and fall case. Defendants' motion for summary judgment should not have been granted: "A property owner, or a party in possession or control of real property, has a duty to maintain the property in a reasonably safe condition ... . In a premises liability case, a defendant who moves for summary judgment has the initial burden of making a prima facie showing that it neither created the condition that allegedly caused the accident nor had actual or constructive notice of its existence... . 'To provide constructive notice, a dangerous condition must be visible and apparent and must exist for a sufficient length of time before the accident to permit the defendant to discover and remedy it' ... . Here, the evidence submitted in support of the defendants' motion demonstrated, prima facie, that they did not have actual notice of the alleged dangerous condition, but failed to eliminate triable issues of fact as to whether they created the condition or had constructive notice of it ...". ***Stepkowski v. Holy Trinity Diocesan High Sch.*, 2019 N.Y. Slip Op. 00924, Second Dept 2-6-19**

PERSONAL INJURY, EVIDENCE, CIVIL PROCEDURE.

SANCTIONS FOR SPOLIATION OF VIDEOTAPE IN THIS SLIP AND FALL CASE SHOULD NOT HAVE BEEN IMPOSED.

The Second Department, reversing Supreme Court, determined defendant store (Fairway) should not have been sanctioned (adverse inference jury instruction) for spoliation of evidence, i.e., videotape depicting areas outside the store. Plaintiff slipped and fell on ice in an area near the entrance to the store. The videotape from the camera which captured the fall was provided to plaintiff. The videotape from the other cameras depicting other areas outside the store was not preserved: "The plaintiff's January 3, 2013, letter specifically requested that Fairway preserve 'any and all video footage depicting the location of my client's accident.' Ten hours of video footage depicting the exact location of the accident before the fall occurred, including footage of the accident itself, were preserved by Fairway and subsequently disclosed to the plaintiff. The plaintiff did not initially request that video footage of other locations also be preserved, so Fairway was not on notice that such footage might be needed for future litigation ... . In addition, the plaintiff has not established that the absence of such footage deprived her of the ability to prove her case ... . Under these circumstances, the plaintiff did not establish that

sanctions against Fairway were warranted ...". ***Sarris v. Fairway Group Plainview, LLC*, 2019 N.Y. Slip Op. 00922, Second Dept 2-5-19**

PERSONAL INJURY, MEDICAL MALPRACTICE, EVIDENCE.

PLAINTIFF'S EXPERT DID NOT LAY A FOUNDATION FOR AN OPINION ABOUT THE PROXIMATE CAUSE OF PLAINTIFF'S INJURY, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT IN THIS MEDICAL MALPRACTICE ACTION SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined defendants' motion for summary judgment in this medical malpractice action should have been granted. Plaintiff was treated by an ophthalmologist for eye pain. The doctor suspected glaucoma. Six months later plaintiff was diagnosed with meningioma, a noncancerous tumor of the membranes surrounding the brain. Plaintiff's expert did not lay a foundation for an opinion that the meningioma could have been treated with radiation, rather than surgery, had it been discovered earlier: " 'While it is true that a medical expert need not be a specialist in a particular field in order to testify regarding accepted practices in that field . . . the witness nonetheless should be possessed of the requisite skill, training, education, knowledge or experience from which it can be assumed that the opinion rendered is reliable' ... . 'Thus, where a physician opines outside his or her area of specialization, a foundation must be laid tending to support the reliability of the opinion rendered' ... . Here, the plaintiff's expert, who was board certified in ophthalmology, was qualified to, and did, raise a triable issue of fact as to whether [defendants] deviated from the accepted standard of care in failing to refer the plaintiff to a neurologist to further evaluate his symptoms. However, the affidavit was insufficient to establish that the plaintiff's meningioma could have been treated by radiation instead of surgery if it had been detected in November 2014. The plaintiff's expert failed to articulate that he had any training in the treatment of meningiomas or what, if anything, he did to familiarize himself with the applicable standard of care. The affidavit, therefore, lacked probative value and failed to raise a triable issue of fact as to whether any departure from the accepted standard of care proximately caused the plaintiff's injuries ...". ***Simpson v. Edghill*, 2019 N.Y. Slip Op. 00923, Second Dept 2-6-19**

THIRD DEPARTMENT

ARBITRATION, MUNICIPAL LAW, CIVIL PROCEDURE, CONTRACT LAW.

COLLATERAL ESTOPPEL CONTROLLED THIS ARBITRATION PROCEEDING TO DETERMINE HEALTH BENEFITS FOR RETIRED FIREFIGHTERS PURSUANT TO THE COLLECTIVE BARGAINING AGREEMENT.

The Third Department, reversing Supreme Court, over a dissent, determined that collateral estoppel controlled this proceeding concerning firefighter health benefits as provided for in the collective bargaining agreement (CBA). The issue had been resolved in prior arbitration proceedings for firefighters who had retired before 2010. The instant proceeding was brought on behalf of firefighters who have or will retire after 2010: "Arbitration awards are entitled to collateral estoppel effect and will bar a party from relitigating a material issue or claim resolved in the arbitration proceeding after a full and fair opportunity to litigate ... . It is undisputed that the arbitration award, rendered after a formal evidentiary hearing at which the parties were represented by counsel, afforded defendant a full and fair opportunity to litigate the issues therein. Accordingly, the only question is whether plaintiffs, as the parties seeking to invoke collateral estoppel, satisfied their burden of 'show[ing] the identity of the issues' between those resolved in the arbitration awards and those in play here ... . * * * The 2010 and 2012 arbitration awards were never vacated — indeed, the 2012 award was confirmed — and are binding. Inasmuch as plaintiffs retired during the period that the reimbursement was provided to retirees under CBAs containing section 27.1, the finding in those awards 'that [defendant] is obligated to reimburse retired firefighters for these payments under the CBA is dispositive of the claims raised here' ...". ***Holloway v. City of Albany*, 2019 N.Y. Slip Op. 00940, Third Dept 2-7-19**

RETIREMENT AND SOCIAL SECURITY LAW, EVIDENCE.

FINDING THAT PETITIONER'S BACK INJURY WAS NOT RELATED TO THE ACCIDENT WAS NOT SUPPORTED BY THE EXPERT TESTIMONY.

The Third Department, reversing the comptroller, determined the petitioner, a police crossing guard, was entitled to disability benefits resulting from her being struck by a car. The finding that petitioner's back injuries were not related to the accident was not supported by the record: "[I]nasmuch as the parties concede that petitioner is permanently incapacitated from performing her duties, the only issue to be resolved is whether she met her burden of demonstrating that her back injuries were causally related to the ... accident... . Notably, the medical experts who examined petitioner all agreed that she suffers from degenerative disc disease of the lumbar spine, including spinal stenosis and disc displacement. These experts, however, provided conflicting medical opinions as to the cause of petitioner's disabling back condition. Although the Comptroller retains the authority to resolve conflicting medical opinions and to credit the opinion of one expert over another ... , the credited expert must articulate a 'rational and fact-based opinion founded upon a physical examination and review of the pertinent medical records' ...". ***Matter of Petras-Ross v. DiNapoli*, 2019 N.Y. Slip Op. 00939, Third Dept 2-7-19**

WORKERS' COMPENSATION.

CLAIMANT'S MATTER WAS FULLY CLOSED AND WAS PROPERLY TRANSFERRED TO THE SPECIAL FUND FOR REOPENED CASES, DESPITE CONTINUING PAYMENTS FOR MEDICAL CARE AND TREATMENT.

The Third Department determined claimant's matter had been fully closed and was properly transferred to the Special Fund for Reopened Cases, despite continuing payments for medical care and treatment: "There is no dispute that the statutory time periods set forth in Workers' Compensation Law § 25-a were satisfied; claimant was injured in September 2005 and the last payment of compensation was made in October 2006. Accordingly, the sole issue is whether the Board's finding of a true closure in this matter is supported by substantial evidence. In this regard, 'compensation' is defined as 'the money allowance payable to an employee or to his [or her] dependents'... . As this Court previously has held, such allowance 'does not include payments for medical treatment or care' ... Further, 'the payment for continuing medical care does not bar the transfer of liability under Workers' Compensation Law § 25-a'... , and neither the potential liability for future treatment nor the possibility that claimant's condition could deteriorate — resulting in the subsequent reopening of the case — 'mean[s] that the matter was not fully closed' ...". ***Matter of Guillen v. Tulley Constr.*, 2019 N.Y. Slip Op. 00945, Third Dept 2-7-19**

FOURTH DEPARTMENT

CIVIL RIGHTS LAW, ATTORNEYS, CIVIL PROCEDURE.

PLAINTIFF'S ACTION WAS NOT FRIVOLOUS WITHIN THE MEANING OF 42 U.S.C. § 1988, PREVAILING PARTY SHOULD NOT HAVE BEEN AWARDED ATTORNEY'S FEES.

The Fourth Department, reversing Supreme Court, determined the award of attorney's fees to the prevailing party pursuant to 42 U.S.C. § 1988 based upon the finding that plaintiff's action was frivolous should not have been granted. Plaintiff sued the county claiming that her employment was terminated in retaliation for her complaints about the special education provided to her son: "The court granted the motion on the basis of 42 USC § 1988, which authorizes the award of attorneys' fees to a prevailing defendant 'upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation" ... . Nonetheless, it remains ' very rare [for] victorious defendants in civil rights cases [to] recover attorneys' fees' ... . Here, in determining that plaintiff's claim against Whittemore [the county personnel director] was frivolous, the court relied on plaintiff's testimony during her deposition. During her deposition, however, plaintiff specifically stated that the factual basis for her claim against Whittemore was that he was the personnel director and his conduct caused injury to her because he allowed someone else to be placed in the position to which she sought to be reinstated. Contrary to the court's determination, any inability of plaintiff to provide further elaboration during her deposition, which was taken early in the litigation shortly after commencement of the action, did not establish that her claim against Whittemore was frivolous. Moreover, a claim may not 'be deemed groundless where [, as here,] the plaintiff has made a sufficient evidentiary showing to forestall summary judgment and has presented sufficient evidence at trial to prevent the entry of judgment against him [or her] as a matter of law' ... . Although the civil rights allegations against Whittemore may have been weak, we cannot deem plaintiff's claim 'frivolous, unreasonable, or without foundation' ...". ***Calhoun v. County of Herkimer*, 2019 N.Y. Slip Op. 01025, Fourth Dept 2-8-19**

CRIMINAL LAW, APPEALS.

THE WAIVER OF INDICTMENT WAS JURISDICTIONALLY DEFECTIVE BECAUSE IT DID NOT INCLUDE THE APPROXIMATE TIME AND PLACE OF THE OFFENSES, THIS IS A MODE OF PROCEEDINGS ERROR, PLEA TO THE SUPERIOR COURT INFORMATION VACATED.

The Fourth Department, in a full-fledged opinion by Justice NeMoyer, reversing the conviction by guilty plea, determined the waiver of indictment was jurisdictionally defective in that there was no indication of the time and date of the alleged offenses (rape). Although defendant had waived his right to appeal, the Fourth Department vacated his guilty plea: "[T]he written waiver does not contain any data whatsoever regarding the 'date and approximate time and place of each offense to be charged in the superior court information,' as explicitly required by CPL 195.20. Notwithstanding that defect, County Court determined that the written waiver 'fully complie[d] with the provisions of Sections 195.10 and 195.20 of the Criminal Procedure Law' and approved it accordingly (see CPL 195.30 [requiring judicial approval of indictment waiver upon determination that it complies with CPL 195.10 and 195.20]). The ensuing SCI [superior court information] charged defendant with two counts of second-degree rape under Penal Law § 130.30 (1). Count one alleged that defendant, 'between approximately September 1, 2013 and September 9, 2013, in the City of Batavia, County of Genesee, State of New York, being eighteen years old or more, engaged in sexual intercourse with another person less than fifteen years old.' Count two alleged that defendant, 'on a second occasion between approximately September 1, 2013 and September 9, 2013, in the City of Batavia, County of Genesee, State of New York, being eighteen years old or more, engaged in sexual intercourse with another person less than fifteen years old.' * * * Because 'an infringement of defendant's right to be prosecuted only by indictment implicates the jurisdiction of the court' ... , the Court of Appeals has repeatedly stressed that the '[f]ailure to

adhere to the statutory procedure for waiving indictment' is a 'jurisdictional[defect] affecting the organization of the court or the mode of proceedings prescribed by law' ...". ***People v. Colon-colon*, 2019 N.Y. Slip Op. 01039, Fourth Dept 2-8-19**

CRIMINAL LAW, EVIDENCE.

DEFENDANT WAS ENTITLED TO A JURY INSTRUCTION ON THE JUSTIFICATION DEFENSE IN THIS ASSAULT CASE, EVEN THOUGH THE DEFENDANT DENIED ASSAULTING THE VICTIM AT TRIAL.

The Fourth Department determined defendant was entitled to a new trial on the assault count because the jury was not instructed on the justification defense. The court noted that the instruction was required even though the defendant denied the assault: "Here, defendant testified at trial that the altercation was an unprovoked attack by a number of correction officers in retaliation for earlier grievances he had lodged against prison staff. Defendant testified that he felt 'trapped' by the attack and started biting another correction officer in self-defense. Correction officers who witnessed the altercation testified that the two officers involved in the altercation were engaged in a prolonged 'struggle' with defendant, during which the three men 'wrestl[ed] pretty hard.' Although defendant denied causing the injuries of the subject correction officer, that officer testified that defendant did cause his injuries. Contrary to the People's contention, defendant was entitled to a justification charge, even though at trial he denied assaulting the subject correction officer, and argued that the People failed to prove that he possessed the pen used to injure the subject correction officer. '[A] defendant's entitlement to a charge on a claimed defense is not defeated solely by reason of its inconsistency with some other defense raised or even with the defendant's outright denial that he was involved in the crime' ... . Rather, '[a] jury may believe portions of both the defense and prosecution evidence . . . and still find . . . that defendant acted justifiably' ...". ***People v. Brown*, 2019 N.Y. Slip Op. 01023, Fourth Dept 2-8-19**

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

NO SHOWING THAT POST TRAUMATIC STRESS DISORDER OR A TRAUMATIC BRAIN INJURY INCREASED THE RISK OF REOFFENSE, FOURTH DEPARTMENT EXERCISED ITS OWN DISCRETION AND REDUCED DEFENDANT'S RISK LEVEL FROM TWO TO ONE.

The Fourth Department, reversing County Court, determined that defendant should have been adjudicated a level one, not a level two risk: "Although defendant was diagnosed with PTSD [post traumatic stress disorder] and may have sustained a TBI traumatic brain injury], the record is devoid of evidence that any such mental impairment 'is causally related to a[ ] risk of reoffense' ... . Nor is the continuing nature of the crime sufficient to support the upward departure because, even if additional points were assessed for risk factor 4, i.e., continuing course of sexual misconduct, defendant's total risk factor score would not result in defendant's classification as a presumptive level two risk ... . Further, there is no basis for an upward departure where, as here, the alleged aggravating factor is adequately taken into account by the risk assessment guidelines ... . Finally, although we conclude that defendant's actions in taking the victim across state lines constitute an aggravating factor that is, 'as a matter of law, of a kind or to a degree not adequately taken into account by the [risk assessment] guidelines' ... , we further conclude that the court improvidently exercised its discretion in granting an upward departure based on that factor under the circumstances of this case. We therefore substitute our own discretion ...". ***People v. Logsdon*, 2019 N.Y. Slip Op. 00998, Fourth Dept 2-8-19**

ENVIRONMENTAL LAW, CIVIL PROCEDURE, APPEALS.

PETITIONERS DID NOT TAKE STEPS TO PRESERVE THE STATUS QUO AND THE POWER PLANT BECAME OPERATIONAL AT THE OUTSET OF THE MOTION PRACTICE SEEKING TO VACATE CERTAIN PERMITS WHICH ALLOWED THE PLANT TO RESUME OPERATIONS, THE APPEAL WAS DEEMED MOOT AND THE PETITION WAS DISMISSED.

The Fourth Department determined that Sierra Club's petition seeking to vacate permits issued to allow respondents to operate a natural gas and biomass power plant, which was formerly coal-powered, was properly dismissed as moot. Petitioner's did not seek a temporary restraining order or other measures to preserve the status quo. The plant became operational while the motion seeking temporary injunctive relief was pending: "We agree with respondents that the appeal should be dismissed as moot ... . Litigation over construction is rendered moot when the progress of the work constitutes a change in circumstances that would prevent the court from ' rendering a decision that would effectively determine an actual controversy' ' ... . In addition to the progress of the construction, other factors relevant to evaluating claims of mootness are whether the party challenging the construction sought injunctive relief, whether the 'work was undertaken without authority or in bad faith' ..., and whether 'substantially completed work' can be undone without undue hardship... . The primary factor in the mootness analysis is 'a challenger's failure to seek preliminary injunctive relief or otherwise preserve the status quo to prevent construction from commencing or continuing during the pendency of the litigation'... . Generally, a petitioner seeking to halt a construction project must 'move for injunctive relief at each stage of the proceeding' ... . The plant has been operating lawfully since March 2017. The failure to preserve the status quo is entirely the fault of petitioners, who waited until the last possible day to commence this proceeding, failed to request a TRO, failed to pursue an injunction with any urgency, waited until the last possible day to take an appeal, spent nine months perfecting the appeal, and failed to

seek injunctive relief from this Court until approximately one year after the entry of the judgment, in a transparent attempt to avoid dismissal of this appeal." ***Matter of Sierra Club v. New York State Dept. of Envtl. Conservation*, 2019 N.Y. Slip Op. 01022, Fourth Dept 2-8-19**

FAMILY LAW.

CHILD SUPPORT STANDARDS ACT (CSSA) WAS INCORRECTLY APPLIED TO INCOME ABOVE THE STATUTORY CAP.

The Fourth Department, reversing (modifying) Supreme Court, determined that the court did not correctly apply the Child Support Standards Act (CSSA): "[T]he court erred in applying the Child Support Standards Act (CSSA) to the combined parental income in excess of the statutory cap ... . It is well settled that 'blind application of the statutory formula to [combined parental income] over [the statutory cap], without any express findings or record evidence of the [child's] actual needs, constitutes an abdication of judicial responsibility and renders meaningless the statutory provision setting a cap on strict application of the formula'... . Here, in awarding child support on income above the statutory cap, the court considered only the father's financial situation. '[T]he court made no factual findings that the child[ ] [had] financial needs that would not be met unless child support were ordered to be paid out of parental income in excess of [the statutory cap],' and we conclude that, 'even if the court had made such a finding, there is no evidence in the record to support it' ... . Therefore, in the exercise of our discretion, we fix the father's basic child support obligation on the basis of the combined parental CSSA income up to the cap amount ...". ***Benedict v. Benedict*, 2019 N.Y. Slip Op. 01042, Fourth Dept 2-8-19**

FAMILY LAW, CRIMINAL LAW.

ORDER OF PROTECTION ISSUED IN THE CRIMINAL PROCEEDING PROHIBITING CONTACT BETWEEN FATHER AND DAUGHTER SHOULD BE SUBJECT TO ANY SUBSEQUENT CUSTODY OR VISITATION ORDERS BY FAMILY OR SUPREME COURT.

The Fourth Department determined the order of protection prohibiting contact between father and daughter should be subject to orders of Family or Supreme Court: "Here, the order of protection issued in this criminal proceeding bars all contact between defendant and his child, and cannot be modified by a subsequent visitation order of Family Court or Supreme Court unless it is first modified or vacated by the criminal court ... . We agree with defendant that, under the circumstances of this case, the order of protection should be subject to any subsequent orders of custody and visitation, and we therefore modify the judgment by amending the order of protection in favor of defendant's biological daughter so that contact will be allowed if ordered by Family or Supreme Court in a custody, visitation or child abuse or neglect proceeding ...". ***People v. Smart*, 2019 N.Y. Slip Op. 01043, Fourth Dept 2-8-19**

FRAUD, CIVIL PROCEDURE.

ALLEGATIONS OF COMPENSABLE DAMAGES INSUFFICIENT, MOTION TO DISMISS FRAUD COMPLAINT SHOULD HAVE BEEN GRANTED.

The Fourth Department, reversing Supreme Court, determined the motion to dismiss fraud causes of action should have been granted because the allegation of compensable damages was deficient. "Plaintiff, a debt buying company, commenced this action alleging ... [defendants] fraudulently induced it to purchase additional debt portfolios pursuant to its agreements with a third party by misrepresenting the terms of the financing arrangement secured by defendants to facilitate the purchase of such portfolios; 'To allege a cause of action based on fraud, plaintiff must assert a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury' ... . 'The true measure of damage is indemnity for the actual pecuniary loss sustained as the direct result of the wrong' or what is known as the out-of-pocket' rule' ... . 'Under this rule, the loss is computed by ascertaining the difference between the value of the bargain which . . . plaintiff was induced by fraud to make and the amount or value of the consideration exacted as the price of the bargain' ... . Here, we conclude that, even as supplemented by the affidavit of plaintiff's president ... , 'plaintiff's pleading is fatally deficient because [it] did not assert compensable damages resulting from defendants' alleged fraud' ... . With respect to the purchase of the subject portfolios, plaintiff received an interest therein worth more than the amount of its alleged investment ... . Further, contrary to plaintiff's contention, the allegation that it lost the enhanced collections on the portfolios that defendants purportedly told it that it could receive under the terms of the financing arrangement is a 'quintessential lost opportunity, which is not a recoverable out-of-pocket loss'... . 'Damages are to be calculated to compensate plaintiff[] for what [was] lost because of the fraud, not to compensate . . . for what . . . might have [been] gained . . . [T]here can be no recovery of profits which would have been realized in the absence of fraud' ...". ***Southwestern Invs. Group, LLC v. JH Portfolio Debt Equities, LLC*, 2019 N.Y. Slip Op. 01035, Fourth Dept 2-8-19**

LABOR LAW-CONSTRUCTION LAW, TAX LAW.

CLASSIFICATION OF THE PROPERTY AS COMMERCIAL IN TAX FILINGS DID NOT PRECLUDE THE APPLICABILITY OF THE ONE-OR-TWO-FAMILY HOME EXEMPTION TO LABOR LAW § 240(1).

The Fourth Department, reversing (modifying) Supreme Court, determined that defendant's (Artifact's) motion for summary judgment on the Labor Law § 240(1) cause of action should have been granted. The one-or-two-family home exemption applied, even though the property was classified as commercial in tax filings: "Contrary to plaintiff's contention, Artifact's classification of the property as commercial in certain tax filings does not estop it from relying upon the exemption in this action ... . The Internal Revenue Code's definition of a residential property is considerably narrower than the scope of the one- or two-family home exemption to liability under section 240 (1) ... , and, as such, Artifact's tax declarations are not 'logically incompatible' with its current reliance upon that exemption ...". ***Wood v. Artifact Props., LLC*, 2019 N.Y. Slip Op. 01030, Fourth Dept 2-8-19**

LIEN LAW, CONTRACT LAW.

COUNTERCLAIM ALLEGING PLAINTIFFS' BREACH OF A HOME IMPROVEMENT CONTRACT WAS NOT VIABLE BECAUSE DEFENDANT CONTRACTORS DID NOT COMPLY WITH THE MECHANIC'S LIEN NOTICE REQUIREMENT OF GENERAL BUSINESS LAW § 771, PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT ON THEIR LIEN LAW CAUSE OF ACTION SHOULD HAVE BEEN GRANTED.

The Fourth Department, reversing (modifying) Supreme Court, determined that defendants-contractors' breach of contract counterclaim should have been dismissed because defendants did not provide the mechanic's lien notice required by General Business Law § 771 and summary judgment on plaintiffs' Lien Law cause of action should have been granted. The action concerned home improvement work done by defendants. The notice failure did not preclude defendants' recovery pursuant to quantum meruit: "[P]laintiffs established that the contract at issue failed to comply with General Business Law § 771 inasmuch as it did not 'contain the following notice to the owner in clear and conspicuous bold face type: Any contractor, subcontractor, or materialman who provides home improvement goods or services pursuant to your home improvement contract and who is not paid may have a valid legal claim against your property known as a mechanic's lien' ... [The] failure 'to enter into a signed written home improvement contract in conformity with General Business Law § 771 bars recovery based upon breach of contract' ... . Plaintiffs met their initial burden [on their Lien Law cause of action] ... by establishing that ... defendants possessed trust funds within the meaning of the Lien Law and failed to keep the records required by that statute. Lien Law § 75 (4) provides that the '[f]ailure of the trustee to keep the books or records required by th[at] section shall be presumptive evidence that the trustee has applied or consented to the application of trust funds actually received by him [or her] . . . for purposes other than a purpose of the trust as specified in section seventy-one of this chapter' The evidence submitted by ... defendants in opposition to the motion ... supported the conclusion that they neglected to comply with the ... requirements of Lien Law § 75 ...". ***Weiss v. Zellar Homes, Ltd.*, 2019 N.Y. Slip Op. 01024, Fourth Dept 2-8-19**

PERSONAL INJURY, JUDGES.

JUDGE SHOULD NOT HAVE GRANTED RELIEF WHICH WAS NOT REQUESTED IN THE MOTION PAPERS, QUESTIONS OF FACT PRECLUDED SUMMARY JUDGMENT ON SOME ISSUES IN THIS SLIP AND FALL CASE.

The Fourth Department, reversing (modifying) Supreme Court, determined questions of fact precluded summary judgment on some issues in this slip and fall case. The decision addresses too many issues to fairly summarize here. The court noted that Supreme Court should not have granted relief (dismissal of cross-claims) not requested in the motion papers. Plaintiff slipped and fell on ice in a delivery area behind defendant Cafe in a plaza owned by defendant Pixley. There was some evidence the Cafe exercised control over at least part of the delivery area (snow removal): "[W]e conclude that the court erred in granting that part of the Café's motion for summary judgment dismissing the complaint against it insofar as the complaint alleges that the Café had constructive notice of the icy condition; the court also erred in denying that part of Pixley's motion for summary judgment dismissing the complaint against it insofar as the complaint alleges that Pixley had actual notice of the icy condition." ***Johnson v. Pixley Dev. Corp.*, 2019 N.Y. Slip Op. 01040, Fourth Dept 2-8-19**

REAL PROPERTY TAX LAW (RPTL), CIVIL PROCEDURE.

EXTENSION OF TIME TO FILE A MOTION TO VACATE A TAX FORECLOSURE JUDGMENT SHOULD NOT HAVE BEEN GRANTED, CPLR 2004 DOES NOT APPLY TO TIME LIMITS SPECIFICALLY CALLED FOR IN THE REAL PROPERTY TAX LAW (RPTL).

The Fourth Department, reversing Supreme Court, determined respondents' motion to vacate a tax foreclosure judgment should not have been granted. The court noted that an extension of time pursuant to CPLR 2004 should not be granted where the Real Property Tax Law addresses the issue: "We further ... with petitioner that the court erred in granting respondents' implicit request for an extension of time to bring the motion (see CPLR 2004). The Court of Appeals has emphasized that, '[a]s a general rule, there should be no resort to the provisions of the CPLR in instances where the [RPTL] expressly

covers the point in issue' ... . We conclude that RPTL article 11 comprehensively addresses the situation where a default judgment of foreclosure is properly obtained and the defaulting property owner seeks to reopen the default and, therefore, such property owner 'may not reach outside of the RPTL to [reopen] such a proceeding'... . More particularly, RPTL 1131 expressly covers the point in issue here inasmuch as it provides, in unambiguous and prohibitory language, that '[a] motion to reopen any such default may not be brought later than one month after entry of the judgment' … . To countenance resort to CPLR 2004 under these circumstances would undermine the statutory scheme established by the legislature and erode the finality of foreclosure proceedings even after a defaulting property owner has been afforded due process ...". ***Matter of Foreclosure of Tax Liens By Proceeding In Rem Pursuant To Art. 11 of The Real Prop. Tax Law By The County of Wayne Relating To The 2015 Town & County Tax (Schenk),*** **2019 N.Y. Slip Op. 01029, Fourth Dept 2-8-19**

REAL PROPERTY TAX LAW (RPTL), MUNICIPAL LAW.

PERSONAL PROPERTY LOCATED ON REAL PROPERTY SUBJECT TO A TAX FORECLOSURE WAS NOT ABANDONED BY THE OWNER OF THE PERSONAL PROPERTY.

The Fourth Department, in a full-fledged opinion by Justice Troutman, reversing Supreme Court, determined respondent's application to vacate "that portion of a judgment of [tax} foreclosure that deemed respondent's personal property located at a foreclosed property to be abandoned to petitioner" should have been vacated. The petitioner-city foreclosed on real property which was not owned by the respondent. The respondent owned hundreds of auto parts which were on the foreclosed property: "[W]e agree with respondent that the court lacked jurisdiction to dispose of personal property. Supreme Court may exercise in rem jurisdiction over real property in a proceeding to foreclose a tax lien (see RPTL 1120 et seq.). A proceeding of that kind 'produces a judgment binding only on those who have been named as parties and duly notified—the usual understanding of what due process requires'... . '[T]he failure to substantially comply with the requirement of providing the taxpayer with proper notice constitutes a jurisdictional defect which operates to invalidate the sale or prevent the passage of title' ... . Here, petitioner did not provide notice to respondent with respect to respondent's personal property and could not have done so. The notice procedures in the statute relate to real property only, not personal property (see RPTL 1122-1125). Moreover, RPTL article 11 does not contain a mechanism by which the tax district may obtain a party's personal property upon that party's default. In the event of a default, the tax district is awarded 'possession of any parcel of real property described in the petition of foreclosure' and is entitled to a deed conveying to the tax district full and complete title to the parcel (RPTL 1136 [3] [emphasis added]). Upon the execution of the deed, any person with a right or interest 'in or upon such parcel shall be barred and forever foreclosed' of that right or interest (id. [emphasis added]). Nothing in RPTL article 11 confers upon Supreme Court in rem jurisdiction over personal property." ***Matter of The Foreclosure of Tax Liens By Proceeding In Rem Pursuant To Art. 11 of The Real Prop. Tax Law By The City of Utica (Suprunchik),*** **2019 N.Y. Slip Op. 01020, Fourth Dept 2-8-19**

To view archived issues of CasePrepPlus,
visit www.nysba.org/caseprepplus.