May 17, 2019

CasePrepPlus

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COURT OF APPEALS

CIVIL PROCEDURE, CONSTITUTIONAL LAW.

OHIO FIREARMS DEALER DID NOT HAVE MINIMUM CONTACTS WITH NEW YORK SUFFICIENT FOR THE EXERCISE OF LONG-ARM JURISDICTION OVER HIM, A GUN PURCHASED IN OHIO BY AN OHIO RESIDENT WAS SOLD ON THE BLACK MARKET IN NEW YORK AND WAS USED IN NEW YORK TO SHOOT PLAINTIFF.

The Court of Appeals, in a full-fledged opinion by Judge DiFiore, over a concurring opinion and a three-judge dissenting opinion, determined that an Ohio firearms dealer (Brown) did not have "minimum contacts" with New York sufficient for the exercise of long-arm jurisdiction (CPLR 302) over him. A gun sold by Brown to Bostic, an Ohio resident, in Ohio, was sold on the black market to a member of a gang in Buffalo, New York, who shot plaintiff: "Defendant Charles Brown, a federal firearm licensee, was authorized to sell handguns only in Ohio and only to Ohio residents, which he primarily accomplished through retail sales at gun shows held in various locations in Ohio. Brown did not maintain a website, had no retail store or business telephone listing, and did no advertising of any kind, except by posting a sign at his booth when participating in a gun show. In a series of transactions in 2000, Brown sold handguns to James Nigel Bostic and his associates. Prior to the transaction involving the gun at issue here, Brown consulted with the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) to ensure its legality. For each transaction, the necessary forms required by the ATF were properly completed and submitted, the purchaser passed the required Federal Bureau of Investigation (FBI) background check before the firearms were transferred, Brown verified that the purchaser had government-issued identification demonstrating Ohio residency, and notification of the purchases was timely sent to local law enforcement and the ATF as required by the federal Gun Control Act (see 18 USC § 922). During the transactions, Bostic indicated he was in the process of becoming a federal firearms licensee and was acquiring inventory for the eventual opening of a gun shop. * * * ... '[A] non-domiciliary tortfeasor has minimum contacts with the forum State . . . if it purposefully avails itself of the privilege of conducting activities within the forum State' ...,'thus invoking the benefits and protections of [the forum state's] laws'... . This test envisions something more than the 'fortuitous circumstance' that a product sold in another state later makes its way into the forum jurisdiction through no marketing or other effort of defendant ... . Put another way, 'the mere likelihood that a product will find its way into the forum' cannot establish the requisite connection between defendant and the forum 'such that [defendant] should reasonably anticipate being haled into court there' ... . The constitutional inquiry 'focuses on the relationship among the defendant, the forum, and the litigation' ... . Significantly, 'it is the defendant's conduct that must form the necessary connection with the forum State that is the basis for its jurisdiction' ...". ***Williams v. Beemiller, Inc.*, 2019 N.Y. Slip Op. 03656, CtApp 5-9-19**

CONTRACT LAW, LANDLORD-TENANT, CIVIL PROCEDURE.

WAIVER OF DECLARATORY JUDGMENT ACTIONS TO RESOLVE DISPUTES ARISING FROM A LEASE WAS NOT AGAINST PUBLIC POLICY AND WAS ENFORCEABLE, THE COMMERCIAL LEASE WAS NEGOTIATED BY SOPHISTICATED, COUNSELED PARTIES.

The Court of Appeals, in a full-fledged opinion by Judge DiFiore, over a three-judge dissenting opinion, determined that the clause in a commercial lease which waived any action for a declaratory judgment concerning lease provisions, and required all disputes to be adjudicated in summary proceedings, was not against public policy and was therefore enforceable: "[T]he declaratory judgment waiver is clear and unambiguous, was adopted by sophisticated parties negotiating at arm's length, and does not violate the type of public policy interest that would outweigh the strong public policy in favor of freedom of contract. ... [t]here is simply nothing in our contemporary statutory, constitutional, or decisional law indicating that the interest in access to declaratory judgment actions or, more generally, to a full suite of litigation options without limitation, is so weighty and fundamental that it cannot be waived by sophisticated, counseled parties in a commercial lease. CPLR 3001 enables Supreme Court to grant declaratory judgments in the context of justiciable controversies but in no way indicates that sophisticated parties may not voluntarily waive the right to seek such relief. A declaratory judgment is a useful tool for providing clarity as to parties' obligations and may, in some circumstances, enable parties to perform under a contract they might otherwise have breached. Access to declaratory relief benefits the parties as well as society in quieting disputes. However, a declaratory judgment is merely one form of relief available to litigants in enforcing a contract. In codifying the

right to seek declaratory relief, the Legislature neither expressly nor impliedly made access to such a claim nonwaivable with respect to any party, much less sophisticated commercial tenants." ***159 MP Corp. v. Redbridge Bedford*, LLC2019 N.Y. Slip Op. 03526, CtApp 5-7-19**

CRIMINAL LAW, APPEALS.

JURY NOTE FOUND IN THE COURT FILE BY APPELLATE COUNSEL WAS, AFTER A RECONSTRUCTION HEARING, DETERMINED TO HAVE BEEN A DRAFT WHICH WAS DISCARDED BY THE JURY, AS OPPOSED TO A NOTE OF WHICH COUNSEL SHOULD HAVE BEEN NOTIFIED, THEREFORE THE PROHIBITION OF RECONSTRUCTION HEARINGS WITH RESPECT TO THE HANDLING OF JURY NOTES DID NOT APPLY.

The Court of Appeals, over a substantive concurrence, determined, based upon a reconstruction hearing held by Supreme Court at the direction of the Appellate Division, a jury note found in the court file by appellate counsel was a draft that was discarded by the jury. Therefore the strict requirements surrounding notification of counsel of the contents of notes from the jury, and the prohibition of reconstruction hearings in that context, did not apply: "We recently held that where the record does not establish that counsel was provided meaningful notice of the contents of a substantive jury note, 'the sole remedy is reversal and a new trial,' not a reconstruction hearing (People v. Parker, 32 NY3d 49, 62 [2018]). However, the purpose of the reconstruction hearing at issue here was not to determine whether the court complied with the counsel notice requirements of CPL 310.30 and People v. O'Rama (78 NY2d 270, 276 [1991]). Instead, the hearing was to determine whether, in the first instance, Exhibit XIV reflected a 'jury . . . request [to] the court for further instruction or information' (CPL 310.30) such that those obligations were triggered. Moreover, the finding of the courts below, following the reconstruction hearing, that Exhibit XIV was a draft note that the jury discarded is supported by the record and, thus, beyond our further review." ***People v. Meyers*, 2019 N.Y. Slip Op. 03658, CtApp 5-9-19**

CRIMINAL LAW, EVIDENCE.

BECAUSE THE DEFENDANT DREW HIS GUN BEFORE THE UNARMED VICTIM "SWIPED" AT IT, THE DEFENDANT WAS THE INITIAL "DEADLY FORCE" AGGRESSOR AND WAS NOT ENTITLED TO THE JUSTIFICATION-DEFENSE JURY INSTRUCTION.

The Court of Appeals, in a full-fledged opinion by Judge Wilson, reversing the Appellate Division, determined defendant (Mr. Brown) was not entitled to the jury instruction on the justification defense. The Court of Appeals found that the defendant was the initial "deadly force" aggressor because he was wielding the gun before the unarmed victim (Mr. Cabbagestalk) "swiped" at the gun: "Mr. Wolf [an eyewitness who testified at trial] said he heard the older man [defendant] say, 'Stay away from my daughter, don't come around here.' Mr. Cabbagestalk responded, 'you can't tell me where to be.' According to Mr. Wolf, Mr. Cabbagestalk was 'getting in the older guy's face a little bit,' 'trying to back him down,' and Mr. Marshall [who was with was trying to calm Mr. Cabbagestalk down. Mr. Wolf testified ... he observed Mr. Cabbagestalk throwing a few punches at Mr. Brown but that he believed those punches did not reach Mr. Brown. Mr. Wolf also testified that Mr. Brown was holding a gun slightly 'above waist high' and 'pointed away from him.' Mr. Cabbagestalk then 'swiped' at Mr. Brown's gun ... ... [A]t some point before Mr. Cabbagestalk's last swing or swipe, Mr. Cabbagestalk said, 'if you going to pull a gun out, you got to use it.' Mr. Brown did just that, shooting Mr. Cabbagestalk in the chest. * * * Because Mr. Brown's drawing of his gun under these circumstances constituted the imminent threat of deadly physical force, the 'initial aggressor' rule bars Mr. Brown from claiming justification unless a reasonable jury could conclude either: (1) that Mr. Brown withdrew from the encounter after drawing his gun, communicated that withdrawal to Mr. Cabbagestalk, and Mr. Cabbagestalk thereafter used or threatened imminent use of deadly physical force (Penal Law § 35.15[1][b]), or (2) that Mr. Cabbagestalk himself was the initial 'deadly force' aggressor. No reasonable jury could reach either conclusion based on the evidence in this case, even viewing the evidence in the light most favorable to Mr. Brown (as we must)." ***People v. Brown*, 2019 N.Y. Slip Op. 03529, CtApp 5-7-19**

CRIMINAL LAW, EVIDENCE.

THE MAJORITY DID NOT RULE OUT THE POSSIBILITY THAT THE NON-DEADLY-FORCE JUSTIFICATION-DEFENSE JURY INSTRUCTION COULD BE APPROPRIATE IN A SECOND DEGREE ASSAULT CASE, BUT HELD THAT GIVING THE DEADLY-FORCE JUSTIFICATION-DEFENSE INSTRUCTION WAS NOT ERROR HERE.

The Court of Appeals, over a concurrence, determined the jury was properly instructed on the "deadly force" justification defense on the assault second count. Defendant was convicted of beating the victim with a belt with a metal buckle, which was deemed a "dangerous instrument." The defendant argued he was entitled to the "non-deadly" or "ordinary" physical force justification-defense jury instruction: "The Penal Law defines '[d]eadly physical force' as 'physical force which, under the circumstances in which it is used, is readily capable of causing death or other serious physical injury' (Penal Law § 10.00 [11]). A '[d]angerous instrument' is defined as 'any instrument, article, or substance . . . which, under the circumstances in which it is used, attempted to be used or threatened to be used, is readily capable of causing death or other serious physical injury' (id. § 10.00 [13]). Defendant argues that the statutory definitions, while similar, are not identical and that a jury may convict a defendant of a crime containing a dangerous instrument element without necessarily concluding that the

defendant used deadly physical force. ... There is no per se rule regarding which justification instructions are appropriate based solely on the fact that the defendant has been charged with second-degree assault with a dangerous instrument. Instead, as in every case where the defendant requests a justification charge, trial courts must view the record in the light most favorable to the defendant and determine whether any reasonable view of the evidence would permit the factfinder to conclude that the defendant's conduct was justified, and, if so, which instructions are applicable ... . Under the particular circumstances of this case, the jury instruction does not require reversal ... . Viewing the record in the light most favorable to defendant, there is no reasonable view of the evidence that defendant merely 'attempted' or 'threatened' to use the belt in a manner readily capable of causing death or serious physical injury ... but that he did not 'use' it in that manner ... ". ***People v. Vega*, 2019 N.Y. Slip Op. 03530, CtApp 5-7-19**

CRIMINAL LAW, JUDGES.

THE TRIAL JUDGE'S NEGOTIATION OF A PLEA DEAL DIRECTLY WITH THE CO-DEFENDANT, IN RETURN FOR THE CO-DEFENDANT'S ESSENTIAL TESTIMONY IDENTIFYING THE DEFENDANT AS ONE OF THE ROBBERS DEPICTED IN A VIDEO, DEPRIVED DEFENDANT OF HIS RIGHT TO A FAIR TRIAL.

The Court of Appeals, in a full-fledged opinion by Judge Stein, over a concurrence, reversing the Appellate Division, determined the trial judge had deprived defendant of a fair trial by negotiating a plea agreement directly with the co-defendant in return for the co-defendant's testimony against the defendant. Although the defendant and co-defendant in this robbery case were captured on video, their faces were covered. At trial the co-defendant identified the defendant as the person depicted in the video: "It is undisputed that, as the Appellate Division concluded, the trial court 'personally negotiate[ed] and enter[ed] into a quid pro quo cooperation agreement with the codefendant whereby the court promised to sentence the codefendant within a specific range in exchange for his testimony against defendant' (151 AD3d at 1639). In so doing, the trial court improperly 'assume[d] the advocacy role traditionally reserved for counsel' ... and ventured from its own role as a neutral arbiter '[s]tationed above the clamor of counsel or the partisan pursuit of procedural or substantive advantage' ... . Indeed, whatever its subjective intentions, the trial court effectively procured a witness in support of the prosecution by inducing the codefendant to testify concerning statements the codefendant made to police—which identified defendant as one of the robbers—in exchange for the promise of a more lenient sentence. Significantly, by tying its assessment of the truthfulness of the codefendant's testimony to that individual's prior statements to police, the trial court essentially directed the codefendant on how the codefendant must testify in order to receive the benefit of the bargain ... . Under these circumstances, the trial court's conduct 'conflicted impermissibly with the notion of fundamental fairness' ... . That is, by assuming the function of an interested party and deviating from its own role as a neutral arbiter, the trial court denied defendant his due process right to '[a] fair trial in a fair tribunal' (In re Murchison, 349 US at 136). This error is not subject to harmless error review and requires reversal ...". ***People v. Towns*, 2019 N.Y. Slip Op. 03527, CtApp 5-7-19**

PRODUCTS LIABILITY, EVIDENCE.

THE *SCARANGELLA* EXCEPTION TO STRICT PRODUCTS LIABILITY WHICH MAY APPLY WHEN A SAFETY FEATURE IS AVAILABLE BUT THE BUYER CHOOSES NOT TO PURCHASE IT, MAY BE APPLICABLE EVEN WHEN THE BUYER IS A RENTAL BUSINESS, SUPREME COURT'S AND THE APPELLATE DIVISION'S CONTRARY RULING REVERSED, NEW TRIAL ORDERED.

The Court of Appeals, in a full-fledged opinion by Judge DiFiore, over a dissenting opinion, reversing the Appellate Division and ordering a new trial, determined: (1) the so-called *Scarangella* exception may apply where the manufacturer sells its product to a rental business; and (2) the jury instruction misstated the law concerning a manufacturer's liability where its product is sold to a rental business. The *Scarangella* case carved out an exception to strict products liability which may apply when the manufacturer has made a safety feature optional and the buyer chooses not to purchase it. Here the plaintiff was operating a Bodcat loader when he was crushed by a small tree which came into the cab. Bobcat sells a cab enclosure ("door kit") which may have deflected the tree. The rental company, Taylor, which purchased the Bobcat and rented it to plaintiff, did not outfit the rented Bobcat with the door kit. The trial court held that the *Scarangella* exception is never available to a manufacturer where the product is sold to a rental company. The Court of Appeals disagreed and held the *Scarangella* exception can be available where a rental business is the purchaser, depending upon the evidence: "[In *Scarangella*] we held that a product is not defective — and a manufacturer or seller is not strictly liable for a design defect based upon a claim that optional safety equipment should have been a standard feature — when the following three conditions are met: '(1) the buyer is thoroughly knowledgeable regarding the product and its use and is actually aware that the safety feature is available; (2) there exist normal circumstances of use in which the product is not unreasonably dangerous without the optional equipment; and (3) the buyer is in a position, given the range of uses of the product, to balance the benefits and the risks of not having the safety device in the specifically contemplated circumstances of the buyer's use of the product' ... . When these elements are present, 'the buyer, not the manufacturer, is in the superior position to make the risk-utility assessment, and a well-considered decision by the buyer to dispense with the optional safety equipment will excuse the manufacturer from liability' ... . * * * Having deemed Scarangella to be wholly inapplicable, neither the trial court nor the Appellate Division examined whether Bobcat raised a triable question of fact warranting a Scarangella charge. ... For purposes of resolution of

this appeal, it is sufficient to observe as a matter of law, based on the evidence presented at this trial, that Bobcat was not entitled to a directed verdict in its favor on the Scarangella exception. Whether a Scarangella instruction will be appropriate on retrial is a matter for the trial court to determine based on the evidence presented at that time." ***Fasolas v. Bobcat of N.Y., Inc.*, 2019 N.Y. Slip Op. 03657, CtApp 5-9-19**

UTILITIES, ENVIRONMENTAL LAW, ADMINISTRATIVE LAW, CONSUMER LAW.

THE PUBLIC SERVICES COMMISSION HAS THE AUTHORITY TO IMPOSE RATE CAPS AND OTHER RESTRICTIONS ON ENERGY SERVICE COMPANIES WHICH USE THE PUBLIC UTILITY INFRASTRUCTURE TO DELIVER ELECTRICITY TO CONSUMERS.

The Court of Appeals, in a full-fledged opinion by Judge Stein, determined the Public Service Commission (PSC) has the authority to impose rate caps on energy service companies (ESCOs) who use the public utility infrastructure: "[W]e are asked to determine whether the Public Service Law authorizes the Public Service Commission (PSC) to issue an order that conditions access to public utility infrastructure by energy service companies (ESCOs) upon ESCOs capping their prices such that, on an annual basis, they charge no more for electricity than is charged by public utilities unless 30% of the energy is derived from renewable sources. We conclude that the Public Service Law, in authorizing the PSC to set the conditions under which public utilities will transport consumer-owned electricity and gas, has such authority. * * * Because the PSC is empowered to regulate utilities' transportation of gas and electricity and created the ESCO markets for the benefit of consumers, and because the legislature has delegated to the PSC the authority to condition ESCOs' eligibility to access utility lines on such terms and conditions that the PSC determines to be just and reasonable, it follows that the PSC has authority to prohibit utilities from distributing overpriced products by conditioning ESCOs' access on a price cap. That is, the statutory framework permits the PSC, pursuant to its authority to regulate the energy market, to impose a price cap on ESCOs as a condition of eligibility. Therefore, although the PSC has no direct rate-making authority over ESCOs, it did not exceed its statutory authority in determining that public utility transportation of energy sold by ESCOs is not 'just and reasonable' if ESCOs are charging consumers more than that charged by public utilities." ***Matter of National Energy Marketers Assn. v. New York State Pub. Serv. Commn.*, 2019 N.Y. Slip Op. 03655, CtApp 5-9-19**

FIRST DEPARTMENT

CRIMINAL LAW.

IN THE FACE OF BATSON CHALLENGES, THE FACTS THAT A JUROR HAD SERVED ON A HUNG JURY AND WORKED AT A SOUP KITCHEN AND ANOTHER JUROR WORKED FOR A COMMUNITY ORGANIZATION HELPING HIV-POSITIVE DRUG USERS WERE DEEMED VALID, RACE-NEUTRAL REASONS FOR STRIKING THE JURORS, THE CONCURRENCE NOTED THESE REASONS WERE BASED UPON QUESTIONABLE ASSUMPTIONS.

The First Department determined the reasons provided by the prosecutor for striking jurors in the face of Batson challenges were race-neutral. The concurrence called into question the validity of striking jurors on the basis of a "questionable assumption that social service workers, who volunteer in soup kitchens and work in HIV clinics, and persons who satisfy their civic duty as jurors in trials resulting in hung juries, are unduly sympathetic to criminal defendants:" "The court properly denied defendant's application pursuant to Batson v. Kentucky (476 US 79 [1986]). ... The record supports the court's finding that the nondiscriminatory reasons provided by the prosecutor for the challenges ... were not pretextual. One panelist had previously served on a hung jury, which we have found to be a valid race-neutral reason for a peremptory challenge ... . An additional non-pretextual explanation for challenging this panelist was the prosecutor's association of her service as a coordinator at a soup kitchen with possible associations with drug users, which raised a concern with the prosecutor that she might have harbored sympathy towards a defendant charged with drug offenses. Somewhat analogously, we previously have found the absence of a racial pretext for peremptory challenges premised on a panelist's social service orientation, which might lead the panelist to sympathize with someone in the defendant's position ...". ***People v. Teran*, 2019 N.Y. Slip Op. 03532, First Dept 5-7-19**

CRIMINAL LAW, JUDGES.

PROVIDING WRITTEN INSTRUCTIONS TO THE JURY OVER DEFENDANT'S OBJECTION REQUIRED REVERSAL AND A NEW TRIAL, HOT LIQUID CAN BE A DANGEROUS INSTRUMENT WITHIN THE MEANING OF THE PENAL LAW.

The First Department, reversing defendant's conviction, determined that "defendant is entitled to a new trial because the court provided written instructions to the jury, at its request, but over defendant's objection (see People v. Johnson , 81 NY2d 980 [1993])." The court also noted that "[t]he jury could have reasonably found that the hot liquid thrown by defendant qualified as a dangerous instrument (see Penal Law §§ 10.00[10], [13]; see also People v. Adolph , 299 AD2d 257, 257 [1st Dept 2002], lv denied 99 NY2d 579 [2003])." ***People v. Peralta*, 2019 N.Y. Slip Op. 03539, First Dept 5-7-19**

FAMILY LAW.

ALTHOUGH THERE IS CLEARLY A NEED FOR A STATUTORY MECHANISM TO KEEP CHILDREN WHO ABSCOND FROM PLACEMENT SETTINGS OFF THE STREETS AND SAFE FROM HARM, FAMILY COURT ACT 153 DOES NOT AUTHORIZE AN ARREST WARRANT FOR THIS PURPOSE.

The First Department, in a full-fledged opinion by Justice Tom, determined that Family Court Act 153 does not authorize an arrest warrant for children who abscond from home or placement settings, notwithstanding that the arrest warrant is issued to keep the child safe and off the streets, and to ensure the child does not engage in self-destructive behavior. The First Department acknowledged that the Administration for Child Services (ACS) needs a mechanism for this purpose, but decided no such statutory mechanism exists at the moment: "These cases, consolidated for appeal, present the recurring issue whether Family Court Act § 153, relied on by Family Court, authorizes the issuance of a warrant for the protective arrest of a child who is neither a respondent nor a witness in a Family Court proceeding for purposes of ensuring the child's health and safety rather than to compel his or her attendance in court. Notwithstanding that such protective arrests may have become a practice of Family Court under very compelling circumstances, in the absence of more explicit statutory authority we cannot endorse the legality of the practice. In reaching our conclusion, though, we do not suggest any criticism of the respective Family Courts in this case nor do we impute improper motives to the Administration for Children's Services, various parties or even law enforcement, who, to all appearances, were operating on the best of motives. However, the issuance of an arrest warrant must proceed from explicit statutory authority. Such is lacking in this case, as is, notably, any authoritative decisional law. The record clearly shows that the two children in these cases are at high risk of bringing harm to themselves or putting themselves in positions where others may harm them if they are left to their own choice of absconding from foster care facilities to enter life on the streets. ... Both have significant vulnerabilities masked by aggressive and confrontational behavior. Both have displayed histories of absconding from home and placement settings, presenting the substantial risk that they would end up on the streets. ... Both children are marked by multiple mental illness diagnoses and neurological impairments requiring medication which they often will not take and apparently did not take when they absconded, leading to the inevitable downward spiral during which each engaged in risky behavior. ... The record also clearly demonstrates the likelihood that they will run away again if not in a controlled setting of some nature, thereby repeating the cycle of being at risk on the streets." ***Matter of Zavion O. (Donna O.)*, 2019 N.Y. Slip Op. 03554, First Dept 5-7-10**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

PLAINTIFF ENTITLED TO SUMMARY JUDGMENT ON HIS LABOR LAW § 240(1) CAUSE OF ACTION, A CABLE TRAY FELL ON HIS HEAD FROM THE TOP OF TWO LADDERS, A SUBCONTRACTOR WAS LIABLE BECAUSE THE CONTRACT DELEGATED THE AUTHORITY TO CONTROL THE WORK TO THE SUBCONTRACTOR, THE LESSEE WAS LIABLE AS AN "OWNER" WITHIN THE MEANING OF LABOR LAW § 240(1).

The First Department determined plaintiff's motion for summary judgment on his Labor Law § 240(1) cause of action was properly granted. A cable tray that was on top of two ladders fell on plaintiff's head. The court further noted that USIS was liable as an agent of the owner because the subcontract delegated the authority to control the work to USIS, and AECOM. the lessee, was liable as an "owner" within the meaning of Labor Law § 240(1): "The cable tray that fell on plaintiff's head from atop two ladders was an object that required securing to prevent it from falling ... . The distance the tray fell was not de minimis and 'the harm to plaintiff was the direct consequence of the application of the force of gravity' upon the unsecured cable tray ... . Moreover, securing the cable tray against falling would not have been contrary to the purpose of the work ... . Supreme Court correctly concluded that USIS Systems was liable under Labor Law § 240(1) as an agent of the owner ... . Here, the terms of the subcontract by which USIS Systems subcontracted the work to USIS Electric demonstrate that USIS Systems had been delegated authority to direct and control the work ... . Moreover, as premises lessee which contracted for the work, AECOM was an owner within the meaning of Labor Law § 240(1) ...". ***Tropea v. Tishman Constr. Corp.*, 2019 N.Y. Slip Op. 03533, First Dept 5-7-19**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

BROWN PAPER ON TOP OF GREEN DUST ALLEGEDLY CONSTITUTED A SLIPPERY CONDITION ON THE FLOOR CAUSING PLAINTIFF'S SLIP AND FALL, PLAINTIFF'S LABOR LAW §§ 241(6) AND 200 CAUSES OF ACTION SHOULD NOT HAVE BEEN DISMISSED.

The First Department determined plaintiff's Labor Law §§ 241(6) and 200 causes of action should not have been dismissed. Plaintiff alleged brown paper on top of green dust (used to keep down dust) created a dangerous slippery condition which caused his slip and fall: "The motion court improperly dismissed plaintiff's Labor Law § 241(6) claim predicated on Industrial Code (12 NYCRR) § 23-1.7(d). The alleged presence of green dust on the floor created a triable issue as to whether a 'foreign substance' created a slippery condition on the floor, in violation of this Code section, and whether such condition caused plaintiff's accident ... . Plaintiff's Labor Law § 200 and common-law negligence claims should similarly be reinstated as the court should not have analyzed plaintiff's accident under the manner and means standard, but should instead have

applied the dangerous condition standard ... . The green dust was a dangerous condition that existed prior to plaintiff's arrival at the job site it was not part of the work plaintiff was performing ... . As such, there are triable issues of fact as to whether the general contractor ... had notice of the hazardous condition of the floor ... . In addition, the owner ... failed to demonstrate the absence of actual or constructive notice of the hazardous condition on its part, since it failed to point to any probative evidence on this issue ...". ***DeMercurio v. 605 W. 42nd Owner LLC*, 2019 N.Y. Slip Op. 03550 First Dept 5-7-19**

MENTAL HYGIENE LAW, CRIMINAL LAW, EVIDENCE.

EVIDENCE THAT DEFENDANT SEX OFFENDER SUFFERS FROM UNSPECIFIED PARAPHILIC DISORDER (USPD) MAY BE ADMISSIBLE IN AN ARTICLE 10 TRIAL, THE EVIDENCE WAS EXCLUDED BELOW, VERDICT VACATED AND PETITION REINSTATED.

The First Department, reversing Supreme Court, determined that evidence of unspecified paraphilic disorder (USPD) can be admitted in a sex offender civil management trial. The evidence was excluded at the Mental Hygiene Law article 10 trial. The verdict that defendant does not suffer from a mental abnormality was vacated and the petition was reinstated: "In Matter of State of New York v. Hilton C. (158 AD3d 707 [2d Dept 2018] ...), the Second Department held that the evidence in the record before it, which is similar to the evidence in the record presently before us, failed to establish that 'the diagnosis of unspecified paraphilic disorder [USPD] has achieved general acceptance in the psychiatric and psychological communities so as to make expert testimony on that diagnosis admissible' ... . In the absence of any other New York State appellate authority, Supreme Court ... that USPD was precluded as a diagnosis in article 10 proceedings. However, we find, contrary to the Second Department, and consistent with the decision in Matter of Luis S. v. State of New York (166 AD3d 1550 [4th Dept 2018]) that the type of evidence presented at the Frye hearing ... in this case — such as the evidence concerning the inclusion of USPD as a diagnosis in the Diagnostic and Statistical Manual of Mental Disorders (DSM-5), which signals its general acceptance by the psychiatric community — is sufficient to satisfy the State's burden of showing that the USPD diagnosis meets the Frye standard. Accordingly, the verdict that respondent does not suffer from a mental abnormality, rendered after the article 10 trial, from which USPD evidence was excluded, must be vacated, the petition reinstated, and the matter remanded for further proceedings, including a determination whether the evidence meets the threshold standard of reliability and admissibility ...". ***Matter of State of New York v. Jerome A.*, 2019 N.Y. Slip Op. 03531, First Dept 5-7-19**

SECOND DEPARTMENT

CIVIL PROCEDURE, FORECLOSURE.

SUPREME COURT DID NOT HAVE THE AUTHORITY TO DISMISS THIS FORECLOSURE ACTION PURSUANT TO CPLR 3216 OR CPLR 3215.

The Second Department, reversing Supreme Court, determined the foreclosure action should not have been dismissed pursuant to CPLR 3216 or 3215 because the statutory criteria were not met. Issue had not been joined so dismissal pursuant to CPLR 3216 was not permitted. And plaintiff had not abandoned the action pursuant to CPLR 3215: "We agree with the plaintiff's contention that the Supreme Court was without authority to direct dismissal of this action pursuant to CPLR 3216. CPLR 3216(b)(1) states that no dismissal should be made under this statute unless issue has been joined. Indeed, '[a] court may not dismiss an action based on neglect to prosecute unless the CPLR 3216 statutory preconditions to dismissal are met' ... . Here, none of the defendants submitted an answer to the complaint and, thus, issue was never joined. We also agree with the plaintiff's contention that the Supreme Court had no authority to direct dismissal of this action under CPLR 3215(c). 'An action is deemed abandoned where a default has occurred and a plaintiff has failed to take proceedings for the entry of a judgment within one year thereafter' (...see CPLR 3215[c]). It is not necessary for a plaintiff to actually obtain a default judgment within one year of the default in order to avoid dismissal pursuant to CPLR 3215(c) ... . Nor is a plaintiff required to specifically seek the entry of a judgment within a year ... . As long as the plaintiff has initiated proceedings for the entry of a judgment within one year of the default, there is no basis for dismissal of the complaint pursuant to CPLR 3215(c) ... . Here, the plaintiff commenced the action on April 16, 2009. The Supreme Court granted the plaintiff's motion for an order of reference only five months later, on September 14, 2009—well within one year of the commencement of the action. Although the plaintiff later withdrew its motion for a judgment of foreclosure and sale, in doing so, it stated that it 'will not be discontinuing [this] action.' Thus, the plaintiff explicitly informed the court that it was not abandoning the action ...". ***National City Mtge. Co. v. Sclavos*, 2019 N.Y. Slip Op. 03605, Second Dept 5-8-19**

CIVIL PROCEDURE, TRUSTS AND ESTATES.

SURVIVING PLAINTIFF IN THIS MEDICAL MALPRACTICE ACTION DID NOT TIMELY MOVE TO SUBSTITUTE A REPRESENTATIVE FOR THE DECEDENT PURSUANT TO CPLR 1021, ACTION PROPERLY DISMISSED.

The Second Department determined the medical malpractice action brought on behalf of a deceased plaintiff by the surviving plaintiff was properly dismissed for failure to timely substitute a representative for the decedent pursuant to CPLR 1021: " 'A motion for substitution pursuant to CPLR 1021 is the method by which the court acquires jurisdiction' over a

deceased party's successors in interest, and such motion 'is not a mere technicality' ... . CPLR 1021 provides, in pertinent part, '[i]f the event requiring substitution occurs before final judgment and substitution is not made within a reasonable time, the action may be dismissed as to the party for whom substitution should have been made.' 'The determination of reasonableness requires consideration of several factors, including the diligence of the party seeking substitution, the prejudice to the other parties, and whether the party to be substituted has shown that the action or defense has potential merit' ... . Here, the record does not support a finding that the surviving plaintiff diligently sought to substitute a representative for the decedent. The proffered explanation for the surviving plaintiff's delay in obtaining letters of administration was unsubstantiated and insufficient to constitute a reasonable excuse. Moreover, the surviving plaintiff failed to submit an affidavit of merit by a medical expert and did not rebut the defendants' allegations that they had been prejudiced by the delay in substitution. Contrary to the surviving plaintiff's contention, the underlying pleadings and verified bill of particulars, standing alone, do not establish the potential merit of the medical malpractice action." ***Green v. Maimonides Med. Ctr.*, 2019 N.Y. Slip Op. 03573, Second Dept 5-8-19**

CONTRACT LAW, EVIDENCE.

EVIDENCE DID NOT SUPPORT THE FINDING THAT DEFENDANT BREACHED THE CONTRACT TO CREATE A WEBSITE FOR PLAINTIFF, JUDGMENT AFTER A NON-JURY TRIAL REVERSED.

The Second Department, reversing a judgment in favor of plaintiff after a non-jury trial, determined the evidence did not support the finding that defendant breached the contract to develop a website for the plaintiff. The agreement did not require defendant to finish developing the website by a specific date and defendant was working on the website during the period the agreement was in effect: " 'The essential elements of a cause of action to recover damages for breach of contract are the existence of a contract, the plaintiff's performance pursuant to the contract, the defendant's breach of its contractual obligations, and damages resulting from the breach' ... . ' [A] written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms' ... . When a contract does not specify the time for performance, the law will imply a reasonable time ... . What constitutes a reasonable time for performance depends upon the facts and circumstances of the case ... . Here, the parties' agreement provided that the defendant would provide services related to developing and maintaining a website for the plaintiff's business. The agreement did not mandate that the website be operational by any particular date; only that the defendant would receive an advance if the website was operational by February 14, 2012. The evidence adduced at trial established that the defendant did provide services related to the development of the website. Moreover, the evidence did not establish that the defendant breached the parties' agreement by failing to provide an active and operational website within a reasonable time." ***Fernandez v. Abatayo*, 2019 N.Y. Slip Op. 03571, First Dept 5-8-19**

CRIMINAL LAW, ADMINISTRATIVE LAW.

PAROLE BOARD DID NOT CONSIDER PETITIONER'S YOUTH AT THE TIME OF THE OFFENSES AND APPEARS TO HAVE DENIED PETITIONER'S APPLICATION FOR RELEASE ON PAROLE SOLELY BASED ON THE SERIOUSNESS OF THE OFFENSES, DE NOVO INTERVIEW IN FRONT OF A DIFFERENT PANEL ORDERED.

The Second Department, reversing Supreme Court, determined the parole board did not support the denial of petitioner's application for release on parole with detailed reasons as required by Executive Law 259-i[2][a][i]. Petitioner was a juvenile at the time of the murders during a robbery attempt. He has been incarcerated for 36 years. He earned college degrees and assumed an leadership role in helping inmates. The Second Department concluded the parole board focused on the nature of the offenses and did not take petitioner's youth at the time of the offenses, or his accomplishments, into consideration: " '[A] juvenile homicide offender . . . has a substantive constitutional right not to be punished with life imprisonment for a crime reflect[ing] transient immaturity'... . '[T]he foundational principle' of the Eighth Amendment jurisprudence regarding punishment for juveniles is that [the] imposition of a [s]tate's most severe penalties on juvenile offenders cannot proceed as though they were not children' ... . 'A parole board is no more entitled to subject an offender to the penalty of life in prison in contravention of this rule than is a legislature or a sentencing court'... . Consequently, '[f]or those persons convicted of crimes committed as juveniles who, but for a favorable parole determination will be punished by life in prison, the [Parole] Board must consider youth and its attendant characteristics in relationship to the commission of the crime at issue' ... . Neither the transcript of the September 2016 interview nor the Parole Board's September 2016 determination shows that the Parole Board considered the petitioner's youth at the time and 'its attendant characteristics' in relationship to the crimes he committed. Instead, the record reflects that the Parole Board did not factor in the petitioner's age at the time and the impact that his age had on his decisions and actions during the commission of these crimes when it decided to deny him parole release based on 'the serious nature of the instant offenses.' " ***Matter of Rivera v. Stanford*, 2019 N.Y. Slip Op. 03601, Second Dept 5-8-19**

CRIMINAL LAW, EVIDENCE.

DEFENDANT WAS PROPERLY PROHIBITED FROM CROSS-EXAMINING A POLICE OFFICER ABOUT FALSE ARREST AND POLICE BRUTALITY LAWSUITS FILED AGAINST THE OFFICER.

The Second Department noted that the defendant was properly prohibited from cross-examining a police officer about four federal lawsuits filed against the officer: "The Supreme Court providently exercised its discretion in prohibiting the defendant from cross-examining a police witness with respect to the allegations of false arrest and/or police brutality in four federal lawsuits filed against that witness. 'Where a lawsuit has not resulted in an adverse finding against a police officer . . . defendants should not be permitted to ask a witness if he or she has been sued, if the case was settled (unless there was an admission of wrongdoing) or if the criminal charges related to the plaintiffs in those actions were dismissed. However, subject to the trial court's discretion, defendants should be permitted to ask questions based on the specific allegations of the lawsuit if the allegations are relevant to the credibility of the witness' ... . 'In cross-examining a law enforcement witness, the same standard for good faith basis and specific allegations relevant to credibility applies, as does the same broad latitude to preclude or limit cross-examination' . 'First, counsel must present a good faith basis for inquiring, namely, the lawsuit relied upon; second, specific allegations that are relevant to the credibility of the law enforcement witness must be identified; and third, the trial judge exercises discretion in assessing whether inquiry into such allegations would confuse or mislead t... he jury, or create a substantial risk of undue prejudice to the parties'... . Here, the complaints in each of the identified actions contain only allegations of unlawful police conduct by large groups of officers, and did not set forth specific acts of misconduct against the police witness individually. Thus, cross-examination of this witness regarding the federal lawsuits was properly denied ...". ***People v. Crupi*, 2019 N.Y. Slip Op. 03614, Second Dept 5-8-19**

CRIMINAL LAW, EVIDENCE, JUDGES.

TRIAL JUDGE ALLOWED THE PROSECUTOR TO QUESTION DEFENDANT ABOUT THE FACTS UNDERLYING PRIOR CONVICTIONS IN VIOLATION OF THE SANDOVAL RULING, CONVICTIONS REVERSED.

The Second Department, reversing defendant's convictions, determined the trial judge implicitly changed the Sandoval ruling by allowing the prosecutor to cross-examine the defendant about the underlying facts of prior convictions: "Prior to the trial, the Supreme Court conducted a Sandoval hearing (see People v. Sandoval, 34 NY2d 371), after which the court ruled that, should the defendant testify on his own behalf, the People would be permitted to ask whether he had two prior felony convictions. However, the People were not permitted to elicit the underlying facts of either of those crimes. ... Without seeking an amendment of the Supreme Court's Sandoval ruling, the prosecutor then asked whether he was being arrested that day in 2008 'because there was a DNA match of [him] committing a burglary.' Defense counsel objected, the objection was overruled, and the defendant denied that this was true. The prosecutor persisted in that line of inquiry, and asked whether the defendant had been convicted of burglary in the third degree in 2009. The defendant responded that '[y]es [he] was convicted of a case in 2008.' Nonetheless, without asking for a modified Sandoval ruling, the prosecutor brought up, no less than six times, that the 2008 conviction was for burglary and involved DNA, going so far to ask the defendant to 'explain' the facts of his 2008 conviction, with the court instructing the defendant to do so. In one instance, after asking the defendant to confirm that he was charged in the instant case with burglary in the second degree, the prosecutor remarked, in effect, that the instant crime was 'the same type of DNA hit that happened back in 2008.' ... The defendant here was denied … [the right to make an informed choice whether to testify] when, after making what he believed to be an informed judgment and taking the witness stand, the Supreme Court implicitly changed the ruling upon which he relied by allowing the prosecutor to continue her course of prejudicial questioning despite objections from defense counsel … ". ***People v. Walters*, 2019 N.Y. Slip Op. 03632, Second Dept 5-8-19**

PERSONAL INJURY, EVIDENCE, TRUSTS AND ESTATES.

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT IN THIS SLIP AND FALL CASE SHOULD NOT HAVE BEEN GRANTED, HEARSAY IS ADMISSIBLE IN OPPOSITION TO A MOTION FOR SUMMARY JUDGMENT, THERE WAS CIRCUMSTANTIAL EVIDENCE OF THE CAUSE OF PLAINTIFF'S DECEDENT'S FALL.

The Second Department, reversing Supreme Court, determined the defendant's motion for summary judgment in this slip and fall case should not have been granted. The complaint alleged plaintiff's decedent tripped over a raised portion of a sidewalk. The evidence included plaintiff's decedent's explanation of the cause of the fall as described by plaintiff-wife. Defendants argued plaintiffs could not prove the cause of the fall because decedent's statements were inadmissible hearsay. The Second Department noted that hearsay is admissible in opposition to a summary judgment motion as long as it is not the only evidence. Here there was circumstantial evidence of the cause of the fall: "The defendants failed to establish their prima facie entitlement to judgment as a matter of law by eliminating all triable issues of fact. They failed to demonstrate that the cause of the decedent's fall could not be established by admissible evidence, either direct or circumstantial ... . While the defendants contend that the plaintiff's deposition testimony as to what the decedent told her as to how the accident occurred constituted inadmissible hearsay, hearsay may be considered on a motion for summary judgment so long as the hearsay evidence is not the only evidence of a triable issue of fact ... . The defendants' submissions included the plaintiff's own deposition testimony concerning her personal observations of the location of the accident shortly after the event and

photographs of the claimed defect. Thus, the defendants failed to carry their burden of demonstrating that the plaintiff could not establish, through direct or circumstantial evidence, that the decedent tripped and fell as the result of a defect in the sidewalk. Further, since the defendants failed to submit evidence as to when they last inspected the sidewalk, they failed to establish lack of constructive notice of the allegedly defective condition of the sidewalk ...". ***Kontorinakis v. 27-10 30th Realty, LLC*, 2019 N.Y. Slip Op. 03579, Second Dept 5-8-19**

PERSONAL INJURY, EVIDENCE, LANDLORD-TENANT.

DEFENDANT HOUSING AUTHORITY DEMONSTRATED THE AREA WHERE PLAINTIFF SLIPPED AND FELL HAD BEEN INSPECTED ON THE MORNING OF THE ACCIDENT AND THERE HAD BEEN NO PRIOR COMPLAINTS ABOUT A WET CONDITION, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT PROPERLY GRANTED.

The Second Department determined that defendant New York City Housing Authority's (NYCHA's) motion for summary judgment in this stairway slip and fall case was properly granted. Plaintiff alleged she slipped on a wet condition that was recurrent. The NYCHA presented evidence the stairway had been inspected the morning of the accident and there had been no prior complaints about a wet condition: "NYCHA established, prima facie, that it did not create or have actual or constructive notice of the condition alleged by the plaintiff to have caused the accident ... . The deposition testimony of the building caretaker who was on duty the morning of the accident was sufficient to establish that the area where the plaintiff fell was inspected that morning before the plaintiff's accident occurred, and would have been cleaned if there were any hazardous conditions present during the inspection. Furthermore, in regard to the claim that it had constructive notice of a recurrent dangerous condition, NYCHA submitted evidence that no complaints about the condition of the stairwell had been received for one year prior to and including the morning of the plaintiff's accident." ***Pagan v. New York City Hous. Auth.*, 2019 N.Y. Slip Op. 03608, Second Dept 5-8-19**

THIRD DEPARTMENT

CIVIL PROCEDURE.

NEW TRIAL ORDERED BECAUSE THE INCONSISTENCY IN THE VERDICT SHEET COULD NOT BE REMEDIED AFTER THE JURY WAS DISCHARGED, THE JURY HAD AWARDED PLAINTIFF-STUDENT $1 MILLION IN A SUIT AGAINST A SCHOOL DISTRICT STEMMING FROM BULLYING BY OTHER STUDENTS.

The Third Department determined a new trial was necessary because of an inconsistency in the jury's answers on the verdict sheet. The trial court attempted to cure the inconsistency after the jury was discharged by speaking with the jury foreman, who was still in the courthouse when the problem was noticed. The jury had awarded plaintiff-student $1 million in a negligent supervision suit against a school district stemming from bullying by other students: "The taking of this verdict was fatally flawed. Pursuant to CPLR 4111 (c), when the answers on a verdict sheet 'are inconsistent with each other and one or more is inconsistent with the general verdict, the court shall require the jury to further consider its answers and verdict or it shall order a new trial' ... . The jury's consideration of question No. 5 was inconsistent with its answer to question No. 4 and should have been brought to the jury's attention with a curative charge, followed by a return to deliberations to resolve the inconsistency ... . However, because the jury had already been discharged, this was not possible and Supreme Court's consultation with the jury foreperson alone, although done in open court, could not take the place of full jury reconsideration ... . In essence, the window of opportunity for Supreme Court to fix the problem closed when the other jurors left the courthouse. Supreme Court's subsequent efforts, while well intentioned, were futile and, given this timeline, our only course of action is to order a new trial ...". ***Motta v. Eldred Cent. Sch. Dist.*, 2019 N.Y. Slip Op. 03714, Third Dept 5-9-19**

DEFAMATION, IMMUNITY, COURT OF CLAIMS.

INCLUSION OF CLAIMANT'S PHOTOGRAPH ON A WALL OF SHAME DEPICTING PERSONS ARRESTED DURING OPERATION SAFE INTERNET, AN INVESTIGATION INTO THE USE OF THE INTERNET FOR THE SEXUAL EXPLOITATION OF CHILDREN, CONSTITUTED ACTIONABLE DEFAMATION BY IMPLICATION SUPPORTING A $300,000 DAMAGES AWARD.

The Third Department, in a full-fledged opinion by Justice Pritzker, determined the Court of Claim's decision awarding claimant $300,000 in this defamation-by-implication action against the state was supported by the evidence. Claimant had been arrested during Operation Safe Internet, but only because of the alleged Internet communication by claimant's roommate. Claimant was arrested solely for possession of drugs and his case was subsequently adjourned in contemplation of dismissal and ultimately dismissed with the record sealed. In a televised news conference about an initiative to "investigate and prosecute crimes involving the online sexual exploitation of children, " under a sign saying "Internet Crimes Against Children," claimant's photograph was one of 61 on a "wall of shame" depicting those who had been arrested during the investigation: "[W]e now adopt a two-part test to determine whether the first element is met in causes of action alleging defamation by implication, requiring proof (1) that the language of the communication as a whole reasonably conveys a defamatory inference, and (2) that such language affirmatively and contextually suggests that the declarant either intended

or endorsed the inference ... . * * * ... [W]ithout providing more information to the public regarding the underlying facts of claimant's case, to a reasonable viewer, the communication as a whole falsely implied that claimant, whose photograph was on the wall of shame, had engaged in a sexual crime against a child ... . * * * ... [W]e find that claimant has established that the context of defendant's communication as a whole can be reasonably read to affirmatively suggest that defendant intended or endorsed the defamatory inference that claimant was arrested for a crime involving the online sexual exploitation of a child ... . In fact, the very placement of claimant's photo in the array strongly suggested to the public that defendant intended and endorsed the message that claimant belonged on the 'wall of shame' because of his fictional crime against children. Further, the use of a small, unreadable label listing the crime for which claimant was actually arrested, which was the particular manner in which the true facts were conveyed, supplied 'additional, affirmative evidence suggesting that the defendant intend[ed] or endorse[d] the defamatory inference' that claimant had been arrested for a crime involving the sexual exploitation of a child ...". ***Partridge v. State of New York*, 2019 N.Y. Slip Op. 03715, Third Dept 5-9-19**

HUMAN RIGHTS LAW, FAIR HOUSING ACT, LANDLORD-TENANT, ANIMAL LAW.

PLAINTIFF-TENANT IS DISABLED BY DEPRESSION, DEFENDANT-LANDLORD'S REFUSAL OF PLAINTIFF'S REQUEST TO KEEP AN EMOTIONAL SUPPORT DOG IN HIS APARTMENT CONSTITUTED DISCRIMINATION UNDER THE FEDERAL HOUSING ACT AND THE HUMAN RIGHTS LAW, THE LANDLORD'S LIMITING PLAINTIFF'S LEASE TERM TO THREE MONTHS CONSTITUTED IMPERMISSIBLE RETALIATION.

The Third Department, in a full-fledged opinion by Justice Garry, reversing Supreme Court, determined plaintiff-tenant's discrimination and retaliation claims against defendant landlord should not have been dismissed. Plaintiff demonstrated his need for an emotional support dog (he suffers from debilitating depression) and further demonstrated the landlord's denial of his request to keep a dog was discriminatory, and the landlord's reduction of the lease term to three months constituted impermissible retaliation: "[T]he parties have strictly limited their arguments on appeal on the question of discrimination to two narrow and carefully circumscribed issues: (1) whether defendant has a qualifying disability within the meaning of the FHA [Fair Housing Act] and the HRL [Human Rights Law] and (2) whether the accommodation he requested was 'necessary to afford [him] equal opportunity to use and enjoy [his] dwelling' as provided in the statutes (42 USC § 3604 [f] [3] [B]; see Executive Law § 296 [18] [2]). * * * ... [B]ased upon defendant's significant limitations in the major life activities of working and interacting with others, we are satisfied that he is disabled within the meaning of the FHA ... . The HRL's definition of disability is broader than those used in the federal disability statutes ... . The HRL does not require a showing of a limitation in a major life activity, but instead defines disability, as pertinent here, as 'a physical, mental or medical impairment . . . [that] is demonstrable by medically accepted clinical or laboratory diagnostic techniques' (Executive Law § 292 [21] [a]). Defendant's therapist, a clinical psychologist, testified in some detail regarding the clinical techniques used to diagnose depression and defendant's specific symptoms ... . [W]e find that defendant 'offered sufficient evidence that having [an emotional support] dog would affirmatively enhance his quality of life by ameliorating the effects of his disability,' and thus demonstrated necessity within the meaning of the FHA and the HRL ... . * * * We are satisfied that plaintiff's actions were sufficiently adverse to constitute interference with the exercise of defendant's rights. Notably, discrimination against a disabled person in the terms or conditions of a lease is prohibited by the FHA and its implementing regulations ...". ***Hollandale Apts. & Health Club, LLC v. Bonesteel*, 2019 N.Y. Slip Op. 03718, Third Dept 5-9-19**

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