CasePrepPlus

April 26, 2019

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

Editor: **Bruce Freeman**

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

FIRST DEPARTMENT

CIVIL PROCEDURE, JUDGES, APPEALS.

JUDGE SHOULD NOT HAVE, SUA SPONTE, VACATED A DEFAULT JUDGMENT IN THE ABSENCE OF A MOTION OR REQUEST, NO APPEAL AS OF RIGHT FROM A SUA SPONTE ORDER.

The First Department, reversing Supreme Court, determined that the judge did not have the authority to vacate a default judgment in absence of a request for that relief. The First Department treated the notice of appeal as a motion for leave to appeal, noting that a sua sponte order is not appealable as of right: "While an order entered sua sponte is not appealable as of right ... , given the lack of evidence of the timeliness of the service of the answer and given the motion court's failure to identify a legal basis for vacating the prior order, we deem the notice of appeal a motion for leave to appeal, and grant leave ... . The court exceeded its authority in sua sponte vacating the prior order granting plaintiff's motion for a default judgment ... . In the absence of a motion or other request for relief from the order, the court's discretion to correct the order was limited to curing any mistake, defect or irregularity 'not affecting a substantial right of a party' (CPLR 5019[a])." ***Betts v. Tsitiridis*, 2019 N.Y. Slip Op. 02970, First Dept 4-18-19**

CRIMINAL LAW, EVIDENCE.

DETECTIVE'S TESTIMONY IN THE GRAND JURY IDENTIFYING THE PERSON DEPICTED IN VIDEOTAPES AS THE DEFENDANT WAS ADMISSIBLE, COURT OFFERED NO OPINION WHETHER THE TESTIMONY WOULD BE ADMISSIBLE AT TRIAL.

The First Department, reversing Supreme Court, determined a police officer's testimony before the grand jury identifying the defendant in two videotapes was admissible. The court expressed no opinion whether the identification testimony would have usurped a jury's role at trial: "The court erroneously dismissed an indictment charging defendant with crimes committed in two incidents, both recorded in videotapes presented to the grand jury, on the ground that a police officer who witnessed neither incident, but knew defendant from the area, identified him in each videotape. This testimony was not impermissible and it did not render the grand jury proceedings defective. The detective testified from his personal knowledge. Moreover, unlike trial jurors who can normally observe a defendant in court, grand jurors do not have that means of making a comparison between a videotape and a defendant's appearance. In so holding, we express no opinion on the admissibility of a similar identification at trial. The 'exceptional remedy of dismissal' ... was not warranted." ***People v. McKinney*, 2019 N.Y. Slip Op. 02950, First Dept 4-18-19**

SECOND DEPARTMENT

CIVIL PROCEDURE, EVIDENCE, NEGLIGENCE.

UNSIGNED DEPOSITIONS WERE ADMISSIBLE AND EVIDENCE SUBMITTED IN REPLY SHOULD HAVE BEEN CONSIDERED.

The Second Department, although affirming the denial of defendants' motion for summary judgment in this slip and fall case on other grounds, noted that the depositions were admissible and evidence submitted in reply should have been considered: "Although the plaintiff's deposition transcript, which the defendants submitted in support of their motion, was unsigned, it was nonetheless admissible as the plaintiff raised no objection to its submission or accuracy and, in fact, requested that the Supreme Court 'incorporate' his transcript into his opposition ... . Regarding the deposition transcript of the decedent's niece, which the defendants also submitted in support of their motion, the defendants demonstrated that they had submitted the unsigned transcript to the decedent's niece for review, but that she failed to sign and return it within 60 days. Thus, the niece's deposition transcript could have been used by the defendants as fully as though signed (see CPLR 3116[a] ...). Furthermore, even though the evidence demonstrating the defendants' compliance with CPLR 3116(a) was submitted by the defendants in reply, the court should have considered it, because it was in direct response to allegations raised for the first time in the plaintiff's opposition papers ... . The unsigned deposition transcript of the defendants' property manager was admissible under CPLR 3116(a) since it was submitted by the defendants themselves and thus adopted as accurate ...". ***Baptiste v. Ditmas Park, LLC*, 2019 N.Y. Slip Op. 02844, Second Dept 4-17-19**

CIVIL PROCEDURE, FORECLOSURE, JUDGES.

SUPREME COURT SHOULD NOT HAVE DISMISSED THE FORECLOSURE COMPLAINT IN THE ABSENCE OF THE PRECONDITIONS REQUIRED BY CPLR 3216.

The Second Department, reversing Supreme Court, determined that the court was without power to dismiss for neglect to prosecute because the preconditions in CPLR 3216 were not met. Supreme Court dismissed the complaint in this foreclosure action, finding that plaintiff bank had not complied with an oral directive issued at a status conference: "Following settlement conferences held pursuant to CPLR 3408, the action was released from the foreclosure settlement conference part without any resolution. In an order ... (hereinafter the dismissal order), the Supreme Court directed dismissal of the action on the ground that the plaintiff failed to comply with an oral directive issued at a status conference ... , to resume prosecution of the action. ... [T]he plaintiff moved to vacate the dismissal order and to restore the action to the calendar. [T]he Supreme Court ... denied the plaintiff's motion. ... 'A court may not dismiss an action based on neglect to prosecute unless the statutory preconditions to dismissal, as articulated in CPLR 3216, are met' ... . Specifically, issue must have been joined, at least one year must have elapsed since joinder of issue, the defendant or the court must have served on the plaintiff a written demand to serve and file a note of issue within 90 days, and the plaintiff must have failed to serve and file a note of issue within the 90-day period (see CPLR 3216[b] ...). Here, the Supreme Court was without power to direct dismissal of the action on the ground of failure to prosecute because the plaintiff was not served with a written demand to serve and file a note of issue within 90 days ...". ***Citimortgage, Inc. v. Ferrari*, 2019 N.Y. Slip Op. 02847, Second Dept 4-17-19**

CIVIL PROCEDURE, JUDGES.

JUDGE SHOULD NOT HAVE, SUA SPONTE, DISMISSED THE ACTION FOR NEGLECT TO PROSECUTE WITHOUT MEETING THE REQUIREMENTS OF CPLR 3216.

The Second Department, reversing Supreme Court, determined the judge should not have, sua sponte, dismissed the case for neglect to prosecute in the absence of the prerequisites mandated by CPLR 3216: "[T]he court directed the plaintiff to file a note of issue within 90 days, and warned that '[i]f plaintiff does not file a note of issue within 90 days this action is deemed dismissed without further order of the Court (CPLR 3216).' Five months later ... the court, sua sponte, in effect, directed dismissal of the action ... . 'A court may not dismiss an action based on neglect to prosecute unless the statutory preconditions to dismissal, as articulated in CPLR 3216, are met' ... . 'Effective January 1, 2015, the Legislature amended, in several significant respects, the statutory preconditions to dismissal under CPLR 3216' ... . One such precondition is that where, as here, a written demand to resume prosecution of the action is made by the court, 'the demand shall set forth the specific conduct constituting the neglect, which conduct shall demonstrate a general pattern of delay in proceeding with the litigation' ... . Here, the certification order did not set forth any specific conduct constituting neglect by the plaintiff ... . Additionally, before issuing an order dismissing the case based on a party's failure to comply with the 90-day demand, the court must give the party notice so that the party has an opportunity to 'show a justifiable excuse for the delay and a good and meritorious cause of action' ... . Here, the Supreme Court failed to give the parties notice and an opportunity to be heard prior to, in effect, directing dismissal of the action pursuant to CPLR 3216 ...". ***Sadowski v. W. David Harmon*, 2019 N.Y. Slip Op. 02918, Second Dept 4-17-19**

CRIMINAL LAW, EVIDENCE.

911 CALL PROPERLY ADMITTED AS PRESENT SENSE IMPRESSION OR EXCITED UTTERANCE, DEFENDANT PROPERLY GIVEN CONSECUTIVE SENTENCES FOR WOUNDING ONE VICTIM WITH THE INTENT TO SHOOT ANOTHER VICTIM.

The Second Department determined a 911 recording was properly admitted under the present-sense-impression and excited-utterance exceptions to the hearsay rule and defendant was properly sentenced to consecutive sentences where, intending to shoot one victim, another victim was also hit: "We agree with the Supreme Court's determination allowing the admission of a recording of a call to the 911 emergency number made by the father of the then-15-year-old victim. The record established that the declarant made the call within seconds of the shooting after his son cried out that he had been shot, and the father saw his neighbor, who was also shot and who the father thought was dying, fall to the ground in a pool of blood. Although the declarant's statements to the 911 operator were hearsay, they were nevertheless admissible under the exception for excited utterances 'made contemporaneously or immediately after a startling event' ... or present sense impressions made while he was "perceiving the event as it is unfolding or immediately afterward' which are 'corroborated by independent evidence establishing [their] reliability' ... . [T]he defendant fired multiple shots with the intent of hitting the older victim and one of those shots hit the 15-year-old victim. However, '[t]he test is not whether the criminal intent is one and the same and inspiring the whole transaction, but whether separate acts have been committed with the requisite criminal intent' ... . The shots which hit the two victims 'were the result of separate and distinct acts of pulling a trigger to discharge a firearm' and 'repetitive discrete acts, such as successive shots . . . [do not] somehow merge such that they lose their individual character where the same criminal intent . . . inspir[es] the whole transaction' ... . Accordingly, the imposi-

tion of consecutive sentences for the two counts of attempted murder in the second degree was legal." ***People v. Smith*, 2019 N.Y. Slip Op. 02911, Second Dept 4-17-19**

FAMILY LAW.

EQUITABLE ESTOPPEL DOCTRINE PROPERLY APPLIED TO FIND THAT THE FORMER SAME-SEX DOMESTIC PARTNER HAD STANDING TO SEEK CUSTODY AND VISITATION RE: CHILDREN BORN DURING THE RELATIONSHIP, PRESUMPTION OF LEGITIMACY RE: A CHILD CONCEIVED WHEN THE BIOLOGICAL MOTHER WAS PREVIOUSLY MARRIED WAS REBUTTED.

The Second Department determined that Family Court properly applied the doctrine of equitable estoppel and the presumption of legitimacy was rebutted in this same-sex domestic-partner case. The biological mother (Perperis) and her domestic partner (Chimienti) were together when both children were born and the relationship lasted three years. The older of the two children was conceived when the biological mother was married, but the couple had separated before the baby was born (followed by divorce): "On March 5, 2018, Nicole Perperis, the biological mother of the two subject children, who were born, via artificial insemination, in September 2014 and May 2016, respectively, entered into a consent order of custody and parenting time (hereinafter the consent order) with her former domestic partner, Jennifer Chimienti. Pursuant to the consent order, the parties agreed to share joint custody of the children, with physical custody and final decision-making authority to Perperis. The consent order also set forth a parenting time schedule for Chimienti. The parties entered into the consent order, forgoing a hearing on the best interests of the children as to custody and parental access, upon the determination of the Family Court in an order ... (hereinafter the September 2017 order), made after a hearing at which Chimienti's standing to seek custody or visitation was contested, that Chimienti established standing, via equitable estoppel, to seek custody of or visitation with the children. .. .[W]e agree with the Family Court that ... the appropriate analysis to decide whether Chimienti had standing to seek custody of and visitation with the children is to apply an equitable estoppel analysis. ... .[W]e agree with the Family Court's determination that, with respect to the older child, the application of an equitable estoppel analysis is not precluded by a legal presumption that the older child, who was born when Perperis was still married to her former wife, is the child of the former wife. We agree with the court's determination that the marital presumption of legitimacy that typically applies to children born during a marriage (see Domestic Relations Law § 24[1]; Family Ct Act § 417) was rebutted by clear and convincing evidence ...". ***Matter of Chimienti v. Perperis*, 2019 N.Y. Slip Op. 02866, Second Dept 4-17-19**

FORECLOSURE, CIVIL PROCEDURE.

DENIAL OF DEFENDANT'S MOTION TO VACATE HIS DEFAULT IN THIS FORECLOSURE ACTION DID NOT PRECLUDE DEFENDANT'S MOTION TO DISMISS BASED UPON PLAINTIFF BANK'S FAILURE TO MOVE FOR A JUDGMENT OF FORECLOSURE WITHIN ONE YEAR AS REQUIRED BY KINGS COUNTY LOCAL RULE 8.

The Second Department, reversing Supreme Court, determined the denial defendant's motion to vacate a default judgment did not preclude defendant's motion to dismiss the foreclosure action based upon plaintiff bank's failure to comply with Rule 8 (Kings County Supreme Court Uniform Civil Rules): "In August 2013, the plaintiff commenced this mortgage foreclosure action against the defendant Andy McAlpin (hereinafter the defendant) and others. The defendant did not answer or appear in the action, and in February 2014, the plaintiff moved, inter alia, for leave to enter a default judgment and for an order of reference. In an order dated October 24, 2014, the Supreme Court granted the plaintiff's motion. The plaintiff did not move for a judgment of foreclosure and sale, and in May 2016, the defendant moved, inter alia, pursuant to CPLR 5015(a)(4) to vacate the order of reference and to dismiss the complaint insofar as asserted against him on the ground that he had not been served with the summons and complaint, for leave to serve a late answer, and to dismiss the complaint on the ground that the plaintiff failed to comply with Part F, rule 8, of the Kings County Supreme Court Uniform Civil Term Rules (hereinafter Rule 8). Rule 8 requires a plaintiff in a foreclosure action to file a motion for a judgment of foreclosure within one year of entry of the order of reference. ... Contrary to the Supreme Court's determination, the defendant was not precluded from seeking relief under Rule 8 by the denial of that branch of his motion which was to vacate his default ...". ***Bank of Am., N.A. v. McAlpin*, 2019 N.Y. Slip Op. 02843, Second Dept 4-17-19**

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

THE PROOF REQUIRED FOR SUMMARY JUDGMENT, FOR BOTH PLAINTIFFS AND DEFENDANTS, IN FORECLOSURE ACTIONS, ON WHETHER THERE HAS BEEN COMPLIANCE WITH THE RPAPL 1304 NOTICE PROVISIONS, EXPLAINED; PRIOR DECISIONS HOLDING THAT A DEFENDANT'S DENIAL OF RECEIPT OF NOTICE WAS SUFFICIENT SHOULD NO LONGER BE FOLLOWED.

The Second Department, in a full-fledged opinion by Justice Iannacci, reversing Supreme Court, fleshed out the proof required for summary judgment, for both plaintiffs and defendants, with respect to compliance with the notice requirements of Real Property Actions and Proceedings Law (RPAPL). The court noted that prior decisions holding that a defendant's denial of receipt of notice was enough should no longer be followed: "Here, the plaintiff failed to establish, prima facie, that it complied with RPAPL 1304. Although Crampton [assistant vice president of Specialized Loan Servicing, LLC] stated in

her affidavit that the RPAPL 1304 notices were mailed by certified and regular first-class mail, and attached copies of those notices, the plaintiff failed to attach, as exhibits to the motion, any documents to prove that the mailing actually happened. There is no copy of any United States Post Office document indicating that the notice was sent by registered or certified mail as required by the statute. Further, while Crampton attested that she was in receipt of the prior loan servicer's records, that she had personal knowledge of the business practices for mailing of notices by Wilmington, and that the 90-day notice was sent in compliance with RPAPL 1304, she did not attest to knowledge of the mailing practices of Bank of America, the entity that allegedly sent the notices to the defendant. * * * Even in the face of a plaintiff's failure to establish, prima facie, that a notice was properly mailed on a motion for summary judgment on the complaint, this Court has held that a defendant still has to meet its burden, on a cross motion for summary judgment dismissing the complaint, of establishing that the condition precedent was not fulfilled ... . Here, the defendant provided no particulars supporting her claim that Bank of America never mailed the RPAPL 1304 notice to her last known address. The defendant only stated that she never received the notice. The defendant did not confirm that she still lived at the address shown on the notice on the date it was purportedly mailed, that she had been receiving other mail at that address, and that she was never contacted by the United States Post Office about mail for which she was required to sign. We hold that a simple denial of receipt, without more, is insufficient to establish prima facie entitlement to judgment as a matter of law dismissing the complaint for failure to comply with the requirements of RPAPL 1304. To the extent that our prior decisions are to the contrary, they should no longer be followed." ***Citibank, N.A. v. Conti-Scheurer*, 2019 N.Y. Slip Op. 02846, Second Dept 4-17-19**

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

PLAINTIFF IN THIS FORECLOSURE ACTION DID NOT DEMONSTRATE COMPLIANCE WITH THE NOTICE REQUIREMENTS OF RPAPL 1304; EVIDENCE OFFERED FOR THE FIRST TIME IN REPLY CAN BE CONSIDERED IF THE OPPOSING PARTY HAS THE OPPORTUNITY TO RESPOND.

The Second Department, reversing Supreme Court in this foreclosure action, determined plaintiff did not demonstrate it had complied with the notice requirements of RPAPL 1304. The court noted that evidence submitted in reply was properly considered because the opposing party had an opportunity to respond: "[T]he plaintiff failed to establish, prima facie, that it strictly complied with RPAPL 1304. RPAPL 1304(1) provides that at least 90 days before a lender, an assignee, or a mortgage loan servicer commences an action to foreclose the mortgage on a home loan as defined in RPAPL 1304, such lender, assignee, or mortgage loan servicer must give notice to the borrower. RPAPL 1304(1) sets forth the requirements for the content of such notice and RPAPL 1304(2) further provides that such notice must be sent "by registered or certified mail and also by first-class mail" to the last known address of the borrower. '[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' ... . Here, even considering the affidavit of Victoria Bressner submitted by the plaintiff for the first time in opposition to the defendant's cross motion, the plaintiff failed to establish strict compliance with RPAPL 1304. Bressner did not have personal knowledge of the purported mailing and did not make the requisite showing that she was familiar with the plaintiff's mailing practices and procedures to establish 'proof of a standard office practice and procedure designed to ensure that items are properly addressed and mailed' ... . Moreover, the record indicates that the notices were not mailed by the plaintiff." ***LNV Corp. v. Sofer*, 2019 N.Y. Slip Op. 02860, Second Dept 4-17-19**

FREEDOM OF INFORMATION LAW (FOIL), CIVIL RIGHTS LAW.

RECORDS OF COMPLAINTS ABOUT A FORMER DETECTIVE MADE TO THE CIVILIAN COMPLAINT REVIEW BOARD (CCRB) PROTECTED FROM DISCLOSURE BY THE CIVIL RIGHTS LAW.

The Second Department determined the records of complaints about a now-retired detective (Scarcella) made to the Civilian Complaint Review Board (CCRB) were protected by Civil Rights Law 50-a and not subject to disclosure pursuant to the Freedom of Information Law (FOIL) (Public Officers Law 87): "The CCRB's records of civilian complaints, 'regardless of where they are kept,' could be used to harass or embarrass police officers, which is exactly what Civil Rights Law § 50-a was intended to prevent ... . Indeed, the Court of Appeals has recently held that disciplinary records arising from civilian complaints against police officers are the very sort of record presenting a potential for abusive exploitation and intended to be kept confidential under Civil Rights Law § 50-a ... . A retired police officer might 'still [be] involved in an open or pending case and . . . , in that context, the requested documents have the potential to be used to degrade, harass, embarrass or impeach his integrity' ... . Here, the petitioner's own submissions show that Scarcella has been called to testify numerous times since his retirement. The CCRB met its burden of showing a substantial and realistic potential for the abusive use of the requested material against Scarcella ...". ***Matter of Hughes Hubbard & Reed, LLP v. Civilian Complaint Review Bd.*, 2019 N.Y. Slip Op. 02875, Second Dept 4-17-19**

FREEDOM OF INFORMATION LAW (FOIL), CORPORATION LAW, MUNICIPAL LAW.

RECORDS KEPT BY A VOLUNTEER AMBULANCE NOT-FOR-PROFIT CORPORATION NOT SUBJECT TO DISCLOSURE PURSUANT TO THE FREEDOM OF INFORMATION LAW (FOIL) BECAUSE THE CORPORATION IS NOT A GOVERNMENTAL ENTITY.

The Second Department, reversing Supreme Court, determined that, Volunteer Ambulance, a not-for-profit corporation, was not a government agency, and therefore was not subject to the Freedom of Information Law (FOIL) (Public Officers Law § 86). "The petitioner, an emergency medical technician, made requests under the Freedom of Information Law (Public Officers Law art 6; hereinafter FOIL) for the production of certain records pertaining to the rejection of her application to be reinstated as a member of the Cortlandt Community Volunteer Ambulance Corps, Inc. (hereinafter Volunteer Ambulance):" "Volunteer Ambulance was formed and incorporated without any participation or assistance of public officials in the Town. Neither the Town nor the District has the authority to select or appoint directors, officers, or members of Volunteer Ambulance. Volunteer Ambulance is not required to submit its budget to the Town or District for review, and neither the Town nor the District has authority to approve Volunteer Ambulance's budget. Neither the Town nor the District has any authority to review or audit Volunteer Ambulance's financial books and records. Volunteer Ambulance receives the majority of its funding from sources other than the payment it receives from the District pursuant to the contract, and purchases all of its equipment, supplies, and services from its own assets. Volunteer Ambulance receives no funding from the Town or District apart from the contract payment. Volunteer Ambulance is solely responsible for the maintenance and expenses related to its buildings. Volunteer Ambulance has the authority to hire staff, who are employees of Volunteer Ambulance, not of the District or Town, and it obtains its own workers' compensation policy for coverage of its employees and members; these persons are not covered by the workers' compensation policy maintained by the District or the Town for its employees or volunteers. Neither the District nor the Town has authority to review or approve contracts entered into by Volunteer Ambulance for professional or other services necessary for its operation. Under these circumstances, it cannot be said that Volunteer Ambulance is a 'governmental entity performing a governmental . . . function' so as to render it an agency subject to the mandates of FOIL (Public Officers Law § 86[3] ...". ***Matter of Outhouse v. Cortlandt Community Volunteer Ambulance Corps, Inc.*, 2019 N.Y. Slip Op. 02881, Second Dept 4-17-19**

PERSONAL INJURY, EVIDENCE.

FRESHLY PAINTED AND SEALED FLOOR WILL NOT SUPPORT A SLIP AND FALL CASE IN THE ABSENCE OF PROOF THE DEFENDANTS HAD ACTUAL, CONSTRUCTIVE OR IMPUTED KNOWLEDGE THE PAINT AND SEALANT COULD RENDER THE FLOOR DANGEROUSLY SLIPPERY.

The Second Department determined that the allegation that a freshly painted floor was slippery was not enough to support a slip and fall case. The defendants' motion for summary judgment was properly granted: "The plaintiff Stephanie Faiella (hereinafter the injured plaintiff) slipped and fell on a recently painted walkway at her place of employment. The walkway was painted several days prior to her accident. ... The walkway was first painted with an epoxy-based paint and then covered with a clear sealant. ... A defendant may not be held liable for the application of 'wax, polish, or paint to a floor . . . unless the defendant had actual, constructive, or imputed knowledge' that the product could render the floor dangerously slippery ...". ***Faiella v. Oradell Constr. Co., Inc.*, 2019 N.Y. Slip Op. 02851, Second Dept 4-17-19**

PERSONAL INJURY, EVIDENCE.

SNOWBOARDER ASSUMED THE RISK OF INJURY CAUSED BY A CREVICE THAT HAD FORMED IN THE AREA WHERE SNOWBOARDERS USED A MOUND OF SNOW TO "CATCH AIR," THE DEFENDANT DEMONSTRATED THE CREVICE FORMED NATURALLY.

The Second Department, reversing Supreme Court, determined that the defendant ski area was entitled to summary judgment in this snowboarding injury case. A mound of snow was used by snowboarders to "catch air." Plaintiff was injured when he used the mound to "catch air" and landed in a five and a half foot crevice: " '[B]y engaging in a sport or recreational activity, a participant consents to those commonly appreciated risks which are inherent in and arise out of the nature of the sport generally and flow from such participation' (... see General Obligations Law §§ 18-101, 18-106) . ... A skier or snowboarder generally 'assumes the inherent risk of personal injury caused by ruts, bumps or variations in the conditions of the . . . terrain' ... . The defendant demonstrated, through the deposition testimony of its employees and the affidavit of its expert, that the crevice was likely caused by a combination of changing temperatures, natural wet springs in the area, and water draining from the snow whale. Underground springs and surface run-off are common on mountains and can undermine the integrity of the snowpack, resulting in voids, holes, crevices, and sinkholes. The defendant demonstrated that it did not create the crevice and that the crevice was the natural consequence of variations in surface and subsurface snow conditions (see General Obligations Law § 18-101). We conclude that the defendant made a prima facie showing of entitlement to judgment as a matter of law by demonstrating that the infant plaintiff assumed the risk of injury that could

be caused by the crevice, and that the defendant did not do anything that unreasonably increased the risk ...". ***Festa v. Apex Capital, LLC*, 2019 N.Y. Slip Op. 02853, Second Dept 4-17-19**

PERSONAL INJURY, EVIDENCE.

DEFENDANT STORE DEMONSTRATED IT TOOK ADEQUATE MEASURES TO MOP UP RAIN WATER IN THIS SLIP AND FALL CASE, THE STORE'S MOTION FOR SUMMARY JUDGMENT WAS PROPERLY GRANTED.

The Second Department determined defendant store (7-Eleven) demonstrated it took adequate steps to mop up rain water in this slip and fall case. The store's motion for summary judgment was properly granted: "It is undisputed that it was raining heavily on the day of the accident, and that there was a mat just inside the front entrance to the store. Said testified at her deposition that store employees were instructed to dry-mop water from the floor every 15 minutes on days it rained. At his deposition, one of Said's employees testified that he mopped water as soon as he observed it. Moreover, the evidence submitted in support of the defendants' motion demonstrated that the employee dry-mopped the area of the floor where the injured plaintiff allegedly fell approximately 15 to 25 minutes before the accident occurred. Said and her employees were not obligated to provide a constant remedy to the problem of water being tracked into the store in rainy weather ... . Further, the defendants demonstrated that the condition was not present for a sufficient period of time for the defendants to have discovered and remedied it, and therefore, there is no basis for an inference that they had constructive notice ...". ***Radosta v. Schechter*, 2019 N.Y. Slip Op. 02916, Second Dept 4-17-19**

PERSONAL INJURY, EVIDENCE, MUNICIPAL LAW.

TENANT DID NOT DEMONSTRATE IT DID NOT EXACERBATE THE CONDITION OF THE SIDEWALK BY ITS EFFORTS TO REMOVE SNOW AND THE PROPERTY OWNER AND MANAGER DID NOT DEMONSTRATE THEY DID NOT HAVE CONSTRUCTIVE NOTICE OF THE CONDITION, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT IN THIS SLIP AND FALL CASE SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined the tenant, the landowner and the property manager did not submit sufficient evidence to warrant summary judgment in their favor in this sidewalk slip and fall case. The tenant (PCM) did not demonstrate that it did not exacerbate the danger by its snow removal and the property owner (2248) and the property manager (Solil) did not demonstrate they did not have constructive notice of the condition. [Defendants moving for summary judgment must address every theory of liability in their papers or the motion will be denied without the need to consider the opposing papers]: "PCM failed to eliminate triable issues of fact as to whether it undertook snow and ice removal efforts on the date of the accident to clear the area of the sidewalk where Pilar allegedly slipped and fell, or whether any snow and ice removal efforts undertaken by it created or exacerbated the icy condition that allegedly caused Pilar to fall ... . 2248, as owner of the premises abutting the sidewalk where Pilar allegedly slipped and fell, and Solil, its managing agent, failed to establish, prima facie, that they lacked constructive notice of the alleged icy condition. Section 7-210 of the Administrative Code imposes a nondelegable duty on 2248 to maintain the sidewalk abutting the premises, where Pilar allegedly fell ... . In a premises liability case, a defendant real property owner or a party in possession or control of real property who moves for summary judgment has the initial burden of making a prima facie showing that it neither created the allegedly dangerous or defective condition nor had actual or constructive notice of its existence ... . Here, neither 2248 nor Solil established when the subject portion of the sidewalk was last inspected relative to when Pilar slipped and fell ... . Accordingly, 2248 and Solil failed to establish, prima facie, that they did not have constructive notice of the condition that allegedly caused the plaintiff decedent's fall ...". ***Branciforte v. 2248 Thirty First St., LLC*, 2019 N.Y. Slip Op. 02845, Second Dept 4-17-19**

THIRD DEPARTMENT

APPEALS, EVIDENCE, COURT OF CLAIMS.

VALID EVIDENTIARY ISSUES WERE NOTICED BY APPELLATE COUNSEL BUT WERE NOT ADDRESSED AT TRIAL, THE STATE'S VERDICT IN THIS MALICIOUS PROSECUTION, FALSE ARREST AND UNLAWFUL IMPRISONMENT ACTION AFFIRMED.

The Third Department, noting the validity of questions raised about the evidence that claimant sold the drugs, affirmed the verdict in favor of the state in this malicious prosecution, false arrest and unlawful imprisonment action. The evidentiary issues were noticed and raised by appellate counsel, but were not raised in the Court of Claims: "If taken at face value, this evidence would validate claimant's testimony that he did not sell drugs to the informant and that defendant should have known as much. Critically important, however, is the fact that this timing discrepancy was never addressed at claimant's criminal trial or the subject bench trial before the Court of Claims, and appears only to have been discerned by claimant's counsel in his appellate brief. Defendant points out in its brief that it was unable to verify when the audio recording began because it did not have the original compact disc. The discrepancy between the commencement of the audio recording and the taking of the photographs is a matter of minutes at best. Missing from this record is any testimony expressly validating

the timing as to when the audio recording began. Had this discrepancy been called to the attention of the Court of Claims, corresponding testimony could have been entertained ... . As such, on this record, we decline to disturb the credibility determination made by the Court of Claims." ***Jenkins v. State of New York*, 2019 N.Y. Slip Op. 02932, Third Dept 4-18-19**