CasePrepPlus

April 12, 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

COURT OF APPEALS

CRIMINAL LAW, CONTRACT LAW.

DEFENDANT'S REFUSING TO TESTIFY WAS DEEMED A VIOLATION OF THE WRITTEN COOPERATION AGREEMENT, HIS MOTION TO WITHDRAW HIS GUILTY PLEA WAS PROPERLY DENIED.

The Court of Appeals, affirming the denial of defendant's motion to withdraw his guilty plea, over an extensive two-judge dissent, determined that defendant's refusal to testify against a person who had participated in a home invasion violated the written cooperation agreement: "As part of a plea agreement and in exchange for a favorable sentence, defendant entered into a written cooperation agreement whereby he promised to 'cooperate completely and truthfully with law enforcement authorities, including the police and the District Attorney's Office, on all matters in which his cooperation is requested, including but not limited to the prosecution of [defendant's accomplices] on charges related to the murder of Jose Sanchez and the assault of [Sanchez's brother].' Prior to entering into the cooperation agreement, defendant had confessed to his involvement in the Sanchez murder and assault, explaining that the crimes were retaliation for a prior invasion of defendant's home by Sanchez and his associates, including Jose Marin. When defendant signed the agreement, he already had testified to Marin's involvement in the home invasion before the grand jury in the Sanchez matter, and he also had assisted the police with their investigation of the home invasion by identifying Marin in a photo array. ... [D]efendant's refusal to testify against Marin violated the express terms of his cooperation agreement. The plain language of the agreement was objectively susceptible to but one interpretation ... . County Court, therefore, did not abuse its discretion by denying defendant's motion to withdraw his guilty plea based on his claimed subjective misinterpretation of the agreement or by concluding, to the contrary, that defendant reasonably understood that his cooperation in the Marin prosecution was required ...". ***People v. Rodriguez*, 2019 N.Y. Slip Op. 02444, CtApp 4-2-19**

CRIMINAL LAW, EVIDENCE, CONSTITUTIONAL LAW.

THE POLICE-OFFICER WITNESS, WHO DID TESTIFY AT TRIAL, DID NOT REMEMBER THE INCIDENT WHICH WAS THE BASIS FOR THE CHARGES AGAINST DEFENDANT, HIS GRAND JURY TESTIMONY WAS PROPERLY ADMITTED AS PAST RECOLLECTION RECORDED, DEFENDANT'S RIGHT OF CONFRONTATION WAS NOT VIOLATED BECAUSE THE WITNESS TESTIFIED.

The Court of Appeals, in a full-fledged opinion by Judge DiFiore, over an extensive three-judge dissent, determined that the police-officer witness's grand jury testimony was properly admitted under the "past recollection recorded" exception to the hearsay rule. The grand jury testimony did not violate the Confrontation Clause because the officer, who could not remember the incident he described to the grand jury, did, in fact, testify at trial: "The foundational requirements for the admissibility of a past recollection recorded are: 1) the witness must have observed the matter recorded; 2) the recollection must have been fairly fresh at the time when it was recorded; 3) the witness must currently be able to testify that the record is a correct representation of his or her knowledge and recollection at the time it was made; and 4) the witness must lack sufficient present recollection of the information recorded ... . 'When such a memorandum is admitted, it is not independent evidence of the facts contained therein, but is supplementary to the testimony of the witness. * * * ... [T]he right to confrontation guarantees not only the right to cross-examine all witnesses, but also the ability to literally confront the witness who is providing testimony against the accused in a face-to-face encounter before the trier of fact ... . The Confrontation Clause is satisfied when these requirements are fulfilled — even if the witness's memory is faulty. The United States Supreme Court has directly addressed the situation where a witness was unable to explain the basis for a prior out-of-court identification due to memory loss ... . In Owens, the Court held that '[t]he Confrontation Clause guarantees only an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish' ... . To that end, '[i]t is sufficient that the defendant has the opportunity to bring out such matters as the witness' bias, his lack of care and attentiveness, his poor eyesight, and even (what is often a prime objective of cross-examination), . . . the very fact that he has a bad memory' ...". ***People v. Tapia*, 2019 N.Y. Slip Op. 02442, CtApp 4-2-19**

REAL PROPERTY TAX LAW (RPTL).

PETITIONER, A CORPORATION OPERATING A BUSINESS ON THE PROPERTY, WAS NOT THE OWNER OF THE REAL PROPERTY AND WAS NOT OBLIGATED TO PAY PROPERTY TAXES, THEREFORE PETITIONER DID NOT HAVE STANDING TO CHALLENGE THE PROPERTY TAX ASSESSMENT PURSUANT TO RPTL 704.

The Court of Appeals, in a full-fledged opinion by Judge Garcia, over an extensive two-judge dissent, determined that the petitioner, which did not own the property during the years the property tax assessments were challenged, lacked standing pursuant to RPTL 704. The property was owned by a trust during the relevant years, and petitioner is a family corporation which operates a House of Pancakes franchise on the property. The property held by the trust was transferred to Portia DeGast in 2013. She is the president of petitioner corporation, which had paid all the property. The tax years in issue were 2010 - 2013: "[T]he parties agree that, during the relevant years, petitioner was not the owner of the subject property, nor was petitioner legally bound to pay the real property taxes. * * * ... [P]etitioner here was not 'legally responsible' for paying the undivided tax liability ... . * * * ... Portia DeGast [is not] an aggrieved party based on her status as a beneficiary of the ... Trust. The parties agree that, during the relevant years, the trust itself — not Ms. DeGast — owned the subject property. Like petitioner, Ms. DeGast was not authorized to pursue an article 7 proceeding on the property owner's behalf. And, like petitioner, Ms. DeGast lacked any legal obligation to pay the real property taxes; to the contrary, the terms of the ... Trust explicitly authorized beneficiaries to 'enjoy the assets held by the trust without rent or other compensation to the trust, such as by occupying the trust's real property' ... . In any event, the petitioner in this matter is the ...Pancake House — not Ms. DeGast." ***Matter of Larchmont Pancake House v. Board of Assessors*, 2019 N.Y. Slip Op. 02441, CtApp 4-2-19**

FIRST DEPARTMENT

ANIMAL LAW, CRIMINAL LAW, APPEALS.

JURY INSTRUCTIONS ALLOWED DEFENDANT TO BE CONVICTED ON A THEORY THAT WAS NOT INCLUDED IN THE INDICTMENT, CONVICTION REVERSED IN THE INTEREST OF JUSTICE IN THIS ANIMAL CRUELTY CASE, NEW TRIAL ORDERED DESPITE DEFENDANT'S HAVING COMPLETED HIS SENTENCE.

The First Department, reversing Supreme Court in the interest of justice, determined the jury instructions in this animal cruelty case allowed a conviction on a theory that was not included in the indictment. A new trial was ordered, despite defendant's having served his sentence: "As the People essentially concede, the court's jury charge constructively amended the indictment ... . The indictment was limited to a theory that defendant personally mistreated his dog. However, the court read Agriculture & Markets Law § 353 to the jury almost in its entirety, including a provision that would allow the jury to convict defendant if he merely permitted another person to mistreat his dog. Unlike ordinary accessorial liability under Penal Law § 20.00, this theory of 'permitting' is an entirely different way of committing the crime from personally mistreating the animal. This error was not harmless, because there was evidence from which a reasonable jury could have inferred that defendant took the blame for his dog's condition to cover for his uncle, who lived with defendant and made inconsistent statements about whether he witnessed defendant beating the dog. However, the fact that defendant has completed his sentence does not warrant dismissal of the indictment. That approach is suitable only in cases of 'relatively minor crimes' ... , and this case involves 'serious' allegations ...of abusing an animal. Accordingly, we remand for a new trial." ***People v. Gentles*, 2019 N.Y. Slip Op. 02623, First Dept 4-4-19**

ATTORNEYS, LEGAL MALPRACTICE.

LEGAL MALPRACTICE COUNTERCLAIM SHOULD HAVE BEEN DISMISSED, SPECULATION ABOUT THE RESULT OF A HEARING HAD THE LAW FIRM APPEARED IS NOT ENOUGH TO SUSTAIN A CLAIM FOR LEGAL MALPRACTICE.

The First Department, reversing Supreme Court, determined that plaintiff law firm's motion for summary judgment dismissing the legal malpractice counterclaim should have been granted. Apparently plaintiff failed to appear at a hearing on a temporary restraining order (TRO): "[P]laintiff demonstrated prima facie entitlement to judgment in the legal malpractice counterclaim by showing that defendants could not prove that but for plaintiff's failure to appear at the TRO hearing the hearing court would have denied the TRO or set a shorter return date ... . Defendants speculate that had plaintiff appeared at the TRO hearing, injunctive relief may have been denied or the hearing court may have adjourned the case to an earlier date. Such speculation is insufficient to sustain a claim for legal malpractice ...". ***Salans LLP v. VBH Props. S.R.L.*, 2019 N.Y. Slip Op. 02611, First Dept 4-4-19**

CONTRACT LAW, FRAUD, FIDUCIARY DUTY.

DEFENDANT STATED VALID COUNTERCLAIMS FOR FRAUDULENT INDUCEMENT, BREACH OF FIDUCIARY DUTY AND NEGLIGENT MISREPRESENTATION IN THIS BREACH OF CONTRACT ACTION, SUPREME COURT REVERSED.

The First Department, reversing Supreme Court, determined defendant had stated counterclaims for fraudulent inducement, breach of a fiduciary duty, and negligent misrepresentation in this breach of contract action: "Sharbat's [plaintiff's] statements that he had 'massive investors' who were prepared to invest in defendant and that he 'had obtained high-value investors for [defendant] in Israel,' while partially hyperbolic, make concrete factual representations that go beyond mere puffery. Simply stated, Sharbat asserted that he had investors lined up and ready to go, when in fact he had none. Since plaintiffs were retained by defendant to bring investors in, these statements constitute misrepresentations of material facts for purposes of the fraudulent inducement counterclaim ... . [The] allegations plead a broker-principal relationship sufficient to impose a fiduciary duty on plaintiffs vis-a-vis defendant ... . Plaintiffs' fiduciary role carried with it a duty to disclose material facts ... . Defendant alleges that plaintiffs negligently misrepresented that they were able to represent it in obtaining investors and facilitating the issuance of securities to raise capital for it, that they were skilled in obtaining financing from 'high-value investors,' that they 'had qualified, high-value investors who were to invest in [defendant],' and that plaintiffs themselves were qualified to invest in defendant. ... These allegations state a counterclaim for negligent misrepresentation ... " ***Solomon Capital, LLC v. Lion Biotechnologies, Inc.*, 2019 N.Y. Slip Op. 02621, First Dept 4-4-19**

CRIMINAL LAW.

GIVING A SECOND *ALLEN* CHARGE AND ALLOWING THE JURY TO CONTINUE DELIBERATING TO 5 OR 6 PM ON A FRIDAY, KNOWING THAT THREE JURORS HAD TRAVEL PLANS FOR MONDAY, DID NOT CONSTITUTE COERCING THE VERDICT, PROVIDING BOTH WRITTEN AND ORAL JURY INSTRUCTIONS WAS NOT IMPROPER.

The First Department, over an extensive two-justice dissent, determined (1) the trial judge's giving two *Allen* charges and allowing the jury to continue deliberations to 5 or 6 pm, at the jury's request, on a Friday, knowing that three jurors could not continue deliberating on Monday because of travel plans, did not constitute coercing a verdict, and (2) providing the jurors with both written and oral jury instructions, without objection, was not improper: "The substance of an Allen charge is not coercive if it is 'appropriately balanced and inform[s] the jurors that they [do] not have to reach a verdict and that none of them should surrender a conscientiously held position in order to reach a unanimous verdict' ... . Here, the trial court's repeated Allen charge included an instruction that the jurors were to 'make every possible effort to arrive at a just verdict,' thereby implicitly instructing the jurors that they were not required to reach a verdict if they did not all agree that the verdict was just. Further, the trial court advised the jury that it 'was not asking any juror to violate his or her conscience or to abandon his or her best judgment.' ... Defendant ... contends that the trial court coerced the verdict by acceding to the request made in Court Exhibit XIII for more time to deliberate on the day of the verdict without immediately addressing the scheduling conflicts set forth in the same jury note in which the request was made. ... As the record reflects, the trial court construed Court Exhibit XIII as meaning that the jurors thought that they could quickly resolve any remaining differences among them and agree upon a verdict within hours that same day, and therefore permitted them to do so. Thus, there was no need for the court to address the traveling plans of some jurors for the following week because this did not appear to be a problem at the time." ***People v. Muhammad*, 2019 N.Y. Slip Op. 02609, First Dept 4-4-19**

CRIMINAL LAW, CONSTITUTIONAL LAW.

PROSECUTION FOR CONSPIRACY TO MURDER AFTER MURDER TRIAL RESULTED IN MANSLAUGHTER AND GANG ASSAULT CONVICTIONS DID NOT VIOLATE THE PROHIBITION AGAINST DOUBLE JEOPARDY.

The First Department determined prosecuting defendant for conspiracy to commit murder, after a trial for the murder resulted in a conviction for manslaughter and gang assault, did not violate the prohibition against double jeopardy: "Defendant's prosecution for conspiracy to commit murder, after a prior prosecution for the actual murder resulted in a trial conviction for manslaughter and gang assault, did not violate the federal or state double jeopardy prohibitions, because conspiracy is not the same offense, for double jeopardy purposes, as murder, manslaughter, or gang assault ... . 'The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not' (Blockburger v. United States, 284 US 299, 304 [1932] [citations omitted]). Neither the fact that the evidence at the homicide trial would have also supported a conspiracy charge, nor the fact that defendant had been alleged to have acted in concert with other persons, has any relevance under the Blockburger test." ***People v. Herrera*, 2019 N.Y. Slip Op. 02631, First Dept 4-4-19**

CRIMINAL LAW, EVIDENCE.

IT WAS (HARMLESS) ERROR TO ALLOW THE ARRESTING OFFICER TO TESTIFY THAT DEFENDANT WAS DEPICTED IN THE VIDEOTAPE WHICH WAS BEING PLAYED.

The First Department determined it was (harmless) error to fail to sustain defense counsel's objection to the arresting officer's unprompted identification testimony that the defendant was depicted in the videotape that was being played: "The officer was not previously familiar with defendant, and there was no basis to conclude he was 'more likely to correctly identify the defendant from the [videotape] than [was] the jury' ... . However, this isolated instance of apparent lay opinion was plainly harmless. After the overruled objection, the prosecutor immediately elicited that the officer could not 'make out the face of the person' in the video whom he had said was defendant. The officer's testimony as a whole made clear that he did not claim to recognize defendant in the video, but that he was testifying about similarities between the appearance and distinctive clothing of the man in the video and that of defendant when he was arrested." ***People v. Calderon*, 2019 N.Y. Slip Op. 02468, First Dept 4-2-19**

CRIMINAL LAW, EVIDENCE.

DEFENDANT WAS HANDCUFFED WHEN THE POLICE SEARCHED A BAG ON THE FLOOR NEAR HIM, THE KNIFE IN THE BAG SHOULD HAVE BEEN SUPPRESSED, JUDGE PROPERLY PROCEEDED TO TRIAL WITHOUT A COMPETENCY EXAM ORDERED BY ANOTHER JUDGE AFTER DEFENDANT REFUSED TO BE EXAMINED.

The First Department determined the warrantless search of a bag next to defendant was not justified as a search of the "grabbable" area because defendant was handcuffed. Admitting the knife in evidence was harmless error, however. Another judge had ordered a sixth CPL article 730 competency exam, but, after the defendant refused to be examined, the trial judge properly commenced the trial without the ordered examination. The defendant had a long history of psychiatric problems, but the most recent exam deemed him competent: "In the circumstances presented, the court did not err when it determined that defendant's trial would commence notwithstanding that a different judge had ordered a sixth CPL article 730 examination, which had not yet been conducted because the defendant refused to be examined ... . The court acted within its discretion to decline to repeatedly issue force orders to compel defendant's submission to the extant competency examination order. Furthermore, the court considered the long history of examinations in this case and its own observations of defendant over its prolonged history. We find nothing in People v. Armlin (37 NY2d 167 [1975]) that prohibits a court from considering changed or extraordinary circumstances in denying a previously granted examination, particularly given defendant's profound lack of cooperation and a recent examination finding him competent. We find that the trial court should have suppressed the 12 inch knife recovered by the police during a warrantless search of defendant's bag. Although at the time of the search the bag was on the floor within the 'grabbable area' next to defendant, he was standing with his arms handcuffed behind his back ... . These circumstances do not support a reasonable belief that the defendant could have either gained possession of a weapon or destroyed evidence located in the bag. Police did not show any exigency to justify the warrantless search of the bag ...". ***People v. Washington*, 2019 N.Y. Slip Op. 02610, First Dept 4-4-19**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

THERE WAS CONFLICTING EVIDENCE WHETHER PLAINTIFF, WHO HAD NO MEMORY OF THE ACCIDENT, FELL FROM AN A-FRAME LADDER OR A SCAFFOLD, BOTH WERE DEEMED INADEQUATE SAFETY DEVICES AND PLAINTIFF WAS ENTITLED TO SUMMARY JUDGMENT ON HIS LABOR LAW § 240(1) CAUSE OF ACTION.

The First Department, reversing (modifying) Supreme Court, determined that the conflicting evidence, indicating plaintiff either fell from an A-frame ladder or from a scaffold, did not preclude summary judgment in plaintiff's favor on his Labor Law § 240(1) cause of action. Plaintiff had no memory of the accident. The court reasoned that both the step ladder and the scaffold constituted an inadequate safety device under the circumstances: "As to the 'ladder version,' although plaintiff has no specific recollection of the ladder moving, he also testified that, immediately before the fall, he was standing on the second to the last rung up, with his hands over his head toward the duct, which he could barely reach. Such testimony establishes prima facie that the ladder did not provide proper protection for plaintiff ... . Because the record is clear that the ladder did not prevent him from falling, his inability to identify the precise manner in which he fell is immaterial ... . As to the 'scaffold version,' it is undisputed fact that the scaffold from which plaintiff purportedly fell had no guardrails. This fact establishes prima facie that it was an inadequate safety device ... . Under either version, defendants have not raised a triable issue of fact as to whether plaintiff's negligence was the sole proximate cause of his accident ...". ***Ajche v. Park Ave. Plaza Owner, LLC*, 2019 N.Y. Slip Op. 02456, First Dept 4-2-19**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

UNLOADING STEEL PLATES USED TO COVER EXCAVATED AREAS AT A CONSTRUCTION SITE WAS A COVERED ACTIVITY UNDER LABOR LAW § 240(1).

The Second Department determined plaintiff was properly awarded summary judgment on his Labor Law § 240(1) cause of action. Plaintiff was injured unloading a two-ton steel plate used to cover excavated areas at a construction site. The defendant's argument that the plate was not unloaded for construction work. but rather for storage, was rejected: "Plaintiff made a prima facie showing that the work he was performing as an employee of Clean at the time of his accident was covered under section 240(1). There is no dispute that plaintiff was injured in the course of unloading an approximately two-ton steel plate at a construction site owned by defendant Con Ed, after transporting the plate to the site by truck. Witnesses consistently indicated that Clean routinely unloaded steel plates at the site for the purpose of covering areas excavated for electrical work. Clean performed this work pursuant to a contract that required it to provide steel plates at excavation sites owned by defendant including the subject site, and also required Clean to perform work ancillary to other tasks enumerated under Labor Law § 240(1) such as removing construction-related debris and installing barricades for excavation work ... . Moreover, plaintiff performed this work on an active construction site while another worker on the site was building a removable roof for a transformer vault. Clean failed to raise triable issues of fact as to whether plaintiff's work was covered by Labor Law § 240(1). It does not avail Clean to assert that plaintiff unloaded the plate merely for the purpose of storage. The Court of Appeals has rejected an interpretation of Labor Law § 240(1) that 'would compartmentalize a plaintiff's activity and exclude from the statute's coverage preparatory work essential to the enumerated act' ...". ***Saquicaray v. Consolidated Edison Co. of N.Y., Inc.*, 2019 N.Y. Slip Op. 02460, First Dept 4-2-19**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

PLAINTIFF WAS NOT ABLE TO DEMONSTRATE DEFENDANTS-HOMEOWNERS DIRECTED HIM TO REMOVE HIS BOOTS WHILE WORKING, PLAINTIFF SLIPPED AND FELL ON STAIRS BECAUSE HE WAS WEARING ONLY SOCKS, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON THE LABOR LAW § 200 CAUSE OF ACTION SHOULD HAVE BEEN GRANTED.

The First Department, reversing Supreme Court, determined defendants-homeowners' motion for summary judgment should have been granted in this Labor Law 200 action. Someone told plaintiff to take off his boots while working in the home and he slipped and fell on the stairs. Plaintiff did not demonstrate that it was the defendants who told him to remove his boots: "Plaintiff claims that he was injured after slipping and falling on slippery stairs because he was directed to remove his boots while working. Defendants established prima facie that they did not exercise supervisory control over the means and methods of plaintiff's work ... . Their principals, the homeowners, testified that they were not home on the day of the accident and that they never asked any workers to remove their boots. In opposition, plaintiff failed to raise an issue of fact as to whether the man from whom he received the instruction to remove his boots had apparent authority to direct his work ... . Plaintiff was unable to identify the man, the man's employer, or the man's relationship to the homeowners. Moreover, plaintiff testified that at first he refused to take his boots off. Plaintiff called his supervisor who warned him that if he did not remove his boots he would be fired. As such, plaintiff's supervisor gave the ultimate direction to remove his boots, which establishes that the employer exercised supervisory control over the injury-producing work. The record also shows that the stairs were not in a dangerous condition ... . Plaintiff himself testified that there were no observable defects on the stairs, that they were not wet, and that they were free of chips and cracks. He admitted that he slipped solely because he was wearing socks with no boots ...". ***Antonio v. West 70th Owners Corp.*, 2019 N.Y. Slip Op. 02626, First Dept 4-4-19**

PERSONAL INJURY.

MISSING CHAIR IN FRONT OF A SLOT MACHINE IS OPEN AND OBVIOUS AND NONACTIONABLE, PLAINTIFF WAS INJURED WHEN SHE ATTEMPTED TO SIT IN FRONT OF A MACHINE WHERE THERE WAS NO CHAIR.

The First Department determined the absence of a chair in front of a slot machine was open and obvious and nonactionable: "[P]laintiff was injured when she fell while attempting to sit down at a slot machine that did not have a chair. Defendants showed that the missing chair was an open and obvious condition that was not inherently dangerous by submitting videotape footage showing the subject slot machine without a chair. Plaintiff also testified that she had previously noticed chairs missing from slot machines at the casino, and that she had been seated next to the subject machine that was without a chair for 20 to 25 minutes before her fall ... . Plaintiff's opposition failed to raise a triable issue of fact. Her argument that slot machines are distracting to the point of being all-encompassing, is unavailing, as she did not provide any probative evidence as to how distracted a person becomes when she or he uses slot machines. Plaintiff's testimony that she was distracted by the slot machines does not lead to a conclusion that they are so distracting that their mere existence makes an open and obvious condition such as a missing chair any less open and obvious ... . Furthermore, that a similar accident apparently occurred at defendant casino does not lead to the conclusion that a missing chair is a latent or inherently dangerous condition." ***Vasquez v. Yonkers Racing Corp.*, 2019 N.Y. Slip Op. 02461, First Dept 4-2-19**

PERSONAL INJURY.

DEFENDANT'S SLOW MOVING TRUCK FURNISHED THE CONDITION FOR THE REAR-END COLLISION BUT WAS NOT THE CAUSE OF THE COLLISION, DIFFICULTY SEEING BECAUSE OF SUNLIGHT DID NOT CONSTITUTE A NON-NEGLIGENT EXCUSE.

The First Department, reversing Supreme Court, determined that defendant's motion for summary judgment should have been granted in this traffic-accident case: "In this rear-end collision case, the fact that the truck owned and operated by defendants had entered onto the parkway one exit earlier than authorized by a permit issued by the Department of Transportation, standing alone, does not establish that the early entry onto the parkway was a proximate cause of the accident ... . The record reflects that the accident occurred on a dry and sunny day with light traffic, that defendant Paolino was driving the truck slowly, and that Paolino had turned on the truck's hazard lights. The truck's presence on the parkway merely furnished the condition or occasion for the occurrence of the accident, but not its cause ... . Plaintiffs' proffered excuse for the accident, that the bright sunlight may have made it difficult for the decedent to see defendants' truck driving through the tunnel, does not constitute a nonnegligent explanation for the rear-end collusion ... . The affidavit by plaintiffs' accident reconstruction expert is not based on any evidence and therefore fails to raise an issue of fact ...". ***Battocchio v. Paolino*, 2019 N.Y. Slip Op. 02477, First Dept 4-2-19**

PERSONAL INJURY, LANDLORD-TENANT.

PLAINTIFF WAS SHOT INSIDE DEFENDANT'S BUILDING, DEFENDANT LANDLORD DEMONSTRATED IT DID NOT HAVE NOTICE OF AN ALLEGED BROKEN LOCK, THE EVIDENCE DID NOT DEMONSTRATE THE ASSAILANT WAS AN INTRUDER AS OPPOSED TO AN INVITED GUEST, AND THERE WAS EVIDENCE PLAINTIFF WAS THE VICTIM OF A TARGETED ATTACK, DEFENDANT LANDLORD'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED.

The First Department, reversing Supreme Court, determined the NYC Housing Authority's (NYCHA's) motion for summary judgment should have been granted in this third-party assault case. Plaintiff was shot inside the building. Defendant demonstrated it did not have notice of an alleged broken lock which would have allowed an intruder to enter the building. And the evidence did not demonstrate the assailant was an intruder as opposed to an invited guest. In addition, plaintiff admitted he was the victim of a targeted attack, which severed any causal relationship with defendant's alleged negligence: "[P]laintiff alleges that he was injured when, while visiting his wife in NYCHA's building, he was shot by defendant Lawrence, who was able to enter the building because of a broken lock on the building's front door. The record establishes that NYCHA lacked notice of a broken lock inasmuch as NYCHA submitted evidence showing that although the front door lock had been repaired a number of times in the months leading up to the incident, NYCHA's supervisor of caretakers testified that the lock was working on the morning of the incident, and for almost a full week beforehand ... . The evidence also fails to show that the alleged assailant was an unauthorized intruder, rather than an invited guest ... . The alleged assailant testified that he lived across from the subject building, that he had numerous family members and friends who lived in the building, and that he was a frequent visitor of the building. Furthermore, plaintiff admitted that he was the victim of a targeted attack by the alleged assailant, which severed the causal nexus between NYCHA's alleged negligence and plaintiff's injuries ...". ***Roldan v. New York City Hous. Auth.*, 2019 N.Y. Slip Op. 02462, First Dept 4-2-19**

PERSONAL INJURY, MUNICIPAL LAW.

ABUTTING PROPERTY OWNER NOT RESPONSIBLE FOR TRIP AND FALL IN TREE WELL NEAR THE SIDEWALK, THE TREE WELL IS NOT UNDER THE PROPERTY OWNER'S CONTROL.

The First Department determined defendant property owner's (Val-Mac's) motion for summary judgment in this sidewalk slip and fall case was properly granted. Plaintiff fell in a tree well near the sidewalk abutting defendant's property: "Plaintiff tripped and fell in a tree well as he walked on the sidewalk in front of Val-Mac's property, which was undergoing repairs to a sewer line running to the street. Absent evidence that Val-Mac controlled the construction or made special use of the sidewalk, there is no issue of fact as to whether it proximately caused the accident, rather than 'merely furnish[ing] the condition or occasion for the occurrence of the event' ... . As the tree well is not part of the sidewalk under Val-Mac's control, the court properly granted summary judgment ...". ***Schwartz v. City of New York*, 2019 N.Y. Slip Op. 02465, First Dept 4-2-19**

SECOND DEPARTMENT

CIVIL PROCEDURE, JUDGES, CONSTITUTIONAL LAW, FORECLOSURE.

JUDGE'S SUA SPONTE DISMISSAL OF THE COMPLAINT IN THIS FORECLOSURE ACTION DEPRIVED PLAINTIFF OF NOTICE AND A CHANCE TO BE HEARD, A VIOLATION OF DUE PROCESS.

The Second Department, reversing Supreme Court, determined the judge should not have, sua sponte, dismissed the complaint as abandoned without giving plaintiff a chance to be heard in this foreclosure action: "[B]y notice of motion dated August 15, 2014, the plaintiff ... moved, inter alia, to extend its time to serve a copy of the order of reference with notice of

entry ... , nunc pro tunc, to March 23, 2007 (hereinafter the second extension of time motion). In an order dated February 26, 2015 (hereinafter the February 2015 order), the Supreme Court denied the second extension of time motion, and, sua sponte, directed the dismissal of the complaint as abandoned, noting, inter alia, that '[t]he order of reference at issue was signed in 2007' and the appointed referee was no longer on the fiduciary list. ... The Supreme Court's sua sponte determination to direct dismissal of the complaint deprived the plaintiff of notice and opportunity to be heard and amounted to a denial of the plaintiff's due process rights (see CPLR 3216 ...). Accordingly, the court should have granted that branch of the plaintiff's motion which was to vacate the February 2015 order." ***Chase Home Fin., LLC v. Plaut*, 2019 N.Y. Slip Op. 02494, Second Dept 4-3-19**

CIVIL PROCEDURE, PERSONAL INJURY, EVIDENCE, PRIVILEGE.

DEFENDANT'S HEALTH AT THE TIME OF THE TRAFFIC ACCIDENT WAS NEVER PLACED IN CONTROVERSY AND THE PHYSICIAN-PATIENT PRIVILEGE WAS NOT WAIVED BY A LETTER TO PLAINTIFF'S ATTORNEY INDICATING DEFENDANT SUFFERED FROM DEMENTIA, ANXIETY AND DEPRESSION.

The Second Department, over a two-justice dissent, determined that defendant driver's (Rozansky's) medical condition at the time of this 2004 traffic accident was not "in controversy" and therefore the driver's medical records were not discoverable. Rozansky, who subsequently died, had, in 2006, submitted a letter from his social worker to plaintiff's attorney claiming he suffered from dementia, anxiety and depression, allegedly to be excused from a deposition, but otherwise the issue of the Rozansky's health was not raised: "[T]he plaintiffs failed to sustain their initial burden of demonstrating that Rozansky's condition at the time of the accident was 'in controversy' within the meaning of CPLR 3121(a) ... . Furthermore, even if the plaintiffs had met that burden, neither Rozansky nor his estate waived the privilege attached to the medical records, as the defendant has not asserted a counterclaim or sought to excuse Rozansky's conduct at the time of the accident on the basis of some condition ... . Contrary to the conclusion of our dissenting colleagues, Rozansky did not place his mental condition at the time of the accident 'in controversy' or waive the privilege attached to his medical records by allegedly declining to be deposed ... . Neither Rozansky nor his estate have sought to excuse his conduct at the time of the accident ... , due to any condition. At best, Rozansky placed his mental condition in September 2006 at issue by allegedly refusing to appear for a deposition ... . The plaintiffs could have moved at that time to compel the deposition and challenged the social worker's diagnosis. Instead, nine years after the social worker's letter, and six years after Rozansky's death, and after filing three notes of issue over the course of some seven years, indicating that discovery was complete and the case was ready for trial, the plaintiffs purported to use the mechanism of a trial subpoena to compel production of Rozansky's medical records from October 22, 1999, to the present. We disagree with our dissenting colleagues that Rozansky's alleged invocation of dementia in September 2006, by submission of a letter from his social worker, established a waiver of the privilege attached to his medical records from October 22, 1999." ***Peterson v. Estate of John Rozansky*, 2019 N.Y. Slip Op. 02568, Second Dept, 4-3-19**

CRIMINAL LAW, APPEALS, IMMIGRATION LAW.

DEFENDANT WAS NOT INFORMED OF THE DEPORTATION CONSEQUENCES OF HIS GUILTY PLEA AND DID NOT HAVE A PRACTICAL ABILITY TO OBJECT, THEREFORE AN EXCEPTION TO THE PRESERVATION REQUIREMENT FOR APPEAL APPLIES, MATTER REMITTED TO ALLOW DEFENDANT TO MOVE TO WITHDRAW HIS PLEA.

The Second Department determined the defendant was not informed of the deportation consequences of his guilty plea and therefore did not have the opportunity to move to withdraw his plea. Therefore a narrow exception to the preservation requirement applies and the matter was remitted to allow defendant to make the motion: "[A] narrow exception to the preservation requirement exists 'in rare cases where the defendant lacks a reasonable opportunity to object to a fundamental defect in the plea which is clear on the face of the record and to which the court's attention should have been instantly drawn,' such that the salutary purpose of the preservation rule is . . . not jeopardized' ... . In this case, the exception applies. At the plea proceeding, the court merely asked defense counsel if he had discussed with the defendant the potential 'immigration consequences' of pleading guilty. Defense counsel responded: 'He is here on a Green Card. We have discussed the immigration consequences.' Furthermore, the People's contention that the written appeal waiver form demonstrates that the defendant was aware of the possibility of deportation prior to the imposition of the sentence is without merit ... . Inasmuch as the record does not demonstrate either that the Supreme Court mentioned, or that the defendant was otherwise aware of, the possibility of deportation, the defendant had 'no practical ability' to object to the court's statement or to otherwise tell the court, if he chose, that he would not have pleaded guilty if he had known about the possibility of deportation ...". ***People v. Mohamed*, 2019 N.Y. Slip Op. 02557, Second Dept 4-3-19**

CRIMINAL LAW, EVIDENCE.

ANGRY REMARK MADE TO PROBATION OFFICER DID NOT CONSTITUTE OBSTRUCTION OF GOVERNMENTAL ADMINISTRATION, PROBATION SHOULD NOT HAVE BEEN REVOKED.

The Second Department, reversing Supreme Court, determined defendant's angry remark made to the probation officer (threatening to "blow her up") was not a crime and therefore did not justify the revocation of probation and incarceration

(defendant has served his sentence): "A person is guilty of obstructing governmental administration in the second degree when 'he intentionally obstructs, impairs or perverts the administration of law or other governmental function or prevents or attempts to prevent a public servant from performing an official function, by means of intimidation, physical force or interference, or by means of any independently unlawful act' (Penal Law § 195.05). 'The plain meaning of the statute and the accompanying commentary clearly demonstrate that the mens rea of this crime is an intent to frustrate a public servant in the performance of a specific function' ... . Although the evidence at the hearing demonstrated that the probation officer was at work, there was no evidence to show that the defendant attempted to prevent her from performing a specific function. The defendant's angry outburst, without more, was insufficient to establish a violation of Penal Law § 195.05. Thus, the Supreme Court's finding that the defendant violated a condition of his probation by failing to lead a law-abiding life is not supported by a preponderance of the evidence ...". ***People v. Brooks*, 2019 N.Y. Slip Op. 02539, Second Dept 4-3-19**

CRIMINAL LAW, EVIDENCE.

ANONYMOUS TIP ALLEGING SUSPICIOUS BEHAVIOR BY MEN WEARING HOODIES GOING IN AND OUT OF A U-HAUL TRUCK DID NOT JUSTIFY PULLING OVER A U-HAUL TRUCK DRIVEN BY A MAN WEARING A HOODIE, WEAPON FOUND IN THE TRUCK SHOULD HAVE BEEN SUPPRESSED.

The Second Department, reversing defendant's conviction, determined that the anonymous tip that persons were acting suspicious going in and out of a U-Haul truck and that one of the persons was wearing a brown hoodie did not justify pulling over a U-Haul truck driven by a man wearing a brown hoodie. The weapon found in the truck should have been suppressed: "[T]he police lacked reasonable suspicion to stop the vehicle based only on the anonymous tip of men 'suspiciously' going in and out of a U-Haul truck, because the tip was insufficient to create reasonable suspicion that the individuals described were engaging in criminal activity ... . The characteristics described in the anonymous tip were readily observable, and the behavior of the individuals described in the tip was consistent with the ordinary use of a U-Haul truck, as the tipster failed to identify what made the behavior suspicious for burglary ... . Additionally, the tip 'lacked predictive information' and was uncorroborated by the officers, as the U-Haul truck was not at the reported location when the officers arrived ... . Accordingly, the information that the police received from the anonymous informant, even coupled with the officers' own observations, did not provide them with reasonable suspicion to make an investigatory stop ...". ***People v. Floyd*, 2019 N.Y. Slip Op. 02546, Second Dept 4-3-19**

ELECTION LAW.

PETITION SEEKING TO INVALIDATE THE ORGANIZATIONAL MEETING OF THE SUFFOLK COUNTY COMMITTEE OF THE CONSERVATIVE PARTY SHOULD HAVE BEEN DENIED.

The Second Department, reversing Supreme Court, determined the petition seeking to invalidate the organizational meeting of the Suffolk County Committee of the Conservative Party should have been denied. The decision is fact specific and deals with many Election Law procedural issues that cannot be fairly summarized here: "[W]e are mindful that 'a court's jurisdiction to intervene in election matters is limited to the powers expressly conferred by statute' ... . The 'internal issues arising within political parties are best resolved within the party organization itself and judicial involvement should only be undertaken as a last resort' ... . While the courts 'will act to protect the rights of committee persons to be present and to vote at meetings of the committee' ... , ' [j]udicial intervention is only warranted upon a clear showing that a party or its leaders have violated [the Election Law] or the party's own rules adopted in accordance with law, or otherwise [have] violat[ed] the rights of party members or the electorate' ... . No such showing was made in this case." ***Matter of Auerbach v. Suffolk County Comm. of the Conservative Party*, 2019 N.Y. Slip Op. 02515, Second Dept 4-3-19**

FAMILY LAW, INDIAN LAW.

FAMILY COURT PROPERLY TRANSFERRED THIS DERIVATIVE NEGLECT PROCEEDING TO THE UNKECHAUG INDIAN NATION PURSUANT TO THE INDIAN CHILD WELFARE ACT (ICWA).

The Second Department determined Family Court properly transferred the derivative neglect proceeding to the Unkechaug Indian Nation pursuant to the Indian Child Welfare Act (ICWA): "The ICWA provides that 'the Indian custodian of the child and the Indian child's tribe shall have a right to intervene at any point' in a proceeding to which the ICWA applies ... . Congress authorized the Department of the Interior, Bureau of Interior Indian Affairs (hereinafter the DOI), to promulgate rules and regulations 'as may be necessary to carry out the provisions of [ICWA]' ... . The current regulations define the term 'child-custody proceeding' as 'any action, other than an emergency proceeding, that may culminate in' foster-care placement, termination of parental rights, preadoptive placement, and adoptive placement ... . 'An action that may culminate in one of these four outcomes is considered a separate child-custody proceeding from an action that may culminate in a different one of these four outcomes' ... . The DOI explained that '[t]he final rule uses the phrase may culminate in one of the following outcomes,' rather than the less precise phrase involves,' used in the draft rule, in order to make clear that ICWA requirements would apply to an action that may result in one of the placement outcomes, even if it ultimately does not. For example, ICWA would apply to an action where a court was considering a foster-care placement of a child, but ultimately decided to return the child to his parents. Thus, even though the action did not result in a foster-care placement, it may have

culminated in such a placement and, therefore, should be considered a child-custody proceeding' under the statute' ...". ***Matter of Dupree M. (Samantha Q.)*, 2019 N.Y. Slip Op. 02523, Second Dept 4-3-19**

FORECLOSURE, EVIDENCE.

RECORDS SUBMITTED BY THE BANK DID NOT MEET THE REQUIREMENTS OF THE BUSINESS RECORDS EXCEPTION TO THE HEARSAY RULE, BANK'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined the records submitted by the bank (Deutsche Bank) did not meet the requirements of the business records exception to the hearsay rule: "Here, in support of its motion, Deutsche Bank submitted the mortgage, the note, and the affidavit of Nicholas Collins, a vice president of Ocwen Loan Servicing, LLC (hereinafter Ocwen), Deutsche Bank's loan servicer, in which Collins averred, inter alia, that the defendant defaulted by failing to make the payments due under the note and mortgage after January 1, 2008. The plaintiff also submitted a limited power of attorney dated June 7, 2012, which demonstrated that Ocwen was authorized to act on Deutsche Bank's behalf. However, Deutsche Bank failed to demonstrate that the records relied upon by Collins, including those relating to the defendant's alleged default, were admissible under the business records exception to the hearsay rule, since Collins, who was employed by Ocwen, did not attest that he was personally familiar with the record-keeping practices and procedures of the plaintiff (see CPLR 4518[a] ...). Thus, Collins failed to lay a proper foundation for admission of the records on which he relied, including the records concerning the defendant's payment history, and therefore, his assertions based on those records were inadmissible ...". ***Deutsche Bank Trust Co. Ams. v. Blount*, 2019 N.Y. Slip Op. 02500, Second Dept 4-3-19**

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

NOTE HOLDER'S COMPLIANCE WITH NOTICE REQUIREMENTS OF RPAPL 1304 NOT DEMONSTRATED, MOTION FOR SUMMARY JUDGMENT IN THIS FORECLOSURE ACTION SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined respondent (the holder of the note) did not demonstrate compliance with the notice provisions of RPAPL 1304. Therefore respondent's motion for summary judgment in this foreclosure action should not have been granted: " '[P]roper service of RPAPL 1304 notice on the borrower or borrowers is a condition precedent to the commencement of a foreclosure action, and the plaintiff has the burden of establishing satisfaction of this condition' ... . 'The statute requires that such notice . . . be sent by registered or certified mail, and also by first-class mail, to the last known address of the borrower' ... . The respondent, which submitted only a copy of the required notice, and did not submit any evidence that the notice was mailed in the manner required by the statute, failed to meet its prima facie burden with respect to the notice requirements of RPAPL 1304. Specifically, the respondent did not submit 'an affidavit of service, [or] proof of mailing by the post office evincing that it properly served the defendant pursuant to RPAPL 1304 [by registered or certified mail and also by first-class mail to his last known address]' ... , or 'proof of a standard office mailing procedure designed to ensure that items are properly addressed and mailed, sworn to by someone with personal knowledge of the procedure' ...". ***Marchai Props., L.P. v. Fu*, 2019 N.Y. Slip Op. 02511, Second Dept 4-3-19**

INSURANCE LAW, ARBITRATION.

PETITION SEEKING A STAY OF ARBITRATION AND A FRAMED-ISSUE HEARING ON THE WHETHER THE TRAFFIC ACCIDENT WAS STAGED SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined that the petition to temporarily stay arbitration of the claim for uninsured motorist benefits pending a framed-issue hearing addressing whether the collision was an accident or intentional should have been granted. The insurer, Global, presented evidence the traffic accident involving an uninsured vehicle was staged. The injured passenger, Eveillard, submitted sufficient evidence to rebut the insurer's position: "As the party seeking a stay of arbitration based upon a lack of coverage, Global bore the initial burden of 'showing the existence of sufficient evidentiary facts to establish a preliminary issue which would justify the stay' ... . Here, contrary to the Supreme Court's determination ... , Global set forth evidentiary facts and submitted documentary evidence sufficient to establish a preliminary issue as to whether the collision giving rise to the claim for uninsured motorist benefits was an accident or an intentional act orchestrated, in part, by Eveillard ... . Since Eveillard submitted evidence sufficient to rebut Global's evidentiary showing, a temporary stay of arbitration pending a framed-issue hearing is warranted ... . Supreme Court should have granted that branch of the petition which was to temporarily stay arbitration of the claim for uninsured motorist benefits pending a framed-issue hearing as to whether the collision was the result of a covered accident or an intentional act, and we remit the matter to the Supreme Court ... for a hearing on the issue of insurance coverage and a new determination thereafter on that branch of the petition which was to permanently stay arbitration." ***Matter of Global Liberty Ins. Co. v. Eveillard*, 2019 N.Y. Slip Op. 02521, Second Dept 4-3-19**

INSURANCE LAW, CIVIL PROCEDURE.

NO PRIVATE RIGHT OF ACTION UNDER NEW YORK'S MENTAL HEALTH PARITY LAW (TIMOTHY'S LAW).

The Second Department determined that New York's mental health parity law (Timothy's Law, Insurance Law §§ 3221(1)(5) and 4303(g)) did not create a private right of action over and above the administrative enforcement provisions. Plaintiff alleged the health insurance benefits administered by defendants were far more restrictive for mental health than for general medical claims: "[T]he Court of Appeals has held that ' regardless of its consistency with the basic legislative goal, a private right of action should not be judicially sanctioned if it is incompatible with the enforcement mechanism chosen by the Legislature or with some other aspect of the over-all statutory scheme' ... . Thus, where 'the legislature clearly contemplated administrative enforcement of the statute, '[t]he question then becomes whether, in addition to administrative enforcement, an implied private right of action would be consistent with the legislative scheme' ... . [D]eterminations of whether the law had been violated require[] complex, fact-based determinations about medical necessity, and DFS [NYS Department of Financial Services] had implemented a comprehensive system to evaluate appeals following denials of coverage ... . '[A]llowing people to litigate these issues in court might yield duplicative or inconsistent results' ...". ***Kamins v. United Healthcare Ins. Co. of N.Y., Inc.*, 2019 N.Y. Slip Op. 02507, Second Dept 4-3-19**

INSURANCE LAW, CONTRACT LAW.

THE EXCEPTION TO THE FAULTY WORKMANSHIP EXCLUSION IN THE FIRE INSURANCE POLICY APPLIED TO PRESERVE COVERAGE FOR ENSUING LOSS.

The Second Department, reversing Supreme Court, determined that the fire damage was covered under the policy: "Following an inspection of the property by a fire investigator and an electrical engineer, the defendant issued a letter to the plaintiffs' claims adjuster disclaiming coverage for 'building damage' on the grounds that 'improper conditions' related to a junction box 'were the direct cause of the fire and instant loss' and the policy specifically excluded coverage for faulty workmanship. ... The exclusion provided, in relevant part, '[w]e do not insure for loss to property described in Coverages A and B caused by any of the following. However, any ensuing loss to property described [in] Coverages A and B not excluded or excepted in this policy is covered. . . . c. Faulty, inadequate or defective: . . . (2) design, specifications, workmanship, repair, construction, renovation, remodeling, grading, compaction . . . of part or all of any property, whether on or off residence premises.' 'Where a property insurance policy contains an exclusion with an exception for ensuing loss, courts have sought to assure that the exception does not supersede the exclusion by disallowing coverage for ensuing loss directly related to the original excluded risk' ... . Therefore, 'an ensuing loss provision . . . provide[s] coverage when, as a result of an excluded peril, a covered peril arises and causes damage' ... . We disagree with the Supreme Court's determination that the plaintiffs did not establish, as a matter of law, that the exception to the faulty workmanship exclusion was applicable to preserve coverage for the damage to their property. The evidence in the record demonstrated that the fire occurred two years after the alleged faulty workmanship related to the junction box, and caused ensuing loss to property 'wholly separate from the defective property itself' ...". ***Fruchthandler v. Tri-State Consumer Ins. Co.*, 2019 N.Y. Slip Op. 02502, Second Dept 4-3-19**

PERSONAL INJURY, EVIDENCE.

DEFENDANT DID NOT PRESENT EVIDENCE THAT THE AREA WHERE PLAINTIFF SLIPPED AND FELL ON ICE WAS INSPECTED OR TREATED ON THE DAY OF THE FALL, THEREFORE DEFENDANT DID NOT DEMONSTRATE A LACK OF CONSTRUCTIVE NOTICE OF THE CONDITION, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined defendant did not demonstrate it did not have constructive notice of the icy condition in this slip and fall case. The defendant presented evidence of the manager's and superintendent's general practices but did not present evidence was inspected or treated on the day of the fall: " 'To meet its initial burden on the issue of lack of constructive notice, [a] defendant must offer some evidence as to when the area in question was last cleaned or inspected relative to the time when the plaintiff fell' ... . Here, the defendant failed to demonstrate, prima facie, that it did not have constructive notice of the alleged ice condition that caused the plaintiff to fall. The deposition testimony of the defendant's site manager merely referred to her general practice of traversing the breezeway where the accident allegedly occurred, one to two times per week, but provided no evidence regarding any specific inspection of the area prior to the plaintiff's fall ... . The superintendent's testimony failed to provide specific details of his snow removal efforts and salting near the time of the incident, and, thus, was too general to establish lack of constructive notice ...". ***Ahmetaj v. Mountainview Condominium*, 2019 N.Y. Slip Op. 02489, Second Dept 4-3-19**

PERSONAL INJURY, EVIDENCE.

DEFENDANT DID NOT DEMONSTRATE WHEN THE AREA WHERE PLAINTIFF SLIPPED AND FELL WAS LAST INSPECTED OR CLEANED, MOTION FOR SUMMARY JUDGMENT PROPERLY DENIED.

The Second Department determined defendant did not demonstrate a lack of constructive notice of the sand and debris in a walkway in this slip and fall case. Therefore their motions for summary judgment were properly denied: " 'Mere reference to general cleaning practices, with no evidence regarding any specific cleaning or inspection of the area in question, is insufficient to establish a lack of constructive notice' ... . [Defendant's] submissions in support of its motion failed to demonstrate, prima facie, a lack of constructive notice. The affidavit of its association president merely referenced his general inspection practices and failed to indicate when the area of the walkway where the alleged slip and fall occurred was last inspected or cleaned relative to the accident ...". ***Butts v. SJF, LLC*, 2019 N.Y. Slip Op. 02491, Second Dept 4-3-19**

PERSONAL INJURY, EVIDENCE.

ALTHOUGH THERE WAS A STORM IN PROGRESS WHEN PLAINTIFF SLIPPED AND FELL, THERE WAS A QUESTION OF FACT WHETHER THE ICY CONDITION EXISTED PRIOR TO THE STORM, DEFENDANT'S SUMMARY JUDGMENT MOTION SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined that, although defendant demonstrated there was a storm in progress in this slip and fall case, there was a question of fact whether the icy condition existed before the storm: "Under the storm in progress rule, a property owner will not be held liable in negligence for accidents occurring as a result of a slippery snow or ice condition 'occurring during an ongoing storm or for a reasonable time thereafter' ... . Here, in support of its motion, the defendant submitted, inter alia, the affidavit and report of a meteorologist with attached certified climatological data, which demonstrated that, at the time of the plaintiff's accident, a wintery mix of freezing rain, sleet, and rain was falling and the temperature may have been at or below freezing. Accordingly, the defendant established, prima facie, that a storm was ongoing at the time of the plaintiff's fall ... . In opposition, however, the plaintiff raised a triable issue of fact, via her General Municipal Law § 50-h hearing testimony, her deposition testimony, and the affidavit of her brother, as to whether the icy condition that caused her fall existed prior to the storm in progress and whether the defendant had constructive notice of the hazard ...". ***Isabel v. New York City Hous. Auth.*, 2019 N.Y. Slip Op. 02506, Second Dept 4-3-19**

PERSONAL INJURY, EVIDENCE, LANDLORD-TENANT.

PLAINTIFF PRESENTED ONLY SPECULATION ABOUT THE CAUSE OF HER SLIP AND FALL, LANDLORD'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined that the landlord's motion for summary judgment in this slip and fall case should have been granted because plaintiff could not identify the cause of her fall: "[T]he landlord met her prima facie burden on her motion for summary judgment dismissing the complaint by submitting the plaintiff's deposition transcript which demonstrated, prima facie, that she was unable to identify the cause of her fall without resorting to speculation ... . The plaintiff's theory that she slipped on water dripping from the ceiling was speculative in light of, inter alia, her deposition testimony that she 'personally didn't see any water dripping, but there must have been a drip from the ceiling because the ground was wet.' Moreover, [third-party defendant] testified at his deposition that, although there had been a prior water leak coming from the ceiling into the kitchen, that leak was not near the location of the plaintiff's accident." ***Bilska v. Truszkowski*, 2019 N.Y. Slip Op. 02490, Second Dept 4-3-19**

PERSONAL INJURY, MUNICIPAL LAW.

CAUSE OF ACTION BASED UPON A THEORY NOT ALLEGED IN THE NOTICE OF CLAIM PROPERLY DISMISSED.

The Second Department determined plaintiff's first cause of action was properly dismissed because it alleged a theory of liability in this slip and fall case that was not alleged in the notice of claim. Apparently the plaintiff fell after getting off defendants' bus: "[In the notice of claim] the plaintiff alleged ... that the accident was caused by 'the carelessness, recklessness and negligence of . . . New York City Transit Authority in the ownership, operation, maintenance, repair, construction, renovation, supervision and control of the aforesaid location.' ... ... [T]he ... defendants established their prima facie entitlement to judgment as a matter of law dismissing the first cause of action ... by submitting proof that the amended notice of claim contained no allegation that the bus operator was negligent in failing to provide the plaintiff with a safe place to alight ...". ***Rojas v. Hazzard*, 2019 N.Y. Slip Op. 02573, Second Dept 4-3-19**

TRUSTS AND ESTATES, ATTORNEYS.

ATTORNEY WHO DRAFTED THE 2005 WILL APPOINTING THE ATTORNEY AS EXECUTOR WAS REQUIRED TO HAVE THE TESTATOR ACKNOWLEDGE THE TESTATOR HAD BEEN INFORMED THAT FAILURE TO COMPLY WITH THE DISCLOSURE REQUIREMENTS WOULD RESULT IN THE ATTORNEY-EXECUTOR'S ENTITLEMENT TO ONLY ONE-HALF THE STATUTORY EXECUTOR'S COMMISSIONS.

The Second Department, resolving a split among Surrogate's Courts, determined that the attorney who drafted the 2005 will appointing himself as executor was required to have the testator sign an acknowledgment the testator had been informed that the failure to comply with statutory disclosure requirements would result in the attorney-executor being entitled to only one-half of the statutory executor's commissions: "The 2004 amendment [of Surrogate's Court Procedure Act (SCPA) 2307-a] was intended, as reflected in both its text and in its legislative history, to require that the testator be informed that, absent the testator's acknowledgment of receipt of the required disclosures, the attorney-executor would receive only one-half of the commissions otherwise payable. That the Legislature inadvertently included this fourth disclosure requirement only in model forms and not in the subdivision dealing directly with the required disclosures was an oversight, as is confirmed by the 2007 amendment and its legislative history ... . At bar, the instrument signed by the testator in 2005 did not include an acknowledgment that he had been informed that the failure to comply with the disclosure requirements would result in the attorney-executor being entitled to only one-half of the statutory executor's commissions. Therefore, we agree with the Surrogate's Court's determination that the petitioner is entitled to only one-half of the statutory executor's commissions ...". ***Matter of Brier*, 2019 N.Y. Slip Op. 02516, Second Dept 4-3-19**

THIRD DEPARTMENT

CRIMINAL LAW.

WAIVER OF INDICTMENT AND SUPERIOR COURT INFORMATION DID NOT INCLUDE THE TIME OF THE OFFENSE, GUILTY PLEA VACATED.

The Third Department, reversing County Court, determined that defendant's guilty plea must be vacated because the waiver of indictment and superior court information were defective. The time of the offense was not indicated: "We agree with defendant's contention that, because there was not strict compliance with the statutory mandates of CPL 195.20, his waiver of indictment is invalid, thereby requiring reversal of the judgment of conviction ... . The plain language of CPL 195.20 requires that a waiver of indictment include the date and approximate time of the charged offense. Although the waiver of indictment and the SCI, when filed together, may be read as a single document in order to satisfy the requirements of the statute, here, neither the waiver of indictment nor the SCI properly indicate the time of the charged offense ... . Moreover, this is not 'a situation where the time of the offense is unknown or, perhaps, unknowable' so as to excuse the absence of such information ...". ***People v. Titus*, 2019 N.Y. Slip Op. 02588, Second Dept 4-4-19**

Because defendant's admission to a violation of probation was induced by the explicit promise his sentence for the probation violation would run concurrently with the sentence for attempted burglary, which was reversed above, defendant's plea to the probation violation was vacated as well. ***People v. Titus*, 2019 N.Y. Slip Op. 02589, Third Dept 4-4-19**

CRIMINAL LAW, CONSTITUTIONAL LAW, ATTORNEYS, APPEALS.

DEFENDANT HAD SERVED HIS ENTIRE SENTENCE BY THE TIME THE ASSAULT SECOND CONVICTION WAS OVERTURNED, THE IMPOSITION OF MORE PRISON TIME UPON HIS SUBSEQUENT PLEA TO THE ASSAULT SECOND CHARGE VIOLATED THE DOUBLE JEOPARDY CLAUSE, DEFENSE COUNSEL WAS INEFFECTIVE FOR NOT REQUESTING TIME SERVED, BECAUSE THE ERROR AFFECTED THE VOLUNTARINESS OF DEFENDANT'S GUILTY PLEA THE WAIVER OF APPEAL DID NOT APPLY.

The Third Department, reversing Supreme Court, determined defendant's motion to vacate his conviction and set aside the sentence should have been granted. The court noted that the waiver of appeal did not apply because the alleged error affected the voluntariness of the guilty plea. At the time defendant's assault second conviction was overturned he had completed his sentence. When he subsequently pled guilty to the assault second charge more prison time was imposed. That violated the prohibition against double jeopardy (punished twice for the same offense). Defense counsel was ineffective for not arguing defendant must be sentenced to time served: "At the time of remittal, it was clear that, more than 15 years earlier, defendant had been sentenced to seven years in prison for his conviction of assault in the second degree, which was the maximum permissible sentence for a second violent felony offender convicted of that crime ... . It was also clear that his assault conviction had been overturned on appeal. These facts and circumstances alone would have alerted a reasonably competent attorney to the possibility that any subsequent sentence that included additional prison time might violate the constitutional prohibition against multiple punishments and, by extension, prompted an inquiry into the amount of time

that defendant had already served in prison on his 2001 assault conviction. It is evident from the record that defense counsel did not recognize or investigate the obvious potential double jeopardy concern at the time of remittal for, if she had, she would have determined — as the People concede — that defendant had already served the maximum permissible prison term for assault in the second degree and, therefore, could be sentenced only to time served ...". ***People v. Jones*, 2019 N.Y. Slip Op. 02586, Third Dept 4-4-19**

FAMILY LAW, TRUSTS AND ESTATES, INSURANCE LAW.

WIFE'S STATUS AS A BENEFICIARY OF AN ANNUITY PAID TO THE HUSBAND WAS REVOKED BY OPERATION OF THE ESTATES, POWERS AND TRUST LAW (EPTL) UPON DIVORCE.

The Third Department determined an annuity paid to the husband in settlement of a medical malpractice action was not payable to the former wife (Malizia), as a beneficiary of the annuity, because her status as a beneficiary was revoked upon divorce, pursuant to the Estates, Powers and Trust Law (EPTL): "EPTL 5-1.4 (a) provides that, '[e]xcept as provided by the express terms of a governing instrument, a divorce . . . revokes any revocable (1) disposition or appointment of property made by a divorced individual to, or for the benefit of, the former spouse.' Malizia's argument that EPTL 5-1.4 does not apply to the annuity is unavailing. Although an annuity is not specifically identified as a governing instrument by EPTL 5-1.4 (f) (5), the statute expressly indicates that the list is illustrative and not exhaustive. An annuity is a testamentary substitute that operates similarly to the examples of governing instruments that are specifically named in the statute by providing for the disposition of property at death ... . In that regard, the annuity specifically provided for payment of the monthly installments to decedent during his lifetime, and the beneficiary designation constituted a disposition of a property interest to the named beneficiary at decedent's death, i.e., the right to receive any guaranteed payments required to be made after his death. The statute was enacted to prevent the inadvertent disposition of such property to a former spouse following termination of a marriage by creating a conclusive and irrebuttable presumption that any revocable disposition of property to a former spouse is automatically revoked upon divorce ...". **United States Life Ins. Co. In The City of New York v. Shields, 2019 N.Y. Slip Op. 02593, Third Dept 4-4-19,**

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