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Editor: **Bruce Freeman**

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SECOND DEPARTMENT

CIVIL PROCEDURE.

ALTHOUGH DEFENDANT WAS AMBIVALENT ABOUT WHEN HE WAS SERVED, THE MOTION TO DISMISS SHOULD NOT HAVE BEEN DENIED ON THAT GROUND, IT IS PLAINTIFF'S BURDEN TO DEMONSTRATE A DEFENDANT WAS TIMELY SERVED WITH A SUMMONS AND COMPLAINT.

The Second Department, reversing (modifying) Supreme Court, determined defendant's motion to dismiss the complaint because defendant was not timely served should have been granted. The defendant was ambivalent about when he was served and the motion was denied on that ground. However, it is the plaintiff's burden to prove when service was made: "[T]he defendant Malka Hayut averred that she had been served on May 12, 2016, more than 120 days after the filing of the summons and complaint, and the defendant Meir Marc Hayut (hereinafter the appellant) averred only that he 'may have been served' on May 12, 2016. ... [T]he Supreme Court, inter alia, denied that branch of the defendants' renewed motion ... to dismiss the complaint insofar as asserted against the appellant [Meir], on the ground that the appellant was equivocal as to whether he was timely served. The burden of proving that personal jurisdiction was acquired over a defendant rests with the plaintiff ... . Although the failure to file an affidavit of service with the court pursuant to CPLR 308(4) is generally a procedural irregularity which may be cured ... , in this case, the plaintiff did not cure the defect. In the absence of evidence that the appellant was properly served, that branch of the defendants' motion which was pursuant to CPLR 3211(a)(8) to dismiss the complaint insofar as asserted against the appellant for lack of personal jurisdiction should have been granted ...". ***Deb v. Hayut*, 2019 N.Y. Slip Op. 02676, Second Dept 4-10-19**

CIVIL PROCEDURE, EVIDENCE, PERSONAL INJURY.

MOTION FOR A JUDGMENT AS A MATTER OF LAW MADE DURING JURY SELECTION WAS PREMATURE, GRANTING THE MOTION ON SPOLIATION GROUNDS VIOLATED THE LAW OF THE CASE.

The Second Department, reversing Supreme Court, determined plaintiff's motion to strike defendant's answer on spoliation grounds in this medical malpractice and wrongful death action, made during jury selection, should not have been granted. It was not a proper motion for a judgment as a matter of law pursuant to CPLR 4401 and the ruling violated the law of the case: "During jury selection, the plaintiff made an oral application, in effect, to strike the defendant's answer and for judgment as a matter of law on the issue of liability based on the defendant's alleged spoliation of evidence relating to certain telemetry strips and the defendant's failure to perform an autopsy on the decedent. In opposition, the defendant argued, among other things, that the Supreme Court had previously denied that branch of a prior motion by the plaintiff which was to strike the defendant's answer based on the defendant's alleged spoliation of evidence. ... 'A motion for judgment as a matter of law is to be made at the close of an opposing party's case or at any time on the basis of admissions (see CPLR 4401), and the grant of such a motion prior to the close of the opposing party's case generally will be reversed as premature even if the ultimate success of the opposing party in the action is improbable' ... . Here, the plaintiff's oral application, which was made during jury selection, was not based on any admissions by the defendant, and the Supreme Court should not have considered the merits of the plaintiff's application at that juncture ... . … Supreme Court violated the doctrine of law of the case by disregarding the prior order denying that branch of the plaintiff's earlier motion which was to strike the defendant's answer based upon the same evidentiary issues ...". ***Fishon v. Richmond Univ. Med. Ctr.*, 2019 N.Y. Slip Op. 02682. Second Dept 4-10-19**

CIVIL PROCEDURE, FORECLOSURE.

PURSUANT TO AN EXCEPTION IN 22 N.Y.C.R.R. § 202.5-b, USING THE NYSCEF ELECTRONIC FILING SYSTEM DID NOT CONSTITUTE PROPER SERVICE OF A NOTICE OF ENTRY ON DEFENDANTS, THE TIME FOR DEFENDANTS TO ANSWER THEREFORE NEVER STARTED TO RUN AND DEFENDANTS WERE NOT IN DEFAULT.

The Second Department, reversing Supreme Court, determined that a notice of entry in this foreclosure action, although the NYSCEF electronic filing system was used, was not properly served and therefore defendants' time to answer never started running and defendants were not in default: "Contrary to the determination of the Supreme Court, since the plaintiff never served the Dedvukaj defendants with notice of entry of the June 2015 order denying their motion to dismiss the complaint,

their answer was timely served, as their time to answer never started to run (see CPLR 3211[f] ...). ... Pursuant to 22 NYCRR 202.5-b, the court rule governing electronic filing for the Supreme Court, a party may serve an interlocutory document upon another party by filing the document electronically: 'Upon receipt of [the] interlocutory document, the NYSCEF site shall automatically transmit electronic notification to all e-mail service addresses in such action . . . . *Except as provided otherwise in subdivision (h)(2) of this section*, the electronic transmission of the notification shall constitute service of the document on the e-mail service addresses identified therein' ... . Subdivision (h)(2), which appears in a subsection entitled 'Entry of Orders and Judgments and Notice of Entry,' provides, in relevant part: '[a] party may serve [an order or judgment and written notice of its entry] electronically by filing them with the NYSCEF site and thus causing transmission by the site of notification of receipt of the documents, which shall constitute service . . . by the filer. In the alternative, a party may serve a copy of the order or judgment and written notice of its entry in hard copy by any method set forth in CPLR 2103(b)(1) to (6). If service is made in hard copy by any such method and a copy of the order or judgment and notice of its entry and proof of such hard copy service are thereafter filed with the NYSCEF site, transmission by NYSCEF of notification of receipt of those documents shall not constitute additional service of the notice of entry on the parties to whom the notification is sent' ... " **JBBNY, LLC v. Dedvukaj, 2019 N.Y. Slip Op. 02692, Second Dept 4-10-19**

CIVIL PROCEDURE, JUDGES.

JUDGE SHOULD NOT HAVE, SUA SPONTE, DISMISSED THE COMPLAINT FOR FAILURE TO PROSECUTE WITHOUT FOLLOWING THE REQUIREMENTS OF CPLR 3216.

The Second Department, reversing Supreme Court, determined that the judge should not have, sua sponte, dismissed the complaint for neglect to prosecute without following the procedure required by CPLR 3216: "The Supreme Court should not have, in effect, pursuant to CPLR 3216, sua sponte, dismissed the amended complaint, as the statutory preconditions to dismissal were not met ... . A court cannot dismiss an action, sua sponte, pursuant to CPLR 3216(a) unless the conditions set forth in CPLR 3216(b) have been met, including the requirement that: '[t]he court or party seeking such relief . . . shall have served a written demand . . . requiring the party against whom such relief is sought to resume prosecution of the action and to serve and file a note of issue within ninety days after receipt of such demand, and further stating that the default by the party upon whom such notice is served in complying with such demand within said ninety day period will serve as a basis for a motion by the party serving said demand for dismissal as against him or her for unreasonably neglecting to proceed' (CPLR 3216[b][3] [emphasis added] ...). Moreover, the court should not have administratively dismissed the amended complaint without further notice to the parties ...". ***Marinello v. Marinello*, 2019 N.Y. Slip Op. 02697, Second Dept 4-10-19**

CRIMINAL LAW, EVIDENCE.

COURT ORDER AUTHORIZING ACCESS TO DEFENDANT'S HISTORICAL CELL SITE LOCATION DATA INCLUDED AN EXPRESS FINDING OF PROBABLE CAUSE AND WAS THEREFORE THE EQUIVALENT OF A WARRANT.

The Second Department determined the court order authorizing access to defendant's historical cell site location data in this murder case was the equivalent of a warrant because it included an express finding of probable cause: "The defendant's contention that his historical cell site location information should have been suppressed as it was purportedly obtained in violation of his Fourth Amendment rights under Carpenter v. United States (__ US __, 138 S Ct 2206 [2018]), is unpreserved for appellate review (see CPL 470.05[2]). In any event, the court order authorizing the acquisition of the records made an express finding of probable cause, which was supported by the People's evidentiary showing ... . Accordingly, the order 'was effectively a warrant' which complied with the requirement of Carpenter ...". ***People v. Clark*, 2019 N.Y. Slip Op. 02719, Second Dept 4-10-19**

CRIMINAL LAW, EVIDENCE, APPEALS.

THE CONSEQUENCES OF DEFENDANT'S WAIVER OF APPEAL WERE EITHER NOT EXPLAINED OR WERE WRONGLY EXPLAINED, THE WAIVER WAS INVALID, THE INITIAL COMMUNICATION BY THE POLICE OFFICER WAS NOT A LEVEL ONE *DE BOUR* INQUIRY, THE SWITCHBLADE DEFENDANT THREW AWAY WHEN THE COMMUNICATION WAS MADE WAS PROPERLY ADMITTED IN EVIDENCE.

The Second Department determined (1) defendant's waiver of appeal was invalid because the nature and consequences of the waiver were either not explained or were wrongly explained, and (2) the police officer's (Conaghan's) initial communication with defendant when the officer was sitting in a moving police vehicle was not a level one *De Bour* inquiry. Therefore the switchblade defendant threw away upon the officer's communication was properly admitted in evidence: "We agree with the Supreme Court's determination that the comment, 'fellas, how you doing tonight,' constituted a greeting and not a level-one De Bour inquiry ... . Conaghan testified at the suppression hearing that, when he asked the defendant and the two other males how they were doing, the window to the vehicle was already rolled down and his partner did not stop the vehicle. He also testified that he often greeted people on the street in this manner. Moreover, the credibility determinations of a court following a suppression hearing are entitled to great deference on appeal and will not be disturbed unless clearly unsupported by the record ... . A review of the record supports the court's finding that Conaghan's testimony was credible. Since there was no impermissible request for information by Conaghan, the defendant's 'unprovoked and wholly volun-

tary' act of throwing the switchblade was not in direct and immediate response to any illegal actions by the police ... . The recovery of the switchblade was not tainted by any illegality, because no illegal inquiry occurred ...". ***People v. Birch*, 2019 N.Y. Slip Op. 02716, Second Dept 4-10-19**

FAMILY LAW, CONTRACT LAW, CIVIL PROCEDURE.

ALLEGATIONS THAT A POSTNUPTIAL AGREEMENT WAS UNCONSCIONABLE SURVIVED THE MOTION TO DISMISS, THE SUBSTANTIVE AND PROCEDURAL CRITERIA FOR THE DISMISSAL OF COUNTERCLAIMS AND AFFIRMATIVE DEFENSES ALLEGING FRAUD, DURESS, COERCION AND UNCONSCIONABILITY DISCUSSED IN SOME DEPTH.

The Second Department, modifying Supreme Court, dealt with the analytical criteria for motions to dismiss counterclaims and affirmative defenses in the context of a postnuptial agreement which was alleged to have been tainted by fraud, coercion, duress and unconscionability. The "unconscionable" allegations survived the dismissal motion. The decision covers all these substantive and procedural issues in some depth and cannot, therefore, be fairly summarized here: "An unconscionable agreement is 'one such as no person in his or her senses and not under delusion would make on the one hand, and as no honest and fair person would accept on the other, the inequality being so strong and manifest as to shock the conscience and confound the judgment of any person of common sense' ... . Because of the fiduciary relationship between spouses, postnuptial agreements 'are closely scrutinized by the courts, and such agreements are more readily set aside in equity under circumstances that would be insufficient to nullify an ordinary contract' ... . 'To warrant equity's intervention, no actual fraud need be shown, for relief will be granted if the [agreement] is manifestly unfair to a spouse because of the other's overreaching' ... . 'Although courts may examine the terms of the agreement as well as the surrounding circumstances to ascertain whether there has been overreaching, the general rule is that [if] the execution of the agreement . . . be fair, no further inquiry will be made' ... . Here, at this stage of the action, the defendant's pleadings, as amplified by his submissions in opposition to the plaintiff's motion and in support of his cross motion ... , are sufficient to allege both procedural and substantive unconscionability." ***Shah v. Mitra*, 2019 N.Y. Slip Op. 02739, Second Dept 4-10-19**

FORECLOSURE, APPEALS.

WHETHER THE ENDORSEMENT WAS AFFIXED TO THE NOTE, A STANDING REQUIREMENT, WAS NOT RAISED BY THE DEFENDANTS ON APPEAL AND THEREFORE COULD NOT BE CONSIDERED BY THE APPELLATE COURT.

The Second Department, over a partial dissent, determined that the plaintiff had established standing to bring the foreclosure action. The issue whether the endorsement was affixed to the note, the issue raised by the dissent, was not raised on appeal, according to the majority, and therefore could not be considered: "We disagree with our dissenting colleague on the issue of whether the plaintiff established that the note was properly endorsed pursuant to the Uniform Commercial Code and, thus, validly transferred to it. The defendants' brief, at most, mentions in passing UCC 3-202(1) along with other boilerplate legal discussion, but then relates the UCC provision to an argument that the plaintiff failed to prove the authority of the assignor to negotiate the note. Further, in challenging the endorsement itself, the defendants focus in their brief on the plaintiff's failure to establish the signature and authority of David A. Spector, whose name is on the endorsement, and the plaintiff's failure to prove the chain of assignments, but the defendants do not actually raise the issue of the affixation of the endorsement to the note. The defendants' brief focuses almost entirely upon the enforceability of the assignment, not the issue of physical possession of the note or endorsement. To the extent physical possession is argued by the defendants, their argument is that the plaintiff failed to prove when the note was received and the circumstances of its delivery, without raising any issue about this particular endorsement being firmly affixed to the note. As a result, the dispositive basis of the dissent, having not been argued on appeal, is simply not before us to consider. It is not appropriate for us to decide an appeal 'on a distinct ground that we winkled out wholly on our own' ... , where no party has had notice and an opportunity to be heard on this ground." ***Green Tree Servicing, LLC v. Molini*, 2019 N.Y. Slip Op. 02686, Second Dept 4-10-19**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

FALL FROM A LADDER WHICH WAS NOT SECURED, AND WHICH SHOOK AND THEN KICKED OUT FROM UNDER PLAINTIFF, ENTITLED PLAINTIFF TO SUMMARY JUDGMENT ON HIS LABOR LAW § 240(1) CAUSE OF ACTION.

The Second Department, reversing Supreme Court, determined that plaintiff's motion for summary judgment on his Labor Law § 240(1) cause of action in this ladder-fall case should have been granted: " 'Although [a] fall from a ladder, by itself, is not sufficient to impose liability under Labor Law § 240(1),' liability will be imposed when the evidence shows that the subject ladder was . . . inadequately secured and that . . . the failure to secure the ladder was a substantial factor in causing the plaintiff's injuries' ... . Here, the plaintiff established, prima facie, that Labor Law § 240(1) was violated and that the violation was a proximate cause of his injuries ... . Through his deposition testimony, the plaintiff demonstrated his prima facie entitlement to judgment as a matter of law on the issue of liability under that statute when he testified that a carpentry foreman directed him to retrieve the subject ladder, which the plaintiff ascended without a spotter, and which shifted and shook before the bottom 'kicked out,' causing him to fall ...". ***DeSerio v. City of New York*, 2019 N.Y. Slip Op. 02679, Second Dept 4-10-19**

PERSONAL INJURY.

BUS COMPANY'S MOTION FOR SUMMARY JUDGMENT IN THIS TRAFFIC ACCIDENT CASE SHOULD NOT HAVE BEEN GRANTED, THE BUS DRIVER SIGNALED TO DEFENDANT DRIVER TO PASS THE BUS AND THE DRIVER EITHER STRUCK THE WHEEL CHAIR LIFT OR THE PLAINTIFF WHO WAS STANDING ON THE LIFT.

The Second Department, reversing Supreme Court, determined that the bus company's (Happy Child's) motion for summary judgment in this traffic accident case should not have been granted. Plaintiff (Jaber) was standing on the bus's wheel chair lift when the bus driver signaled to defendant driver (Todd) to drive past the bus. Todd stuck either the defendant or the lift: "The Happy Child defendants failed to establish, prima facie, that the bus driver's alleged action in signaling Todd to maneuver his car through the narrow space between the extended lift—on which Jaber was still standing—and parked cars on the other side of the street did not set into motion an eminently foreseeable chain of events that resulted in Jaber's injuries ... . Accordingly, the Happy Child defendants' motion for summary judgment dismissing the complaint and all cross claims insofar as asserted against them should have been denied, regardless of the sufficiency of the plaintiffs' or Todd's opposing papers ...". ***Jaber v. Todd*, 2019 N.Y. Slip Op. 02690, Second Dept 4-10-19**

PERSONAL INJURY, CIVIL PROCEDURE, EVIDENCE.

PLAINTIFF WAS NOT ENTITLED TO THE PRESUMPTION DEFENDANT RECEIVED A LETTER ALLEGEDLY REQUESTING THAT SURVEILLANCE VIDEO BEFORE AND AFTER PLAINTIFF'S SLIP AND FALL BE PRESERVED AS THERE WAS NO PROOF OF MAILING, DEFENDANT SHOULD NOT HAVE BEEN SANCTIONED FOR SPOLIATION PURSUANT TO CPLR 3126.

The Second Department, reversing Supreme Court, determined that the plaintiff was not entitled to the "presumption of receipt" with respect to a letter alleged to have been sent to the defendant requesting that surveillance video from 6 hours before to 2 hours after plaintiff's slip and fall be preserved. Only a two-minute clip showing plaintiff's fall had been preserved and Supreme Court had precluded the defendant from presenting video evidence as a sanction for spoliation pursuant to CPLR 3126: "[T]he plaintiff did not establish that the defendant failed to preserve all of the surveillance video footage taken on the date of the accident after the defendant was placed on notice that the evidence might be needed for future litigation ... . The letter dated February 23, 2016, which was submitted for the first time with the plaintiff's reply papers, may be considered, since the defendant had an opportunity to respond and submit papers in surreply ... . However, the defendant denied receiving this letter and we reject the plaintiff's argument that he is entitled to the presumption of receipt. The mere assertion in the reply affirmation of the plaintiff's attorney that the letter dated February 23, 2016, was 'sent' to the defendant, unsupported by someone with personal knowledge of the mailing of the letter or proof of standard office practice or procedure designed to ensure that the letter was properly addressed and mailed, was insufficient to give rise to the presumption of receipt that attaches to letters duly addressed and mailed ...". ***Sanders v. 210 N. 12th St., LLC*, 2019 N.Y. Slip Op. 02737, Second Dept 4-10-19**

PERSONAL INJURY, MUNICIPAL LAW.

DEFENDANT TRANSIT AUTHORITY DID NOT ELIMINATE QUESTIONS OF FACT ABOUT WHETHER THE MOVEMENT OF THE BUS WAS UNUSUAL AND VIOLENT, PLAINTIFF-PASSENGER WAS INJURED WHEN SHE FELL ON THE BUS, TRANSIT AUTHORITY'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined that defendant NYC Transit Authority's motion for summary judgment in this bus-passenger injury case should not have been granted: "According to the plaintiff, the bus stopped in a manner that caused her to fall and sustain injuries. ... In seeking summary judgment dismissing a complaint which alleges injuries to a plaintiff arising out of a fall on a bus, a common carrier has the burden of establishing, prima facie, that the stop that caused the fall was not unusual and violent ... . We disagree with the Supreme Court's determination granting the defendant's motion. The evidence submitted by the defendant, which included, inter alia, the deposition testimony of the plaintiff regarding her fall and the bus camera video footage of her fall, failed to eliminate triable issues of fact as to whether the movement of the bus at issue was unusual and violent ...". ***Giordano v. New York City Tr. Auth.*, 2019 N.Y. Slip Op. 02684, Second Dept 4-10-19**

PRODUCTS LIABILITY, PERSONAL INJURY.

DISTRIBUTOR'S AND SELLER'S MOTIONS FOR SUMMARY JUDGMENT IN THIS PRODUCTS LIABILITY AND NEGLIGENT DESIGN ACTION SHOULD HAVE BEEN GRANTED, PLAINTIFF'S OWN ACTIONS CONSTITUTED THE SOLE PROXIMATE CAUSE OF PLAINTIFF'S INJURY AND THE DANGER WAS OPEN AND OBVIOUS.

The Second Department, reversing (modifying) Supreme Court, determined the distributor's (Skyfood's) and seller's (E & A's) motions for summary judgment in this products liability and negligent design action should have been granted. Plaintiff lost several fingers when he tried to remove a piece of cheese from a meat grinder being used to grate cheese by reaching

into the hopper without turning the machine off. The court held that the plaintiff's own actions constituted to sole proximate cause of the injury and the danger was open and obvious (no duty to warn): "The Supreme Court should have granted that branch of Skyfood's motion which was for summary judgment dismissing the causes of action alleging strict products liability and negligent design insofar as asserted against it. Skyfood established its prima facie entitlement to judgment as a matter of law dismissing those causes of action by submitting, inter alia, the deposition transcripts of the plaintiff and the affidavit of an expert, which showed that the plaintiff's own conduct of knowingly placing his hand into the hopper of the operating cheese grater without turning it off was the sole proximate cause of his injuries ... . In opposition, the plaintiff failed to raise a triable issue of fact ... . We agree with the Supreme Court's determination granting those branches of the separate motions of Skyfood and E & A which were for summary judgment dismissing the causes of action alleging failure to warn insofar as asserted against each of them. Skyfood and E & A made a prima facie showing of entitlement to judgment as a matter of law dismissing those causes of action insofar as asserted against them by establishing, as a matter of law, that they had no duty to warn the plaintiff of the open and obvious danger of knowingly placing his hand into a cheese grater in close proximity to its spinning blade ...". **Hernandez v. Asoli, 2019 N.Y. Slip Op. 02688, Second Dept 4-10-19**

REAL ESTATE, CONTRACT LAW, FRAUD.

DISCLAIMER IN THE REAL ESTATE PURCHASE AND SALE CONTRACT PRECLUDED ACTIONS BASED IN FRAUD ALLEGING THE CONCEALMENT OF A RECURRING MOLD-CAUSING CONDITION.

The Second Department, reversing Supreme Court, determined that the causes of action alleging fraud in the concealment of a recurring mold-causing condition should have been dismissed. The real estate contract included a disclaimer which stated that plaintiffs relied upon their own inspection of the property and not on any representations made by others: " 'In an action to recover damages for fraud, the plaintiff must prove a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury' ... . In the context of real estate transactions, 'New York adheres to the doctrine of caveat emptor and imposes no duty on the seller or the seller's agent to disclose any information concerning the premises when the parties deal at arm's length, unless there is some conduct on the part of the seller or the seller's agent which constitutes active concealment' ... . 'If however, some conduct (i.e., more than mere silence) on the part of the seller rises to the level of active concealment, a seller may have a duty to disclose information concerning the property' ... . 'To maintain a cause of action to recover damages for active concealment, the plaintiff must show, in effect, that the seller or the seller's agents thwarted the plaintiff's efforts to fulfill his [or her] responsibilities fixed by the doctrine of caveat emptor' ... . The presence of disclaimers in a written agreement may preclude a claim of common-law fraud by rendering any resulting reliance unjustified ... . Moreover, a specific disclaimer of reliance on representations as to the condition of real property will generally bar related fraud-based claims ... . Here, the contract of sale for the subject premises set forth, a... lia, that the plaintiffs were 'fully aware of the physical condition and state of repair of the Premises . . . based on [their] own inspection and investigation thereof,' and that they were 'entering into this contract based solely upon such inspection and investigation and not upon any information . . . or representations . . . given or made by Seller or its representatives.' " **Comora v. Franklin, 2019 N.Y. Slip Op. 02671, Second Dept 4-10-19**

THIRD DEPARTMENT

CRIMINAL LAW.

DATE OF THE ORIGINAL SENTENCE, NOT THE DATE OF RESENTENCING, SHOULD HAVE BEEN USED TO DETERMINE WHETHER DEFENDANT WAS A SECOND FELONY OFFENDER, COUNTY COURT REVERSED.

The Third Department, reversing County Court, determined defendant, in 2015, should not have been sentenced as a second felony offender. Defendant's prior conviction was in 2002, but he was resentenced in 2005 because he failed to complete drug program which was a condition of the 2002 conviction. County Court used the 2005 resentencing as the predicate felony. But the original 2002 original sentence should have been used: "County Court unlawfully sentenced defendant as a second felony offender pursuant to Penal Law § 70.06. As relevant here, when determining whether a prior felony constitutes a predicate felony conviction for purposes of being sentenced as a second felony offender, the 'sentence [for the prior felony conviction] must have been imposed not more than [10] years before commission of the felony of which the defendant presently stands convicted' (Penal Law § 70.06 [1] [b] [iv] ...). In addition, a prior 'sentence of conditional discharge . . . shall be deemed to be a sentence' (Penal Law § 70.06 [1] [b] [iii]). Here, County Court erred in determining that the controlling date for the prior felony conviction is the March 2005 resentencing and not the April 2002 original sentence of a conditional discharge that was imposed with respect to that crime ... . Inasmuch as the underlying felony was committed on February 2, 2014, as alleged in the indictment, the April 2002 sentence for the predicate felony was well beyond the 10-year look-back period ...". **People v. Montague, 2019 N.Y. Slip Op. 02750, Third Dept 4-11-19**

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA).

DEFENDANT WAS ENTITLED TO A DOWNWARD DEPARTURE BECAUSE THE VICTIM WAS NEARLY 17 AND NO FORCE WAS INVOLVED.

The Third Department, reversing County Court, determined defendant was entitled to a downward departure under risk level guidelines: "Here, the Board recommended a downward departure on the ground set forth in the above guidelines. Significantly, the victim was to turn 17 only two months after the incident and reported that no force was used and that she was a willing participant. Moreover, the victim had various communications with defendant on Facebook and spent time with him prior to the incident, which appears to have been their only sexual encounter. Notably, County Court declined to grant a downward departure on the basis that defendant had already benefited from the victim's consent by obtaining a light criminal sentence. Clearly, this was not an appropriate factor to be considered under the guidelines. Therefore, under the circumstances presented, we find that defendant established by a preponderance of the evidence the existence of mitigating factors not taken into account by the guidelines and that County Court abused its discretion in denying his request for a downward departure ... . Consequently, defendant's total risk score of 90, which presumptively placed him in the risk level two classification, should be reduced by the 25 points allocable to risk factor 2 (sexual contact with victim), giving him a total risk score of 65 and placing him in the risk level one classification." **People v. Secor, 2019 N.Y. Slip Op. 02759, Third Dept 4-11-19**

FAMILY LAW, CIVIL RIGHTS LAW.

CHILD'S NAME CHANGE TO THE HYPHENATED SURNAMES OF BOTH PARENTS, WHO ARE NOT MARRIED, AFFIRMED.

The Third Department, over a two-justice dissent, determined the petition to change the child's last name was properly granted to the extent that the hyphenated surnames of both parents, who are not married, were assigned to the child: "The parties have joint legal custody and the mother has always had primary physical custody of the child. Because he was overseas on active military duty, the father was not present at the time of the child's birth. Prior to the child's birth, however, the father had strongly expressed to the mother that the child should have his surname. Nevertheless, the mother gave the child her surname, Bafumo. The father commenced this proceeding in November 2016 under Civil Rights Law article 6 to change the surname of the child from Bafumo to Weinhofer, his surname. ... A petition to change the surname of a child shall be granted as long as the opposing party does not have a reasonable objection to the proposed name change and 'the interests of the [child] will be substantially promoted by the change' (Civil Rights Law § 63). Although it appears that Supreme Court rendered its determination based solely on the second element — whether the child's interests would be substantially promoted by the name change — given that the record is sufficiently developed as to the first element — whether the mother's objections to the father's petition were reasonable — it is unnecessary to remit the matter for a new hearing ... . That said, we find that the mother's objections were not reasonable." **Matter of Bafumo, 2019 N.Y. Slip Op. 02767, Third Dept 4-10-19**

WORKERS' COMPENSATION.

BOARD'S FINDING THAT CLAIMANT FRAUDULENTLY EXAGGERATED THE EFFECTS OF HIS INJURIES NOT SUPPORTED BY SUBSTANTIAL EVIDENCE, BOARD'S DETERMINATION REVERSED.

The Third Department, reversing the Workers' Compensation Board, determined the finding that claimant fraudulently exaggerated the effects of his injuries was not supported by the record. The Board's rulings were based upon claimant's answering calls as a volunteer firefighter and some video surveillance footage. But there was no evidence of what activities claimant engaged in as a volunteer firefighter, and the video evidence was deemed to have been mischaracterized by the Board: "Regarding the video surveillance at a personal injury accident, the Board found that claimant exhibited no apparent difficulty or disability. In the video surveillance, claimant is observed walking around the accident scene; which is not inconsistent with his reports of injury given that he did not need an assistive device to walk but, as noted in his medical records, could walk independently with a mild antalgic gait. Furthermore, any conclusion by the Board that claimant's movements of his neck, arms and back were inconsistent with his loss of range of motion were not supported by any medical testimony at the hearing and amount to speculation as to whether such movements were inconsistent with the degree of range of motion noted in his medical records. Again, claimant was not in need of any assistive device for his injuries and the degree to which claimant moved his neck, arm and back in the video surveillance, and whether it was inconsistent with his medical records, could not be ascertained without additional medical testimony. ... We also find that the Board mischaracterized the video surveillance depicting claimant 'walking into a grocery store . . . and then bending fully at the waist to retrieve a loaf of bread.' Although claimant maintained that his daily living activities had been affected by his injuries, the video did not clearly reflect any heavy lifting or repetitive motion inconsistent with his complaints of pain. Significantly, claimant was deemed totally disabled from performing his job duties as a laborer, but not totally disabled from all activities. It is also noted that the addendum submitted ... is factually inaccurate as it incorrectly indicates that claimant is seen 'carrying packages' at the grocery store, but the video depicts claimant carrying only a loaf of bread." **Matter of Persons v. Halmar Intl., LLC, 2019 N.Y. Slip Op. 02760, Third Dept 4-11-19**