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COURT OF APPEALS

CIVIL PROCEDURE, APPEALS, SECURITIES, CONTRACT LAW.

TRUSTEE'S BREACH OF CONTRACT ACTION IN THIS RESIDENTIAL MORTGAGE BACKED SECURITIES CASE WAS TIME-BARRED, THE ACTION COULD NOT RELATE BACK PURSUANT TO CPLR 203 BECAUSE THE TIMELY ACTION BY ANOTHER PARTY WAS PRECLUDED BY THE CONTRACT, THE COURT OF APPEALS COULD NOT CONSIDER WHETHER THE ACTION WAS TIMELY PURSUANT TO CPLR 205, EVEN THOUGH THE ISSUE WAS ADDRESSED BY THE APPELLATE DIVISION, BECAUSE THE ISSUE WAS NOT FULLY ADDRESSED IN SUPREME COURT.

The Court of Appeals, in a full-fledged opinion by Judge Rivera, determined that the trustee's breach of contract action in this residential-mortgage-backed-securities securities case was time-barred. A certificate holder had filed a timely action, but the relevant contract precluded the action by the certificate holder. Therefore the trustee's action could not be deemed to relate-back to it (CPLR 203). The Court of Appeals could not consider whether the trustee's action was timely under CPLR 205, despite the fact that the Appellate Division addressed the issue, because the issue was not fully addressed by the parties in Supreme Court and the Court of Appeals does not have interest of justice jurisdiction: "CPLR 203 (f) has no application here because the certificate holder's pre-existing action was not valid. The lower courts concluded that under the no action clause, the certificate holder could not bring the action on behalf of itself, any other certificate holder, or the Trustee. Those conclusions are not at issue in this Court. Thus, the certificate holder's action was subject to dismissal, and there is no valid pre-existing action to which a claim in a subsequent amended pleading may relate back. The Trustee's contention that it may use the relation-back doctrine of CPLR 203 (f) to cure the certificate holder's lack of a right to sue, and that it may therefore avoid any problem with the identity of the plaintiff upon re-filing pursuant to CPLR 205 (a), is without merit." ***U.S. Bank Natl. Assn. v. DLJ Mtge. Capital, Inc.*, 2019 N.Y. Slip Op. 01168, CtApp 2-19-19**

CIVIL PROCEDURE, SECURITIES, CONTRACT LAW.

THE SOLE REMEDY PROVISION OF THE CONTRACT IN THIS RESIDENTIAL MORTGAGE BACKED SECURITIES CASE, WHICH REQUIRED THAT THE DEFENDANT BE NOTIFIED AND GIVEN THE OPPORTUNITY TO REPURCHASE DEFECTIVE MORTGAGES, WAS NOT COMPLIED WITH PRIOR TO THE RUNNING OF THE STATUTE OF LIMITATIONS, PLAINTIFF'S TIMELY COMPLAINT WAS PROPERLY DISMISSED WITHOUT PREJUDICE, DESPITE THE FAILURE TO COMPLY WITH THE SOLE REMEDY PROVISION, ALLOWING PLAINTIFF TO REFILE THE COMPLAINT WITHIN SIX MONTHS PURSUANT TO CPLR 205.

The Court of Appeals, in a full-fledged opinion by Judge Rivera, determined that the trustee's breach of contract action in the residential-mortgage-backed-securities (RMBS) case was properly dismissed without prejudice, allowing plaintiff to refile pursuant to CPLR 205 (which allows a suit to be refiled within six months of a dismissal that is not on the merits). The contractual sole remedy provision, which requires that the defendant (DLJ) be notified and given the opportunity to repurchase any mortgages deemed defective, was not be complied with and the timely complaint was dismissed for that reason: "As a general rule, under CPLR 205 (a) a subsequent action may be filed within six months of a non-merits dismissal of the initial timely-filed matter. Here, we conclude that CPLR 205 (a) applies to an RMBS trustee's second action when its timely first action is dismissed for failure to comply with a contractual condition precedent. * * * The difference between a procedural and substantive condition precedent is well-established. A condition precedent is substantive when it 'describe[s] acts or events which must occur before a party is obliged to perform a promise made pursuant to an existing contract'... . In other words, the condition is 'part of the cause of action and necessary to be alleged and proven, and without this no cause of action exist[s]' ... , RMBS notice and sole remedy provisions are not substantive elements of the cause of action, but instead limitations on the remedy for a breach of the mortgage loan representations and warranties ... . They serve as a precondition, 'a procedural prerequisite to suit,' not a separate undertaking by the trustee ... . Since notice and sole remedy provisions 'do[] not create a substantive condition precedent' ... , they do not affect when the statute of limitations commences because the limitations clock begins to run when the contract is executed. Nevertheless, DLJ argues that the Trustee had to fulfill the procedural condition precedent before the limitations period expired, and its failure to do so rendered the original action untimely, such that a new action cannot be commenced pursuant to CPLR 205 (a). DLJ's argument cannot be reconciled

with our case law that a suit may be refiled pursuant to CPLR 205 (a) despite a plaintiff's failure to comply with a condition precedent prior to the expiration of the statute of limitations." ***U.S. Bank Natl. Assn. v. DLJ Mtge. Capital, Inc.*, 2019 N.Y. Slip Op. 01169, CtApp 2-19-19**

CRIMINAL LAW.

WHERE A DEFENDANT HAS BEEN RESENTENCED BECAUSE THE ORIGINAL SENTENCE WAS ILLEGAL, THE DATE OF THE ORIGINAL SENTENCE CONTROLS FOR DETERMINATION OF PREDICATE FELONY STATUS.

The Court of Appeals, in a full-fledged opinion by Judge Stein, over a three-judge dissent, reversing the Appellate Division, determined that, where a defendant has been resentenced because the original sentence was illegal, the date of the original sentence, not the subsequent resentence, controls for the purpose of determining predicate felony status: "[D]efendant's proffered interpretation of Penal Law § 70.06 is not supported by the plain language of that provision, its well-established legislative purpose, or our precedent. Therefore, because the original sentences on defendant's 1989 convictions were imposed before commission of the present felony, the sequentiality requirement of the predicate felony statute was satisfied, and defendant was properly sentenced as a second felony offender." ***People v. Thomas*, 2019 N.Y. Slip Op. 01167, CtApp 2-19-19**

CRIMINAL LAW, EVIDENCE.

MONITORING AND RECORDING PHONE CALLS MADE BY PRETRIAL DETAINEES WHO ARE NOTIFIED THE CALLS ARE MONITORED AND RECORDED DOES NOT VIOLATE THE FOURTH AMENDMENT, THE RECORDINGS MAY BE SHARED WITH LAW ENFORCEMENT AND PROSECUTORS WITHOUT A WARRANT.

The Court of Appeals, in a full-fledged opinion by Judge Feinman, over a two-judge dissent, determined recording phone conversation of pretrial detainees who are notified the calls are monitored and recorded does not violate the Fourth Amendment. Therefore such recordings can be shared with law enforcement and prosecutors: "[W]here detainees are aware that their phone calls are being monitored and recorded, all reasonable expectation of privacy in the content of those phone calls is lost, 'and there is no legitimate reason to think that the recordings, like any other evidence lawfully discovered, would not be admissible' ... . Moreover, the signs posted near the telephones used by the inmates state that calls are monitored in 'accordance with DOC policy' which, according to the DOC Operations Order, provides that while recordings are confidential and not available to the public, the District Attorney's Office may request a copy of an inmate's recorded calls which will be provided upon approval by DOC ... . We therefore reject defendant's argument that he retained a reasonable expectation of privacy once the calls were lawfully intercepted by DOC and hold that there were no additional Fourth Amendment protections that would prevent DOC from releasing the recording to the District Attorney's Office absent a warrant." ***People v. Diaz*, 2019 N.Y. Slip Op. 01260, CtApp 2-19-19**

CRIMINAL LAW, MENTAL HYGIENE LAW.

COURT RECORDS RELATED TO PROCEEDINGS FOR THE COMMITMENT AND RETENTION OF DANGEROUS MENTALLY ILL ACQUITTEES ARE NOT CLINICAL RECORDS AND THEREFORE ARE NOT SUBJECT TO THE AUTOMATIC SEALING REQUIREMENT IN THE MENTAL HYGIENE LAW.

The Court of Appeals, in a full-fledged opinion by Judge DiFiore, determined that the records of Criminal Procedure Law § 330.20 proceedings related to the commitment and retention of insanity acquittees (suffering from a dangerous mental disorder) are not "clinical records" within the meaning of the Mental Hygiene Law and, therefore, are not subject to the automatic sealing requirement: "The plain text of Mental Hygiene Law § 33.13 ... cuts against defendant's interpretation that the term 'clinical record' includes the entire record of court proceedings or dictates to a court how to manage its own records. * * * Throughout our history, 'the institutional value' of open judicial proceedings has fostered 'an appearance of fairness' ... and ensured 'the public interest in having proceedings of courts of justice public, not secret, for the greater security thus given for the proper administration of justice' ... . Interpreting Mental Hygiene Law § 33.13, despite the absence of any supporting statutory language, to provide a blanket sealing requirement of an entire court record that is automatically conferred disregards that tradition. In balancing the privacy rights of a defendant with the public's right to know how dangerous mentally ill acquittees are managed by the courts, the legislature eschewed an automatic sealing requirement of the court record. We refuse to disturb that balance today. Here, defendant demanded an automatic seal in stark contrast to a case specific analysis that demands a court to find good cause sufficient to rebut the legislative presumption of public access for any sealing, in part or whole, upon due consideration of the competing and compelling interests of the public and the parties ...". ***Matter of James Q. (Commissioner of the Off. for People with Dev. Disabilities)*, 2019 N.Y. Slip Op. 01166, CtApp 2-19-19**

PERSONAL INJURY, MUNICIPAL LAW.

VILLAGE CODE PROVISION WHICH REQUIRES WRITTEN NOTICE OF A SIDEWALK DEFECT BEFORE MUNICIPAL LIABILITY CAN BE IMPOSED APPLIES TO A STAIRWAY FROM A PUBLIC ROAD TO A MUNICIPAL PARKING LOT, STAIRWAY SLIP AND FALL ACTION PROPERLY DISMISSED.

The Court of Appeals, over an extensive two-judge dissent, determined that the village code provision which requires written notice of a sidewalk defect before the village can be held liable applies to a stairway connecting a public road to a municipal parking lot. Because plaintiff did not plead or prove written notice of a stairway defect, plaintiff's slip and fall action was properly dismissed: "In Woodson v. City of New York, this Court determined that a stairway may be classified as a sidewalk for purposes of a prior written notice statute if it 'functionally fulfills the same purpose that a standard sidewalk would serve' (93 NY2d 936, 937-938 [1999] ...). * * * The courts below correctly applied Woodson in holding that the stairway at issue 'functionally fulfills the same purpose' as a standard sidewalk, and therefore plaintiff was required to show that the Village received prior written notice of the allegedly defective condition ...". ***Hinton v. Village of Pulaski*, 2019 N.Y. Slip Op. 01261, CtApp 2-21-19**

PERSONAL INJURY, TOXIC TORTS, CONTRACT LAW.

RELEASE SIGNED BY PLAINTIFF'S DECEDENT IN 1997 DID NOT ENTITLE CHEVRON TO SUMMARY JUDGMENT IN THIS ASBESTOS-MESOTHELIOMA CASE.

The Court of Appeals, in a full-fledged opinion by Judge Wilson, over a three-judge dissent, determined that defendant Chevron was not entitled to summary judgment in this asbestos-mesothelioma action. Plaintiff's decedent [Mr. South] signed a release in 1997 and Chevron argued the release precluded the subsequent lawsuit: "Like Supreme Court, the Appellate Division concluded that the record did not demonstrate Chevron's entitlement to summary judgment, because the release did not specifically mention mesothelioma, which then required the court to determine whether extrinsic evidence entitled Chevron to summary judgment. Pointing to the 'meager consideration' [$1,750] and the lack of any diagnosis of mesothelioma as to Mr. South at the time he settled, the Appellate Division concluded that the record left open the question of whether the release pertained to an existing pulmonary condition and the fear of some future asbestos-related disease, or if it was intended to release all future asbestos-related diseases arising from Mr. South's employment by Texaco. The parties agree that, at the time he executed the release, Mr. South suffered from a nonmalignant pulmonary disease but not from mesothelioma or cancer. ... The sole question presented to us on this appeal is whether Chevron has established that the release, coupled with the 1997 complaint, eliminates all material questions of fact and proves that the release bars the claims here as a matter of law. Answering that question requires us to consider the protections afforded to Mr. South by admiralty law and Section 5 of FELA [Federal Employers' Liability Act] (45 USC § 55), which is incorporated into the Jones Act by 46 USC § 30104. ... .. .[W]e conclude that Chevron has not met its burden to demonstrate the absence of any material question of fact." ***Matter of New York City Asbestos Litig.*, 2019 N.Y. Slip Op. 01259, CtApp 2-19-19**

FIRST DEPARTMENT

CIVIL RIGHTS LAW, MUNICIPAL LAW.

FOOTAGE FROM A POLICE OFFICER'S BODY-WORN CAMERA IS NOT A PERSONNEL RECORD AND THEREFORE IS NOT PROTECTED FROM DISCLOSURE BY CIVIL RIGHTS LAW § 50-a.

The First Department determined that footage from a police officer's body-worn camera was not a "personnel record" protected from disclosure by Civil Rights Law § 50-a: "While we recognize petitioner's valid concerns about invasion of privacy and threats to the safety of police officers, we are tasked with considering the record's general 'nature and use,' and not solely whether it may be contemplated for use in a performance evaluation. Otherwise, that could sweep into the purview of § 50-a many police records that are an expected or required part of investigations or performance evaluations, such as arrest reports, stop reports, summonses, and accident reports, which clearly are not in the nature of personnel records so as to be covered by § 50-a. We find that given its nature and use, the body-worn-camera footage at issue is not a personnel record covered by the confidentiality and disclosure requirements of § 50-a ... . The purpose of body-worn-camera footage is for use in the service of other key objectives of the program, such as transparency, accountability, and public trust-building. Although the body-worn-camera program was designed, in part, for performance evaluation purposes, and supervisors are required, at times, to review such footage for the purpose of evaluating performance, the footage being released here is not primarily generated for, nor used in connection with any pending disciplinary charges or promotional processes. New York Civil Liberties Union v. New York City Police Department, __NY3d__, 2018 N.Y. Slip Op. 8423 [2018], which involved disciplinary matters, does not constrain this analysis. The footage, here, rather, is more akin to arrest or stop reports, and not records primarily generated for disciplinary and promotional purposes. To hold otherwise would defeat the purpose of the body-worn-camera program to promote increased transparency and public accountability." ***Matter of Patrolmen's Benevolent Assn. of the City of N.Y., Inc. v. De Blasio*, 2019 N.Y. Slip Op. 01170, First Dept 2-19-19**

CONSUMER LAW.

SOLICITATIONS FOR NEWSPAPER AND MAGAZINE SUBSCRIPTIONS WERE MATERIALLY MISLEADING IN VIOLATION OF GENERAL BUSINESS LAW § 349, THE SOLICITATIONS IMPLIED THEY WERE SENT DIRECTLY FROM THE PUBLISHER.

The First Department, reversing Supreme Court, determined solicitations for newspaper and magazine subscriptions were materially misleading, violating the General Business Law and the Executive Law: "[W]e conclude as a matter of law that solicitations for newspaper and magazine subscriptions promulgated by respondents are materially misleading (... see generally General Business Law §§ 349; 350; Executive Law § 63[12]). The solicitations implied that they were sent directly from the publishers or their authorized agents and offered their lowest available rates. However, the record demonstrates that respondents had at best indirect relationships with publishers (some of whom expressly forbade respondents to sell their publications) and offered rates well above the standard subscription prices. ... The disclaimer on the back of the solicitations is insufficiently prominent or clear to negate the overall misleading impression that consumers are being offered standard publisher rates ... . The disclaimer appears on the back of the solicitation, is not referenced on the front, and consists of two dense paragraphs of block text all in the same typeface, making it unlikely to be read by consumers. In addition, the disclaimer either does not address or directly contradicts several claims made on the front of the solicitation, and its use of the term 'agent' implies a closer relationship with the publishers than respondents actually have." ***Matter of People of the State of N.Y. v. Orbital Publ. Group, Inc.*, 2019 N.Y. Slip Op. 01329, First Dept 2-21-19**

CRIMINAL LAW, EVIDENCE.

POLICE OFFICER WAS PROPERLY ALLOWED TO IDENTIFY DEFENDANTS AS THE PERSONS DEPICTED IN VIDEOTAPES.

The First Department noted that a police officer was properly allowed to identify defendants as persons depicted in videotapes: "The circumstances ... warranted testimony by the officer identifying defendants as persons depicted in videotapes ... . Notwithstanding the fact that defendants had not changed their appearance subsequent to having been videotaped, the testimony was permissible, because '[the] testimony served to aid the jury in making an independent assessment regarding whether the [men] in the [video] [were] indeed the defendant[s]'... . Furthermore, the circumstances suggested that the jury would be less able than the officer to determine whether the defendants were seen in the videotapes, given the poor quality of the surveillance tapes, which showed groups of young men, mostly from a distance, thus rendering his testimony appropriate ... . The trial court instructed the jurors that the officer's testimony concerning the identities of those seen on video was his opinion and that the ultimate identification determination belonged exclusively to the jury. Furthermore, none of the officer's testimony violated the hearsay rule or defendants' right of confrontation." ***People v. Pinkston*, 2019 N.Y. Slip Op. 01171, First Dept 2-19-19**

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA).

SORA COURT MAY HAVE OVERASSESSED THE RISK IN A STATUTORY RAPE CASE, MATTER REMITTED FOR PROPER APPLICATION OF THE CRITERIA ANNOUNCED BY THE COURT OF APPEALS IN PEOPLE v. GILLOTTI.

The First Department sent the matter back to the SORA court for further consideration of the request for a downward department where defendant was convicted of statutory rape: "In People v. Gillotti (23 NY3d 841 [2014]), the Court of Appeals outlined a three-step process for determining whether to grant a defendant's request for a downward departure. First, the hearing court is to determine whether alleged mitigating circumstances are 'of a kind or degree not adequately taken into account by the guidelines'... . If so, the court applies a preponderance of the evidence standard … to determine whether the defendant has proven the existence of those circumstances ... . Finally, if the first two steps are satisfied, the court must 'exercise its discretion by weighing the aggravating and mitigating factors to determine whether the totality of the circumstances warrants' a downward departure to avoid an overassessment of the defendant's dangerousness and risk of sexual reoffense ... . While not entirely clear on this point, the decision of the hearing court in this case suggests that, in this case of statutory rape, the court considered itself bound, as a matter of law, to conclude that the various details of the offense urged as mitigating circumstances by defendant were adequately accounted for by the guidelines. Thus, the court appeared to consider itself unable to engage in the discretionary weighing prescribed in Gillotti's third step. To the extent that the court acted based on this reasoning, it operated on an inaccurate premise that is contradicted by numerous cases that have granted downward departures in a similar context ... , as well as the Guidelines themselves (see Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 9 [2006]). 'In cases of statutory rape, the Board has long recognized that strict application of the Guidelines may in some instances result in overassessment of the offender's risk to public safety' ... . Accordingly, the fact that in such a case the offender is not assessed any points for force or injury should not be the end of the discussion of whether to grant a downward departure." ***People v. Soto*, 2019 N.Y. Slip Op. 01184, First Dept 2-19-19**

SECOND DEPARTMENT

CRIMINAL LAW, EVIDENCE.

IT WAS (HARMLESS) ERROR TO ADMIT TESTIMONY OF THE PEOPLE'S DNA EXPERT, THE TESTIMONIAL HEARSAY VIOLATED DEFENDANT'S RIGHT TO CONFRONTATION.

The Second Department determined the testimony of the People's DNA expert violated defendant's right to confrontation. The error was deemed harmless however: "[T]he Supreme Court should not have admitted, over the defendant's objection, the testimony of the People's DNA expert, as such testimony violated the defendant's right to confrontation... . In order to satisfy the Confrontation Clause where the People seek to introduce testimonial DNA evidence, 'an analyst who witnessed, performed or supervised the generation of defendant's DNA profile, or who used his or her independent analysis on the raw data, as opposed to a testifying analyst functioning as a conduit for the conclusions of others, must be available to testify'... . Although the People's expert testified that he conducted a 'technical review' of the reports prepared by another criminalist whom he supervises, he did not establish that such review entailed using his own independent analysis on the raw data ... . Even so, the error in admitting the testimonial DNA evidence was harmless since the proof of the defendant's guilt, without reference to the erroneously admitted DNA evidence, was overwhelming and there was no reasonable possibility that the Supreme Court would have acquitted the defendant had it not been for the error ...". ***People v. Dyson*, 2019 N.Y. Slip Op. 01225, Second Dept 2-20-19**

DEFAMATION, PRIVILEGE.

EMAIL CALLING INTO QUESTION THE LEGITIMACY OF PLAINTIFF'S PHD PROTECTED BY QUALIFIED PRIVILEGE.

The Second Department determined the defendant's CPLR 4401 motion to dismiss the complaint after trial in this defamation action was properly granted. The statements were deemed to be protected by qualified privilege: "The parties are members of the faculty of the School of Business at Medgar Evers College (hereinafter MEC), a college of the City University of New York (hereinafter CUNY). The plaintiff commenced this action alleging that each of the defendants sent an email defaming her to other faculty and staff within the School of Business. The content of the emails related to the quality or legitimacy of the plaintiff's doctoral degree, and included statements that she did not have a recognized Ph.D., that her degree was not genuine, and that it was purchased from a diploma mill. * * * A qualified privilege extends to a communication made by one person to another upon a subject in which both have an interest ... . The privilege does not apply where the plaintiff can demonstrate that the communication was not made in good faith, but was motivated solely by malice, meaning, in this context, 'spite or a knowing or reckless disregard of a statement's falsity' ... . However, '[m]ere conclusory allegations, or charges based upon surmise, conjecture, and suspicion are insufficient to defeat the claim of qualified privilege' ... . Here, based on the plaintiff's evidence, the challenged statements concerned a matter in which the defendants and the recipients of the defendants' emails had a common interest, namely, the academic reputation and integrity of the School of Business and its faculty ... . Contrary to the plaintiff's contention, accepting her evidence as true and affording her every favorable inference which may be properly drawn from it ... , that evidence does not support a reasonable conclusion that the challenged statements were motivated solely by malice." ***Udeogalanya v. Kiho*, 2019 N.Y. Slip Op. 01251, Second Dept 2-20-19**

FORECLOSURE, DEBTOR-CREDITOR.

BANK ENTITLED TO JUDGMENT UNDER THE DOCTRINE OF EQUITABLE SUBROGATION.

The Second Department determined plaintiff was entitled to summary judgment pursuant to the equitable subrogation theory in this foreclosure action: "[T]he plaintiff commenced this action to foreclose a mortgage in the principal amount of $480,000, which it alleged was secured by real property in Brooklyn, owned by the defendants Tzilia Dalfin (hereinafter Tzilia) and Angel E. Daflin (hereinafter Angel), who have been divorced since the 1990s. It is undisputed that $453,900.03 of the proceeds of the mortgage were used to pay off Tzilia and Angel's prior mortgage on the property as well as outstanding taxes. * ** * Under the doctrine of equitable subrogation, '[w]here property of one person is used in discharging an obligation owed by another or a lien upon the property 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' ... . Even if, as Angel contends, his signature on the subject mortgage was forged, the plaintiff could still recover against him on the theory of equitable subrogation based upon its payoff of the prior mortgage and liens against his property at the closing of the subject mortgage ... . [T]he plaintiff established its ... entitlement to judgment as a matter of law on a theory of equitable subrogation by submitting evidence that $453,900.03 of the proceeds of the subject mortgage were used to pay off the prior mortgage and taxes for which Angel was liable ...". ***Wells Fargo Bank, N.A. v. Dalfin*, 2019 N.Y. Slip Op. 01255, Second Dept 2-20-19**

FORECLOSURE, JUDGES, CIVIL PROCEDURE.

JUDGE SHOULD NOT HAVE, SUA SPONTE, DISMISSED THE FORECLOSURE ACTION WHEN PLAINTIFF BANK ATTEMPTED TO BRING PREVIOUSLY FILED PAPERS INTO COMPLIANCE WITH SUBSEQUENT ADMINISTRATIVE ORDERS.

The Second Department, reversing Supreme Court, determined the judge should not have, sua sponte, dismissed the foreclosure action when plaintiff bank attempted to bring previously filed documents into compliance with subsequent administrative orders: " 'A court's power to dismiss a complaint, sua sponte, is to be used sparingly and only when extraordinary circumstances exist to warrant dismissal'... . Here, the plaintiff's counsel attempted to comply, in good faith, with Administrative Orders 548/10 and 431/11 of the Chief Administrative Judge, which did not exist at the time of the commencement of the action, or at the time of the plaintiff's prior motion for an order of reference. Under such circumstances, dismissal was not warranted. Nothing in the Administrative Orders requires the dismissal of an action merely because the plaintiff's counsel discovers that there was some irregularity or defect in a prior submission, nor is the plaintiff effectively required to commence an entirely new action ...". ***JP Morgan Chase Bank, N.A. v. Laszlo*, 2019 N.Y. Slip Op. 01205, Second Dept 2-20-19**

INSURANCE LAW, JUDGES.

TRIAL JUDGE GAVE THE WRONG JURY INSTRUCTION CONCERNING THE LIABILITY OF AN INSURANCE COMPANY FOR DAMAGE WHEN THERE IS EVIDENCE THAT THE CAUSE OF THE DAMAGE COULD EITHER BE A CAUSE COVERED BY THE POLICY OR A CAUSE NOT COVERED BY THE POLICY, THE OVER $1.8 MILLION VERDICT REVERSED AND NEW TRIAL ORDERED.

The Second Department, reversing the over $1.8 million verdict in this property damage case, determined that the trial judge did not give the proper jury instruction. There was evidence that the water damage during Hurricane Sandy could have been caused by water which backed up in the sewers, which was covered by the police, or surface water, which was not covered by the policy: " 'A trial court is required to state the law relevant to the particular facts in issue, and a set of instructions that confuses or incompletely conveys the germane legal principles to be applied in a case requires a new trial' ... . Under an all-risk property damage policy, where multiple perils work together to cause the same loss, and one or more of those perils is covered under the policy, New York follows the majority rule such that the loss will be covered if the 'proximate, efficient and dominant cause' of the loss is covered by the policy ... . By contrast, a minority of jurisdictions adhere to the broader 'concurrent cause' rule, under which a loss will be covered 'if any one of multiple non-remote causes of the same loss is a non-excluded peril' ... . Here, the Supreme Court's instruction to the jury misstated the law in that it permitted the jury to find coverage for the plaintiffs' loss if one or more covered perils acted together with a noncovered peril to cause the same loss, without regard to whether the efficient or dominant cause of the loss was a covered peril under the policy. Since the error may have prejudiced the defendant, a new trial is warranted ... ". ***Greenberg v. Privilege Underwriters Reciprocal Exch.*, 2019 N.Y. Slip Op. 01202, Second Dept 2-20-19**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

QUESTION OF FACT WHETHER STOCKING SHELVES WAS PART OF A LARGER RENOVATION PROJECT AND THEREFORE A COVERED ACTIVITY UNDER LABOR LAW § 240(1).

The Second Department, reversing Supreme Court, determined that defendant's motion for summary judgment in this Labor Law § 240(1) action should have been denied. Plaintiff was stocking shelves when he fell 20 feet. There was a question of fact whether stocking shelves was part of the larger renovation project and therefore covered under Labor Law § 240(1): "[T]he warehouse defendants' submissions failed to demonstrate, as a matter of law, that the plaintiff's activity in stocking shelves was not performed as part of the larger renovation project that he had been hired to complete on the premises, including assembly of the shelving structures and other tasks attendant to preparing the warehouse to receive ... stock merchandise ...". ***Bonilla-Reyes v. Ribellino*, 2019 N.Y. Slip Op. 01193, Second Dept 2-20-19**

PERSONAL INJURY.

DEFENDANT DID NOT DEMONSTRATE THE ABSENCE OF CONSTRUCTIVE KNOWLEDGE OF THE CONDITION OF THE STAIRWAY WHERE PLAINTIFF ALLEGEDLY SLIPPED AND FELL, HOWEVER DEFENDANT WAS ENTITLED TO SUMMARY JUDGMENT BECAUSE PLAINTIFF COULD NOT IDENTIFY THE CAUSE OF THE FALL.

The Second Department determined the defendant did not demonstrate the absence of constructive notice of the condition of the stairway where plaintiff allegedly slipped and fell. Therefore defendant's motion for summary judgment should not have granted on that ground. However, although Supreme Court didn't rule on the issue, the Second Department held that defendant's motion for summary judgment should have been granted because plaintiff could not identify the cause of the fall: "[T]he defendant failed to establish, prima facie, that it did not have constructive notice of the alleged hazardous condition. While the deposition testimony of the premises' caretaker demonstrated that the caretaker inspected and cleaned the subject stairwell on a regular basis, the defendant failed to present evidence regarding specific cleaning or inspection of the area in question relative to the time when the subject accident occurred ... . Thus, the defendant was not entitled to summary

judgment dismissing the complaint on the ground that it established that it did not have notice of the alleged hazardous condition. A defendant in a slip-and-fall case may also establish its prima facie entitlement to judgment as a matter of law by submitting evidence that the plaintiff cannot identify the cause of his or her fall without engaging in speculation ... . Here, the defendant demonstrated its prima facie entitlement to judgment as a matter of law by submitting the plaintiff's General Municipal Law § 50-h hearing and deposition transcripts, which demonstrated that he was unable to identify the cause of his fall without resorting to speculation ... . In opposition, the plaintiff failed to raise a triable issue of fact in this regard ...". ***Rodriguez v. New York City Hous. Auth.*, 2019 N.Y. Slip Op. 01246, Second Dept 2-20-19**

PERSONAL INJURY, EDUCATION-SCHOOL LAW.

COLLEGE DID NOT OWE A DUTY OF CARE TO TWO STUDENTS WHO DIED IN A FIRE IN THE OFF-CAMPUS HOUSE THEY WERE RENTING.

The Second Department determined the college (Marist College) did not owe a duty of care to two students (Kerry and Eva) who died in a fire in an off-campus house (Brennan house). The house was on a private-off-campus-housing list made available to students by the college: " 'The threshold question in any negligence action is: does defendant owe a legally recognized duty of care to plaintiff?' ... . In the context of this action, a critical consideration in determining whether such a duty exists is whether Marist College's relationship with either the Brennans or Kerry and Eva placed the college in the best position to protect against the risk of harm ... . Also relevant is the principle that 'one who assumes to act, even though gratuitously, may thereby become subject to the duty of acting carefully' ... . Marist College did not owe a duty of care to Kerry and Eva. Contrary to the plaintiffs' argument, Marist College demonstrated ... that it did not owe a duty to ensure that the off-campus housing listed on its website, which included the Brennan house, complied with all relevant fire safety standards. Even if, in theory, Marist College could have refused to list landlords on its website unless each landlord's off-campus housing met all relevant fire safety laws and regulations, imposing such a requirement on the college is simply not warranted because the college is not 'in the best position to protect against the risk of harm'... . In this regard, it bears recalling that the doctrine of in loco parentis has no application at the college level ... . Adult students who chose to live off campus, as well as the private landlords with whom they enter into a contractual relationship, are in the best position to ensure that off-campus apartments and houses have the required number of smoke detectors and other fire safety features. While the risk of fire is all too foreseeable—often with tragic consequences, as this case demonstrates—'[f]oreseeability, alone, does not define duty—it merely determines the scope of the duty once it is determined to exist' ...". ***Fitzsimons v. Brennan*, 2019 N.Y. Slip Op. 01200, Second Dept 2-20-19**

PERSONAL INJURY, FAMILY LAW.

COMPLAINT AGAINST A FOSTER CARE AGENCY STATED CAUSES OF ACTION FOR NEGLIGENT PLACEMENT, LOSS OF THE CHILDREN'S SERVICES AND EXPENSES FOR THE CHILDREN'S CARE AND TREATMENT.

The Second Department, modifying Supreme Court, determined that plaintiff, the children's guardian, stated causes of action against the foster care agency, Graham Windham, for negligent placement of the children and for loss of services of the children and expenses for care and treatment of the children: " 'Counties and foster care agencies cannot be vicariously liable for the negligent acts of foster parents, who are essentially contract service providers' ... . 'However, counties and foster care agencies may be sued to recover damages for negligence in the selection of foster parents and in supervision of the foster home'... . Ultimately, to sustain a cause of action for negligent supervision, the plaintiff must establish that the defendant 'had sufficiently specific knowledge or notice of the dangerous conduct which caused injury; that is, that the third-party acts could reasonably have been anticipated' ... . [A] parent may recover damages measured by the pecuniary loss sustained by the injuries to the child, including the value of the child's services, if any, of which the parent was deprived and reasonable expenses necessarily incurred in an effort to restore the child to health ... . Thus, the court should not have directed dismissal, pursuant to CPLR 3211(a)(7), of so much of the third cause of action insofar as asserted against Graham Windham as sought to recover damages for the loss of the children's services and the expense for their care and treatment." ***George v. Windham*, 2019 N.Y. Slip Op. 01201, Second Dept 2-20-19**

PERSONAL INJURY, MEDICAL MALPRACTICE, MUNICIPAL LAW.

LATE NOTICE OF CLAIM SHOULD HAVE BEEN DEEMED TIMELY SERVED, MEDICAL RECORDS PROVIDED TIMELY NOTICE OF THE NATURE OF THE MEDICAL MALPRACTICE CLAIM.

The Second Department, reversing Supreme Court, determined that plaintiff's motion to deem a late notice of claim timely served should have been granted. The attempt to serve the notice of claim was three years late. Plaintiff, who was born in 2010, brought a medical malpractice action alleging the city hospital was negligent by sending plaintiff's mother home when she presented at the emergency room complaining of contractions. The Second Department held that the medical records provided the defendant with timely knowledge of the nature of the claim: "The medical records demonstrated that the hospital failed to admit the plaintiff's mother to the hospital when she presented to the emergency room on November 23, 2010, notwithstanding an order in the emergency room record from a physician that the mother 'was to be admitted secondary to non-reassuring fetal heart tracing.; Inasmuch as the medical records, upon independent review, showed that

the mother was not admitted to the hospital on November 23, 2010, despite a physician's order, and that two days later, the plaintiff was delivered one hour after the mother arrived at the hospital and only after a fetal heart monitor alarm sounded four times, they provided the hospital with actual knowledge of the essential facts constituting the claim ... . [T]he plaintiff made an initial showing that the hospital would not suffer any prejudice by the delay in serving a notice of claim, and the hospital failed to rebut the showing with particularized indicia of prejudice... . Further, the absence of prejudice was demonstrated by virtue of the fact that the hospital had possessed timely actual knowledge of the essential facts constituting the claim ...". ***J.H. v. New York City Health & Hosps. Corp.*, 2019 N.Y. Slip Op. 01203, Second Dept 2-20-19**

REAL ESTATE, FRAUD, FIDUCIARY DUTY.

PLAINTIFF ENTITLED TO SUMMARY JUDGMENT ON THE FRAUD AND BREACH OF FIDUCIARY DUTY CAUSES OF ACTION, DEFENDANT PURCHASED THE PROPERTY FOR HERSELF WHILE ACTING AS PLAINTIFF'S REAL ESTATE BROKER.

The Second Department determined plaintiff was entitled to summary judgment on the fraud and breach of fiduciary duty causes of action against defendant (Maureen), a real estate broker. The complaint alleged that Maureen purchased the property herself while acting as plaintiff's broker: " '[A] real estate broker is a fiduciary with a duty of loyalty and an obligation to act in the best interests of the principal'... . '[I]n dealing with the principal, a real estate broker must act honestly and candidly, and the broker must disclose all material information that it may possess or obtain concerning the transactions involved'... . Moreover, '[w]here a broker's interests or loyalties are divided due to a personal stake in the transaction or representation of multiple parties, the broker must disclose to the principal the nature and extent of the broker's interest in the transaction or the material facts illuminating the broker's divided loyalties' ... . 'A breach of this duty of loyalty by a real estate broker may constitute a fraud for which the broker is answerable in damages' ...". ***Edwards v. Walsh*, 2019 N.Y. Slip Op. 01197, Second Dept 2-20-19**

THIRD DEPARTMENT

CONTEMPT, CRIMINAL LAW, ENVIRONMENTAL LAW.

MOTION TO PURGE THE CONTEMPT ORDER REGARDING THE REMOVAL OF SOLID WASTE THAT HAD BEEN DUMPED ON A FIELD BY DEFENDANTS SHOULD HAVE BEEN GRANTED AND THE INCARCERATED DEFENDANT SHOULD BE RELEASED.

The Third Department, reversing Supreme Court, determined defendants' motion to purge the contempt order should have been granted and one of the defendants, Cascino, who had been incarcerated for more than a year to force compliance with the underlying order, should be released. The court had ordered defendants to remove solid waste that had been dumped by then on a field. Much of the material had been removed but questions of fact remained whether all of it had been removed: "[A] question of fact remains as to whether defendants completed the required remediation. This impasse brings us back to the fundamental problem that the disputed material looks like regular topsoil to the human eye. Despite ongoing removal efforts and Supreme Court having concluded multiple hearings throughout 2016 and 2017 as to the remediation performed, the difficulty of identifying the precise location of any remaining material has left the parties at a continuing impasse. Given these circumstances, we conclude that to continue Cascino's incarceration any further would serve no viable purpose and cannot be sustained. We are satisfied that the record establishes a significant effort on defendants' part to purge the contempt, while recognizing that there remains some dispute as to whether all the disputed material has been removed. That said, until such time as a definitive showing has been made that the disputed material actually remains and precisely where, it would be improvident to continue Cascino's incarceration. For these reasons, we conclude that the order must be reversed and defendants' motion to purge the contempt granted." ***Town of Copake v. 13 Lackawanna Props., LLC*, 2019 N.Y. Slip Op. 01271, Third Dept 2-21-19**

CONTRACT LAW, CIVIL PROCEDURE.

IN COURT STIPULATION OF SETTLEMENT WAS BINDING DESPITE AGREEMENT TO FINALIZE IT IN WRITING.

The Third Department, reversing Supreme Court, determined that the in-court stipulation was binding, notwithstanding the agreement to memorialize it in writing: "The threshold question presented is whether the parties reached a binding settlement. A stipulation of settlement placed on the record by counsel in open court is binding, all the more so when, as here, the parties contemporaneously confirm their acceptance on the record (see CPLR 2104 ...). 'To be enforceable, an open court stipulation must contain all of the material terms and evince a clear mutual accord between the parties' ... . As a matter of policy, stipulations of settlement are encouraged to promote judicial economy and to 'provide litigants with predictability and assurance that courts will honor their prior agreements' ... . The nuance here concerns the additional component of a more specific writing to follow the open court settlement, as interjected by the court without objection by counsel. Following the October 19, 2017 appearance, plaintiffs forwarded a draft written settlement to defendant ... . While acknowledging that it was prepared to finalize the settlement agreement, defendant raised concerns about the scope of the indemnification language and a provision requiring defendant 'to make tax-related representations.' The agreement was not signed and

the subject motion ensued. The parties acknowledge that they agreed to memorialize the record stipulation in a written agreement and, at the same time, agree that the record stipulation is binding. Although defendant has professed an intent to finalize the settlement once certain language issues as to the release and indemnification are resolved, it is significant that defendant does not contend that there are any necessary material terms not included in the oral stipulation... . As recounted above, it bears emphasis that the scope of both the required release and indemnification are in fact outlined in the oral stipulation. In our view, defendant's language concerns present an implementation issue that the parties expressly accounted for in the record stipulation by having Supreme Court retain jurisdiction. Given the above, we conclude that the record stipulation constitutes a binding settlement, notwithstanding the parties' dispute over finalizing the written agreement. It follows that the court erred in declining to 'so order' the transcript, and, given defendant's default in payment, by denying plaintiffs' motion for judgment." ***Birches At Schoharie, L.P. v. Schoharie Senior Gen. Partner LLC*, 2019 N.Y. Slip Op. 01277, Third Dept 2-21-19**

COURT OF CLAIMS, WORKERS' COMPENSATION, CIVIL PROCEDURE.

COURT OF CLAIMS DID NOT HAVE SUBJECT MATTER JURISDICTION OVER A WORKERS' COMPENSATION ISSUE, REVIEW OF AN AGENCY DETERMINATION MUST BE BROUGHT AS AN ARTICLE 78 PROCEEDING.

The Third Department determined the Court of Claims did not have subject matter jurisdiction over review of an agency determination, which must be brought as an Article 78 action: "At issue is whether the Court of Claims has subject matter jurisdiction over the action. While claimant seeks significant financial relief, the core of its claim challenges defendant's determination to classify the therapists as employees for purposes of calculating the premium due under the workers' compensation policy. This is a threshold agency determination that the Court of Claims lacks subject matter jurisdiction to address ... . Such agency determinations are subject to review in the context of a CPLR article 78 proceeding commenced in Supreme Court, where a successful petitioner would be entitled to recover an overpayment as incidental relief (see CPLR 7806 ...). As such, claimant's application should have been denied." ***Family & Educ. Consultants, LLC v. New York State Ins. Fund*, 2019 N.Y. Slip Op. 01273, Third Dept 2-21-19**

CRIMINAL LAW, APPEALS.

PEOPLE'S FAILURE TO PROCURE ANOTHER ACCUSATORY INSTRUMENT AFTER THE COURT REDUCED THE CHARGE RENDERED THE INDICTMENT JURISDICTIONALLY DEFECTIVE, REQUIRING DISMISSAL AFTER TRIAL DESPITE DEFENDANT'S FAILURE TO RAISE THE ISSUE AND THE PRESENTATION OF SUFFICIENT EVIDENCE OF THE REDUCED CHARGE.

The Third Department, reversing the conviction and dismissing the indictment as jurisdictionally defective, determined that the People's failed to file an instrument with the reduced charged ordered by the judge or seek permission to re-present the case to a grand jury. The fact that error was not raised by the defendant and the fact that the reduced charge was supported by sufficient evidence did not matter in the face of the insufficient accusatory instrument: " 'Where a court acts to reduce a charge contained in an indictment and the People fail within 30 days to take any action in response to this decision, the order directing the reduction shall take effect and the People are obligated, if they intend to pursue a prosecution, to either file an instrument containing the reduced charge or obtain permission to re-present the matter to a grand jury' ... . Inasmuch as the People did nothing after County Court ordered a reduction in the remaining count, 'the only charge that remained viable after the expiration of the [30-day] stay was the reduced count' of course of sexual conduct against a child in the first degree ... . The People never filed a reduced indictment charging that offense, however, and County Court had no independent power to effectuate the reduction via an amendment to the original indictment ... . 'A valid and sufficient accusatory instrument is a nonwaivable jurisdictional prerequisite to a criminal prosecution,' and the People's failure to file an indictment charging the reduced count precluded County Court from trying and convicting defendant on it ...". ***People v. Stone*, 2019 N.Y. Slip Op. 01264, Third Dept 2-21-19**

CRIMINAL LAW, ATTORNEYS, EVIDENCE.

DEFENSE COUNSEL'S INTRODUCING INTO EVIDENCE A SEARCH WARRANT APPLICATION WHICH IMPLICATED THE DEFENDANT IN CRIMES CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL.

The Third Department, reversing defendant's conviction, determined defense counsel's placing in evidence a search warrant application which included prejudicial information about crimes involving the defendant amounted to ineffective assistance of counsel: "[R]ather than a single error, we are confronted with a set of three closely-related errors at two stages of the trial: the failure to redact the irrelevant and prejudicial hearsay from the search warrant application before introducing it for the limited purpose of revealing [the applicant's] errors; the failure to request a limiting instruction that would have advised the jury of that purpose; and the subsequent failure to object to the prosecutor's repeated exhortations to the jury to rely on the application's hearsay information as proof of defendant's guilt. These errors, as well as the prejudicial testimony elicited from the detective, gain particular significance in the light of the close nature of the other evidence. The admissible proof that defendant constructively possessed the contraband and had the requisite intent to sell, although adequate to support the verdict, was not overwhelming. Further, the information in the application directly contradicted counsel's theory

of defense, which was that the girlfriend, and not defendant, possessed and sold the drugs found in the apartment. Thus, although counsel's challenged conduct took place in the context of an otherwise effective performance, we find that the cumulative effect of his errors deprived defendant of a fair trial and requires reversal of the judgment ...". ***People v. Newman*, 2019 N.Y. Slip Op. 01263, Third Dept 2-21-19**

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA).

SCHOOL-GROUNDS RESTRICTION APPLIES ONLY TO OFFENDERS SERVING A SENTENCE FOR ONE OF THE OFFENSES ENUMERATED IN THE EXECUTIVE LAW AT THE TIME OF RELEASE, SINCE PETITIONER, WHO WAS A LEVEL THREE SEX OFFENDER, WAS SERVING A SENTENCE FOR BURGLARY AT THE TIME OF RELEASE, THE SCHOOL-GROUNDS RESTRICTION DID NOT APPLY TO HIM.

The Third Department, in a full-fledged opinion by Justice Aarons, disagreeing with the Fourth Department, determined that the restriction in the Executive Law prohibiting a sex offender from living within 1000 feet of a school only applied if the sentence being served at the time of release on parole is for one of the offenses enumerated in the statute. Defendant had previously been convicted of a sex offense and had been adjudicated a level three sex offender. But the offense for which he was incarcerated at the time of his release (burglary) is not an enumerated offense: "[T]he statute is unambiguous and interpret it in the manner advanced by him. In this regard, we read 'such person' as plainly and unequivocally referring to 'a person serving a sentence for an offense defined in [Penal Law articles 130, 135 or 263 or Penal Law § 255.25, § 255.26 or 255.27]' (Executive Law § 259-c [14]). We are unpersuaded by respondent's contention that 'such person' in Executive Law § 259-c (14) can be rationally read to refer only to 'a person' or 'a person serving a sentence' as stated in the beginning of the statute and without regard to that part of the statute specifying various offenses. Based on the foregoing, we find that the school-grounds restriction provided in Executive Law § 259-c (14) applies either to (1) an offender serving one of the enumerated offenses whose victim was under 18 years old, or (2) an offender serving one of the enumerated offenses who was designated a risk level three sex offender. Because petitioner was not serving a sentence for an offense delineated in Executive Law § 259-c (14), the statute does not apply to him." ***People v. Superintendent, Woodbourne Corr. Facility*, 2019 N.Y. Slip Op. 01267, Third Dept 2-21-19**

PERSONAL INJURY, CIVIL RIGHTS LAW, MUNICIPAL LAW, IMMUNITY, ANIMAL LAW.

POLICE DOG RELEASED TO TRACK SUSPECTS WENT OUT OF THE HANDLER'S SIGHT AND BIT PLAINTIFF, 42 U.S.C. § 1983, NEGLIGENCE AND BATTERY ACTIONS SURVIVED SUMMARY JUDGMENT, QUESTION OF FACT WHETHER POLICE OFFICER ENTITLED TO QUALIFIED IMMUNITY, CITY ENTITLED TO SUMMARY JUDGMENT PURSUANT TO THE PROFESSIONAL JUDGMENT RULE.

The Third Department determined several causes of action property survived summary judgment in this case where a police officer (Ashe) released his K-9 partner (a trained police dog named Elza) which bit plaintiff as he was walking to his car. After Elza was released she ran out of Ashe's sight. Ashe was attempting to use Elza to track suspects who had just robbed a gas station. The Third Department held, inter aliia, that the 42 U.S.C. § 1983 action properly survived summary judgment, Ashe was not entitled to qualified immunity as a matter of law, the battery action properly survived summary judgment, and the city was entitled to summary judgment on the common-law negligence action based on the professional judgment rule: "There is at least a question of fact as to whether a reasonable police officer, aware that the dog could not differentiate a suspect from an innocent bystander, would allow the dog to search off leash and out of sight of the handler. Moreover, the record contains evidence from which a jury could find that the City 'fail[ed] to train its employees in a relevant respect [that] evidences a deliberate indifference to the rights of its inhabitants[, which] can . . . be properly thought of as a city policy or custom that is actionable under [42 USC] § 1983' ... . [P]laintiffs' expert ... opined in his affidavit that Ashe failed to comply with standard police practice, including keeping the K-9 within visual range and providing audible warnings. Based on the foregoing, there are triable issues of fact that preclude summary judgment on the issue of Ashe's entitlement to qualified immunity ... . [T]he City was entitled to dismissal of the common-law negligence claims based on the professional judgment rule. ' That rule 'insulates a municipality from liability for its employees' performance of their duties where the . . . conduct involves the exercise of professional judgment such as electing one among many acceptable methods of carrying out tasks, or making tactical decisions' ...". ***Relf v. City of Troy*, 2019 N.Y. Slip Op. 01287, Third Dept 2-21-19**

PERSONAL INJURY, COURT OF CLAIMS, VEHICLE AND TRAFFIC LAW.

SNOWPLOW DRIVER WAS EXEMPT FROM STANDARD NEGLIGENCE AND DID NOT ACT RECKLESSLY IN THIS TRAFFIC ACCIDENT CASE, COURT OF CLAIMS REVERSED.

The Third Department, reversing the Court of Claims, determined the snowplow driver was not liable in this traffic accident case. The highway-work exemption from standard negligence applied and the driver was not reckless: "There is little dispute that the Court of Claims erred in applying Vehicle and Traffic Law § 1104, which affords certain privileges to '[t]he driver of an authorized emergency vehicle, when involved in an emergency operation' ... and has no applicability to a vehicle such as a snowplow put to its intended use . The pertinent statute is instead Vehicle and Traffic Law § 1103 (b), which

'exempts from the rules of the road all vehicles . . . which are 'actually engaged ... in work on a highway,' and imposes on such vehicles a recklessness standard of care' ... . Inasmuch as 'the snowplow [here] was clearing the road during a snowstorm' when the accident occurred, both the snowplow and its driver are exempted 'from the rules of the road' ... . As such, liability will only attach if defendant and its employees behaved in a reckless manner, meaning a 'conscious disregard of 'a known or obvious risk that was so great as to make it highly probable that harm would follow' ...". ***Howell v. State of New York*, 2019 N.Y. Slip Op. 01281, Third Dept 2-21-19**

WORKERS' COMPENSATION, TRUSTS AND ESTATES.

EMPLOYEE'S ESTATE ENTITLED TO THE AMOUNT OF THE SCHEDULE LOSS OF USE AWARD THAT ACCRUED UP UNTIL THE EMPLOYEE'S DEATH, NOT THE ENTIRE SLU AWARD.

The Third Department determined that the employee's estate was entitled to the portion of the schedule loss of use (SLU) award that had accrued up until the time of the employee's death: "In our view, the 2009 statutory amendments did not alter the longstanding rule that, where an injured employee dies without leaving a surviving spouse, child under 18 years old or dependent, only that portion of the employee's SLU award that had accrued at the time of the death is payable to the estate, along with reasonable funeral expenses... . Nor did, as claimant contends, the amendments alter the rate at which an SLU award accrues to an injured employee who is posthumously awarded SLU benefits. Absent clear statutory language or an indication of statutory intent, we cannot conclude that, in granting the option of a lump-sum payment, the Legislature intended for the employee's estate to collect any portion of the posthumous SLU award that had not accrued prior to death. Accordingly, claimant was not entitled to the entirety of decedent's SLU award." ***Matter of Estate of Youngjohn v. Berry Plastics Corp.*, 2019 N.Y. Slip Op. 01290, Third Dept 2-21-19**

ZONING, LAND USE, MUNICIPAL LAW.

LOCAL LAW WHICH HAD BEEN DECLARED VOID COULD NOT BE THE BASIS FOR DETERMINING WHETHER PETITIONER'S USE OF THE LAND FOR MINING WAS A VALID PREEXISTING NONCONFORMING USE.

The Third Department determined that a local law which had been declared void could not be the basis for determining whether the petitioner's use of the property for mining was a valid preexisting nonconforming use. Once the local law had been declared void the prior law went back into effect. That law was not changed until 2015. So the 2015 law is the proper basis for determining whether the property is subject to a valid preexisting nonconforming use: "Central to petitioner's contention is the general premise that the judicial nullification and voidance of an ordinance revives, by operation of law, the prior ordinance in effect before the null and void law was adopted ... . Even more fundamental, a voided law can have no lasting effect ... . To that end, 'a void thing is no thing. It changes nothing and does nothing. It has no power to coerce or release. It has no effect whatever. In the eye of the law it is merely a blank, the same as if the types had not reached the paper'... . Therefore, inasmuch as an annulled law can have no lingering effect, petitioner is entitled to have its nonconforming use rights evaluated as of the effective date of the 2015 ordinance, unless, of course, that ordinance is also annulled prior to any such determination ... . To hold otherwise would not only give the annulled Local Law No. 2 complete effect, i.e., render mining a nonconforming use in petitioner's zoning district as of the date of the illegally-enacted law, but it would incentivize municipalities to rush to enact local laws with any number of infirmities, including SEQRA violations." ***Matter of Cobleskill Stone Prods., Inc. v. Town of Schoharie*, 2019 N.Y. Slip Op. 01272, Third Dept 2-21-19**

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