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FIRST DEPARTMENT

CRIMINAL LAW, ATTORNEYS.

MOTION TO VACATE DEFENDANT'S JUDGMENT OF CONVICTION SHOULD NOT HAVE BEEN DENIED WITHOUT A HEARING; SUPREME COURT MAY HAVE IMPROPERLY RELIED ON CPL § 440.30(d) WHICH ONLY APPLIES IF THE MOTION IS BASED SOLELY ON AN ALLEGATION BY THE DEFENDANT.

The First Department, reversing Supreme Court, determined defendant's motion to vacate his judgment of conviction should not have been denied without a hearing. There was a question of fact whether defense counsel was aware he could call an expert to testify defendant, who had ingested drugs, did not have the required mental state (depraved indifference). The First Department noted Supreme Court may have improperly relied on Criminal Procedure Law (CPL) § 440.30(d) which applies only if the motion is based solely on an allegation by the defendant (not the case here): "While the motion court had a sound basis for its conclusion that there was 'no reasonable possibility' that defendant's trial counsel 'was unaware that he could call an expert to testify about the defendant's state of mind,' we find that this was not an adequate basis for denying the motion without a hearing in these circumstances. First, to the extent the court may have been relying on CPL 440.30(d), that section permits summary denial when 'there is no reasonable possibility that such an allegation is true,' but it applies only when the allegation 'is made solely by the defendant.' That is not the case here, where the allegation at issue regarding trial counsel's statements was made by defendant's motion counsel based on his own knowledge. Nor do we believe that this is a case such as People v. Samandarov (13 NY3d 433 [2009]), where the lack of merit of a CPL 440.10 motion could be determined on the parties' submissions, despite it being 'theoretically possible that a hearing could show otherwise' (id. at 440). Here, while the court's perception may well be borne out, there are issues of fact sufficient to warrant a hearing ...". ***People v. Martin*, 2020 N.Y. Slip Op. 00067, First Dept 1-7-20**

FAMILY LAW, SOCIAL SERVICES LAW, APPEALS.

AMENDMENT TO SOCIAL SERVICES LAW EXTENDING SUBSIDIES FOR CHILDREN CARED FOR BY A GUARDIAN UNTIL AGE 21 SHOULD HAVE BEEN APPLIED RETROACTIVELY; THE MATTER IS APPEALABLE AS OF RIGHT.

The First Department, reversing Family Court, determined the amendment to Social Services Law § 458-b allowing monthly subsidies for children cared for by guardians to be extended to age 21 (from 18) should be applied retroactively. The matter was deemed appealable as of right: "... [T]he order is appealable as of right, because it is an order of disposition that terminates the children's guardianship placement once the children reach the age of 18 and terminates the proceeding itself ... . In any event, this Court can deem a notice of appeal from the denial of the motion a request for permission to appeal and we would grant that request ... . A review of the legislative history supports the conclusion that the amended statute is remedial in nature. ... [W]e can discern from the legislative history that the intent was to remove the disparity created between foster/adoptive parents and guardians since foster/adoptive parents are able to obtain subsidies notwithstanding the age of the child at the time of fostering or adoption. The mere fact that the amended statute is remedial in nature is not determinative as to whether it should be applied retroactively ... . [A] remedial amendment will only be applied retroactively if it does not impair vested rights ... . [T]he amendment does not create a new entitlement; rather it expands 'existing benefits to a class of persons arbitrarily denied those benefits by the original legislation' ... . There is no dispute that had the children been adopted by the grandmother and remained with her under the auspices of foster care, or had the grandmother proceeded with guardianship after they turned 16, they would have been entitled to subsidies until the children turned 21." ***Matter of Jaquan L. (Pearl L.)*, 2020 N.Y. Slip Op. 00213, First Dept 1-9-20**

PERSONAL INJURY.

DEFENDANT PROPERTY OWNER/MANAGER'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED; DEFENDANTS DEMONSTRATED THEY DID NOT HAVE NOTICE OF ANY PROBLEMS WITH A DOOR WHICH ALLEGEDLY MALFUNCTIONED CAUSING PLAINTIFF'S DECEDENT TO FALL OUT OF A WHEELCHAIR LIFT.

The First Department, reversing Supreme Court, determined defendants' [property owner/manager's ?] motion for summary judgment should have been granted. Plaintiff alleged the door to a wheelchair lift on the exterior of the building

where plaintiffs lived malfunctioned causing plaintiff's decedent to fall out of the lift. The defendants presented evidence they did not have notice of any problems with the door: "Defendants established prima facie entitlement to judgment as a matter of law in this action where plaintiff's decedent was injured when the door to the wheelchair lift on the exterior of the building in which they lived malfunctioned causing him to fall out of the lift. Defendants submitted evidence demonstrating that they did not have notice of any malfunction in the subject door through service records showing no issues related to the door opening prematurely ... . In opposition, plaintiff failed to raise a triable issue of fact. Plaintiff did not submit any evidence that complaints about the lift were similar in nature or caused by similar contributing factors ... . Nor is the doctrine of res ipsa loquitur applicable under the circumstances presented ...". ***Pui Kum Ng Lee v. Chatham Green, Inc.*, 2020 N.Y. Slip Op. 00069, First Dept 1-7-20**

PERSONAL INJURY, CONTRACT LAW, ATTORNEYS, INSURANCE LAW.

DEFENDANTS' ATTORNEYS HAD APPARENT AUTHORITY TO BIND DEFENDANTS TO THE OPEN-COURT STIPULATED SETTLEMENT OF $8,875,000; IN ADDITION, DEFENDANTS RATIFIED THE STIPULATION BY FAILING TO TIMELY OBJECT TO IT.

The First Department, in a full-fledged opinion by Justice Acosta, determined that defendants (the Infiniti defendants) were bound by an open-court stipulated settlement of $8,875,000 in this personal injury case. The attorneys had apparent authority to bind the defendants. And the defendants ratified the stipulation by failing to timely object to it: "I write to highlight the fundamental principle that parties are bound by stipulations signed in open court by their attorneys. The issue arose in the context of a negligence case, where plaintiff was seriously injured when she was struck by a motor vehicle while standing on a sidewalk median in Brooklyn. The vehicle was owned by defendant Infiniti of Manhattan, Inc. and driven by defendant Massamba Seck (the Infiniti defendants). Plaintiff suffered serious injuries and required extensive hospitalization and multiple surgeries. At issue in this case is whether the Infiniti defendants are bound by a settlement agreement entered into by their attorneys. We find that the Infiniti defendants are bound, because their attorneys had apparent authority to bind them to the $8,875,000 judgment. Significantly, there is no affidavit or testimony by Infiniti stating that Infiniti, or any of its employees, was unaware of the settlement or that Infiniti did not authorize the settlement. The only ones making this claim are the lawyers from the firm that was hired by the insurance companies to defend the Infiniti defendants. The fact that one of the insurers is now unable to pay its intended $5 million portion does not inure to the Infiniti defendants' benefit. Rather, the Infiniti defendants are responsible for the portion of the agreed-upon amounts that the insurers do not pay. To accept their position would alter the way litigation is conducted in New York State. Courts would have to conduct colloquies in every case to make sure that the parties, notwithstanding their attorneys' actions in appearing for them on numerous occasions and signing stipulations, acquiesced in the terms of the stipulations. That is unacceptable, especially here, where the Infiniti defendants never objected to the stipulation until the filing of the instant order to show cause more than a year and six months after the stipulation was signed in open court." ***Pruss v. Infiniti of Manhattan, Inc.*, 2020 N.Y. Slip Op. 00229, First Dept 1-9-20**

PERSONAL INJURY, EMPLOYMENT LAW.

PLAINTIFF ALLEGED DEFENDANT'S EMPLOYEE, A SECURITY GUARD, ATTACKED HER; DEFENDANT'S EMPLOYEE ALLEGED PLAINTIFF ATTACKED HIM AND HE ACTED IN SELF DEFENSE; THE EMPLOYER WOULD NOT BE LIABLE UNDER EITHER SCENARIO; THE EMPLOYER'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED.

The First Department, reversing Supreme Court, determined the security guard's employer's (SEB's) motion for summary judgment in this third-party assault case should have been granted. Plaintiff alleged the security guard attacked her without provocation. The security guard alleged he acted in self defense after plaintiff and others attacked him. The employer would not be liable in either scenario: "Plaintiff Gregory testified that SEB's employee, a security guard who was then working at a movie theater, attacked her with a box cutter and slashed her face and body with it after she tapped him on the shoulder and told him she had enjoyed the movie she had just seen. The security guard gave a different version of events and claimed that he was acting in self defense after plaintiffs and others attacked him with box cutters. However, neither version of events would give rise to liability on the part of SEB. Under plaintiff's version of events, SEB could not be held liable because SEB's employee's unprovoked assault on Gregory with a box cutter was not within the scope of any duties he may have had as a security guard and was not done in furtherance of SEB's business interests ... . Under the security guard's version of events, even assuming for purposes of this appeal that his actions were within the scope of his duties as a security guard and were done in furtherance of SEB's business interests, SEB would not be held liable because the security guard's actions were taken in self-defense after being attacked by patrons of the movie theater." ***Gregory v. National Amusements, Inc.*, 2020 N.Y. Slip Op. 00223, First Dept 1-9-20**

WORKERS' COMPENSATION, EMPLOYMENT LAW.

THIRD-PARTY PLAINTIFFS WERE NOT REQUIRED TO AND DID NOT PARTICIPATE IN THE WORKERS' COMPENSATION PROCEEDINGS; THEREFORE THE WORKERS' COMPENSATION BOARD'S FINDING THAT THIRD-PARTY DEFENDANT WAS PLAINTIFF'S EMPLOYER WAS NOT BINDING ON THE THIRD-PARTY PLAINTIFFS.

The First Department, reversing Supreme Court, determined the Workers' Compensation Board's finding that third-party defendant I & G Group was plaintiff's employer was not binding on the third-party plaintiffs because the third-party plaintiffs did not participate in the Workers' Compensation proceedings. Therefore the matter has to be litigated and I & G Group's motion for summary judgment should not have been granted: "The Court of Appeals has ... recognized that a decision by the worker's compensation board may not be binding on parties who do not participate in its hearings. * * * '[U]nless the Legislature expands the definition of parties in interest, the unfortunate result will be that a duplicative proceeding must be held and the issue of compensability adjudicated anew because defendants never had a full and fair opportunity' to litigate the question' ... . Here, because it is undisputed that appellants [third-party plaintiffs] were not given notice of the worker's compensation hearing, and were not afforded the opportunity to present evidence or cross-examine witnesses, their third-party claims, in which they challenge the identity of plaintiff's employer, should not have been dismissed as precluded by the board's prior determination of that issue ...". ***Martinez v. 250 W. 43 Owner, LLC*, 2020 N.Y. Slip Op. 00058, First Dept 1-7-20**

SECOND DEPARTMENT

ARBITRATION, EMPLOYMENT LAW, CONTRACT LAW, LABOR LAW.

PLAINTIFFS WERE NOT SIGNATORIES TO CONTRACTS WHICH REQUIRED ARBITRATION OF WAGE-UNDERPAYMENT ALLEGATIONS AND PLAINTIFFS DID NOT EXPLOIT THE BENEFITS OF THE CONTRACTS; THEREFORE PLAINTIFFS COULD NOT BE COMPELLED TO ARBITRATE.

The Second Department determined the plaintiffs in this putative class action alleging wage-underpayment in violation of Labor Law article 6 could not be compelled to arbitrate. Plaintiffs were not parties to the contracts with defendants which compelled arbitration and did not seek to exploit the benefits of those contracts: "... '[U]nder limited circumstances nonsignatories may be compelled to arbitrate' ... . Under the direct benefits theory of estoppel, a nonsignatory may be compelled to arbitrate where the nonsignatory 'knowingly exploits' the benefits of an agreement containing an arbitration clause, and receives benefits flowing directly from the agreement ... . 'The benefits must be direct, and the party seeking to compel arbitration must demonstrate that the party seeking to avoid arbitration relies on the terms of the agreement containing the arbitration provision in pursuing its claim' ... . Where the benefits are merely 'indirect,' a nonsignatory cannot be compelled to arbitrate a claim ... . 'A benefit is indirect where the nonsignatory exploits the contractual relation of the parties, but not the agreement itself' ... . Here, contrary to the defendants' contention, the plaintiffs should not be compelled to arbitrate based upon the agreements. The record does not establish that the plaintiffs were even aware of the existence of the agreements or that they knowingly exploited the benefits of the agreements ... ". ***Arboleda v. White Glove Enter. Corp.*, 2020 N.Y. Slip Op. 00098, Second Dept 1-8-20**

CONTRACT LAW, FRAUD, UNJUST ENRICHMENT, CIVIL PROCEDURE.

PLAINTIFFS' ACTION ALLEGING BREACH OF AN ORAL CONTRACT REGARDING REPAYMENT OF A LOAN SECURED BY A NOTE AND MORTGAGE SHOULD HAVE BEEN DISMISSED AS BARRED BY THE STATUTE OF FRAUDS; THE FRAUD AND UNJUST ENRICHMENT CAUSES OF ACTION MUST BE DISMISSED AS DUPLICATIVE OF THE BREACH OF CONTRACT CAUSE OF ACTION.

The Second Department, reversing Supreme Court, determined plaintiffs' action alleging breach of an alleged oral contract concerning the repayment of a loan secured by a note and mortgage should have been dismissed as barred by the statute of frauds. The fraud and unjust enrichment causes of action must also be dismissed as duplicative of the breach of contract cause of action: "The complaint alleged that contemporaneously with executing the note and mortgage, the plaintiffs and the defendant entered into an oral agreement providing, inter alia, that in exchange for assigning a contract to purchase certain real property to the defendant, the plaintiffs would be responsible for paying only the interest on the loan. The complaint, which asserted causes of action sounding in breach of contract, fraud, and unjust enrichment, sought, among other things, recovery of the settlement amount paid by the plaintiffs in the foreclosure action, less the amount of interest allegedly due pursuant to the oral agreement. The defendant moved pursuant to CPLR 3211(a) to dismiss the complaint. The Supreme Court denied the motion, and the defendant appeals. Accepting the facts as alleged in the complaint as true, and according the plaintiffs the benefit of every possible inference, dismissal of the breach of contract cause of action should have been granted, since enforcement of the alleged oral agreement, ostensibly to modify the note and mortgage, is barred by the statute of frauds (see General Obligations Law §§ 5-703[1]; 5-1103 ...). Dismissal of the causes of action alleging fraud and unjust enrichment should also have been granted as they are duplicative of the unenforceable contractual cause of

action and thus constitute an impermissible attempt to circumvent the statute of frauds ...". ***Botanical Realty Assoc. Urban Renewal, LLC v. Gluck*, 2020 N.Y. Slip Op. 00099, Second Dept 1-8-20**

CRIMINAL LAW.

JUROR SHOULD NOT HAVE BEEN REPLACED WITH AN ALTERNATE; NO SHOWING JUROR WAS 'UNAVAILABLE' WITHIN THE MEANING OF CPL § 270.35; CONVICTION REVERSED.

The Second Department, reversing defendant's conviction, determined the trial judge should not have discharged a juror and replaced her with an alternate after the proof had closed and before summations. The juror was not "unavailable" within the meaning of Criminal Procedure Law (CPL) § 270.35: "... [A]fter both sides had rested but before summations, the Supreme Court, over the defendant's objection, excused juror No. 10 and replaced her with an alternate on the basis that juror No. 10 had to travel to Maryland for an evening work obligation the next day, which was a Friday. The day after the alternate was substituted, the jury found the defendant guilty of assault in the first degree and criminal possession of a weapon in the fourth degree. ... [T]he defendant's statutory and constitutional rights were violated when, over the defendant's objection, the court excused Juror No. 10 and substituted an alternate juror. The record does not demonstrate that Juror No. 10 was unavailable as that term is used in CPL 270.35 ... . Juror No. 10's work obligation did not render her unavailable for jury service, as her own convenience or potential financial hardship are insufficient to render her unavailable under CPL 270.35 ...". ***People v. Alleyne*, 2020 N.Y. Slip Op. 00154, Second Dept 1-8-20**

CRIMINAL LAW.

SENTENCE DEEMED HARSH AND EXCESSIVE; REDUCED IN THE INTEREST OF JUSTICE.

The Second Department reduced the defendant's sentence, noting it was defendant's first conviction, her strong family and community ties, her long employment history and her mental health history. "The defendant was convicted of two counts each of rape in the third degree, criminal sexual act in the third degree, and endangering the welfare of a child arising out of two separate incidents wherein the defendant, who was a paraprofessional at a school which the 16½-year-old victim attended, took the victim to a hotel and had sexual intercourse and oral sex with him:" "Appeal by the defendant from a judgment ... convicting her of rape in the third degree (two counts), criminal sexual act in the third degree (two counts), and endangering the welfare of a child (two counts), after a nonjury trial, and sentencing her to determinate terms of imprisonment of 3 years on each of the counts of rape in the third degree (counts 1 and 4) and criminal sexual act in the third degree (counts 2 and 5), to be followed by a period of postrelease supervision of 10 years, and a determinate term of imprisonment of 1 year on each of the counts of endangering the welfare of a child (counts 3 and 6), with the sentences imposed on counts 1, 2, and 3 to run concurrently with each other, and the sentences imposed on counts 4, 5, and 6 to run concurrently with each other and consecutively to the sentences imposed on counts 1, 2, and 3. * * *The sentence imposed, which is at the upper end of the legal sentencing range, is harsh and excessive ... . Accordingly, exercising our interest of justice jurisdiction, we modify the sentence to the extent indicated herein ..". ***People v. Thompson*, 2020 N.Y. Slip Op. 00164, Second Dept 1-8-20**

CRIMINAL LAW.

DEFENDANT'S DISCARDING A BAG OF MARIJUANA AS HE WAS BEING PURSUED BY POLICE FOR AN OPEN-CONTAINER VIOLATION CONSTITUTED ATTEMPTED TAMPERING WITH PHYSICAL EVIDENCE.

The Second Department determined that defendant's discarding a bag of marijuana as he was being pursued by a police officer for violating the city's open-container law constituted attempted tampering with physical evidence, not tampering with physical evidence: "Here, the charge of tampering with physical evidence was based on the defendant's act of discarding the plastic bag containing marijuana as he was being pursued by Officer Scuadroni for violating the City's open-container law. Contrary to the People's contention, the defendant's act of discarding the bag did not constitute an act of concealment within the meaning of Penal Law § 215.40(2). Nevertheless, since the defendant 'engage[d] in conduct that tends to effect, and comes dangerously near to accomplishing, an act of concealment intended to suppress the physical evidence' ... , there is legally sufficient evidence to sustain a conviction of attempted tampering with physical evidence (see Penal Law §§ 110.00, 215.40[2 ...). Accordingly, we reduce the defendant's conviction of tampering with physical evidence to attempted tampering with physical evidence ...". ***People v. Zachary*, 2020 N.Y. Slip Op. 00165, Second Dept 1-8-20**

DEFAMATION.

PLAINTIFF DID NOT ELIMINATE QUESTIONS OF FACT ABOUT WHETHER PLAINTIFF'S PUBLIC STATEMENTS CALLING DEFENDANTS CON ARTISTS, SCAMMERS AND THIEVES WERE DEFAMATORY; PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT DISMISSING THE COUNTERCLAIMS ALLEGING DEFAMATION PROPERLY DENIED; THE LAW OF DEFAMATION CONCISELY AND COMPLETELY EXPLAINED.

The Second Department determined defendants' counterclaims alleging defamation properly survived plaintiff's motion for summary judgment. The law of defamation is concisely and completely explained in the decision: "... [D]uring a Sabbath gathering at the parties' synagogue, the plaintiff allegedly stood up at the center podium, asked for the congregants' atten-

tion, and, pointing to the Nissanis, stated that he wanted 'to make an announcement for everyone to know' that '[w]e have in our synagogue two NOCHLIM,' which the Nissanis claim is a Hebrew word for 'scammers or con artists.' The plaintiff allegedly continued: 'They are David Nissani and Ronen Nissani,' and 'if they ask you to do any business with them, or to invest with them, then you definitely should not.' After services had concluded, while the Rabbi was admonishing the plaintiff for bringing business affairs to the synagogue, the plaintiff allegedly stated in the presence of the Rabbi and the synagogue's president, 'But these people are Nochlim and Ganavim,' a Hebrew word for 'thieves.' As Ronen Nissani began to walk home from the synagogue, the plaintiff allegedly shouted at him in front of the synagogue in the presence of others that 'I'm going to be on your ass until I get my money! I'm not going to leave you alone! You will see! You are thieves!; * * * The plaintiff failed to establish, prima facie, that these statements did not constitute false assertions of fact ... . Viewed in the context in which the allegedly defamatory statements were made, a reasonable listener would likely understand those statements to imply that the Nissanis swindled the plaintiff out of money in connection with their business ... . The statements can readily be proven true or false and, given the tone and overall context in which the statements were made, signaled to the average listener that the plaintiff was conveying facts about the Nissanis ... . Even if the challenged statements had not conveyed assertations of fact, they would nonetheless be actionable as mixed opinion, since a reasonable listener would have inferred that the plaintiff had knowledge of facts, unknown to the audience, which supported the assertions he made ...". ***Levy v. Nissani*, 2020 N.Y. Slip Op. 00113, Second Dept 1-8-20**

EDUCATION-SCHOOL LAW, PERSONAL INJURY, EVIDENCE.

DEFENDANT SCHOOL DID NOT DEMONSTRATE IT DID NOT HAVE CONSTRUCTIVE NOTICE OF THE PROTRUDING SCREW WHICH LACERATED PLAINTIFF-STUDENT'S LEG; THE SCHOOL'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The Second Department determined defendant school did not demonstrate it lacked constructive notice of the protruding screw which allegedly lacerated plaintiff-student's leg as she walked by bleachers. Therefore the school's motion for summary judgment should not have been granted: "A property owner, or a party in possession or control of real property, has a duty to maintain the property in a reasonably safe condition ... . In a premises liability case, a defendant property owner, or a party in possession or control of real property, who moves for summary judgment has the initial burden of making a prima facie showing that it neither created the alleged dangerous condition nor had actual or constructive notice of its existence for a sufficient length of time to have discovered and remedied it ... . To meet its initial burden on the issue of lack of constructive notice, the moving party is required to offer some evidence as to when the accident site was last inspected or maintained prior to the plaintiff's accident ... . Here, in support of their motion, the defendants submitted, inter alia, the affidavit of the School District's Director of Facilities, Roald Broas, who averred, in relevant part, that the School District did not maintain the subject bleachers, but instead 'hire[d] subcontractors to perform inspections and maintenance of the bleachers.' Broas's conclusory affidavit—which failed to identify the subcontractor who performed the last inspection or maintenance on the bleachers, as well as when and how such inspection or maintenance was performed—was insufficient to establish, prima facie, the School District's lack of constructive notice of the alleged dangerous condition ...". ***Kelly v. Roy C. Ketcham High Sch.*, 2020 N.Y. Slip Op. 00111, Second Dept 1-8-20**

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

THE TIP OF PLAINTIFF THIRD-GRADER'S FINGER WAS SEVERED WHEN A DOOR IN THE SCHOOL BUILDING SLAMMED SHUT; THE DEFENDANT-SCHOOL'S (DEPARTMENT OF EDUCATION'S [DOE'S]) MOTION FOR SUMMARY JUDGMENT WAS PROPERLY GRANTED; THE DOOR WAS NOT DEFECTIVE, THE SCHOOL HAD NO NOTICE OF A PROBLEM WITH THE DOOR, SUPERVISION COULD NOT HAVE PREVENTED THE ACCIDENT, AND NYC IS NOT LIABLE FOR AN ACCIDENT ON SCHOOL (DOE) PROPERTY.

The Second Department determined defendant school (NYC Department of Education [DOE]) was entitled to summary judgment in this premises liability and negligent supervision action. Plaintiff third-grader alleged a door closed on his finger, severing the tip. The school demonstrated it had no notice of any problems with the door and that supervision could not have prevented the accident. The Second Department noted that the unsigned depositions were properly considered because they were submitted by the DOE and therefore were adopted as accurate, and further noted that, because the accident occurred on school property, the city (NYC) was not liable: "The unsigned deposition transcripts of the school's custodial engineer and the injured plaintiff's teacher, who testified on behalf of their employer, the DOE, were admissible under CPLR 3116(a) because the transcripts were submitted by the DOE and, therefore, were adopted as accurate ... . The deposition testimony of the building's custodial engineer established that he inspected the door at least twice per week before the accident. Moreover, the school principal provided evidence that a search of the school's records revealed no 'indication of any maintenance, repairs, work orders, or other issues reported' with respect to the door during the two-year time period prior to the accident. This evidence, together with evidence that the subject door was in regular use, including regular use by the infant plaintiff, was sufficient to establish, prima facie, that the door was not defective ... . When an accident occurs

in so short a span of time that even the most intense supervision could not have prevented it, lack of supervision is not the proximate cause of the injury ...". ***E.W. v. City of New York*, 2020 N.Y. Slip Op. 00175, Second Dept 1-8-20**

EMPLOYMENT LAW, LABOR LAW, CIVIL PROCEDURE, CORPORATION LAW.

PLAINTIFF STATED A CAUSE OF ACTION FOR VIOLATION OF LABOR LAW § 196-d AGAINST A CORPORATE OFFICER AND A SHAREHOLDER INDIVIDUALLY FOR FAILING TO REMIT SERVICE CHARGES AND GRATUITIES TO THEIR WAITSTAFF EMPLOYEES; REQUEST FOR AN EXTENSION TO SEEK CLASS CERTIFICATION SHOULD HAVE BEEN GRANTED; MOTION TO AMEND THE COMPLAINT SHOULD HAVE BEEN GRANTED; PLAINTIFF'S DISCOVERY DEMANDS WERE PALPABLY IMPROPER.

The Second Department, reversing (modifying) Supreme Court, determined: (1) plaintiff banquet server had stated a cause of action against the Cortses (an officer and a shareholder in the corporation, Falkirk Management, sued by plaintiff) individually alleging the Cortses were plaintiff's employers within the meaning of Labor Law § 196-d and did not remit service charges and gratuities to the waitstaff; (2) corporate shareholders and officers like the Cortes can be liable for corporate violations of the Labor Law; plaintiff's discovery demands were burdensome or immaterial and therefore improper (CPLR 3101(a)); (3) plaintiff's request for an extension to move for class certification should have been granted (CPLR 901(a); 902); and (4) plaintiff's motion to amend the complaint should have been granted: "... [T]he complaint alleged that the Cortses exercised control over the 'day-to-day operations' of '[the Country Club],' including 'authority regarding the pay practices' of Falkirk Management. * * * ... [T]he information sought by the plaintiff in her first set of interrogatories and first request for the production of documents was largely burdensome or immaterial, and consequently, palpably improper ... . * * * A plaintiff's need to conduct pre-class certification discovery to determine whether the prerequisites of a class action set forth in CPLR 901(a) can be satisfied constitutes good cause for the extension of the 60-day time period fixed by CPLR 902 ... . * * * [Re: the motion to amend the complaint:] the defendants alleged no surprise or prejudice ... . Moreover, the proposed amendments are not palpably insufficient or patently devoid of merit ...". ***Lomeli v. Falkirk Mgt. Corp.*, 2020 N.Y. Slip Op. 00115, Second Dept 1-8-20**

FAMILY LAW, CIVIL PROCEDURE.

NEITHER NEW YORK NOR PENNSYLVANIA IS THE HOME STATE OF THE CHILD IN THIS CUSTODY CASE; NEW YORK HAS JURISDICTION BECAUSE OF THE CHILD'S CONNECTIONS TO THE STATE; FAMILY COURT REVERSED.

The Second Department, reversing Family Court, determined neither New York nor Pennsylvania was the "home state" of the child under the statutes and, under the circumstances, New York has jurisdiction to make an initial custody determination: "... [A]lthough the child was living in New York for six consecutive months immediately before this proceeding was commenced, he was not living with a parent in this state for that time period, because the mother did not move to New York until January 2018. Moreover, the maternal great grandmother was not a 'person acting as a parent,' as that term is defined by statute, because she had not been awarded legal custody of the child by a court and did not claim a right to legal custody of the child ... . Pennsylvania did not have jurisdiction over the matter. Pennsylvania also did not qualify as the home state of the child, since the child had been living in New York for more than six months prior to the commencement of the proceeding (see Domestic Relations Law § 76[1][a] ...). Thus, the child did not have a home state at the time of commencement. In such a case, New York may exercise jurisdiction if '(i) the child . . . and at least one parent . . . have a significant connection with this state other than mere physical presence; and (ii) substantial evidence is available in this state concerning the child's care, protection, training, and personal relationships' (Domestic Relations Law § 76[1][b] ...). The record demonstrates the child's and the mother's significant connection with New York, as well as the availability of substantial evidence in this state, which is where the child and the mother continue to reside with the maternal great grandmother, and where the child is enrolled in school and is seen by a pediatrician ...". ***Matter of Defrank v. Wolf*, 2020 N.Y. Slip Op. 00126, Second Dept 1-8-20**

FAMILY LAW, CONTEMPT, APPEALS.

SENTENCE WHICH INCLUDED BOTH JAIL TIME AND PROBATION FOR VIOLATION OF A CHILD SUPPORT ORDER IS ILLEGAL; AN ILLEGAL SENTENCE IS APPEALABLE WITHOUT PRESERVATION OF THE ERROR.

The Second Department, reversing Family Court, determined the imposition of a jail sentence and probation for father's failure to pay support in violation of a court order was illegal. An illegal sentence is appealable without preservation of the error: "Although the father failed to preserve his challenge to the legality of his sentence, a challenge to an unlawful sentence is not subject to the preservation rule ... . Family Court Act § 454 expressly delineates the authority of the Family Court to impose either probation or a term of incarceration upon a finding of a willful violation of an order of support, not both (... Family Court Act § 454[3]). Thus, the Family Court was without authority to impose both a jail term and probation (see Family Court Act § 454[3] ...). Since the father completed his 90-day term of incarceration, that portion of his sentence imposing probation must be vacated ...". ***Matter of Lopez v. Wessin*, 2020 N.Y. Slip Op. 00137, Second Dept 1-8-20**

FAMILY LAW, CONTEMPT, ATTORNEYS.

FATHER DID NOT RECEIVE EFFECTIVE ASSISTANCE OF COUNSEL IN THIS CHILD SUPPORT PROCEEDING RESULTING IN HIS COMMITMENT TO THREE MONTHS IN JAIL; NEW HEARING ORDERED.

The Second Department, reversing Family Court, determined father did not receive effective assistance of counsel in this child support proceeding which committed father to three months in jail for violation of the child support order: "We agree with the father that he was deprived of the effective assistance of counsel at a hearing on the mother's petition for violation of an order of child support. In support proceedings such as this one, 'the appropriate standard to apply in evaluating a claim of ineffective assistance is the meaningful representation standard'... . Here, the father's defense at the hearing was that because of a back injury, he was unable to continue working as a mail carrier beginning in January 2018 and that, prior to obtaining a new position at the post office in March 2019, he searched for different work. Notably, despite being advised on multiple occasions that the father was required to provide a financial disclosure affidavit, tax forms, proof that he was diligently searching for employment, and certified medical records, counsel failed to procure the father's medical records or provide the court with any relevant financial documentation. The father's counsel also failed to call any witnesses to testify as to the effects of the father's back injury, subpoena his treating physician, or obtain a medical affidavit. The Family Court made specific reference to the lack of any credible medical testimony, financial disclosure affidavit, tax returns, or proof of a job search in its determination that the father failed to refute the mother's prima facie showing of willfulness. Counsel's failure to obtain relevant medical information or to procure financial and job search records that may have supported the father's contention constituted a failure to meaningfully represent the father, and he is entitled to a new hearing on the violation petition ...". ***Matter of Miller v. DiPalma*, 2020 N.Y. Slip Op. 00140, Second Dept 1-8-20**

FAMILY LAW, EVIDENCE.

EVIDENCE SUPPORTED DERIVATIVE NEGLECT FINDING.

The Second Department determined the evidence supported Family Court's derivative neglect finding: "... [T]he evidence adduced at the fact-finding hearing established that the mother's verbal abuse of Hannah due to an untreated mental illness demonstrated such an impaired level of parental judgment as to create a substantial risk of harm to Samuel. Hannah testified that the mother threw things at her and instructed her brothers, including Samuel, to hit her when the mother became frustrated with her. According to Hannah, after these proceedings were commenced, the mother told Hannah that Hannah would be placed in a mental institution and raped in the petitioner's custody, told Hannah that the mother would pretend Hannah was dead and burn Hannah's clothes, and threatened to kill Hannah once the case was over. The mother's conduct caused Hannah to fear the mother and her brothers. This evidence sufficiently supported the Family Court's conclusion that the mother derivatively neglected Samuel, as it demonstrated that the mother had such an impaired level of parental judgment as to create a substantial risk of harm to the well-being of Samuel ...". ***Matter of Samuel A. R. (Soya R.)*, 2020 N.Y. Slip Op. 00144, Second Dept 1-8-20**

FAMILY LAW, EVIDENCE.

ALTHOUGH THE CHILD WAS 17 AND HAD A LONG STANDING PARENT-CHILD RELATIONSHIP WITH MOTHER'S HUSBAND, THE DOCTRINE OF EQUITABLE ESTOPPEL SHOULD NOT HAVE BEEN APPLIED TO DISMISS MOTHER'S PETITION FOR GENETIC MARKER TESTING TO DETERMINE PATERNITY; THE CHILD WAS AWARE FROM A YOUNG AGE THAT THE PUTATIVE FATHER WAS THE CHILD'S BIOLOGICAL FATHER AND THERE WAS NO SHOWING THE PATERNITY PETITION WAS NOT IN THE CHILD'S BEST INTERESTS.

The Second Department, reversing Family Court, determined the doctrine of equitable estoppel should not have been applied to dismiss mother's petition for a genetic marker test to determined paternity. The petition was brought when the child was 17 and the child was aware at a young age that the putative father was in fact the child's biological father. The child had developed a parent-child relationship with mother's husband, who had known the child since the child was two. The equitable estoppel doctrine is applied solely in the child's best interests which were not shown to be detrimentally affected by the paternity petition: "As the party moving for dismissal of the petition, the putative father failed to establish that the child would suffer irreparable loss of status, destruction of his family image, or other harm to his physical or emotional well-being if a genetic marker test was ordered ... . Here, the record reflects that the child was told by his mother and the husband at a young age that the putative father was his biological father. 'Equitable estoppel is not used to deny the existence of a relationship, but rather to protect one' ... . Absent any indication that the child's relationship with the husband needed protection from a determination as to whether the putative father was the biological father, equitable estoppel was not available to the putative father as a remedy ... . Thus, under the circumstances, any lack in diligence by the mother in pursuing her earlier petitions was not a basis to estop her from seeking to establish the putative father's paternity ...". ***Matter of Denise R.-D. v. Julio R. P.*, 2020 N.Y. Slip Op. 00145, Second Dept 1-8-20**

FAMILY LAW, EVIDENCE.

SUPPORT MAGISTRATE HAD THE AUTHORITY TO VACATE MAINTENANCE ARREARS; THE FORMER HUSBAND DEMONSTRATED THE FORMER WIFE WAIVED HER RIGHT TO MAINTENANCE PAYMENTS 16 YEARS BEFORE THE PETITION WAS BROUGHT.

The Second Department, reversing Family Court, determined the former husband's (appellant's) objection to the support magistrate's order that appellant pay maintenance arrears should have been granted. The support magistrate had terminated the former wife's (respondent's) right to maintenance payments but held she did not have the authority to vacate the arrears. The Second Department held respondent had waiver her right to maintenance payments years before and appellant was not obligated to pay the arrears: "... [P]ursuant to Domestic Relations Law § 236(B)(9)(b), a prior judgment or order as to maintenance may be modified or annulled after the accrual of such arrears where 'the defaulting party shows good cause for failure to make an application for relief from the judgment or order directing payment prior to the accrual of such arrears' ... . The appellant demonstrated that in June 2001, the respondent waived her right to receive maintenance payments ... . 'A valid waiver requires no more than the voluntary and intentional abandonment of a known right which, but for the waiver, would have been enforceable' ... . 'It may arise by either an express agreement or by such conduct or failure to act as to evince an intent not to claim the purported advantage' ... . Here, the evidence adduced at the hearing demonstrated that after the appellant stopped paying maintenance beginning in June 2001 pursuant to the parties' alleged oral agreement, the respondent did not make any written demands or otherwise move to enforce the maintenance provision of the parties' judgment of divorce for a period of more than 16 years. Although a waiver 'is not created by negligence, oversight, or thoughtlessness, and cannot be inferred from mere silence' ... , the respondent's conduct evinced an intent by her to abandon her right to maintenance payments and supported the appellant's claim that she had orally agreed to terminate his maintenance obligation in June 2001 ...". ***Matter of Makris v. Makris*, 2020 N.Y. Slip Op. 00139, Second Dept 1-8-20**

FORECLOSURE, CIVIL PROCEDURE.

PLAINTIFF BANK'S PRIOR FORECLOSURE ACTION WAS DISMISSED FOR FAILURE TO DEMONSTRATE STANDING; RES JUDICATA DOES NOT PRECLUDE THE INSTANT FORECLOSURE ACTION BECAUSE THE PRIOR ACTION WAS NOT DISMISSED ON THE MERITS; COLLATERAL ESTOPPEL DOES NOT PRECLUDE THE INSTANT ACTION BECAUSE THE STANDING ISSUE IS NOT THE SAME.

The Second Department, reversing Supreme Court, determined the prior dismissal of plaintiff bank's foreclosure action for failure to demonstrate standing did not, under the doctrines of res judicata or collateral estoppel, preclude the present action. The prior dismissal was not on the merits and the standing issue in the current procedure is not the same as in the prior proceeding: "Here, as the prior action was dismissed for lack of standing, without reaching the merits of the foreclosure claim itself, the defendants failed to demonstrate that 'a judgment on the merits exists between the same parties involving the same subject matter' ... . 'To accord res judicata effect to the [judgment in the prior action] would bar a court from ever addressing the merits of plaintiff's mortgage foreclosure claim, even if plaintiff became able to demonstrate its standing to sue, and there is nothing in the record to suggest . . . [that there are] exceptional circumstances or an unreasonable neglect to prosecute that would warrant such an extreme sanction' ... . [T]he defendants failed to demonstrate that the issue of whether the plaintiff has standing under the circumstances of this action was identical to the issue adjudicated in the prior action ... . In the prior action, the plaintiff failed to establish that it had possession of the original endorsed note at the time that action was commenced, while in the present action, the issue is whether the plaintiff had possession of the original endorsed note at the time this action was commenced ...". ***HSBC Bank USA, N.A. v. Pantel*, 2020 N.Y. Slip Op. 00109, Second Dept 1-8-20**

FORECLOSURE, CIVIL PROCEDURE, TRUSTS AND ESTATES.

PARTY WHICH PURCHASED THE PROPERTY AFTER FORECLOSURE WAS COMMENCED WAS ENTITLED TO INTERVENE IN THE FORECLOSURE PROCEEDINGS BUT DID NOT HAVE STANDING TO ALLEGE PLAINTIFF BANK DID NOT COMPLY WITH NOTICE REQUIREMENTS; THE ESTATE OF THE ORIGINAL BORROWER IS NOT A NECESSARY PARTY.

The Second Department, reversing (modifying) Supreme Court, determined the party (appellant) which purchased the property after foreclosure was commenced should have been allowed to intervene in the foreclosure proceedings. The Second Department further determined the estate of the original borrower was not a necessary party, the appellant did not have standing to allege plaintiff bank's noncompliance with the notice requirements of Real Property Actions and Proceedings Law (RPAPL) 1304 and plaintiff's failure to serve a notice of default: "On September 10, 2015, the plaintiff commenced this action to foreclose a mortgage on premises owned by the defendant Shawn A. Carrington. Carrington failed to answer the complaint. On March 23, 2016, Carrington sold the premises to the appellant 1698 Management Corp. ... The appellant was entitled to intervene as of right pursuant to CPLR 1012(a) since it established that the representation of its interest by the parties would be inadequate, that the action involved the disposition of title to real property, and that it would be bound and adversely affected by a judgment of foreclosure and sale ... . Contrary to the court's determination, the appellant was not limited to continuing the action in Carrington's name pursuant to CPLR 1018. The fact that the appellant obtained its

interest in the premises after the action was commenced and the notice of pendency was filed does not definitively bar intervention ... , nor does the fact that Carrington defaulted in answering the complaint ... . Furthermore, under the circumstances of this case, the appellant's motion, made less than five months after it purchased the premises, and before an order of reference was issued, was timely ...". ***US Bank N.A. v. Carrington*, 2020 N.Y. Slip Op. 00173, Second Dept 1-8-20**

FORECLOSURE, EVIDENCE.

PLAINTIFF BANK DID NOT PRESENT SUFFICIENT EVIDENCE OF STANDING TO BRING THE FORECLOSURE ACTION; BANK'S MOTION FOR SUMMARY JUDGMENT IN THIS FORECLOSURE ACTION SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined plaintiff bank's motion for summary judgment in this foreclosure action should not have been granted. Plaintiff did not demonstrate it had standing to bring the action: "... [T]he plaintiff failed to meet its prima facie burden of establishing that it had standing to commence the action. In support of its motion, the plaintiff relied on the affidavit of Melissa Gallio, the Vice President of Loan Documentation for the plaintiff. Gallio stated that her knowledge of this case was based upon her review of 'the books and records' maintained by the plaintiff, and asserted that the plaintiff was 'in possession of the Note and Mortgage' '[a]s of January 10, 2007.' However, Gallio's assertions as to the contents of the records were inadmissible hearsay to the extent that the records she purported to describe were not submitted with her affidavit ... . While a witness may read into the record from the contents of a document which has been admitted into evidence ... , a witness's description of a document not admitted into evidence is hearsay ...". ***Wells Fargo Bank, N.A. v. Springer*, 2020 N.Y. Slip Op. 00176, Second Dept 1-8-20**

FORECLOSURE, EVIDENCE.

THE BANK DID NOT PROVE IT HAD STANDING TO BRING THE FORECLOSURE ACTION.

The Second Department, reversing Supreme Court, determined plaintiff bank's motion for summary judgment in this foreclosure action should not have been granted. Plaintiff bank did not submit sufficient proof of standing to bring the action: "Where, as here, a plaintiff's standing to commence a foreclosure action is placed in issue by defendant, it is incumbent upon the plaintiff to prove its standing to be entitled to relief ... . A plaintiff establishes its standing in a mortgage foreclosure action by demonstrating that, when the action was commenced, it was either the holder or assignee of the underlying note ... . Either a written assignment of the underlying note or the physical delivery of the note prior to the commencement of the foreclosure action is sufficient to transfer the obligation, and the mortgage passes with the debt as an inseparable incident ... . Here, the plaintiff failed to meet its burden to establish, prima facie, its entitlement to summary judgment because the affidavit submitted in support of the motion was insufficient to establish standing ...". ***Deutsche Bank Natl. Trust Co. v. Conrado*, 2020 N.Y. Slip Op. 00103, Second Dept 1-8-20**

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

THE BANK DID NOT PROVE STANDING, DEFENDANT'S DEFAULT, OR COMPLIANCE WITH THE NOTICE REQUIREMENTS OF RPAPL 1304; CRITERIA FOR PROVING EACH ISSUE EXPLAINED IN SOME DETAIL.

The Second Department, reversing Supreme Court, determined plaintiff bank's motion for summary judgment should not have been granted because plaintiff's standing, defendants' default, and plaintiff's compliance with the notice provisions of RPAPL 1304 were not proven. The Second Department explained the proof requirements for each: "... [T]he plaintiff failed to show that the note was properly endorsed and thus validly transferred to it ... . * * * ... [T]he plaintiff also failed to submit admissible evidence of the defendants' default in making the mortgage payments due under the terms of the note and mortgage ... . * * * The plaintiff also failed to proffer evidence establishing its compliance with the notice requirements of RPAPL 1304." ***U.S. Bank N.A. v. Moulton*, 2020 N.Y. Slip Op. 00171, Second Dept 1-8-20**

LABOR LAW-CONSTRUCTION LAW, CIVIL PROCEDURE, PERSONAL INJURY.

JURY CONFUSION AND THE INCONSISTENT VERDICT IN THIS LABOR LAW § 241(6) ACTION REQUIRED A NEW TRIAL; EVEN A WORKER AUTHORIZED TO BE WITHIN THE RANGE OF AN EXCAVATOR BUCKET CAN CLAIM THE PROTECTION OF THE INDUSTRIAL CODE PROVISION WHICH PROHIBITS WORK IN AN AREA WHERE A WORKER MAY BE STRUCK BY EXCAVATION EQUIPMENT.

The Second Department, reversing Supreme Court, determined the inconsistent verdict in this Labor Law § 241(6) action required a new trial. The trial court had dismissed the action. The Second Department noted that even though plaintiff was a member of an excavator crew and therefore was authorized to be within range of a moving excavator bucket he still claim the protections provided by 12 N.Y.C.R.R. § 23-9.5(k) which provides "[p]ersons shall not be . . . permitted to work in any area where they may be struck . . . by any excavation equipment." Plaintiff's hand was crushed by an excavator bucket: "The jury returned a verdict finding that the City defendants violated Industrial Code (12 NYCRR) 23-4.2(k), but that the violation was not a substantial factor in causing the accident. Although the instructions on the verdict sheet directed the jury to end its deliberations if it found that the violation of Industrial Code (12 NYCRR) 23-4.2(k) was not a substantial factor in causing the accident, the jury further found that the injured plaintiff was negligent and that his negligence was a substantial

factor in causing the accident. The jury then proceeded to apportion fault 25% to the City defendants and 75% to the injured plaintiff. After the Supreme Court instructed the jurors to reconsider its verdict, the jury returned a second verdict which was identical to the first verdict, except that the jurors did not answer the questions as to the injured plaintiff's negligence and apportionment of fault. ... 'When a jury's verdict is internally inconsistent, the trial court must direct either reconsideration by the jury or a new trial' (...see CPLR 4111[c] ...). 'On reconsideration, the jury [is] free to substantively alter its original statement so as to conform to its real intention, and [is] not bound by the terms of its original verdict inasmuch as that verdict was not entered by the court' ... . 'Even after reconsideration by the jury, a trial court has discretion to set aside a verdict which is clearly the product of substantial confusion among the jurors' . 'A new trial should be granted where . . . the record demonstrates ... substantial confusion among the jurors in reaching a verdict' ...". ***Torres v. City of New York*, 2020 N.Y. Slip Op. 00170, Second Dept 1-8-20**

PERSONAL INJURY.

WOOD WHICH HAD FALLEN TO THE GROUND FROM A SPLIT RAIL FENCE IS AN OPEN AND OBVIOUS CONDITION WHICH IS NOT ACTIONABLE IN THIS SLIP AND FALL CASE.

The Second Department determined wood from a split rail fence which had fallen to the ground was open and obvious and therefore not actionable in this slip and fall case: "A landowner has a duty to maintain its premises in a reasonably safe condition . There is, however, no duty to protect or warn against conditions that are open... and obvious and not inherently dangerous ... . Here, the defendants established their entitlement to judgment as a matter of law by demonstrating, prima facie, that the wood on the ground was open and obvious and not inherently dangerous ...". ***Swinney v. Nassau County*, 2020 N.Y. Slip Op. 00169, Second Dept 1-8-20**

PERSONAL INJURY, CONTRACT LAW.

DEFENDANT CLEANING SERVICE CONTRACTOR SUBMITTED EVIDENCE WHICH CREATED A QUESTION OF FACT WHETHER, PURSUANT TO THE *ESPINAL* CRITERIA, IT LAUNCHED AN INSTRUMENT OF HARM WHICH CAUSED PLAINTIFF'S SLIP AND FALL; DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined defendant cleaning service contractor's motion for summary judgment in this slip and fall case should not have been granted. Plaintiff alleged defendant was liable under Espinal for launching or creating an instrument of harm by mopping the floor without placing warning signs in the area where she fell: "Generally, a contractual obligation, standing alone, will not give rise to tort liability in favor of a third party (see Espinal v. Melville Snow Contrs., 98 NY2d 136, 140). However, there are three exceptions to the general rule ... . Here, the plaintiff alleged only one of the Espinal exceptions: that the defendant created or launched an instrument of harm. Thus, in support of its motion for summary judgment dismissing the complaint, the defendant was required to establish, prima facie, that it did not create or launch an instrument of harm ... . [T]he defendant's submissions demonstrated the existence of triable issues of fact regarding the location of "wet floor" signs and whether the wet floor or the signs were readily observable by a reasonable use of the plaintiff's senses as she entered the area through a closed door ... . Thus, the defendant failed to establish, prima facie, that it did not create the condition that caused the plaintiff to fall or that it provided adequate notice of the alleged hazardous condition ...". ***Ramsey v. Temco Serv. Indus., Inc.*, 2020 N.Y. Slip Op. 00166, Second Dept 1-8-20**

PERSONAL INJURY, LANDLORD-TENANT, MUNICIPAL LAW.

TENANT IN THE BUILDING ABUTTING A DEFECTIVE SIDEWALK WAS NOT LIABLE FOR A SLIP AND FALL; RELEVANT LAW CONCISELY AND COMPLETELY EXPLAINED.

The Second Department, reversing Supreme Court, determined defendant, a tenant in the building abutting the sidewalk, could not be held liable for a sidewalk defect which allegedly caused plaintiff's slip and fall. The Second Department concisely but completely laid out the law on the issues: "Pursuant to Administrative Code of the City of New York § 7-210(a), 'the owner of real property abutting any sidewalk" has a duty "to maintain such sidewalk in a reasonably safe condition.' 'Notwithstanding any other provision of law, the owner of real property abutting any]sidewalk . . . shall be liable for any injury to property or personal injury, including death, proximately caused by the failure of such owner to maintain such sidewalk in a reasonably safe condition' ... . 'As a general rule, the provisions of a lease obligating a tenant to repair the sidewalk do not impose on the tenant a duty to a third party' ... . 'However, where a lease agreement is so comprehensive and exclusive as to sidewalk maintenance as to entirely displace the landowner's duty to maintain the sidewalk, the tenant may be liable to a third party' ... . Here, the defendant established its prima facie entitlement to judgment as a matter of law by demonstrating that it did not create the alleged defect, make special use of the sidewalk, violate any applicable statute, or have a contractual duty to maintain the sidewalk where the accident occurred ...". ***Leitch-Henry v. Doe Fund, Inc.*, 2020 N.Y. Slip Op. 00112, Second Dept 1-8-20**

THIRD DEPARTMENT

ENVIRONMENTAL LAW, TAX LAW, ADMINISTRATIVE LAW.

ALTHOUGH A HEAT PUMP SYSTEM DRAWS HEAT FROM SOLAR ENERGY STORED IN THE GROUND, IT IS NOT A QUALIFIED SOLAR ENERGY SYSTEM WITHIN THE MEANING OF THE TAX LAW FOR PURPOSES OF ELIGIBILITY FOR A $5000 TAX CREDIT.

The Third Department determined that a heat pump system, although it draws heat from solar energy stored in the ground, is not a qualified solar energy system within the meaning of Tax Law § 606(g-1). Therefore, as the Tax Tribunal found, petitioners were not entitled to a $5000 tax credit for the heat pump system: "... [S]olar energy system equipment is defined as 'an arrangement or combination of components utilizing solar radiation, which, when installed in a residence, produces energy designed to provide heating, cooling, hot water or electricity for use in such residence' ... . Here, the Tribunal limited the applicability of the tax credit to those systems that 'directly' utilize solar radiation, an interpretation which petitioners assert is too narrow, ... [W]e do not agree with petitioners' assertion that the plain language of the statute unambiguously includes ground source heat pump systems simply because they utilize solar energy ... . As the record reveals, heat harvested by a ground source heat pump system is not, strictly speaking, "solar radiation" since it is being radiated from the ground after being absorbed by the crust. Thus, although a broad reading of the phrase 'utilize[es] solar radiation' could certainly include the system at issue, an interpretation excluding indirect utilization of solar energy is not unreasonable. Further, we find that the fact that the system removes heat from indoor air during the warm summer months and moves it to the ground, thereby not utilizing solar radiation, presents another reason to exclude the system from the purview of the tax credit ...". ***Matter of Suozzi v. Tax Appeals Trib. of the State of N.Y.*, 2020 N.Y. Slip Op. 00193, Third Dept 1-9-20**

MUNICIPAL LAW, CONTRACT LAW, ENVIRONMENTAL LAW.

WASTEWATER TREATMENT COMPANY'S CONTRACT WITH THE MUNICIPALITY WAS NOT VOID; THE CONTRACT WAS IN THE PUBLIC INTEREST AND THERE WAS NO PROOF THE BID SPECIFICATIONS WERE IMPROPERLY DEVELOPED WITH THE COMPANY OR DESIGNED TO ENSURE THE COMPANY RECEIVED THE CONTRACT.

The Third Department, over a partial dissent, determined the plaintiff municipality breached its contract with defendant sewage-treatment company. The plaintiff municipality argued that, although there was competitive bidding under General Municipal Law §§ 103 and 120-w, the contract was void because the bid specifications were improperly developed with the defendant and were designed to ensure defendant got the contract, but that argument was rejected by both Supreme Court and the Third Department: "... [P]laintiff provided nothing to contradict the proof that [use of defendant's technology] served the public interest because it was safer, more reliable and less likely to generate troublesome odors than other technologies. [D]efendant produced an affidavit from plaintiff's then-mayor, who stated that the options for sludge treatment had been thoroughly investigated and that the type of equipment offered by defendant would further the public interest by stabilizing plaintiff's sludge disposal costs, providing an environmentally sensitive means for that disposal and decreasing odors emanating from the WWTF [wastewater treatment facility] that might affect ongoing waterfront development. The then-mayor further averred that the bid documents were prepared by municipal employees and that the specifications included nothing of peculiar benefit to defendant. ... Defendant's president, a mechanical engineer, confirmed that point and averred that '[n]early any sludge drying pelletizing system on the market' could have satisfied the bid specifications. Plaintiff accordingly failed to meet its burden of showing that the 2004 agreement was void, and defendant demonstrated its entitlement to summary judgment on claims relating to that agreement's validity ...". ***City of Kingston v. Aslan Envtl. Servs., LLC*, 2020 N.Y. Slip Op. 00192, Third Dept 1-9-20**

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