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FIRST DEPARTMENT

CRIMINAL LAW, ATTORNEYS.

DEFENSE COUNSEL MISCALCULATED THE NUMBER OF DAYS OF DELAY ATTRIBUTABLE TO THE PEOPLE IN THE SPEEDY TRIAL MOTION, WHICH CONSTITUTED INEFFECTIVE ASSISTANCE, CONVICTION REVERSED, INDICTMENT DISMISSED.

The Second Department, reversing defendant's conviction and dismissing the indictment, determined defense counsel's failure to properly calculate the days of delay attributable to the People for the speedy trial motion constituted ineffective assistance: "Defendant was denied the effective assistance of counsel ... with regard to his speedy trial motion. In his CPL 30.30(2) motion for defendant's release, defense counsel mistakenly calculated 99 days of includable time, instead of the correct calculation of 103 days. The People conceded the 99 days, and the court released defendant. When defense counsel thereafter moved to dismiss the indictment under CPL 30.30(1), defense counsel and the prosecutor repeated that error in calculating the delay as 99 days, with the court ultimately finding only 181 days of includable time and denying the motion. Had counsel correctly calculated 103 days of chargeable time, the includable time would have totaled 185 days, rather than 181, and defendant's speedy trial claim would have been meritorious. We have considered and rejected the People's arguments concerning the 63-day period following defendant's uncontested motion for release from custody, which the court found to be includable in its ultimate calculation on the dismissal motion." ***People v. Coulibaly*, 2019 NY Slip Op 04289, First Dept 5-30-19**

CRIMINAL LAW, EVIDENCE, CIVIL PROCEDURE, JUDGES, MUNICIPAL LAW.

PETITIONER, WHO CONSENTED TO PROVIDING A DNA SAMPLE AFTER ARREST, MAY SEEK DISCRETIONARY EXPUNGEMENT OF THE DNA PROFILE AND UNDERLYING DOCUMENTS UPON BEING ADJUDICATED A YOUTHFUL OFFENDER, RESPONDENT JUDGE DIRECTED TO DECIDE WHETHER EXPUNGEMENT IS APPROPRIATE UNDER THE FACTS.

The First Department, in a full-fledged opinion by Justice Gische, granted a writ of mandamus directing the respondent-judge to consider whether the expungement of DNA evidence derived from a sample provided with petitioner's consent after arrest is appropriate. The petitioner was subsequently adjudicated a youthful offender (YO) and sought expungement on that ground. The DNA evidence is maintained by the New York City Office of Chief Medical Examiner (OCME). The First Department concluded that the OCME is subject to the State Executive Law and a court has the discretionary authority to expunge the YO's DNA profile from the SDIS (index system used for mutual exchange, use and storage of DNA records), along with the underlying DNA records: "[Re: the propriety of the Article 78 proceeding:] In the absence of an available remedy at law (see CPL 450.20), the important issues raised on this appeal will escape this Court's review unless this petition proceeds ... . Moreover, this Court has original jurisdiction over the issues raised because they concern a sitting justice (CPLR 506[b][1]; 7804[b] ...). ... There is abundant support for the conclusion that OCME's responsibilities in testing, analyzing and retaining DNA data is subject to the State Executive Law. Respondent's arguments that the statutory reference to a 'state' DNA identification index in Article 49-B necessarily excludes a local DNA laboratory like that the one operated by OCME, is unavailing. ... [W]e hold that the same discretion afforded to a court under the Executive Law to expunge DNA profiles and related records when a conviction is vacated may also be exercised where, as here, a YO disposition replaces a criminal conviction. The motion court, in finding that, as a matter of law, it had no discretion, failed to fulfill its statutory mandate to consider whether in the exercise of discretion, expungement of petitioner's DNA records was warranted in this case. ... Petitioner did not, either expressly or by implication, waive the privilege of nondisclosure and confidentiality by providing his DNA before the court made its determination that he was eligible for YO status. Clearly the Executive Law permits an adult who has voluntarily given his or her DNA in connection with a criminal investigation the right to seek discretionary expungement where a conviction had been reversed or vacated. A youthful offender does not have and should not be afforded fewer pre-YO adjudication protections than an adult in the equivalent circumstances." ***Matter of Samy F. v. Fabrizio*, 2019 NY Slip Op 04120, First Dep 5-28-19**

ELECTION LAW.

FAILURE TO INCLUDE CITY, STATE AND/OR ZIP CODES OF THE CANDIDATES' RESIDENCES DID NOT INVALIDATE THE DESIGNATING PETITIONS.

The First Department determined the petitioners' article 16 proceedings were timely and the designating petitions were not facially defective: "Petitioners' article 16 special proceedings should be deemed timely because petitioners did not receive notice that their designating petitions contained defects within the 14-day statutory period prescribed by Election Law § 16-102(2) and they acted with due diligence by promptly commencing the article 16 proceeding after that period ended ... . Petitioners' designating petitions were not facially defective because they substantially complied with the Election Law ... . Here, the designating petitions merely omitted the city, state and/or zip codes of the candidates' residences. Where a petition only contains errors regarding an incorrect or incomplete address, including where the name of the city is omitted, a petitioner has substantially complied with the Election Law and their designating petitions should not be invalidated as defective ...". ***Matter of Merber v. Board of Elections in the City of N.Y.*, 2019 NY Slip Op 04231, First Dept 5-29-19**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

PLAINTIFF FELL FROM A SCAFFOLD WHICH HAD NO RAILINGS, PLAINTIFF DID NOT NEED TO DEMONSTRATE THE SCAFFOLD WAS DEFECTIVE, PLAINTIFF PROPERLY GRANTED SUMMARY JUDGMENT ON THE LABOR LAW § 240(1) CAUSE OF ACTION.

The First Department determined plaintiff's motion for summary judgment in this Labor Law § 240(1) scaffold-fall case was properly granted. The scaffold had not railings and plaintiff fell when the scaffold tipped because one of its wheels went through the floor. The court noted that plaintiff was not required to show that the scaffold was defective: "It is undisputed that the scaffold he was supplied with and directed to use lacked railings, and that he fell off when the scaffold tipped as one wheel broke through the floor on which it was standing. Plaintiff was not provided with any other safety devices. This evidence establishes prima facie a violation of Labor Law § 240(1) ... . Plaintiff was not required to show that the scaffold was defective ...". ***Martinez-Gonzalez v. 56 W. 75th St., LLC*, 2019 NY Slip Op 04111, First Dept 5-28-19**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

INDUSTRIAL CODE PROVISION WHICH REFERRED TO THE REQUIREMENT THAT A 'DESIGNATED PERSON' OPERATE A POWER BUGGY IS SPECIFIC ENOUGH TO SUPPORT A LABOR LAW § 241(6) CLAIM, PLAINTIFF WAS STRUCK BY A POWER BUGGY OPERATED BY SOMEONE WHO WAS NOT A 'DESIGNATED PERSON.'

The First Department, in a full-fledged opinion by Justice Singh, over a two-justice dissent, determined that an Industrial Code provision requiring that a power buggy be operated by a "designated person" was specific enough to support a Labor Law § 241(6) claim. Plaintiff was injured when he was struck in the back by a power buggy operated by someone who was horsing around and fell off the buggy before it struck plaintiff. The First Department searched the record and awarded summary judgment to the plaintiff: "We agree with the dissent that the regulation's requirement that a 'trained and competent operator . . . shall' operate the power buggy is general, as it lacks a specific requirement or standard of conduct. However, since the term 'designated person' has been held to be specific, 12 NYCRR 23-9.9(a) is a proper predicate for a claim under Labor Law § 241(6). The dissent's concern that we are exposing a defendant to liability for injury caused by a power buggy operated by an unauthorized person is misplaced ... . We note that the Court of Appeals has reiterated that, while the duty imposed by Labor Law § 241(6) may be 'onerous[,] . . . it is one the Legislature quite reasonably deemed necessary by reason of the exceptional dangers inherent in connection with constructing or demolishing buildings or doing any excavating in connection therewith' ... , and that '[t]he Industrial Code should be sensibly interpreted and applied to effectuate its purpose of protecting construction laborers against hazards in the workplace' ... . Moreover, liability under Labor Law § 241(6) 'is dependent on the application of a specific Industrial Code provision and a finding that the violation of the provision was a result of negligence' ... . The fact that the operating engineer was 'horse playing' prior to operating the power buggy does not absolve defendant from liability under Labor Law § 241(6) ...". ***Toussaint v. Port Auth. of N.Y. & N.J.*, 2019 NY Slip Op 04302, First Dept 5-30-19**

PERSONAL INJURY, EVIDENCE.

DEFENDANT RESTAURANT DEMONSTRATED IT DID NOT HAVE ACTUAL OR CONSTRUCTIVE NOTICE OF THE GREASY OR SLIPPERY CONDITION IN THIS SLIP AND FALL CASE, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT PROPERLY GRANTED.

The First Department determined defendant restaurant's summary judgment motion in this slip and fall case was properly granted. The restaurant demonstrated the floor had been inspected ten minutes before plaintiff fell and the floor had been cleaned the night before: "Defendants established prima facie that they neither created the dangerous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it ... . Among other things, defendants' manager received no complaints concerning the floor and saw nothing on the floor when he inspected in the morning or later, around ten minutes before plaintiff fell ... . The evidence that neither plaintiff nor defendants' employees

saw the slippery substance on the floor until after plaintiff fell demonstrates that it was not sufficiently visible and apparent to charge defendants with constructive notice ... . Furthermore, testimony by defendant's manager that the porter cleaned the restaurant floor every night with a solution of water and vinegar is sufficient to establish a lack of constructive notice ... . In opposition, plaintiff failed to raise a triable issue of fact. Plaintiff's speculation that her fall could have been caused by the porter's use of a vinegar and water mixture to clean the floors is insufficient to sustain a cause of action ... . The wet or greasy substance on the floor of a busy restaurant was a transient condition that could have appeared at any point after the porter finished cleaning the floors in the morning ...". ***Valenta v. Spring St. Natural*, 2019 NY Slip Op 04118, First Dept 5-28-19**

PERSONAL INJURY, TOXIC TORTS, CONTRACT LAW.

DEFENDANT'S SUBCONTRACTOR USED A PAINT STRIPPING PRODUCT DURING AN OFFICE BUILDING RENOVATION, PLAINTIFF, AN EVENING OFFICE CLEANER, ALLEGED INJURY FROM BREATHING TOXIC FUMES, THERE IS EVIDENCE DEFENDANT HAD A DUTY TO WARN, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT PROPERLY DENIED.

The First Department determined defendant's motion for summary judgment in this toxic tort case was properly denied. Plaintiff, an evening cleaner in an office building, allege she was injured by inhaling toxic fumes from a paint stripping product used by a defendant's subcontractor (Island Painting): "Defendant failed to establish prima facie that it did not have actual or constructive notice of the alleged dangerous condition of the premises in time to take corrective measures ... . Defendant submitted no evidence with respect to notice. However, there is evidence in the record that defendant had superintendents on site who oversaw the subcontractors' work and that defendant had a duty to notify and warn the building owner and its occupants of hazardous work undertaken on the project site so as to safeguard the building's occupants against exposure to such hazards. Thus, issues of fact exist as to whether defendant knew of the scheduled use of the paint stripper and of the product's toxicity and yet failed to warn the building owner and occupants to prevent harm to them. These issues of fact as to negligence also preclude summary judgment in defendant's favor on its claim for contractual indemnification by Island Painting ...". ***Arias v. Recife Realty Co.*, N.V., 2019 NY Slip Op 04269, First Dept 5-30-19**

SECOND DEPARTMENT

BANKRUPTCY, ATTORNEYS, LEGAL MALPRACTICE, NEGLIGENCE.

PLAINTIFF SUED DEFENDANT ATTORNEYS ALLEGING INACCURATE ADVICE CAUSED HER TO FILE FOR BANKRUPTCY, BECAUSE THE LEGAL MALPRACTICE ACTION ACCRUED WHEN PLAINTIFF FILED FOR BANKRUPTCY, THE LAWSUIT BECAME PART OF THE BANKRUPTCY ESTATE AND PLAINTIFF WAS THEREBY STRIPPED OF THE CAPACITY TO SUE.

The Second Department determined plaintiff did not have the capacity to sue the defendant attorneys for legal malpractice. The lawsuit alleged the attorneys gave inaccurate advice which caused plaintiff to file for bankruptcy on March 20, 2012. Because plaintiff's legal malpractice action accrued on the day she filed for bankruptcy, and the suit was not listed as an asset, the lawsuit became part of the bankruptcy estate: "The commencement of a bankruptcy proceeding creates an 'estate' that is comprised of 'all legal or equitable interests of the debtor in property as of the commencement of the case' (11 USC § 541[a][1]...). 'Upon the filing of a voluntary bankruptcy petition, all property which a debtor owns, including a cause of action, vests in the bankruptcy estate' ... . 'Although federal law determines when a debtor's interest in property is property of the bankruptcy estate, property interests are created and defined by state law'... . Causes of action that accrue under state law prior to the filing of a bankruptcy petition, as well as those that accrue as a result of the filing, are property of the estate ... . '[A] debtor's failure to list a legal claim as an asset in his or her bankruptcy proceeding causes the claim to remain the property of the bankruptcy estate and precludes the debtor from pursuing the claim on his or her own behalf' ...". ***Burbacki v. Abrams, Fensterman, Fensterman, Eisman, Formato, Ferrara & Wolf, LLP*, 2019 NY Slip Op 04128, Second Dept 5-29-19**

CIVIL PROCEDURE, ZONING, LAND USE.

PLAINTIFFS' ACTION SEEKING TO ENJOIN THE CONSTRUCTION OF A HOME PLAINTIFFS CONTENDED WAS IN VIOLATION OF THE TOWN CODE SHOULD HAVE BEEN DISMISSED PURSUANT TO THE DOCTRINE OF LACHES.

The Second Department, reversing Supreme Court, determined that the doctrine of laches applied to plaintiffs' action seeking to enjoin defendant's construction of a house. Plaintiffs alleged the construction violated the Town Code: " 'To establish laches, a party must show: (1) conduct by an offending party giving rise to the situation complained of, (2) delay by the complainant in asserting his or her claim for relief despite the opportunity to do so, (3) lack of knowledge or notice on the part of the offending party that the complainant would assert his or her claim for relief, and (4) injury or prejudice to the offending party in the event that relief is accorded the complainant' ... . ' The mere lapse of time without a showing of prejudice will not sustain a defense of laches. In addition, there must be a change in circumstances making it inequitable to grant the relief sought' ... . 'Moreover, as the effect of delay may be critical to an adverse party, delays of even less than one year have been sufficient to warrant the application of the defense' ... . The plaintiffs commenced this action nearly three years

after the building permit was first issued in May 2012 and after [plaintiff] Kverel withdrew his administrative appeal, two years after the parties entered into the stipulation, and more than six months after construction purportedly commenced in August 2014. Although the building permit was amended several times thereafter and as late as February 2015, the record demonstrates that the plaintiffs were aware as early as July 2012, when the subject property remained undeveloped and before the defendant purchased the subject property, of their claim that the defendant's construction was in violation of the Town Code. Although the record unequivocally demonstrates that the plaintiffs were opposed to the defendant's construction on the subject property, the plaintiffs did not seek administrative review by the ZBA or injunctive relief until they commenced this action." ***Kverel v. Silverman*, 2019 NY Slip Op 04152, Second Dept 5-29-19**

CRIMINAL LAW, APPEALS.

WAIVER OF APPEAL INVALID, COURT NOT BOUND BY PURPORTED COMMITMENT TO A PARTICULAR SENTENCE AT THE TIME OF THE PLEA, PRESENTENCE REPORT INADEQUATE, SENTENCE REVERSED.

The Second Department, reversing defendant's sentence and remitting for resentencing, determined defendant's waiver of appeal was invalid and the sentencing court did not have sufficient information about the defendant at the time of sentencing. The presentence investigation report was incomplete, in part because there was no interpreter available. The Second Department further determined that the sentencing court could not be bound by a purported commitment to the prosecutor at the time of the plea to impose a particular sentence: " … '[A] sentence negotiated prior to the plea, and in most cases prior to receipt of a presentence report, does not automatically become the sentence of the court' ... . The determination of an appropriate sentence requires the court to exercise its discretion 'after due consideration given to, among other things, the crime charged, the particular circumstances of the individual before the court and the purpose of a penal sanction, i.e., societal protection, rehabilitation and deterrence' ... . … Most troubling ... is that in preparing the presentence investigation report for the Supreme Court in advance of sentencing, the Department of Probation did not interview the defendant because it was 'unable to secure an interpreter' on two scheduled dates for an interview. Thus, the presentence investigation report does not contain any information regarding the defendant's mental status, educational background, employment history, or military background. The report indicates that the defendant's physiological health was 'unknown,' and that his psychological condition was 'unavailable.' Even though the Department of Probation did not interview the defendant, the report indicates that the defendant 'reported no use of controlled substances and/or alcohol.' Under the circumstances here, the information contained in the record of the plea proceeding, the sentencing proceeding, and the presentence investigation report was insufficient for a sentencing court to exercise discretion in determining an appropriate sentence." ***People v. Pelige*, 2019 NY Slip Op 04204, Second Dept 5-29-19**

ELECTION LAW.

DESIGNATING PETITION SHOULD HAVE BEEN VALIDATED, SUPREME COURT SHOULD NOT HAVE INVALIDATED TWO SIGNATURES BECAUSE THE CANDIDATE WAS NOT GIVEN THE OPPORTUNITY TO RESPOND TO THE ALLEGATION, MADE DURING CROSS-EXAMINATION AT A HEARING, THAT THE TWO SIGNATURES WERE INVALID.

The Second Department, reversing Supreme Court, determined Supreme Court should not have invalidated two signatures on a designating petition because the candidate, Alfieri, was not given the opportunity to prepare a response to the claim the signatures were invalid. Those two signatures, combined with correcting a miscalculation of the number of signatures made by Supreme Court, gave Alfieri one more than the 1500 signatures required for a valid designating petition: " 'The Supreme Court may entertain specific objections to signatures on a designating petition that were not asserted before a board of elections to the extent the [other party] was given adequate notice of which signatures on his or her designating petition are being challenged and the grounds thereof' ... . Here, the invalidation petitioners served their bill of particulars raising additional objections ..., prior to the commencement of the hearing on the validating and invalidating petitions. Consequently, Alfieri had adequate notice of the invalidation petitioners' grounds for objecting to the additional signatures identified in their bill of particulars to enable him to prepare his defense ... . With respect to the challenge of the 2 signatures that first arose during the cross-examination ... , Alfieri was not given any notice that the Supreme Court would consider whether those signatures were made by the same person and then compare those signatures to the voters' buff cards to determine whether the signatures on the designating petition matched those on the buff cards. Since the lack of notice deprived Alfieri of an opportunity to adequately prepare a response as to the validity of those 2 signatures, the court should not have invalidated those 2 signatures ...". ***Matter of Alfieri v. Bravo*, 2019 NY Slip Op 04159, Second Dept 5-29-19**

ELECTION LAW.

CANDIDATE DID NOT HAVE THE OPPORTUNITY TO RESPOND TO CHALLENGES TO SIGNATURES ON THE DESIGNATING PETITION, ALTHOUGH THE SUBSCRIBING WITNESS HAD TEMPORARILY MOVED OUT OF THE RESIDENCE DESCRIBED IN THE STATEMENT OF WITNESS SHE INTENDED TO RETURN, DESIGNATING PETITION SHOULD NOT HAVE BEEN INVALIDATED.

The Second Department, reversing Supreme Court, determined the designating petition should not have been invalidated on the basis of challenged signatures and the residence of the subscribing witness. The candidate (Brezler) was not given the opportunity to respond to the challenged signatures and, although the subscribing witness was not residing at the stated address, she had moved out only temporarily due to construction: " 'The Supreme Court may entertain specific objections to signatures on a designating petition that were not asserted before a board of elections to the extent the respondent was given adequate notice of which signatures on his or her designating petition are being challenged and the grounds thereof' ... . Here, Brezler was not given notice, until the hearing on the invalidation petition was underway, that the petitioners were challenging numerous signatures on the ground that they did not match those signatories' signatures on their buff cards and that the Supreme Court would be comparing the majority of the challenged signatures to those voters' buff cards to determine whether the signatures on the designating petition matched those on the buff cards. Contrary to the petitioners' contention, their specifications of objections filed with the Westchester County Board of Elections (hereinafter the Board) and incorporated by reference into the invalidation petition did not provide notice of this basis for challenging the signatures. ... A subscribing witness is required to include, in the Statement of Witness, his or her residence address (see Election Law § 6-132[2]). This requirement 'protects the integrity of the nominating process by assuring that a subscribing witness is subject to subpoena in a proceeding challenging the petition' ... . The Election Law defines the term 'residence' as 'that place where a person maintains a fixed, permanent and principal home and to which he [or she], wherever temporarily located, always intends to return' (Election Law § 1-104[22] ...). The 'crucial determination whether a particular residence complies with the requirements of the Election Law is that the individual must manifest an intent [to reside there], coupled with physical presence without any aura of sham' ...". ***Matter of Walfish v. Brezler*, 2019 NY Slip Op 04179, Second Dept 5-29-19**

ELECTION LAW, FRAUD, CIVIL PROCEDURE.

DESIGNATING PETITION PROPERLY INVALIDATED AND THE CANDIDATE'S NAME WAS PROPERLY STUCK FROM THE PRIMARY BALLOT, THE CANDIDATE'S NAME APPEARED ON DESIGNATING PETITIONS FOR TWO DIFFERENT PUBLIC OFFICES WHICH PRESUMPTIVELY MISLED THE PUBLIC.

The Second Department determined the designating petition was properly invalidated and the candidate's name (Duffy) was properly removed from the primary ballot. The Second Department noted that the failure to include the index number on the order to show cause and the petition was a mistake which could be disregarded. The index number was on the request for judicial intervention which was served with the order to show cause and petition (CPLR 2001). The Second Department further noted that the petition met the strict pleading requirements for fraud by by virtue of the incorporation of another document (objections) by reference (CPLR 3016 (b) and 3014).: "[T]he Supreme Court granted the petition to invalidate the petition designating Duffy as a candidate for Council Member and directed that Duffy's name be removed from the primary ballot. The court found that Duffy and her agents did not intentionally seek to mislead enrolled party voters while gathering designating petition signatures, but that Duffy nevertheless knew that her name appeared simultaneously on two separate designating petitions for two different public offices, which presumptively misled enrolled voters as to which of the two public offices she was truly seeking. The court found that Duffy 'failed to rebut this presumption by public action and/or filings in such a manner as to prevent election fraud.' * * *... [T]he voters were misled, warranting the invalidation of the designating petition for Council Member. In circulating the designating petition for that office, Duffy deleted from the committee's designating petition the name of a candidate who had been endorsed by the committee, substituted her name for the name of that candidate, and circulated the revised designating petition without the permission of Bouvier, whose name continued to appear on the designating petition. The designating petition, as altered and circulated, was 'misleading in suggesting that the various candidates listed intended to run together' as a team ... . While a single instance of adding another candidate's name without consent, standing alone, has been found insufficient to warrant the invalidation of an entire designating petition ... , this case involves much more than the mere addition of a name to a designating petition. Here, Duffy affirmatively altered an existing designating petition containing other names by substituting her own name in place of the name of a candidate who had been endorsed by the committee. Moreover, under the circumstances of this case, the problem of misleading voters was compounded by the simultaneous circulation of two designating petitions designating Duffy for two separate public offices ...". ***Matter of Lynch v. Duffy*, 2019 NY Slip Op 04168, Second Dept 5-29-19**

EMPLOYMENT LAW, CIVIL PROCEDURE, EVIDENCE, PRIVILEGE.

IN THIS NEGLIGENT SUPERVISION, HIRING AND RETENTION CASE, THE MEDICAL RECORDS OF A NON-PARTY WITNESS WHO ALLEGED IMPROPER CONDUCT BY DEFENDANT DOCTOR ARE DISCOVERABLE ONLY TO THE EXTENT THEY INCLUDE NON-PRIVILEGED INFORMATION INDICATING DEFENDANT DOCTOR'S EMPLOYER WAS AWARE OF THE ALLEGATIONS, THE NON-PARTY WITNESS DID NOT WAIVE THE PHYSICIAN-PATIENT PRIVILEGE BY DISCUSSING HER MEDICAL HISTORY IN A DEPOSITION.

The Second Department, modifying Supreme Court, determined the medical records of a non-party witness were discoverable only to the extent that they included non-privileged information demonstrating defendant Huntington Medical Group (HMG) was on notice that defendant doctor (Wishner) had acted improperly with patients. Plaintiff sued HMG alleging negligent hiring, supervision and retention of Wishner. Plaintiff had deposed a non-party witness who apparently had alleged improper conduct by Wishner. Defendants sought to discover the non-party witness's medical records. The Second Department noted that the defendants (1) had not shown the medical records were relevant to the improper conduct allegations and (2) the non-party witness had not waived the physician-patient privilege. The matter was remitted for an in camera review of the records by Supreme Court: "The physician-patient privilege seeks to protect confidential communications relating to the nature of the treatment rendered and the diagnosis made ... . The physician-patient privilege applies to information communicated by the patient while the physician attends the patient in a professional capacity, as well as information obtained from observation of the patient's appearance and symptoms ... . 'The privilege applies at examinations before trial, and it covers both oral testimony and documents, such as hospital records, which presumably are drawn up in large part based on communications imparted by the patient to the treating physician' ... . Here, the nonparty witness expressly declined to waive the physician-patient privilege as to her medical records, and her deposition testimony with respect to the facts of Wishner's alleged improper conduct during the subject physical examination and the facts and incidents of her medical history does not constitute privileged information ... . Thus, the nonparty witness did not waive the physician-patient privilege as to her medical records ... . [P]rivileged medical records may contain nonprivileged information that could be discoverable if relevant ... . Thus, we remit this matter to the Supreme Court, ... for an in camera inspection of the nonparty witness' medical records stored by HMG for a determination of whether such records, or any parts thereof, contain any nonprivileged information relevant to the issue of whether HMG was on notice of Wishner's alleged improper conduct toward patients during his examination of them and, if so, for the entry of an order directing that such nonprivileged information, if any, shall be produced to the defendants." ***Mullen v. Steven G. Wishner*, 2019 NY Slip Op 04180, Second Dept 5-29-19**

ENVIRONMENTAL LAW, MUNICIPAL LAW.

THE CITY ALLOWED THE LOT TO BE USED FOR COMMUNITY GARDENS BUT NEVER UNEQUIVOCALLY DEDICATED THE LOT AS PARKLAND, THEREFORE THE PUBLIC TRUST DOCTRINE DID NOT APPLY AND THE CITY CAN DEVELOP THE LAND.

The Second Department determined land used for a community garden (Lot 142) was never unequivocally dedicated as parkland by the city. Therefore the public trust doctrine did not prohibit the city from developing the land: "Under the public trust doctrine, a land owner cannot alienate land that has been impliedly dedicated to parkland without obtaining the approval of the legislature ... . A party seeking to establish such an implied dedication to parkland and thereby successfully challenging the alienation of the land must show that (1) '[t]he acts and declarations of the land owner indicating the intent to dedicate his land to the public use [are] unmistakable in their purpose and decisive in their character to have the effect of a dedication and (2) that the public has accepted the land as dedicated to a public use' ... . 'It remains an open question whether the second prong . . . applies to a municipal land owner'... . Regardless, '[w]hether a parcel has become a park by implication is a question of fact which must be determined by such evidence as the owner's acts and declarations, and the circumstances surrounding the use of the land' ... . '[I]f a landowner's acts are equivocal, or do not clearly and plainly indicate the intention to permanently abandon the property to the use of the public, they are insufficient to establish a case of dedication'... .'The burden of proof rests on the party asserting that the land has been dedicated for public use' ... . Here, the defendants submitted evidence showing that the City's actions and declarations did not unequivocally manifest an intent to dedicate Lot 142 as parkland. Their exhibits showed that the City permitted the community garden to exist on a temporary basis as the City moved forward with its plans to develop the parcel. Their exhibits also demonstrated that any management of Lot 142 by the City's Department of Parks and Recreation was understood to be temporary and provisional ...". ***Matter of Coney Is. Boardwalk Community Gardens v. City of New York*, 2019 NY Slip Op 04162, Second Dept 5-29-19**

INSURANCE LAW.

INSURED DID NOT VIOLATE THE SUM POLICY BY SETTLING WITH THE OTHER DRIVER WITHOUT THE SUM CARRIER'S CONSENT, THE SUM CARRIER WAS INFORMED OF THE SETTLEMENT AND TOOK NO ACTION WITHIN 30 DAYS.

The Second Department, reversing Supreme Court, determined the supplementary uninsured/underinsured motorist (SUM) carrier (petitioners) was not entitled to permanently stay arbitration on the ground that the injured party (appellant) had settled with other driver's carrier without the SUM carrier's consent. In fact the SUM carrier had notice of the settlement and took no action within 30 days. Therefore the settlement did not violate the SUM carrier's policy: "[T]he provisions of language set forth in Insurance Regulation 35-D (see 11 NYCRR 60-2.3), which must be included in all motor vehicle liability insurance policies in which SUM coverage has been purchased, require, inter alia, that where an insured advises the insurer of an offer to settle for the full amount of the tortfeasor's policy, the insurer must either consent to the settlement or advance the settlement amount to the insured and assume the prosecution of the tort action within 30 days ... . Where the insurer does not timely respond in accordance with such condition, the insured may settle with the tortfeasor without the insurer's consent and without forfeiting his or her rights to SUM benefits ... . The petitioners' submissions demonstrated that the appellant executed a release ... 'after thirty calendar days actual written notice' to the petitioners, as provided for in Condition 10, which is required by Insurance Regulation 35-D to be part of the SUM endorsement. Consequently, the petitioners failed to establish that the appellant settled ... in violation of a condition of the policy requiring the petitioners' consent to settle." ***Unitrin Direct Ins. Co. v. Muriqi*, 2019 NY Slip Op 04178, Second Dept 5-29-19**

MEDICAL MALPRACTICE, PERSONAL INJURY, CIVIL PROCEDURE.

ADEQUATE SUPERVISION OF PLAINTIFF AFTER SURGERY RESULTING IN MEMORY LOSS WAS PART OF PLAINTIFF'S TREATMENT, THEREFORE A CAUSE OF ACTION RESULTING FROM PLAINTIFF'S LEAVING THE HOSPITAL SOUNDED IN MEDICAL MALPRACTICE, NOT NEGLIGENCE, PLAINTIFF'S MOTION TO AMEND THE COMPLAINT, ALTHOUGH PARTIALLY GRANTED, SHOULD HAVE BEEN GRANTED IN ITS ENTIRETY.

The Second Department determined plaintiff's action against defendant hospital sounded in medical malpractice, not negligence, and plaintiff's motion to amend the complaint to add a medical-malpractice cause of action (which was granted by Supreme Court) and other allegations should have been granted in its entirety. Plaintiff suffered memory loss after surgery and repeatedly threatened to leave the hospital. She did in fact leave and was not found for five days. The Second Department determined the failure to supervise plaintiff was an element of her treatment and therefore the actions sounded in medical malpractice: "[W]hen the complaint challenges the medical facility's performance of functions that are 'an integral part of the process of rendering medical treatment' and diagnosis to a patient, such as taking a medical history and determining the need for restraints, it sounds in medical malpractice ... . [T]he allegations at issue essentially challenged the hospital's assessment of the plaintiff's supervisory and treatment needs ... . Thus, the conduct at issue derived from the duty owed to the plaintiff as a result of a physician-patient relationship and was substantially related to her medical treatment ... . 'Applications for leave to amend pleadings under CPLR 3025(b) should be freely granted unless the proposed amendment (1) would unfairly prejudice or surprise the opposing party, or (2) is palpably insufficient or patently devoid of merit' ... . Here, there was no showing of prejudice, and the plaintiff's proposed amended complaint was not papably insufficient or patently devoid of merit. Therefore, the court should not have limited the allegations that the plaintiff could include in her amended complaint." ***Jeter v. New York Presbyt. Hosp.*, 2019 NY Slip Op 04148, Second Dept 5-29-19**

PERSONAL INJURY, CONTRACT LAW.

THE ALLEGED FAILURE TO ELIMINATE A TRIPPING HAZARD WAS NOT ACTIONABLE BECAUSE PLAINTIFF WAS NOT A PARTY TO THE CONTRACT BETWEEN DEFENDANT AND PLAINTIFF'S EMPLOYER, DEFENDANT'S ACTS OR OMISSIONS DID NOT FIT WITHIN ANY OF THE *ESPINAL* EXCEPTIONS IN THIS SLIP AND FALL CASE.

The Second Department, reversing Supreme Court, determined the defendant, which had contracted with plaintiff's employer to offer a work-training program, did not owe a duty of care to the plaintiff who tripped and fell over extension cord wires during the training session. The only *Espinal* exception alleged was that the defendant launched an instrument of harm, which was deemed inapplicable by the Second Department. The alleged failure to eliminate the tripping hazard was not actionable: " '[A] contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party' ... . However, there are three exceptions to that general rule: '(1) where the contracting party, in failing to exercise reasonable care in the performance of [its] duties, launche[s] a force or instrument of harm'; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely' ... . The Supreme Court's determination that a triable issue of fact existed as to whether the defendant negligently failed to correct the alleged tripping hazard amounts to a finding that the defendant may have merely failed to become 'an instrument for good,' which is insufficient to impose a duty of care upon a party not in privity of contract with the injured party ...". ***Espeleta v. Synergy Resources, Inc.*, 2019 NY Slip Op 04138, Second Dept 5-29-19**

PERSONAL INJURY, BATTERY, EMPLOYMENT LAW, CIVIL PROCEDURE.

ALLEGED ASSAULT BY DOCTOR WAS OUTSIDE THE SCOPE OF THE DOCTOR'S EMPLOYMENT BY DEFENDANT HOSPITAL, THE ACTION AGAINST THE HOSPITAL PURSUANT TO THE DOCTRINE OF RESPONDEAT SUPERIOR SHOULD HAVE BEEN DISMISSED, TIME FOR SUMMARY JUDGMENT MOTION STARTED ANEW AFTER THE NOTE OF ISSUE WAS VACATED, FAILURE TO ATTACH PLEADINGS TO MOTION FOR SUMMARY JUDGMENT NOT FATAL.

The Second Department, reversing Supreme Court, determined this third-party assault case against the defendant hospital based upon an alleged sexual assault by an employee-doctor should have been dismissed. Because the alleged assault and battery was not in furtherance of defendant's business, the doctrine of respondeat superior did not apply. The Second Department noted that the defendant's motion for summary judgment was not untimely because the note of issue had been vacated, which started the time for summary judgment anew. The Second Department also noted that the failure to attach the pleadings to the motion for summary judgment was not fatal because they were attached to the reply: "Pursuant to CPLR 3212(b), a court will grant a motion for summary judgment when, viewing the evidence in the light most favorable to the opponent of the motion, it determines that the movant's papers justify holding, as a matter of law, that the cause of action has no merit. 'The doctrine of respondeat superior renders an employer vicariously liable for torts committed by an employee acting within the scope of the employment. Pursuant to this doctrine, the employer may be liable when the employee acts negligently or intentionally, so long as the tortious conduct is generally foreseeable and a natural incident of the employment' ... . 'An employee's actions fall within the scope of employment where the purpose in performing such actions is to further the employer's interest, or to carry out duties incumbent upon the employee in furthering the employer's business' ... . 'An act is considered to be within the scope of employment if it is performed while the employee is engaged generally in the business of the employer, or if the act may be reasonably said to be necessary or incidental to such employment' ... . Thus, where an employee's actions are taken for wholly personal reasons, which are not job related, the challenged conduct cannot be said to fall within the scope of employment ... . A sexual assault perpetrated by an employee is not in furtherance of an employer's business and is a clear departure from the scope of employment, having been committed for wholly personal motives ... . Here, the evidence submitted by the defendants demonstrated that the doctor's alleged conduct was not in furtherance of St. John's business and was a departure from the scope of his employment, having been committed for wholly personal motives ...". ***Montalvo v. Episcopal Health Servs., Inc.*, 2019 NY Slip Op 04158, Second Dept 5-29-19**

PERSONAL INJURY, EVIDENCE.

NO EVIDENCE ICE ON WHICH PLAINTIFF SLIPPED AND FELL WAS FORMED BEFORE THE STORM, DEFENDANT ENTITLED TO SUMMARY JUDGMENT PURSUANT TO THE STORM IN PROGRESS RULE.

The Second Department, reversing Supreme Court, determined the NYC Transit Authority (NYCTA) was entitled to summary judgment in this slip and fall case pursuant to the storm in progress rule. The evidence did not support plaintiff's allegation that the ice had formed before the storm: " 'Under the so-called storm in progress' rule, a property owner will not be held responsible for accidents occurring as a result of the accumulation of snow and ice on its premises until an adequate period of time has passed following the cessation of the storm to allow the owner an opportunity to ameliorate the hazards caused by the storm' ... . A defendant property owner may establish a prima facie case for summary judgment by presenting evidence that there was a storm in progress when the plaintiff allegedly slipped and fell ... . Here, the evidence that NYCTA submitted in support of its motion, including a transcript of the plaintiff's testimony at her General Municipal Law § 50-h hearing, a transcript of the plaintiff's deposition testimony, and certified climatological data, demonstrated, prima facie, that the subject accident occurred while a storm was in progress ... . In this regard, the plaintiff testified that it was snowing at the time of the accident, and the certified climatological data confirms that testimony. In opposition, the plaintiff failed to raise a triable issue of fact. Her contention that she slipped and fell on ice that existed prior to the storm that was in progress on the date of the accident was based on speculation and conjecture ... . Indeed, the plaintiff presented no evidence, expert or otherwise, that the ice on which she fell was not produced by the storm in progress on the date of the accident ..". ***Allen v. New York City Tr. Auth.*, 2019 NY Slip Op 04121, Second Dept 5-29-19**

PERSONAL INJURY, EVIDENCE.

ALLEGEDLY OPERATING A TREE-TRIMMING BUSINESS WITHOUT A LICENSE AND ENTRUSTING THE TREE-TRIMMING TRUCK TO PLAINTIFF'S CO-WORKER, IF NEGLIGENT, WERE NOT PROXIMATE CAUSES OF PLAINTIFF'S INJURY, THE DANGEROUS CONDITION ON THE TRUCK WHICH CAUSED PLAINTIFF'S INJURY WAS OPEN AND OBVIOUS, AND THE ACCIDENT WAS AN 'EXTRAORDINARY OCCURRENCE,' SO THERE WAS NO DUTY TO WARN.

The Second Department determined the allegations that defendants were operating a tree-trimming business without a license and negligently entrusted the tree-trimming to one Perez (with whom plaintiff worked) were not proximate causes of the injury. Plaintiff caught a ring on his finger on a spike on a metal step on the truck and his finger was severed. The court noted that the danger was open and obvious and the accident was an 'extraordinary occurrence' so there was no duty to warn: " 'Evidence of negligence is not enough by itself to establish liability. It must also be proved that the negligence was

[a proximate] cause of the event which produced the harm'... . Thus, 'liability may not be imposed upon a party who merely furnishes the condition or occasion for the occurrence of the event but is not one of its causes' ... . Further, 'proximate cause is no less essential an element of liability because the negligence charged is premised in part or in whole on a claim that a statute or ordinance . . . has been violated' ... . [E]ven if the defendants were negligent in operating a tree-trimming business without a license or in lending or renting or entrusting the truck to Perez, such negligent acts only furnished the occasion for the plaintiff's accident ... , but were not a proximate cause of the accident. The defendants additionally demonstrated, prima facie, that they did not have any 'special knowledge concerning a characteristic or condition peculiar to [Perez] which render[ed] [his] use of the [truck] unreasonably dangerous,' as is required to establish a negligent entrustment cause of action ... . In opposition, the plaintiff failed to raise a triable issue of fact as to either negligence or negligent entrustment. With respect to the cause of action alleging a violation of the defendants' duty to warn, the defendants demonstrated ... that any danger posed by the stairs was open and obvious and known to the plaintiff from his prior use of the truck ... . Moreover, the plaintiff's accident was an 'extraordinary occurrence' ... . '[T]here is no duty to warn against an extraordinary occurrence, which would not suggest itself to a reasonably careful and prudent person as one which should be guarded against'...". ***Deschamps v. Timberwolf Tree & Tile Serv.*, 2019 NY Slip Op 04133, Second Dept 5-29-19**

PERSONAL INJURY, EVIDENCE.

DEFENDANT DID NOT DEMONSTRATE WHEN THE AREA WAS LAST INSPECTED AND THEREFORE DID NOT DEMONSTRATE IT LACKED CONSTRUCTIVE NOTICE OF THE ICE IN THIS SLIP AND FALL CASE, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined that the defendant condominium's motion for summary judgment in this ice slip and fall case should not have been granted. Defendant did not demonstrate when the area had last been inspected: " 'A property owner will be held liable for a slip-and-fall accident involving snow and ice on its property only when it created the dangerous condition which caused the accident or had actual or constructive notice of its existence' ... . 'Thus, a defendant who moves for summary judgment in a slip-and-fall case has the initial burden of making a prima facie showing that it neither created the hazardous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it' ... . 'To meet its initial burden on the issue of lack of constructive notice, [a] defendant must offer some evidence as to when the area in question was last cleaned or inspected relative to the time when the plaintiff fell' ... . Here, Vista II failed to establish, prima facie, that it did not have constructive notice of the alleged patches of ice. In support of its motion, Vista II submitted, inter alia, the deposition testimony of the managing agent of the property, who merely testified about his general inspection practices and provided no evidence regarding any specific inspection of the areas in question prior to the plaintiff's falls ...". ***Lauture v. Board of Mgrs. at Vista at Kingsgate, Section II*, 2019 NY Slip Op 04154, Second Dept 5-29-19**

REAL ESTATE, CONTRACT LAW, REAL PROPERTY LAW, EVIDENCE.

PLAINTIFF DID NOT SUBMIT PROOF IT HAD THE FINANCIAL ABILITY TO CLOSE ON THE PURCHASE OF REAL PROPERTY, PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON ITS ACTION FOR SPECIFIC PERFORMANCE OF THE REAL ESTATE PURCHASE AGREEMENT SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined plaintiff's motion for summary judgment in this action for specific performance of a real estate purchase agreement should not have been granted. Plaintiff did not submit proof it had the financial ability to close: " 'A plaintiff seeking specific performance of a contract for the sale of real property bears the burden of demonstrating that he or she was ready, willing, and able to perform his or her obligations under the contract' ... . '[C]onclusory assertions that the plaintiff was ready, willing, and able to perform, are insufficient to satisfy this burden' ... . 'When a purchaser submits no documentation or other proof to substantiate that it had the funds necessary to purchase the property, it cannot prove, as a matter of law, that it was ready, willing, and able to close' ... . Thus, in moving for summary judgment on a complaint seeking specific performance of a contract for the sale of real property, a plaintiff purchaser must submit evidence demonstrating its financial ability to purchase the property, and in the absence of such evidence, the motion must be denied ... . Here, the plaintiff failed to establish, prima facie, that it was ready, willing, and able to purchase the subject property. More specifically, the conclusory assertions of Gavriel Yakubov, the alleged sole member of the plaintiff, that he had always been, and remained, ready, willing, and able to close, absent any evidence demonstrating the plaintiff's financial ability to close, were insufficient to establish, prima facie, that the plaintiff was ready, willing, and able to purchase the subject property ...". ***GLND 1945, LLC v. Ballard*, 2019 NY Slip Op 04143, Second Dept 5-29-19**

THIRD DEPARTMENT

ELECTION LAW.

PERSONS WHO SIGNED A DESIGNATING PETITION WHICH WAS DEEMED NULL AND VOID COULD VALIDLY SIGN A SUBSEQUENT OPPORTUNITY TO BALLOT PETITION.

The Third Department, reversing the Board of Elections, determined that the persons who signed a designating petition which was deemed null and void could validly sign a subsequent opportunity to ballot petition: "In general, when a qualified voter signs a designating petition and, on a subsequent date, signs an opportunity to ballot petition, the voter's signature on the later opportunity to ballot petition is invalid (see Election Law § 6-134 [3]...). However, where, as here, a qualified voter signs a designating petition that is subsequently invalidated or deemed 'null and void' by operation of law (Election Law § 6-146 [1]), the voter is permitted to sign an opportunity to ballot petition subsequent to the invalidation of the designating petition ... . 'A contrary holding would deprive persons who signed a designating petition later held invalid from exercising the separate right given to them by the Election Law to request the opportunity to write in the name of a candidate of their choice' ...". **Matter of Stack v. Harrington, 2019 NY Slip Op 04314, Third Dept 5-31-19**

ELECTION LAW, FRAUD.

ONE FRAUDULENT SIGNATURE DID NOT CONSTITUTE CLEAR AND CONVINCING EVIDENCE THE DESIGNATING PETITION WAS PERMEATED BY FRAUD.

The Third Department determined that Supreme Court properly declined to invalidate the entire designating petition after finding one signature should be invalidated: "Petitioner presented a witness who testified unequivocally that the signature on the petition attributed to her was not her own, noting that her name appears the way it does when her husband signs it. The witness's husband also testified confirming that he had signed both his own name and that of his wife, which they both agreed was a common practice for them throughout their 40-year marriage. The subscribing witness who gathered the foregoing signatures, however, testified, with notable detail, that he recalled both the husband and the wife signing for themselves. William Nicholas, who had accompanied the subscribing witness but did not formally witness any signatures, gave similar, strikingly-specific testimony. Supreme Court credited the testimony of the husband and the wife and, while reticent to find that the subscribing witness and Nicholas had perjured themselves, rejected their version of events and thereby invalidated the subject signature. We perceive no reason not to give deference to those findings ... . However, one fraudulent signature is not clear and convincing evidence that a designating petition is permeated with fraud ... . Further, there was no evidence that [the candidate] herself participated in the procurement or submission of any fraudulent signature ...". ***Matter of Overbaugh v. Benoit*, 2019 NY Slip Op 04261, Third Dept 5-30-19**

ELECTION LAW, FRAUD.

THE CANDIDATE SIGNED THE SUBSCRIBING WITNESS STATEMENT WHICH INDICATED EACH VOTER SIGNED THE DESIGNATING PETITION IN HIS PRESENCE, WHICH WAS NOT THE CASE, DESIGNATING PETITION WAS PROPERLY INVALIDATED BASED UPON THE CANDIDATE'S PARTICIPATION IN FRAUDULENT ACTIVITY.

The Third Department determined the designating petition was properly invalidated because there was clear and convincing evidence the candidate (Subedi) participated in fraudulent activity: "Regarding the challenged signatures for which Subedi was the subscribing witness, it is undisputed that the voters did not subscribe their signatures in Subedi's presence nor did they identify themselves to Subedi as the signatories. Notwithstanding the foregoing, Subedi signed the subscribing witness statement on each sheet containing the challenged signatures and attested that, '[e]ach of the individuals whose names are subscribed to this petition sheet . . ., subscribed the same in [his] presence . . . and identified himself or herself to be the individual who signed [the] sheet.' Subedi then filed the designating petition and did not notify the Board of any irregularity or otherwise correct his subscribing witness statement. Under these circumstances, we conclude that Supreme Court correctly determined that there was clear and convincing evidence of fraudulent conduct on the part of Subedi ... . We note that Subedi freely admits his error and contends that he was not trying to gain any unfair advantage. Fraud, however, does not require any proof of a 'nefarious motive' ...". ***Matter of Burman v. Subedi*, 2019 NY Slip Op 04315, Third Dept 5-31-19**

UNEMPLOYMENT INSURANCE.

NEWSPAPER DELIVERY CARRIERS ARE EMPLOYEES ENTITLED TO UNEMPLOYMENT INSURANCE BENEFITS.

The Third Department determined claimant, a newspaper delivery carrier, was an employee of the The Hearst Corporation and was therefore entitled to unemployment insurance benefits: "[T]he record demonstrates that Hearst established the delivery routes, determined the rate of pay for each route, provided carriers with customer lists containing the suggested order of delivery, handled customer complaints, imposed monetary penalties for unsatisfactory deliveries, prohibited carriers from inserting their own flyers into the newspapers without prior approval and required carriers to maintain a valid

driver's license and their own liability insurance. Notably, when new carriers were retained, Hearst arranged to have someone accompany them to show them their routes. In addition, Hearst imposed performance guidelines, set forth in written contracts like the ones it entered into with claimant, requiring carriers not to miss more than two deliveries per thousand. It also provided carriers, including claimant, with an orientation checklist setting forth additional information, such as delivery time deadlines, as well as the requirement that they provide a trained substitute if unable to cover a shift. In view of the foregoing, the Board's finding that Hearst exercised sufficient direction and control over claimant and similarly situated carriers so as to establish the existence of an employment relationship is supported by substantial evidence and is consistent with other newspaper delivery cases involving analogous facts ...". ***Matter of Hennessy (Hearst Corp.--Commissioner of Labor)*, 2019 NY Slip Op 04245, Third Dept 5-30-19**

UNEMPLOYMENT INSURANCE.

CLAIMANT WAS AN EMPLOYEE OF A CONSULTING COMPANY FOR AFTERSCHOOL PROGRAMS AND WAS THEREFORE ENTITLED TO UNEMPLOYMENT INSURANCE BENEFITS.

The Third Department determined claimant was an employee of a consulting company for afterschool programs (LaRue) and was therefore entitled to unemployment insurance benefits: "Claimant was hired by LaRue to perform site observations, work on grant applications and conduct training workshops. For site observations, LaRue provided guidance and direction to claimant on what to look for and provided forms for claimant to use, some of which were developed by LaRue. Claimant would submit a report to LaRue following the site observation, which, at LaRue's direction, had to contain resource references. LaRue would then make changes and edits to the report and submit a final report to the client. For training workshops, claimant was provided with all materials needed, including a power point presentation, props, workshop sign-in sheets and evaluations that were returned to LaRue afterward. For grant applications, LaRue provided claimant with prior applications for reference and set deadlines for the grants to be submitted to her for review. LaRue would then compile the final grant project application for the client by a specified deadline. Claimant was paid for travel time in connection with site visits. LaRue billed the clients and intervened with any difficulty regarding site visits, and any complaints about claimant from a client would be directed to LaRue. In addition, LaRue routinely communicated with claimant regarding the status of the work." ***Matter of Loewecke (Larue--Commissioner of Labor)*, 2019 NY Slip Op 04255, Third Dept 5-30-19**

UNEMPLOYMENT INSURANCE, LABOR LAW, EMPLOYMENT LAW.

ALTHOUGH CLAIMANT WAS REHIRED AFTER THE STRIKE, THE EMPLOYER HAD NOT ASSURED CLAIMANT OF THE RIGHT TO RETURN TO WORK DURING THE STRIKE, THEREFORE THE EMPLOYER WAS NOT ENTITLED TO THE SEVEN-WEEK SUSPENSION OF UNEMPLOYMENT BENEFITS DURING A STRIKE PERMITTED BY LABOR LAW § 592.

The Third Department determined claimant was entitled to unemployment insurance benefits and were not subject to the seven-week suspension of benefits during a strike (Labor Law § 592). The suspension of benefits is not applicable where, as here, the employer indicates it is hiring permanent replacements for the strikers: "Although it is unclear which of claimants' positions were filled by the permanent replacement workers, the record unequivocally demonstrates that none of the claimants were notified in a certified writing that they would be able to return to their prior positions upon the conclusion of the strike. Moreover, although claimants ultimately were allowed to return to their prior positions following ratification of the parties' ... Memorandum of Agreement ending the strike, that agreement is of no consequence because the employer failed to provide any written certification during either the seven-week suspension period or at any time prior to the conclusion of the strike assuring claimants that they would retain the right to return to their prior positions upon conclusion of the strike ...". ***Matter of D'Altorio (Clare Rose, Inc.--Commissioner of Labor)*, 2019 NY Slip Op 04249, Third Dept 5-30-19**

WORKERS' COMPENSATION.

INJURY CAUSED BY THE INHALATION OF ASPERGILLUS FUNGUS PROPERLY DEEMED A COMPENSABLE ACCIDENTAL INJURY ENTITLING CLAIMANT TO WORKERS' COMPENSATION BENEFITS.

The Third Department determined injury from the inhalation of aspergillus fungus was properly classified as an accidental injury entitling claimant to workers' compensation benefits. Claimant was exposed to the fungus at work and suffers from allergic bronchopulmonary aspergillosis: " 'To be compensable under the Workers' Compensation Law, an accidental injury must arise both out of and in the course of employment' ... . 'Notably, this is a factual issue for the Board to resolve, and its determination will be upheld if supported by substantial evidence'"... . 'To establish an accidental work-related condition that developed over time, rather than from a sudden event, [a] claimant [is] required to demonstrate by competent medical evidence that his or her condition resulted from unusual environmental conditions or events assignable to something extraordinary' ... . '[T]he concept of time-definiteness required of an accident can be thought of as applying to either the cause or the result, . . . and it is not decisive that a claimant is unable to pinpoint the exact date on which the incident occurred' ...". ***Matter of Connolly v. Covanta Energy Corp.*, 2019 NY Slip Op 04244, Third Dept 5-30-19**

WORKERS' COMPENSATION. CRIMINAL LAW.

CLAIMANT'S CONVICTION FOR THE UNLAWFUL MANUFACTURE OF METHAMPHETAMINES DID NOT CONSTITUTE PROOF THAT CLAIMANT PERFORMED WORK OR MADE FALSE STATEMENTS REGARDING WORK SUCH THAT CLAIMANT SHOULD BE DISQUALIFIED FROM RECEIVING BENEFITS UPON RELEASE FROM PRISON.

The Third Department determined that claimant's conviction for the unlawful manufacture of methamphetamine did not constitute work within the meaning of Workers' Compensation Law § 114-a. Therefore, claimant did not perform any work or make any false statements regarding work which would disqualify him from receiving benefits upon release from prison: "Workers' Compensation Law § 114-a (1) provides, in relevant part, that '[i]f for the purpose of obtaining compensation . . ., or for the purpose of influencing any determination regarding any such payment, a claimant knowingly makes a false statement or representation as to a material fact, such person shall be disqualified from receiving any compensation directly attributable to such false statement or representation.' 'In making such a determination, the Board is the sole arbiter of witness credibility and its determination as to whether a claimant violated Workers' Compensation Law § 114-a will be upheld if supported by substantial evidence' ... . To be guilty of unlawful manufacture of methamphetamine in the third degree, a person must possess, at the same time and location, '[t]wo or more items of laboratory equipment and two or more precursors, chemical reagents or solvents in any combination,' with the intent to use such products to unlawfully manufacture, prepare, or produce methamphetamine, or knowing that another intends to do so (Penal Law § 220.73 [1]). The elements of the crime do not require that any work be performed. Substantial evidence supports the Board's finding that the conviction alone is insufficient to establish any work activity by claimant or that he received any type of remuneration ...". ***Matter of Stone v. Saulsbury/Federal Signal*, 2019 NY Slip Op 04250, Third Dept 5-30-19**

FOURTH DEPARTMENT

ELECTION LAW.

ALTHOUGH THE CANDIDATE'S RESIDENCE WAS BEING RENOVATED AND SHE TEMPORARILY LIVED ELSEWHERE SHE INTENDED TO RETURN TO THE RESIDENCE WHICH WAS INDICATED ON THE DESIGNATING PETITION, THE DESIGNATING PETITION SHOULD NOT HAVE BEEN INVALIDATED.

The Fourth Department, reversing Supreme Court, determined respondent candidate's designating petition should not have been invalidated on the ground that the she did not live at the address provided on the petition: "The record reflects that respondent was actively engaged in renovating the property at the address provided on the designating petitions, that respondent signed a temporary lease for a property also located within the relevant voting district, and that respondent intended on permanently residing at the property listed on the designating petitions once renovations were complete. Indeed, Supreme Court expressly noted that it did not 'question . . . the integrity of [respondent's] testimony in saying that [it was] her intention to live [at the address].' Notwithstanding the fact that the address listed on the designation petitions was not respondent's current residence and thus did not comply with Election Law § 6-132, '[w]here, as here, there is no proof of any intention on the part of the candidate or of those who have solicited signatures on his [or her] behalf to mislead or confuse, and no evidence that the inaccuracy did or would lead or tend to lead to misidentification or confusion on the part of those invited to sign the petition or seeking to verify his [or her] qualification,' the petition should not be invalidated ...". ***Matter of McNiel v. Martin*, 2019 NY Slip Op 04305, Fourth Dept 5-30-19**

ELECTION LAW, CIVIL PROCEDURE.

PETITIONER DID NOT LIVE IN THE TOWN WHERE THE CHALLENGED CANDIDATE WAS RUNNING FOR OFFICE AND THEREFORE DID NOT HAVE STANDING TO CHALLENGE THE DESIGNATING PETITIONS, SUPREME COURT SHOULD NOT HAVE STRUCK THE RESPONDENT CANDIDATES' ANSWER BASED UPON ALLEGED DEFECTS IN THE VERIFICATION AND DENIALS.

The Fourth Department, reversing Supreme Court, determined that the respondent candidates' answer should not have been stricken based upon alleged defects in the verification and denials and petitioner did not have standing to contest the designating petition because she did not reside in the town where the single challenged candidate was running for office: "CPLR 3026 provides that '[p]leadings shall be liberally construed' and that '[d]efects shall be ignored if a substantial right of a party is not prejudiced.' Here, we conclude that petitioner did not establish substantial prejudice from any alleged defect in the verification, and thus candidate respondents' answer should not have been stricken on that ground ... . Moreover, 'the CPLR does not provide for the striking of improper denials' ... . Furthermore, we note that candidate respondents properly raised standing as an affirmative defense in their April 24 answer, and we agree with candidate respondents that petitioner lacked standing to commence this proceeding pursuant to Election Law article 16. A condition precedent to commencing a proceeding as an objector pursuant to section 16-102 is compliance with the requirements of section 6-154,

including that the objector be a 'voter registered to vote for such public office' (§ 6-154 [2]). Here, petitioner served her specifications of objections upon Vickman and upon the chairwoman and the secretary of the Party only, and not on any of the other candidate respondents listed on the authorization. Petitioner, however, lacked standing to challenge the designating petition of Vickman or to challenge the authorization as it pertained to Vickman, who was running for public office in the Town of Farmersville, because petitioner was not a resident of that town ...". ***Matter of Augostini v. Bernstein*, 2019 NY Slip Op 04312, Fourth Dept 5-30-19**

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