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FIRST DEPARTMENT

ARBITRATION, ATTORNEYS, APPEALS.

RESPONDENT, THE PREVAILING PARTY IN AN ARBITRATION, WAS ENTITLED TO ATTORNEY'S FEES FOR THE SUBSEQUENT ARTICLE 75 PROCEEDING TO VACATE THE AWARD AND FOR THE APPEAL TO THE APPELLATE DIVISION.

The First Department, reversing (modifying) Supreme Court, determined the respondent, who prevailed in an arbitration proceeding, was entitled to attorney's fees for the subsequent Article 75 proceedings and appeal to the Appellate Division: "Judgment ... awarding respondent attorney's fees in the sum total of $980 in connection with a no-fault arbitration award ... [remanded] to Supreme Court for a determination of respondent's reasonable attorney's fees incurred in the article 75 proceeding brought by petitioner to vacate the arbitration award and on this appeal ... . 'The attorney's fee for services rendered ... in a court appeal from a master arbitration award and any further appeals, shall be fixed by the court adjudicating the matter' (11 NYCRR § 65-4.10[j][4]). The term 'court appeal' applies to a proceeding taken pursuant to CPLR article 75 to vacate or confirm a master arbitration award ... . Accordingly, respondent TC Acupuncture, as a prevailing applicant for payment by petitioner insurer of attorney's fees in an article 75 proceeding reviewing an arbitration award, is entitled to an additional award of attorney's fees, as fixed by the court, for its motion to modify the order, in a 2015 article 75 proceeding denying Countrywide's petition to vacate the arbitration award, to include a ruling confirming the arbitration and its opposition to Countrywide's motion to reargue that order. Supreme Court erred in failing to award these additional fees. Respondent is also entitled to the attorney's fees incurred in this appeal to this Court of the order issued in the article 75 proceeding, to be fixed by the court, upon remand, pursuant to 11 NYCRR § 65-4.10(j)(4) ...". ***Matter of Country-Wide Ins. Co. v. TC Acupuncture P.C.*, 2020 N.Y. Slip Op. 00048, First Dept 1-2-20**

CIVIL PROCEDURE, PERSONAL INJURY, MEDICAL MALPRACTICE.

AFTER JURISDICTIONAL DISCOVERY, PLAINTIFF DID NOT DEMONSTRATE NEW YORK HAD JURISDICTION OVER THREE OF FOUR NEW JERSEY DEFENDANTS IN THIS MEDICAL MALPRACTICE CASE; WITH RESPECT TO ONE NEW JERSEY DEFENDANT, THE JURISDICTION ISSUE MUST BE DECIDED BY THE JURY.

The First Department, reversing Supreme Court, determined that New Jersey defendant Princeton Radiology Associates (PRO) and the associated defendant doctors (Tsai and Chon) had demonstrated New York did not have jurisdiction over them in this medical malpractice action. With regard to another related New Jersey defendant, Princeton Procure Management, LLC (PPM), the First Department held its lack-of-jurisdiction affirmative defense should not have been dismissed and a jury must decide the issue: "After defendants PPM, PRO, Tsai and Chon moved to dismiss for lack of personal jurisdiction, the motion court found that plaintiff had made a 'substantial start' in demonstrating a basis for personal jurisdiction over those defendants. PPM appealed and this Court affirmed, noting the evidence that PPM had identified a principal place of business in New York, and that it 'marketed its Somerset, New Jersey, location to target New York residents, touting its proximity to New York in advertising,' and 'entered into an agreement with a consortium of New York City hospitals for the referral of cancer patients for treatment at its facility' ... . Plaintiff did not meet her ultimate burden of establishing that Drs. Tsai and Chon, New Jersey doctors who treated her in New Jersey, projected themselves, on their own initiative, into New York to engage in a sustained and substantial transaction of business related to her claims, such that specific long-arm jurisdiction existed over them under CPLR 302(a)(1) ... . [Re: PPM] we conclude that the evidence submitted by plaintiff ... does not warrant dismissal of PPM's affirmative defense of lack of jurisdiction. As to general jurisdiction under CPLR 301, plaintiff presented documents in which PPM listed a New York place of business, but PPM submitted an affidavit of its president, who identified PPM's principal place of business as in New Jersey and denied having a New York principal office. ... Plaintiff also failed to establish that specific long-arm jurisdiction exists over PPM under CPLR 302(a)(1). The evidence presented by plaintiff, including various contracts and the radio interviews and billing documents discussed above, provides a 'sufficient start' in demonstrating a basis for asserting personal jurisdiction ... , but does not warrant dismissal of PPM's affirmative defense ...". ***Robins v. Procure Treatment Ctrs., Inc.*, 2020 N.Y. Slip Op. 00047, First Dept 1-2-20**

FAMILY LAW.

HUSBAND DID NOT DEMONSTRATE ENTITLEMENT TO 50% OF THE APPRECIATION OF WIFE'S SEPARATE PROPERTY IN THIS DIVORCE ACTION.

The First Department, reversing (modifying) Supreme Court in this divorce action, determined 50% of the appreciation of the wife's separate property should not have been distributed to the husband: "The court improperly distributed 50% of the appreciation of the wife's separate real property because the husband failed to establish his entitlement to it. The husband argues that he is entitled to 50% of the appreciation of the property on the ground that he actively contributed toward the renovations of the property. However, the husband fails to provide any nexus between his alleged contributions and the property's appreciation in value. The husband relies on the testimony of a city tax assessor, who testified only as to the property's passive appreciation, specifically, that the property appreciated in value based on comparative sales in the area, and did not testify that any appreciation in value was due to the renovations done to the property. Indeed, the assessor could not have testified as to whether the property appreciated due to the renovations because he never entered the property to view any of the renovations and he did not take such renovations into account when making his assessment." ***Gordon v. Anderson*, 2020 N.Y. Slip Op. 00034, First Dept 1-2-20**

LANDLORD-TENANT, DEBTOR-CREDITOR, APPEALS.

LATE FEES IMPOSED BY THE LANDLORD MAY CONSTITUTE USURIOUS INTEREST; APPEAL HEARD DESPITE PRO SE DEFENDANT-TENANT'S FAILURE TO PERFECT THE APPEAL; THE APPEAL RAISED A PURELY LEGAL ISSUE WHICH IS DETERMINATIVE.

The First Department, reversing Supreme Court, determined defendant tenant raised a question whether the late fees assessed by the landlord constituted usurious interest. The Second Department heard the appeal despite the pro se defendant's failure to perfect the appeal from the correct judgment, noting that the issue is purely legal: "... [T]he court should have considered defendant's argument that the late fees, which along with returned check fees, constitute additional rent under the lease, amount to unenforceable usurious interest rates (see Sandra's Jewel Box v. 401 Hotel, 273 AD2d 1, 3 [1st Dept 2000] ["the late charge provision of the lease . . . while not technically interest, is unreasonable and confiscatory in nature and therefore unenforceable"] ...). Although defendant raised this argument for the first time in reply, we consider it because the issue is determinative and is purely legal ... . Plaintiff defined additional rent as 'primarily late fees,' and it appears that the late fee lease provision permitting a 5% charge on amounts due actually resulted in what would amount to a 60% interest rate or higher, depending on plaintiff's accounting practices. Moreover, even with plaintiff's voluntary reduction of the late fee to 2%, additional rent comprises nearly half the sum demanded for the relevant 27-month period. Accordingly, we remand the matter to the motion court for a determination whether the late fees were 'unreasonable and grossly disproportionate to the amount of actual unpaid rent' ...". ***JW 70th St. LLC v. Simon*, 2020 N.Y. Slip Op. 00042, First Dept 1-2-20**

THIRD DEPARTMENT

CIVIL PROCEDURE, REAL PROPERTY LAW, ENVIRONMENTAL LAW,

UPON LEARNING THE STATE, BY EFFECTIVELY MISLEADING THE COURT, OBTAINED A JUDGMENT DETERMINING IT OWNED LAND IN THE ADIRONDACK PARK, THE COURT PROPERLY EXERCISED ITS DISCRETION TO VACATE THE JUDGMENT PURSUANT TO CPLR 5015.

The Third Department determined Supreme Court properly vacated a judgment pursuant to CPLR 5015 in the interests of substantial justice because plaintiff (the State of New York) had misled the court in proceedings leading to the judgment that it owned land in the Adirondack Park: "Plaintiff argued at trial that, although it could not identify the specific instrument that gave it a superior claim to the parcel at issue, several instruments granted it title to most of Township 40 and that the parcel 'was not included within the bounds of any exception' ... Plaintiff was aware that the success of this argument would threaten the claims of hundreds of individuals to land in Township 40, and misrepresented to Supreme Court that it would rely upon a judgment in this action to bring RPAPL article 15 actions against those individuals. Upon succeeding, plaintiff instead enforced the 2001 judgment against defendants alone ... . It ... became evident that plaintiff sought the 2001 judgment despite the doubts ... regarding its ownership claims in Township 40 ... . Plaintiff subjected defendants to selectively harsh treatment under a judgment about which it harbored doubts, in other words, and Supreme Court stated that it would not have granted the judgment had plaintiff taken the legal position it later adopted. Supreme Court did not abuse its discretion in finding that these circumstances afforded sufficient reason to vacate the 2001 judgment in the interest of substantial justice ...". ***State of New York v. Moore*, 2020 N.Y. Slip Op. 00008, Third Dept 1-2-10**

CRIMINAL LAW, EVIDENCE.

THE INDICTMENT CHARGING PROMOTING PRISON CONTRABAND WAS JURISDICTIONALLY DEFECTIVE BECAUSE IT ALLEGED DEFENDANT POSSESSED LESS THAN 25 GRAMS OF MARIJUANA WHICH DOES NOT MEET THE DEFINITION OF 'DANGEROUS CONTRABAND," AN ELEMENT OF THE OFFENSE.

The Third Department, reversing defendant's conviction and dismissing the indictment, determined the indictment, charging defendant with promoting prison contraband in the first degree was jurisdictionally defective because it alleged possession of less than 25 grams of marijuana: "Defendant asserts that the indictment is jurisdictionally defective based on the Court of Appeals' decision in People v. Finley (10 NY3d 647 [2003]). In that case, the Court held that the possession of a small amount of marihuana, specifically less than 25 grams, did not, absent aggravating circumstances, constitute dangerous contraband within the meaning of Penal Law §§ 205.00 (4) and 205.25 as is necessary to support the charge of promoting prison contraband in the first degree ... . Defendant contends that there is no valid basis in the indictment for this charge because he possessed less than 25 grams of marihuana. The People concede that this is a jurisdictional defect warranting reversal of the judgment of conviction. In addition, defendant requests that the indictment be dismissed in its entirety, and the People consent to such relief given that defendant's guilty plea satisfied both charges contained therein. Accordingly, based upon our review of the record, the case law and the parties' submissions, we conclude that the judgment of conviction must be reversed, thereby vacating the plea and sentence, and that the indictment must be dismissed in its entirety." ***People v. Lawrence*, 2020 N.Y. Slip Op. 00004, Third Dept 1-2-20**

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA), APPEALS.

COUNTY COURT DID NOT ISSUE A WRITTEN ORDER RE THE DEFENDANT'S RISK ASSESSMENT PURSUANT TO THE SEX OFFENDER REGISTRATION ACT (SORA); THEREFORE THE APPEAL WAS NOT PROPERLY BEFORE THE APPELLATE DIVISION AND WAS DISMISSED.

The Third Department determined Count Court had not issued a written order with respect to the defendant's risk assessment under the Sex Offender Registration Act (SORA) and therefor the appeal was not properly before the court: "Following a hearing at which the People advocated for an upward departure, County Court granted the request and classified defendant as a risk level three sex offender with a sexually violent offender designation. Defendant appeals. It is a statutory requirement that County Court 'render an order setting forth its determinations and findings of fact and conclusions of law on which the determinations are based' (Correction Law § 168-n [3] ...). That written order then must be 'entered and filed in the office of the clerk of the court where the action is triable' (CPLR 2220 [a] ...). Although the record before us contains a decision of County Court that sets forth its findings of fact and conclusions of law, the court did not issue a written order and the risk assessment instrument does not contain the 'so ordered' language so as to constitute an appealable order. Absent any order by the court, this appeal is not properly before us and must be dismissed ...". ***People v. Johnson*, 2020 N.Y. Slip Op. 00006, Third Dept 1-2-20**

DEBTOR-CREDITOR, MUNICIPAL LAW, EMPLOYMENT LAW, CRIMINAL LAW, CIVIL PROCEDURE.

PENSION OF POLICE OFFICER CONVICTED OF MURDER AND ATTEMPTED MURDER CAN, UNDER THE SON OF SAM LAW, BE REACHED TO SATISFY A $1 MILLION JUDGMENT OBTAINED BY THE CRIME VICTIM.

The Third Department determined the Son of Sam Law trumped the CPLR, the Retirement and Social Security Law, and the Administrative Code of the City of New York with respect to the pension of a former NYC police officer who was convicted of murder and attempted murder and against whom plaintiff obtained a personal injury judgment of more than $1 million: " 'Executive Law § 632-a sets forth a statutory scheme intended to improve the ability of crime victims to obtain full and just compensation from the person(s) convicted of the crime by allowing crime victims or their representatives to sue the convicted criminals who harmed them when the criminals receive substantial sums of money from virtually any source and protecting those funds while litigation is pending' ... . [I]n 2001, the Legislature amended the [Son of Sam] law to allow a crime victim to seek recovery from 'funds of a convicted person,' which includes 'all funds and property received from any source by a person convicted of a specified crime,' but specifically excludes child support and earned income (Education Law § 632-a [1] [c]). * * * This Court has found ... that CPLR 5205 (c) is superseded by the Son of Sam Law ... . Defendant's assertions that Retirement and Social Security Law § 110 and Administrative Code of the City of New York § 13-264 protect his pension from assignment to satisfy plaintiff's money judgment are similarly without merit due to the broad reach of the Son of Sam Law ...". ***Prindle v. Guzy*, 2020 N.Y. Slip Op. 00011, Third Dept 2-1-20**

EDUCATION-SCHOOL LAW, PERSONAL INJURY.

VERDICT FINDING THE SCHOOL DISTRICT WAS NEGLIGENT BUT FURTHER FINDING THE NEGLIGENCE WAS NOT THE PROXIMATE CAUSE OF THE STUDENT'S SUICIDE WAS NOT AGAINST THE WEIGHT OF EVIDENCE; PLAINTIFFS ALLEGED BULLYING AT SCHOOL CAUSED THEIR SON'S SUICIDE.

The Third Department determined the verdict finding the school district was negligent but further finding the negligence was not the proximate cause of plaintiff-student's suicide was not against the weight of the evidence. Plaintiffs alleged

bullying at school was the reason for their son's suicide and claimed the school was liable under a negligent-supervision theory: "... "[A] jury's finding that a party was at fault but that [such] fault was not a proximate cause of [decedent's] injuries is inconsistent and against the weight of the evidence only when the issues are so inextricably interwoven as to make it logically impossible to find negligence without also finding proximate cause' ... . The conduct of defendant's employees was not blameless ... — indeed, it appears that several minor incidents involving decedent provided missed opportunities for them to uncover what was going on — but the fact remains that the trial proof neither established the degree of the bullying that decedent received at school nor showed that defendant could have anticipated its impact upon him. Therefore, the jury could logically find that defendant was negligent by failing 'to adequately supervise' decedent in some respects ... , but that the pain, suffering and suicide of decedent were not foreseeable consequences of that negligence ... . The issues of negligence and proximate cause were not inextricably interwoven as a result and, after viewing the evidence in the light most favorable to the nonmoving party, 'we find that the evidence did not so preponderate in plaintiff[s'] favor that the jury's verdict could not have been reached on any fair interpretation of the evidence' ...". ***C.T. v. Board of Educ. of S. Glens Falls Cent. Sch. Dist.*, 2020 N.Y. Slip Op. 00023, Third Dept 1-2-20**

ENVIRONMENTAL LAW, CORPORATION LAW, LIMITED LIABILITY COMPANY LAW.

MEMBER OF LLC WHICH OWNED A MOBILE HOME PARK IS PERSONALLY LIABLE, PURSUANT TO THE RESPONSIBLE CORPORATE OFFICER DOCTRINE, FOR AN $800,000 PENALTY IMPOSED FOR FAILING TO COMPLY WITH AN ORDER ISSUED BY THE DEPARTMENT OF ENVIRONMENTAL PROTECTION REQUIRING SEWAGE-TREATMENT MEASURES.

The Third Department determined Burr, one of two members of a limited liability company, C & J, was properly held personally liable for the violation of an administrative order issued by the Department of Environmental Conservation (DEP). C & J owned a mobile home park and the administrative order concerned the treatment of waste from the park. The penalty was more than $800,000.00: "Under Limited Liability Company Law § 609, a member of a limited liability company is generally not liable for the contractual obligations of the company. The 2008 order on consent, however, is not merely a contractual obligation. It is also an administrative order, the violation of which is subject to statutory enforcement (see ECL 71-1929). This Court has recognized that a responsible corporate officer may be held personally liable for violations of consent orders issued by DEC that implicate public health and safety ... . Individual liability may be imposed where the corporate officer has the knowledge of and ability to prevent or remedy a violation that presents a public health hazard ... . There can be little dispute that Burr was well aware of the ongoing sewage violations at the park, and, as managing member, he held a position of authority to address the problem. ... [T]he 2008 consent order, which Burr signed on C & J's behalf, expressly provided for stipulated penalties in the event that C & J 'fail[ed] to strictly and timely comply.' The order further specified that it was binding on C & J and its officers. ... [W]e conclude that Supreme Court did not err in holding Burr personally liable under the responsible corporate officer doctrine." ***State of New York v. C & J Enters., LLC*, 2020 N.Y. Slip Op. 00024, Third Dept 1-2-20**

ENVIRONMENTAL LAW, MUNICIPAL LAW, LAND USE.

THE FACT THAT PETITIONERS OWN PROPERTY ADJACENT TO THE NATURE PRESERVE DID NOT GIVE THEM STANDING TO CONTEST THE TOWN'S NEGATIVE DECLARATION UNDER SEQRA WITH RESPECT TO THE TOWN'S PURCHASE OF THE PRESERVE.

The Third Department determined petitioners did not have standing to contest the negative declaration under the State Environmental Quality Review Act (SEQRA) allowing the town's purchase of land held by a nature conservancy: "It is well settled that standing to challenge an alleged SEQRA violation by a governmental entity requires a petitioner to demonstrate 'that it would suffer direct harm, injury that is in some way different from that of the public at large' ... . Importantly, '[p]etitioners must have more than generalized environmental concerns to satisfy that burden and, unlike . . . cases involving zoning issues, there is no presumption of standing to raise a SEQRA or other environmental challenge based on a party's close proximity alone' ... . Here, petitioners claim of standing is based upon the fact that they own property directly adjacent to the nature preserve and have asserted concerns that the Town, in conducting its SEQRA review, failed to consider the impact of increased motor vehicle and pedestrian traffic and/or the environmental effect that a newly proposed parking lot and hiking trail would have on the nature preserve. Initially, assuming, without deciding, that petitioners adequately established their ownership interest in the property directly adjacent to the nature preserve, their position as adjacent landowners does not automatically confer standing on them to challenge the Town Board's negative declaration ... . Moreover, petitioners' asserted concerns fail to allege any unique or distinct injury that they will suffer as a result of the Town's proposed land acquisition that is not generally applicable to the public at large ...". ***Matter of Hohman v. Town of Poestenkill*, 2020 N.Y. Slip Op. 00013, Third Dept 1-2-20**

FORECLOSURE.

PLAINTIFF BANK'S ATTEMPT TO DE-ACCELERATE THE MORTGAGE JUST BEFORE THE STATUTE OF LIMITATIONS RAN WAS PROPERLY REJECTED.

The Third Department, affirming the dismissal of the foreclosure action, held that the plaintiff bank's attempt to de-accelerate the mortgage just before the statute of limitations ran was properly rejected: "As stated by the Second Department, 'acceleration notices must be clear and unambiguous to be valid and enforceable, . . . [and] de-acceleration notices must also be clear and unambiguous to be valid and enforceable' (Milone v. US Bank N.A., 164 AD3d 145, 153 [2018] ...). Notably, in Milone, the Court cautioned against pretextual de-acceleration letters issued to avoid an impending statute of limitations. ... [T]he Second Department reasoned in Milone that 'a de-acceleration letter is not pretextual if . . . it contains an express demand for monthly payments on the note, or, in the absence of such express demand, it is accompanied by copies of monthly invoices transmitted to the homeowner for installment payments' or other comparable evidence .. . ... [P]laintiff's purported de-acceleration letter was issued on the eve of the expiration of the statute of limitations. Although the letter expressly 'reinstates the [l]oan as an installment loan,' it does not demand the resumption of monthly payments or provide monthly invoices for payment due. Instead, the letter specifies that defendant remained in default for failing to make the required monthly installment payments since November 1, 2008 and offers to discuss 'a variety of homeowner's assistance programs.' Not to be overlooked is that the March 2, 2016 letter was followed by two June 13, 2016 letters providing 30 days to cure the default by making a payment due of $101,831, as well as a 90-day notice required under RPAPL 1304 — a condition precedent to initiating a foreclosure action. In our view, this proffer does not constitute a valid de-acceleration, as plaintiff simply put defendant on notice of its obligation to cure an eight-year default and then promptly embarked on the notices required to initiate a second foreclosure action. It follows that plaintiff's second action was properly dismissed as untimely." ***Wells Fargo Bank, N.A. v. Portu*, 2020 N.Y. Slip Op. 00025, Third Dept 1-2-20**

INSURANCE LAW, PERSONAL INJURY, VEHICLE AND TRAFFIC LAW.

THE CARRIER WHICH HAD ISSUED A BUSINESS AUTOMOBILE INSURANCE POLICY COVERING THE INSURED'S FLATBED TRUCK WAS OBLIGATED TO DEFEND THIS ACTION STEMMING FROM AN INJURY INCURRED WHILE UNLOADING A TRACTOR FROM THE FLATBED TRUCK; UNLOADING A TRUCK IS CONSIDERED OPERATION OF THE TRUCK UNDER VEHICLE AND TRAFFIC LAW 388.

The Third Department determined plaintiff-insurer was obligated to defend and the insured in this personal injury case stemming from the unloading of a tractor from a flatbed truck owned by the insured. The tractor rolled over the insured's son as it was being unloaded. The son and his wife sued the insured and the insured's farm. Plaintiff carrier brought this action for a declaratory judgment that it was not obligated to defend or indemnify, apparently claiming the (insured's) truck was not being operated when the accident occurred: "If anything within the 'four corners of the complaint suggest[s] . . . a reasonable possibility of coverage,' the insurer must defend, even though it may not ultimately be bound to pay because the insured may not be liable ... . Pursuant to the Vehicle and Traffic Law, '[e]very owner of a vehicle used or operated in this state shall be liable and responsible for . . . injuries to person or property resulting from negligence in the use or operation of such vehicle, in the business of such owner or otherwise, by any person using or operating the same with the permission, express or implied, of such owner' (Vehicle and Traffic Law § 388 [1]) ... . * * * 'The policy of insurance issued must be as broad as the insured owner's liability for use of the vehicle by the owner or anyone using the vehicle with his [or her] permission' ... . Loading and unloading of a covered vehicle constitute 'use or operation' pursuant to Vehicle and Traffic Law § 388 (1) ... , and a vehicle does not have to be in motion to be in 'use or operation' ... . * * * George Henderson [the insured] loaded and secured the tractor on the flatbed truck, drove the flatbed truck to the farm, rolled the bed back and tilted it, and operated the winch that was supposed to be holding the tractor in place. He also regularly requested or allowed Charles Henderson [his son} and the other individual to unload machinery from the flatbed truck. Charles Henderson asserted that, due to George Henderson not paying attention, the winch cable went slack, causing it to release from the tractor and allow the tractor to roll. George Henderson is potentially both directly and vicariously liable for negligence in the personal injury action ... , and there is prima facie 'reasonable possibility of coverage' ... . Thus, plaintiff is obliged to defend George Henderson and the farm in the underlying action." ***Farm Family Cas. Ins. Co. v. Henderson*, 2020 N.Y. Slip Op. 00021, Third Dept 1-2-20**

MENTAL HYGIENE LAW, CRIMINAL LAW. CONTRACT LAW.

DEFENDANT NEED NOT BE INFORMED AT THE TIME OF THE PLEA TO A SEX OFFENSE THAT HE OR SHE MAY BE SUBJECT TO A MENTAL HYGIENE LAW ARTICLE 10 CIVIL ACTION AS THE RELEASE DATE APPROACHES.

The Third Department determined defendant, a sex offender who was found to suffer from a mental abnormality after Mental Hygiene Law Article 10 trial, was not entitled specific performance of his plea agreement, which made no mention of the of potential Mental Hygiene Law proceedings: "Respondent next challenges Supreme Court's denial of his pretrial motion to dismiss the petition inasmuch as his 1997 plea agreement is a legal and binding contract — one that entitled him

to specific performance. Proceedings pursuant to the Sex Offender Management and Treatment Act 'are expansive civil proceedings, which are entirely separate from and independent of the original criminal action' ... . Moreover, '[i]t is well settled that trial courts are required to advise defendants who plead guilty regarding the direct consequences of such plea, but they have no obligation to iterate every collateral consequence of the conviction' ... . As relevant here, 'the potential for either civil confinement or supervision pursuant to [the Sex Offender Management and Treatment Act] is a collateral consequence of a guilty plea and, therefore, the current state of the law does not require that defendants be informed of it prior to entering a plea of guilty' ... . As such, we discern no error in Supreme Court's denial of respondent's request for specific performance. Nor are we persuaded by respondent's assertion that specific performance is appropriate because the Mental Hygiene Law article 10 litigation ensued following the expiration of his sentence, as the article 10 proceeding commenced upon the date that the petition was filed, prior to respondent's release date ...". ***Matter of State of New York v. Robert G.*, 2020 N.Y. Slip Op. 00009, Third Dept 1-2-20**

PERSONAL INJURY.

THE JURY WAS PROPERLY INSTRUCTED ON THE DOCTRINE OF RES IPSA LOQUITUR; PLAINTIFF WAS INJURED WHEN AN AUDITORIUM RISER COLLAPSED WHEN SHE WAS WALKING ON IT.

The Third Department determined the jury in this personal injury action was properly instructed on the doctrine of res ipsa loquitur. A riser used for a choral rehearsal collapsed as plaintiff was walking on it: "To be entitled to a res ipsa loquitur jury charge, a plaintiff must establish (1) that the injurious event is 'of a kind that ordinarily does not occur in the absence of someone's negligence,' (2) that the event was 'caused by an agency or instrumentality within the exclusive control of the defendant' and (3) that the event was not 'due to any voluntary action or contribution on the part of the plaintiff' ... . [A] jury could reasonably conclude that the collapse of a stage riser being put to its intended use qualifies as an event that would not ordinarily occur in the absence of negligence ,,, , ... [Plaintiff} ... proffered expert testimony demonstrating that the collapse was most likely caused by a flaring of the riser's locking mechanism, a condition caused by 'wear and tear' and which allegedly could have been discovered with proper inspection and maintenance. [P]laintiff's ... expert evidence of negligence did not preclude her from also relying on the doctrine of res ipsa loquitur ... . The evidence established that the auditorium was locked whenever it was not in use and that defendant's agents exclusively assembled, disassembled, maintained and repaired the risers. * * * [P]laintiff was not required to 'conclusively eliminate the possibility' that someone intentionally disengaged the locking mechanism ... . Rather, all that was required was that the likelihood of an intentional act 'be so reduced that the greater probability lies at defendant's door' ...". ***Elsawi v. Saratoga Springs City Sch. Dist.*, 2020 N.Y. Slip Op. 00019, Third Dept 1-2-20**

TRUSTS AND ESTATES.

THE TRUST PROVISION IN THE WILL WAS INVALID FOR LACK OF A BENEFICIARY; SURROGATE'S COURT'S CONSTRUCTION OF THE WILL PROPERLY EXPRESSED THE DECEDENT'S INTENT.

The Third Department determined Surrogate's Court properly found that the trust in the will was invalid for lack of a beneficiary and the court's construction of the will effectuated the decedent's intent: "There is no dispute regarding Surrogate's Court's determination that the trust created in article six of decedent's will is invalid due to the lack of a beneficiary. Thus, the issue turns on whether the court's construction of the will, after striking the trust, effectuated decedent's intent. In addition to creating the invalid trust, the purpose of which was to manage and continue the Dawe Family genealogical research, article six of decedent's will provides, 'I am mindful of my two brothers . . . and of my other relatives, all of whom I love dearly, but I do not make any other direct testamentary disposition for any of them.'... This language is unambiguous and manifests decedent's intent that none of his family members was to receive direct testamentary gifts ... . The language at the end of article six provides that, upon the termination of the trust, 'all the assets of the trust . . . shall be distributed outright, free of future trust, to [respondent], a not-for-profit library . . . which promotes and facilitates genealogical research, it being my hope that said library will then preserve (and continue) the Dawe family genealogical research I have conducted (and my said related web site).' This language is similarly unambiguous, manifesting decedent's intent that respondent receive the residuary of his estate with the hope that decedent's genealogical research would be continued ...". ***Matter of Dawe*, 2020 N.Y. Slip Op. 00017, Third Dept 1-2-20**

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