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COURT OF APPEALS

CRIMINAL LAW, APPEALS, ATTORNEYS.

DEFENDANT WAS NOT AFFORDED INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL, DESPITE COUNSEL'S LIMITED COMMUNICATION WITH DEFENDANT, COUNSEL'S NOT ACTING UNTIL THE APPEAL WAS ON THE DISMISSAL CALENDAR, AND COUNSEL'S SUBMISSION OF A MINIMAL BRIEF WITH SIX LINES OF TEXT IN THE STATEMENT OF FACTS AND NO CITATIONS TO THE RECORD, WHICH INCLUDED A 4000 PAGE TRIAL TRANSCRIPT.

The Court of Appeals, in a full-fledged opinion by Judge Stein, over two separate, extensive dissenting opinions, determined defendant was not afforded ineffective assistance by his appellate counsel. The majority acknowledged that the appellate brief was "terse" and was not a model to be emulated, but noted the brief raised substantive issues that were addressed by the Appellate Division on the merits. The failure to raise the harsh and excessive sentence issue, and the failure to seek review by the Court of Appeals did not constitute ineffective assistance: **FROM JUDGE RIVERA'S DISSENT:** "[D]efendant maintains that counsel was ineffective because he initially failed to perfect the appeal, causing the Appellate Division to place the matter on the court's Dismissal Calendar, thus risking the loss of defendant's only appeal as of right ... . [C]ounsel failed to communicate at all with his client in the three years following his appointment to represent defendant, and only as a late-day response to the Dismissal Calendar notification. ... * * * The failings of the brief are substantial. ... The brief is barely 20 double-spaced pages, including separate pages for the cover, tables of contents and cases, CPLR 5531 statement, and issues presented. ... Inexplicably, at the end of the facts section, appellate counsel inserted a photocopy of a six-page letter from trial counsel to the judge requesting an adjournment. The factual recitation consists of two pages and six lines of text. There is not a single citation in this section to the record on appeal, as required by the First Department's Local Rule § 120.8 (b)(4) which requires an appellant's brief to include a statement of facts "with appropriate citations to the . . . record." This hardly seems adequate given defendant appealed from a judgment following a three-month joint trial with two co-defendants, resulting in a trial transcript spanning over 4,000 pages, and involving multiple serious counts, including murder. In contrast, the People submitted a brief over 175 pages long, with 60 pages solely devoted to the facts." ***People v. Alvarez*, 2019 N.Y. Slip Op. 02383, CtApp 3-28-19**

CRIMINAL LAW, VEHICLE AND TRAFFIC LAW, ADMINISTRATIVE LAW, EVIDENCE.

POLICE OFFICER HAD REASONABLE GROUNDS TO PULL OVER PETITIONER'S CAR AFTER THE CAR CROSSED THE FOG LINE WITH A BLINKER ON AND THEN MOVED BACK INTO THE LANE, REVOCATION OF DRIVER'S LICENSE FOR FAILURE TO SUBMIT TO A CHEMICAL TEST AFFIRMED.

The Court of Appeals, over a dissent, determined the stop of defendant's car was based upon reasonable grounds to believe petitioner had violated Vehicle and Traffic Law § 1128. Therefore the revocation of petitioner's license for refusing to submit to a chemical test was affirmed: "At the administrative hearing, testimony was elicited that, while on patrol at 1:00 AM on December 22, 2013, a police officer observed petitioner's vehicle 'make an erratic movement off the right side of the road, crossing the fog line and [moving] off the shoulder [with the vehicle's] right front tire.' Once the vehicle left the paved roadway — and with the right-hand turn signal on — the officer saw the vehicle immediately move left, returning to its original lane of travel. After observing that there was no animal or other obstruction of the roadway that would have explained the 'erratic jerking action,' the police officer pulled the vehicle over. During the stop, the officer noticed that petitioner smelled of alcohol and exhibited other signs of inebriation. Petitioner admitted that he 'had a few drinks' and asked the officer to give him a ride home, failing field sobriety tests and a preliminary breath test given at the scene. At the precinct, despite receiving the appropriate warnings, petitioner refused to take a chemical test, resulting in an administrative license revocation hearing. The police officer's testimony at the hearing, articulating credible facts to support a reasonable belief that petitioner violated Vehicle and Traffic Law § 1128 (a) (failure to remain in lane), provided substantial evidence that he had probable cause to stop petitioner's vehicle ... . Any negative or adverse inference that was drawn from petitioner's failure to testify at the administrative revocation hearing was permissible ...". ***Matter of Schoonmaker v. New York State Dept. of Motor Vehs.*, 2019 N.Y. Slip Op. 02259, CtApp 3-28-19**

EMPLOYMENT LAW, LABOR LAW, CIVIL PROCEDURE.

DEPARTMENT OF LABOR'S INTERPRETATION OF A WAGE ORDER WHICH ALLOWED 24-HOUR LIVE-IN HOME HEALTH CARE AIDES TO BE PAID FOR 13 HOURS WAS NOT IRRATIONAL OR UNREASONABLE, APPELLATE DIVISION REVERSED, MATTER REMITTED FOR CONSIDERATION OF OTHER GROUNDS FOR CLASS CERTIFICATION.

The Court of Appeals, in a full-fledged opinion by Judge Rivera, over a two-judge dissent, reversing the Appellate Division, determined that the Department of Labor's interpretation of a minimum wage order applicable to home health aides was not irrational or unreasonable. The matter was sent back for consideration of other grounds for class certification: "The common issue presented in these joint appeals is whether, pursuant to the New York State Department of Labor's (DOL) Miscellaneous Industries and Occupations Minimum Wage Order (Wage Order), an employer must pay its home health care aide employees for each hour of a 24-hour shift. DOL has interpreted its Wage Order to require payment for at least 13 hours of a 24-hour shift if the employee is allowed a sleep break of at least 8 hours—and actually receives five hours of uninterrupted sleep—and three hours of meal break time. DOL's interpretation of its Wage Order does not conflict with the promulgated language, nor has DOL adopted an irrational or unreasonable construction, and so the Appellate Division erred in rejecting that interpretation. Therefore, we reverse the Appellate Division orders and remit for consideration of alternative grounds for class certification for alleged violations of New York's Labor Law, inclusive of defendants' alleged systematic denial of wages earned and due, unaddressed by the courts below because of their erroneous rejection of DOL's interpretation." ***Andryeyeva v. New York Health Care, Inc.*, 2019 N.Y. Slip Op. 02258, CtApp 3-26-19**

HUMAN RIGHTS LAW, COOPERATIVES, ANIMAL LAW.

NYS STATE DIVISION OF HUMAN RIGHTS' DETERMINATION THAT THE DISABLED COOPERATIVE SHAREHOLDER WAS DISCRIMINATED AGAINST WHEN SHE WAS PROHIBITED FROM KEEPING A DOG IN HER COOPERATIVE APARTMENT CONFIRMED BY THE COURT OF APPEALS, REVERSING THE APPELLATE DIVISION.

The Court of Appeals, over a two-judge dissent, in a brief memorandum that did not recite the facts, reversed the Appellate Division and confirmed the NYS Division of Human Rights (SDHR) determination that petitioners had discriminated against the disabled complainant, a cooperative shareholder, by prohibiting her from keeping a dog in the cooperative apartment. ***Matter of Delkap Mgt., Inc. v. New York State Div. of Human Rights*, 2019 N.Y. Slip Op. 02260, CtApp 3-26-19**

SUMMARY OF THE FACTS FROM THE APPELLATE DIVISION'S DECISION (WHICH THE COURT OF APPEALS REVERSED HERE): "The complainant testified that, since obtaining the dog, her cardiac arrhythmia, which caused her to have rapid heart rate and experience palpitations, had significantly decreased; her ability to sleep had improved, resulting in her feeling less tired during the day; her discomfort due to her rheumatoid arthritis had improved because she was more physically active with the dog; and the dog decreased her stress, helping to improve the symptoms caused by her rheumatoid arthritis and cardiac arrhythmia. Sometime after the hearing concluded, the petitioners directed the complainant to immediately remove her dog from her apartment contending, erroneously, that the SDHR had issued a final order in their favor. The complainant thereafter moved out of her apartment with the dog. In a recommendation and findings ... an administrative law judge (hereinafter ALJ) of the SDHR determined that the Coop had discriminated against the complainant in the terms, conditions, and privileges of her housing on the basis of her disability, and that she should have been allowed to keep the dog in her apartment as a reasonable accommodation for her disability. The ALJ also determined that the respondents retaliated against the complainant for opposing the discrimination and filing a complaint with the SDHR. The Acting Commissioner of the SDHR adopted the ALJ's recommendation and findings and directed the petitioners to pay $5,000 to the complainant in compensatory damages for mental anguish and $10,000 in punitive damages, assessed a $5,000 penalty upon each petitioner payable to the State, and directed the petitioners to create and implement standard policies and procedures to evaluate shareholders' requests for reasonable accommodations and to develop and implement training to prevent unlawful discrimination."

MUNICIPAL LAW, LAND USE.

CONVERSION OF A HISTORIC LOWER MANHATTAN LANDMARK, A RARE CLOCK AND CLOCK TOWER, TO A LUXURY APARTMENT WAS PROPERLY APPROVED BY THE NYC LANDMARKS PRESERVATION COMMISSION, APPELLATE DIVISION REVERSED.

The Court of Appeals, in a full-fledged opinion by Judge Garcia, over an extensive two-judge dissenting opinion, reversing the Appellate Division, determined the NYC Landmarks Preservation Commission (LPC) properly approved the redevelopment of 346 Broadway, a historic building in Lower Manhattan that the LPC had previously designated as a landmark. The redevelopment entailed conversion of an interior landmark (a clock) to a luxury apartment: "In its initial designation report, the LPC noted several of the building's unique features. The exterior of the 'palazzo-like tower,' constructed in 'the neo-Italian Renaissance style,' was largely built with 'white Tuckahoe marble.' The 'interiors' were also 'designed using the finest craftmanship and lavish materials' including 'marble, bronze, [and] mahogany.' Among the interior spaces designated were the former 'Banking Hall,' a 'grand and boldly scaled neo-Classical room' with 'monumental freestanding

Corinthian columns, and '[t]he clock tower' which housed a 'No. 4 Striking Tower Clock'—a mechanical clock driven 'by a thousand pound weight' which 'strikes the hours' with a hammer and a '5000 pound bell.' * * * ... [T]the developer intended to keep the clock running electrically. ... ... [T]he LPC found that the developer's plan would have 'the main lobby, stair hall, clock tower rooms and banking hall . . . fully restored. 'Additionally, it would 'allow accessibility by the public to the lobby and former banking hall.' The LPC also found that "the clock mechanism and faces will be retained, thereby preserving these significant features.' In sum, the LPC found that 'the proposed restorative work will return . . . the interior closer to [its] original appearance, and will aid in [its] long-term preservation.' **FROM JUDGE RIVERA'S DISSENT:** Notwithstanding the historical significance of the clock to the City, the LPC approved the building owner's request to convert this interior landmark into a luxury apartment. ***Matter of Save America's Clocks, Inc. v. City of New York*, 2019 N.Y. Slip Op. 02385, CtApp 3-28-19**

REAL PROPERTY LAW, REAL PROPERTY TAX LAW, CONDOMINIUMS, AGENCY.

CONDOMINIUM UNIT OWNERS' AUTHORIZATION OF THE CONDOMINIUM BOARD TO CHALLENGE THE CONDOMINIUM'S REAL PROPERTY TAX ASSESSMENT REMAINS VALID FOR SUBSEQUENT TAX YEARS UNLESS CANCELED OR RETRACTED, THERE IS NO NEED FOR YEARLY AUTHORIZATIONS.

The Court of Appeals, in a full-fledged opinion by Judge Fahey, over a two judge dissent, reversing the Appellate Division, determined that a condominium board of managers need only seek one authorization from condominium unit owners to challenge the condominium's real property tax assessment The authorization is deemed to remain in effect in subsequent tax years unless canceled or retracted: "This appeal presents the question whether Real Property Law § 339-y (4) requires a condominium board of managers to obtain a separate authorization from each condominium unit owner granting the board authority to proceed on behalf of that owner for each tax year in which the board challenges the condominium's real property tax assessment. We conclude that section 339-y (4) allows a standing authorization issued by an owner to confer authority upon a board to act on behalf of that owner for the tax year in which that authorization was issued and in all subsequent tax years, unless such authorization is canceled or retracted." ***Matter of Eastbrooke Condominium v. Ainsworth*, 2019 N.Y. Slip Op. 02384, CtApp 3-28-19**

FIRST DEPARTMENT

CONTRACT LAW, CORPORATION LAW, CIVIL PROCEDURE.

MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM IN THIS BREACH OF CONTRACT ACTION, BASED UPON DOCUMENTARY EVIDENCE, SHOULD NOT HAVE BEEN GRANTED.

The First Department, in a full-fledged opinion by Justice Manzanet-Daniels, reversing Supreme Court, determined the motion to dismiss based on documentary evidence should not have been granted in this breach of contract action. Plaintiff and defendant had entered a Share Purchase Agreement (SPA) in which plaintiff agreed to purchase defendant, Symbio, for between $100 and $110 million. The opinion is fact specific and cannot be fairly summarized here: "Plaintiff's claims are not definitively contradicted by the documentary evidence. The record (to the extent there is one on this motion pursuant to CPLR 3211) demonstrates the existence of issues of fact concerning when plaintiff determined that there was a matter that might give rise to a right of indemnification so that it was required to give notice pursuant to section 8.03(a) of the parties' contract. ... Further, defendants' defense of a condition precedent is not conclusively established. Even if section 8.03(a) might be construed as a condition precedent (which is highly doubtful), there has been no showing regarding the materiality of the provision as would be necessary given that nonoccurrence of the condition would lead to a draconian forfeiture." ***XI Lux Holdco S.A.R.L. v. SIC Holdings, LLC*, 2019 N.Y. Slip Op. 02437, First Dept 3-28-19**

FORECLOSURE, EVIDENCE.

NO PROOF NOTE WAS IN POSSESSION OF PLAINTIFF WHEN THE ACTION WAS COMMENCED, PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT IN THIS FORECLOSURE ACTION SHOULD NOT HAVE BEEN GRANTED.

The First Department, over a two justice dissent, reversing Supreme Court, determined the evidence of standing was insufficient and plaintiff's motion for summary judgment in this foreclosure action should not have been granted. The majority held there was no proof the plaintiff was in possession of the note when the action was brought: "On or about September 17, 2014, plaintiff executed a power of attorney appointing Ocwen Loan Servicing, LLC (Ocwen) as its attorney-in-fact with power to enforce its rights with regard to loans included in the PSA [pooling and service agreement]. Two years after that, on October 19, 2016, plaintiff moved for summary judgment. Plaintiff submitted an affidavit by Kyle Lucas, an employee of a company whose indirect subsidiary is Ocwen. Lucas alleged that plaintiff had had physical possession of the note since June 6, 2007, but he failed to identify any document which provided the basis for his knowledge. A copy of defendant's note, endorsed in blank ... , was attached to plaintiff's summary judgment motion. However, there is nothing in the record that proves when the note was physically delivered to plaintiff." ***Deutsche Bank Natl. Trust Co. v. Guevara*, 2019 N.Y. Slip Op. 02412, First Dept 3-28-19**

INSURANCE LAW, DEBTOR-CREDITOR.

RELEVANT REGULATION, RATHER THAN THE POLICY LANGUAGE, CONTROLLED THE CALCULATION OF INTEREST ON INSURANCE POLICY PROCEEDS.

The First Department, reversing Supreme Court, determined the relevant regulation, as opposed to the less generous insurance policy provision, controlled the payment of interest on policy proceeds: "Defendant['s] ... insurer's bare offer to pay the policy limit was not a tender' of the policy for the purposes of stopping the accrual of prejudgment interest under 11 NYCRR 60-1.1(b). While the policy provides that the insurer will pay interest on a judgment until 'we have paid, offered to pay or deposited in court the part of the judgment that is within our Limit of Insurance,' 11 NYCRR 60-1.1(b) requires the insurer to pay postjudgment interest until it has 'paid or tendered or deposited in court' the part of the judgment that does not exceed the policy limit. As the policy language is less generous to the insured than the regulation, it is deemed superseded by the regulation ... . Within that framework, a bare offer to pay does not constitute a tender. Thus, interest must be calculated from the date of entry of the order that granted summary judgment to plaintiff until the date of payment ...". ***Gyabaah v. Rivlab Transp. Corp.*, 2019 N.Y. Slip Op. 02417, First Dept 3-28-19**

MEDICAL MALPRACTICE, NEGLIGENCE, CIVIL PROCEDURE.

ACTION BASED UPON FAILURE TO SUPERVISE PLAINTIFF'S USE OF A HOSPITAL REST ROOM SOUNDED IN MEDICAL MALPRACTICE, NOT NEGLIGENCE, THE ACTION WAS THEREFORE TIME-BARRED.

The First Department, reversing Supreme Court, determined plaintiff's action, which alleged inadequate supervision when plaintiff used a hospital rest room, sounded in medical malpractice, not negligence. Therefore the action was time-barred: "Plaintiff alleges that defendants failed to properly assess her condition and the degree of her supervisory needs in the restroom, a claim sounding in medical malpractice, and her action, brought three years after her injuries, is therefore untimely ... . Because the loss of consortium claim is derivative of the injured plaintiff's claim, that cause of action must also be dismissed as untimely ... . ***Kim v. New York Presbyt.*, 2019 N.Y. Slip Op. 02425, First Dept 3-28-19**

SECOND DEPARTMENT

CIVIL PROCEDURE, JUDGES, TRADEMARKS, UNFAIR COMPETITION, CORPORATION LAW.

JUDGE SHOULD NOT HAVE, SUA SPONTE, GRANTED A PRELIMINARY INJUNCTION IN THIS TRADEMARK INFRINGEMENT CASE, CORPORATE OFFICERS PROPERLY SUED IN THEIR INDIVIDUAL CAPACITIES.

The Second Department, modifying Supreme Court, determined that defendants' motion to dismiss the trademark infringement, trademark dilution and unfair competition causes of action was properly denied. The court noted that the complaint properly alleged torts by defendants in their individual capacities without alleging facts supporting piercing the corporate veil. The Second Department held that the judge, sua sponte, should not have granted the preliminary injunction: " '[P]reliminary injunctive relief is a drastic remedy which will not be granted unless a clear right thereto is established under the law and the undisputed facts upon the moving papers, and the burden of showing an undisputed right rests upon the movant' ... . 'As a general rule, the decision to grant or deny a preliminary injunction lies within the sound discretion of the Supreme Court' ... . 'In exercising that discretion, the Supreme Court must determine if the moving party has established: (1) a likelihood of success on the merits, (2) irreparable harm in the absence of an injunction, and (3) a balance of the equities in favor of the injunction' ... . ' [A]bsent extraordinary circumstances, a preliminary injunction will not issue where to do so would grant the movant the ultimate relief to which he or she would be entitled in a final judgment' ... . The plaintiff did not request a preliminary injunction ... [T]he record in this case lacks evidence establishing, among other things, irreparable harm or extraordinary circumstances warranting a preliminary injunction that would, in effect, depart from the status quo and grant the plaintiff its ultimate relief ... . The evidence at this stage further fails to demonstrate that the plaintiff possesses a likelihood of success on the merits ... . The court therefore improvidently exercised its discretion in sua sponte awarding preliminary injunctive relief to the plaintiff." ***Emanuel Mizrahi, DDS, P.C. v. Angela Andretta, DMD, P.C.*, 2019 N.Y. Slip Op. 02315, Second Dept 3-27-19**

CRIMINAL LAW, ATTORNEYS, JUDGES.

DEFENDANT WAS HOUSED FIVE HOURS AWAY FROM THE COURT AND HIS ATTORNEY, REPEATED REQUESTS TO MOVE DEFENDANT CLOSER WERE GRANTED BUT NOT COMPLIED WITH, DEFENDANT MOVED TO WITHDRAW HIS PLEA AT SENTENCING, GIVEN THE POSSIBILITY DEFENDANT HAD EFFECTIVELY BEEN DEPRIVED OF HIS RIGHT TO COUNSEL, INQUIRY INTO THE VOLUNTARINESS OF THE PLEA SHOULD HAVE BEEN CONDUCTED.

The Second Department, reversing Supreme Court, determined the sentencing judge should have inquired into the voluntariness of defendant's guilty plea before accepting it. The defendant had been housed more than one hundred miles from the court and his attorney. Repeated requests to move the defendant closer to allow consultation with his attorney

were granted but not complied with. When the court set the matter down for trial anyway, the defendant pled guilty: "The Supreme Court ordered that the defendant be moved to Rikers Island, or at a minimum, a correctional facility closer to the court. The court issued numerous orders over the following two weeks directing that the defendant be moved, none of which was complied with. Each appearance required the defendant to travel at least five hours each way. Defense counsel continued to argue that the Department of Corrections and Community Supervision was violating the defendant's constitutional rights to consult with his attorney and to defend this case. The court noted that it would be nearly impossible to hold a jury and try the case under these conditions. The court nevertheless stated that the trial would commence, regardless of where the defendant was housed. The very next court date, the defendant agreed to plead guilty. Two weeks later, at the sentencing, the defendant made an application to withdraw his plea, contending that he had entered the plea involuntarily, given the circumstances and his lack of access to his counsel. The Supreme Court denied the application without engaging in any inquiry of the defendant, other than to comment on the favorable plea offer secured by defense counsel. Under the circumstances, it cannot be said that the Supreme Court was able to make an informed determination as to the question of the voluntary nature of the defendant's plea without conducting such an inquiry. The record substantiates the defendant's claim that his plea was effectively coerced by the ongoing violation of his Sixth Amendment right to counsel and, thus, a genuine factual issue as to the voluntariness of the plea existed that could only be resolved after a hearing. Under these circumstances, the court should have conducted a hearing to explore the defendant's allegations in order to make an informed determination ...". ***People v. Hollmond*, 2019 N.Y. Slip Op. 02354, Second Dept 3-27-19**

CRIMINAL LAW, EVIDENCE.

AMENDMENT OF THE INDICTMENT ON THE EVE OF TRIAL CHANGED THE THEORY OF PROSECUTION FROM ACTUAL POSSESSION OF A WEAPON TO CONSTRUCTIVE POSSESSION OF A WEAPON, CONVICTION REVERSED.
The Second Department, reversing defendant's conviction and dismissing the indictment, determined that the People should not have been allowed to amend the indictment on the eve of trial. The indictment charged defendant with possession of a weapon when he visited his girlfriend on October 20. The People sought to amend the indictment to allege possession of a weapon on October 22, when the weapon was found pursuant to a search of defendant's residence: "By seeking, on the eve of trial, to amend the indictment to include the days following the purported incident with the former girlfriend, the People changed the theory of their case from the defendant's actual possession of a weapon, as witnessed and attested to by the former girlfriend, to constructive possession, meaning his exercise of dominion or control over an area of the defendant's residence where a loaded weapon was found ... . Defense counsel, in opposing the amendment, asserted that he had relied upon the indictment and the VDF [voluntary disclosure form] prepared by the District Attorney's Office, giving the date of the offense as October 20, 2015, in preparing for the case, including defense counsel's efforts to prove, through time cards and testimony, that it was impossible for the defendant to have been at his former girlfriend's apartment at the time of the incident on October 20, 2015. As such, defense counsel presented evidence that the defense had been substantially undermined by the amendment of the indictment and that, effectively, he was forced to forgo an alibi-type defense ...". ***People v. McLean*, 2019 N.Y. Slip Op. 02356, Second Dept 3-27-19**

CRIMINAL LAW, EVIDENCE, APPEALS.

ALTHOUGH THE OPERATION OF THE KNIFE WAS DEMONSTRATED AT TRIAL, THERE WAS NO RECORD EVIDENCE THAT THE KNIFE POSSESSED BY DEFENDANT WAS A GRAVITY KNIFE, RELATED CONVICTION REVERSED UNDER A WEIGHT OF THE EVIDENCE ANALYSIS.
The Second Department, under a weight of the evidence analysis, determined that the proof did not support the jury's finding that the weapon possessed by defendant was a gravity knife: "Penal Law § 265.00(5) defines a '[g]ravity knife' as a 'knife which has a blade which is released from the handle or sheath thereof by the force of gravity or the application of centrifugal force which, when released, is locked in place by means of a button, spring, lever or other device.' '[A] gravity knife, as so defined, requires that the blade lock in place automatically upon its release and without further action by the user' ... . Although an officer demonstrated the operation of the knife at trial, the record contains 'no contemporaneous description of what the jury saw' during that demonstration ... . Further, there is no other evidence in the record that established whether or how the blade locked. In short, the People failed to create a record proving that the knife satisfied the statutory definition of a gravity knife ... . Thus, the weight of the evidence before us does not support a finding that the defendant's knife was, in fact, a gravity knife ...". ***People v. Sauri*, 2019 N.Y. Slip Op. 02359, Second Dept 3-27-19**

EDUCATION-SCHOOL LAW, NEGLIGENCE.

LACK OF SUPERVISION WAS NOT THE PROXIMATE CAUSE OF PLAINTIFF STUDENT'S FALL, PLAINTIFF WAS ENGAGING IN AGE-APPROPRIATE BEHAVIOR TAKING TURNS JUMPING OVER A KNEE-HIGH FENCE WHEN SHE FELL AND WAS INJURED, SCHOOL DISTRICT'S SUMMARY JUDGMENT MOTION PROPERLY GRANTED.
The Second Department determined the school district's motion for summary judgment in this school recess injury case was properly granted. Plaintiff, who was in eighth grade, was injured when her shin struck a knee-high fence as she attempted

to jump over it, causing her to fall on a concrete walkway. She had been taking turns with her friends jumping the fence for 10 or 15 minutes: "The plaintiff testified at a General Municipal Law § 50-h hearing and her deposition that she did not see any school personnel outside the school building either before or at the time of the incident. ... 'Schools are under a duty to adequately supervise the students in their charge and they will be held liable for foreseeable injuries proximately related to the absence of adequate supervision' ... . However, '[s]chools are not insurers of safety, . . . for they cannot reasonably be expected to continuously supervise and control all movements and activities of students' ... . Here, the defendant established ... that the plaintiff was engaged in an age-appropriate activity that did not constitute dangerous play, and that the alleged lack of supervision was not a proximate cause of the accident ...". ***Chiauzzi v. Sewanhaka Cent. High Sch. Dist.*, 2019 N.Y. Slip Op. 02310, Second Dept 3-27-19**

EDUCATION-SCHOOL LAW, NEGLIGENCE, MUNICIPAL LAW, CIVIL PROCEDURE.

STUDENT ON STUDENT ASSAULT WAS NOT FORESEEABLE, THEORIES IN THE PLEADINGS WHICH WERE NOT MENTIONED IN THE NOTICE OF CLAIM PROPERLY DISMISSED.

The Second Department, reversing Supreme Court, determined defendant school district's motion for summary judgment should have been granted in this student-on-student assault case. The assault arose abruptly and and lasted 20 to 30 seconds and was not foreseeable. In addition, the theories of liability not mentioned in the notice of claim, but asserted in the pleadings, should have been dismissed: "[T]he School District established, prima facie, that the alleged assault by the fellow student was an unforeseeable act and that the School District had no actual or constructive notice of prior conduct of the students involved here which was similar to the subject incident ... . Moreover, the School District established, prima facie, that 'the incident occurred in so short a period of time that any negligent supervision on its part was not a proximate cause of the infant plaintiff's injuries' ... . '[T]he prima facie showing which a defendant must make on a motion for summary judgment is governed by the allegations of liability made by the plaintiff in the pleadings' ... . However, if the defendant is a municipality, the plaintiff may not raise in the complaint causes of action or legal theories that were not directly or indirectly mentioned in the notice of claim and that 'substantially alter' the nature of the claim or add a new theory of liability ... . By submitting evidence that the notice of claim did not mention ... causes of action and legal theories, the School District established its ... entitlement to judgment as a matter of law dismissing all of the causes of action, other than negligent supervision, that were asserted in the complaint and bill of particulars against the School District ...". ***Meyer v. Magalios*, 2019 N.Y. Slip Op. 02336, Second Dept 3-27-19**

FORECLOSURE, EVIDENCE.

THE SECOND DEPARTMENT USED THIS OPINION AS A VEHICLE TO EXPLAIN THE COMPLEX PROOF REQUIREMENTS FOR SUMMARY JUDGMENT MOTIONS BROUGHT IN FORECLOSURE ACTIONS, EMPHASIZING THE REQUIREMENTS OF THE BUSINESS RECORDS EXCEPTION TO THE HEARSAY RULE.

The Second Department, in a full-fledged opinion by Justice Miller, explained in detail the proof requirement for a summary judgment motion in a foreclosure action, emphasizing the requirements of the business records exception to the hearsay rule. The court determined that the bank's proof of standing was sufficient, but the proof of defendant's default was not. The opinion is too detailed to be fairly summarized here and should be consulted for guidance in foreclosure actions: "From an appellate perspective, the recent flood of foreclosure appeals has revealed consistent and repeated confusion about some of the most fundamental aspects of the procedural, substantive, and evidentiary law that must be routinely applied in a foreclosure context. In an effort to provide additional clarity in this important area of the law, we deem it appropriate to collect and reiterate some of these foundational principles in the hope that such clarity will eliminate many of the disputes that make up an ever-increasing proportion of trial-level dockets. For the reasons that follow, we modify the order appealed from. ... [I]t bears noting that the business record exception to the hearsay rule applies to a "writing or record" (CPLR 4518[a]). Although '[t]he foundation for admission of a business record usually is provided by the testimony of the custodian, the author or some other witness familiar with the practices and procedures of the particular business' ... , it is the business record itself, not the foundational affidavit, that serves as proof of the matter asserted ... . Accordingly, '[e]vidence of the contents of business records is admissible only where the records themselves are introduced' ...". ***Bank of N.Y. Mellon v. Gordon*, 2019 N.Y. Slip Op. 02306, Second Dept 3-27-19**

FORECLOSURE, EVIDENCE.

PLAINTIFF'S PROOF OF STANDING IN THIS FORECLOSURE ACTION WAS NOT IN ADMISSIBLE FORM, PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined the evidence that the plaintiff had standing in this foreclosure action did not meet the requirements of the business records exception to the hearsay rule and plaintiff's summary judgment motion should not have been granted: "In support of its motion, the plaintiff relied on the affidavit of Gabriel De Souza, a contract management coordinator for Ocwen Loan Servicing, LLC (hereinafter Ocwen), which serviced the subject mortgage for the plaintiff. De Souza indicated that his knowledge of this case was based on his 'review of the business records,' and asserted that the plaintiff was 'in possession of the Note at the time of commencement of this action.' He did

not indicate that the business records of the plaintiff had been incorporated into Ocwen's business records. Moreover, the plaintiff failed to demonstrate the admissibility of the assertions made by De Souza or the records relied upon by him under the business records exception to the hearsay rule (see CPLR 4518[a] ...). Inasmuch as the plaintiff's motion was based on evidence that was not in admissible form, it failed to establish its prima facie entitlement to judgment as a matter of law ...". ***Deutsche Bank Natl. Trust Co. v. Lee*, 2019 N.Y. Slip Op. 02313, Second Dept 3-27-19**

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

PLAINTIFF'S PROOF OF COMPLIANCE WITH THE NOTICE REQUIREMENTS OF REAL PROPERTY ACTIONS AND PROCEEDINGS LAW 1304 IN THIS FORECLOSURE ACTION WAS INSUFFICIENT, PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined plaintiff did not demonstrate compliance with the notice requirements of Real Property Actions and Proceedings Law (RPAPL) 1304: "[T]he plaintiff failed to submit an affidavit of service or proof of mailing by the United States Postal Service evidencing that it properly served the defendant pursuant to RPAPL 1304. The plaintiff instead relied on the 'Affidavit of Mailing' of a vice president of loan documentation of Wells Fargo. However, the affiant did not aver that she personally mailed the notice, and she did not aver that she was familiar with the plaintiff's mailing practices and procedures, and, therefore, she did not establish proof of a standard office practice and procedure designed to ensure that items are properly addressed and mailed .... Similarly, the presence of numbered bar codes on the copies of the 90-day statutory notices submitted by the plaintiff did not suffice to establish, prima facie, proper mailing under RPAPL 1304 ...". ***U.S. Bank N.A. v. Offley*, 2019 N.Y. Slip Op. 02377, Second Dept 3-27-19**

LABOR LAW-CONSTRUCTION LAW, EMPLOYMENT LAW, CORPORATION LAW, WORKERS' COMPENSATION LAW.

DEFENDANT WAS NOT AN ALTER EGO OF PLAINTIFF'S EMPLOYER, PLAINTIFF WAS NOT DEFENDANT'S SPECIAL EMPLOYEE, PLAINTIFF WAS ENTITLED TO SUMMARY JUDGMENT ON HIS LABOR LAW § 240(1) CAUSE OF ACTION BASED UPON THE ALLEGATION THE LADDER MOVED FOR NO APPARENT REASON, NOTWITHSTANDING EVIDENCE PLAINTIFF MAY HAVE SAID HE PLACED THE LADDER ON A DROP CLOTH.

The Second Department, modifying Supreme Court, determined defendant's affirmative defenses alleging it was an alter ego of plaintiff's employer and plaintiff was its special employee, thereby insulating defendant from anything other than liability under the Workers' Compensation Law, should have been dismissed. Summary judgment was properly awarded to plaintiff on his Labor Law § 240(1) cause of action. Plaintiff alleged the ladder he was on moved for no apparent reason. The fact that plaintiff apparently told a co-worker that he set the ladder on a drop cloth merely raised a question of his contributory negligence, which is not a defense to a Labor Law 240 (1) action: " 'Labor Law § 240(1) imposes a nondelegable duty upon owners and general contractors to provide safety devices to protect workers from elevation-related risks' ... . The sole proximate cause defense applies where the plaintiff, acting as a 'recalcitrant worker,' misused an otherwise proper safety device, chose to use an inadequate safety device when proper devices were readily available, or failed to use any device when proper devices were available ... . Contributory negligence on the part of the worker is not a defense to a Labor Law § 240(1) cause of action ... . Here, the plaintiff made a prima facie showing of entitlement to ... judgment as a matter of law on the issue of liability on the Labor Law § 240(1) cause of action, by submitting evidence that the ladder on which he was standing moved for no apparent reason, causing him to fall ... . In opposition to the plaintiff's prima facie showing, the defendant failed to raise a triable issue of fact as to whether the plaintiff's own acts or omissions were the sole proximate cause of his injuries ... . Contrary to the defendant's contention, the deposition testimony of the plaintiff's coworker implying that, after the accident, the plaintiff might have told the coworker that the plaintiff had set the ladder up on top of a drop cloth, even if true, would render the plaintiff only contributorily negligent, a defense not available under Labor Law § 240(1) ...". ***Salinas v. 64 Jefferson Apts., LLC*, 2019 N.Y. Slip Op. 02370, Second Dept 3-27-19**

MEDICAL MALPRACTICE, NEGLIGENCE, CIVIL PROCEDURE.

DEFENDANTS' MOTION TO SET ASIDE THE VERDICT FINDING LIABILITY IN THIS MEDICAL MALPRACTICE ACTION SHOULD NOT HAVE BEEN GRANTED, PLAINTIFF'S MOTION TO SET ASIDE THE VERDICT AWARDING NO DAMAGES FOR PAST AND FUTURE PAIN AND SUFFERING OR FUTURE LOST WAGES SHOULD HAVE BEEN GRANTED, PLAINTIFF ALLEGED HER CHILD WAS INJURED IN UTERO.

The Second Department, reversing Supreme Court, determined that defendants' motion to set aside the verdict finding liability in this medical malpractice action should not have been granted, and the plaintiff's motion to set aside so much of the verdict as awarded no damages for past or future pain and suffering or future lost earnings should have been granted. The action alleged damage to plaintiff's child in utero: "Here, the plaintiff adduced legally sufficient proof to establish a departure from the standard of care and as to causation. In particular, the plaintiff's expert obstetrician-gynecologist, Barry Schifrin, opined that the child suffered a placental 'abruption plus or minus fetomaternal transfusion,' which caused 'a problem of oxygen availability in the baby's brain.' Schifrin opined that continuous EFM testing should have been undertaken beginning on the date of the mother's fall, November 4, 2008. Schifrin testified that the EFM performed on November

12, 2008, showed that the child had been in distress for 'quite some time.' The plaintiff's expert pediatric hematologist, Jill DeJong, opined that the child's anemia was related to a fetomaternal transfusion. Based on that evidence, the jury could have reasonably found that had the respondents undertaken or begun continuous EFM on November 10, 2008, the harm to the child would have been avoided or mitigated. Further, although the respondents' experts opined that the respondents did not depart from accepted practice, the jury was entitled to resolve the conflicting expert testimony in the plaintiff's favor ... . Accordingly, the Supreme Court should not have granted that branch of the respondents' motion which was to set aside the jury verdict on the issue of liability and for judgment as a matter of law ... . The jury's failure to award any damages for past pain and suffering and future pain and suffering deviates materially from reasonable compensation, in light of the evidence of the severe deficits suffered by the child, her ongoing need for medical treatment, ongoing medical events such as intractable seizures, and evidence of her consciousness and ability to interact with others (see CPLR 5501[c] ...). The jury's failure to award any damages for future lost earnings also deviates materially from reasonable compensation ...". ***Larkin v. Wagner*, 2019 N.Y. Slip Op. 02327, Second Dept 3-27-19**

MEDICAL MALPRACTICE, NEGLIGENCE, CIVIL PROCEDURE, EVIDENCE, TRUSTS AND ESTATES.

DECEDENT'S CONSENT TO SURGERY SUBMITTED IN SUPPORT OF SUMMARY JUDGMENT IN THIS MEDICAL MALPRACTICE ACTION DID NOT VIOLATE THE DEAD MAN'S STATUTE, THE CONSENT WAS AUTHENTICATED BY THE MEDICAL RECORDS.

The Second Department, reversing Supreme Court, determined the medical malpractice and wrongful death actions should have been dismissed. With respect to the "lack of informed consent" cause of action, the court held that the submission of the informed consent form by the defendant did not violate the Dead Man's Statute: "The plaintiff contends that Meyerson [defendant surgeon] cannot rely upon the portion of his expert's affidavit which states that the decedent was aware of the risks of the procedure because he signed a consent form for a similar procedure in 2012, because this evidence would be inadmissible pursuant to CPLR 4519, the so-called Dead Man's Statute. CPLR 4519 'precludes a party or person interested in the underlying event from offering testimony concerning a personal transaction or communication with the decedent' ... . While evidence excludable at trial under CPLR 4519 may be considered in opposition to a motion for summary judgment so long as it is not the sole evidence proffered ... , such evidence 'should not be used to support summary judgment' ... . However, the statute does not bar 'the introduction of documentary evidence against a deceased's estate. . . . [A]n adverse party's introduction of a document authored by a deceased does not violate the Dead Man's Statute, as long as the document is authenticated by a source other than an interested witness's testimony concerning a transaction or communication with the deceased' ... . Inasmuch as the expert's affidavit as to the decedent's execution of the form was predicated upon the medical records, which contained the decedent's consent form for the prior surgery and on which the expert relied, and the records were properly authenticated and submitted on the motion, Meyerson properly relied upon the expert opinion to support his motion ...". ***Wright v. Morning Star Ambulette Servs., Inc.*, 2019 N.Y. Slip Op. 02381, Second Dept 3-27-19**

MUNICIPAL LAW, NEGLIGENCE, ATTORNEYS.

ALTHOUGH PLAINTIFFS APPEARED FOR THE § 50-h HEARING, PLAINTIFFS' ATTORNEY REFUSED TO LET THE PLAINTIFFS TESTIFY UNLESS EACH PLAINTIFF COULD HEAR THE OTHER'S TESTIMONY, BECAUSE THE 50-h HEARING IS A CONDITION PRECEDENT TO BRINGING SUIT, PLAINTIFFS' LAWSUIT WAS PROPERLY PRECLUDED.

The Second Department, over a two-justice dissent, determined that plaintiffs were precluded from proceeding with the lawsuit because, although plaintiffs appeared for the § 50-h hearing, plaintiffs' attorney refused to participate in the § 50-h hearing unless each plaintiff was present when the other testified. The majority held that the § 50-h hearing is a condition precedent to any lawsuit and the statute does not create a right for plaintiff's to be present for each other's testimony at the hearing: "The purpose of General Municipal Law § 50-h is to enable a municipality to make a prompt investigation of the circumstances of a claim by examining the claimant about the facts of the claim ... . The oral examination of a claimant pursuant to General Municipal Law § 50-h serves to supplement the notice of claim and provides an investigatory tool to the municipality, with a view toward settlement ... . 'Compliance with a demand for a General Municipal Law § 50-h examination is a condition precedent to the commencement of an action against a municipal defendant, and the failure to so comply warrants dismissal of the action' ... . 'A party who has failed to comply with a demand for examination pursuant to General Municipal Law § 50-h is precluded from commencing an action against a municipality' ... . ' [A] court cannot amend a statute by inserting words that are not there, nor will a court read into a statute a provision which the Legislature did not see fit to enact' ... . Moreover, '[i]n the construction of statutes, each word or phrase in the enactment must be given its appropriate meaning' ... , which is in derogation of the common law, is to be strictly construed ... . In strictly construing a statute, courts 'will not go beyond the clearly expressed provisions of the act' ...". ***Colon v. Martin*, 2019 N.Y. Slip Op. 02312, Second Dept 3-27-19**

THIRD DEPARTMENT

FAMILY LAW.

A NEW HEARING ON FATHER'S PETITION TO RELOCATE IS REQUIRED BECAUSE THE COURT MAY HAVE PLACED TOO MUCH EMPHASIS ON THE CHILD'S ENROLLMENT IN A PARTICULAR SCHOOL AS THE BASIS FOR GRANTING THE PETITION.

The Third Department, reversing Family Court, determined a new hearing on father's relocation petition was required because the court may have put too much emphasis on the child's enrollment in a particular school: "Family Court determined that it was in the best interests of the child to award the father physical custody of the child and to permit the child to relocate to New York City. In making this determination, we note that the court took into account the child's relationship with the family members in each parties' household, the child's current school and Promise Academy, the parties' relative fitness to provide a safe and healthy environment and the structure in each household to support the child's educational needs. The court, however, conditioned such change of custody and relocation upon the child's enrollment in Promise Academy for the 2017-2018 school year. In our view, by imposing such condition, the court erroneously elevated the child's matriculation at Promise Academy from one factor to be considered in the best interests analysis to the sole dispositive factor. Inasmuch as no one factor is dispositive ... , the order must be reversed and a new hearing to be conducted on the father's modification petition within 20 days of this Court's decision." ***Matter of Lionel PP. v. Sherry QQ.*, 2019 N.Y. Slip Op. 02398, Third Dept 2-28-19**

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