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FIRST DEPARTMENT

CRIMINAL LAW, IMMIGRATION LAW, ATTORNEYS.

DEFENDANT WAS TOLD BY DEFENSE COUNSEL WHEN HE PLED GUILTY IN 2007 THAT IF HE STAYED OUT OF TROUBLE WHILE ON PROBATION HE WOULD NOT BE DEPORTED, HOWEVER DEPORTATION WAS MANDATORY; DEFENDANT WAS ENTITLED TO A HEARING ON HIS MOTION TO VACATE HIS CONVICTION BASED UPON INEFFECTIVE ASSISTANCE OF COUNSEL; CRITERIA FOR DETERMINING WHETHER THERE WAS A REASONABLE PROBABILITY DEFENDANT WOULD HAVE GONE TO TRIAL, INCLUDING HIS UNDISPUTED STRONG DESIRE TO STAY IN THE US, EXPLAINED IN SOME DEPTH.

The First Department, in a full-fledged opinion by Justice Renwick, reversing Supreme Court, determined defendant (Martinez) was entitled to a hearing on his CPL § 440.10 motion to vacate his 2007 judgment of conviction. At the time defendant pled guilty the court warned him there could be immigration consequences, but defense counsel told him he wouldn't have to worry about deportation if he stayed out of trouble while on probation. In fact, however, deportation was mandatory. Supreme Court denied the motion based in part on defendant's motivation for it, i.e., the expansion of his taxi business in Massachusetts. The First Department noted that plaintiff's current motivation for the motion to vacate is irrelevant. The matter was sent back for a hearing in front of a different judge: "In the context of a guilty plea, the ultimate question of prejudice is whether there was a reasonable probability that a reasonable person in a defendant's circumstances would have gone to trial if given constitutionally adequate advice ... . A defendant must convince the court that a decision to reject the plea bargain would have been rational ... . In that regard, appropriate factors to be weighed include, among others, evidence of defendant's incentive, at the time of his plea, to remain in the United States rather than his native country; his respective family and employment ties at the time of his plea, to the United States, as compared to his country of origin; the strength of the People's case; and defendant's sentencing exposure ... . In answering the prejudice question, judges should be cognizant that a noncitizen defendant confronts a very different calculus than confronts a United States citizen ... . For a noncitizen defendant, 'preserving [his] right to remain in the United States may be more important to [him] than any jail sentence'... . Thus, a determination of whether it would be rational for a defendant to reject a plea offer 'must take into account the particular circumstances informing the defendant's desire to remain in the United States' ... . Significantly, on the record before this Court, there is reason to believe that Martinez would have given paramount importance to avoiding deportation, if he had known that it was more than a mere possibility, but was an unavoidable consequence of his plea to an aggravated felony. Indeed, evidence regarding Martinez's background completely supports his current assertion that his main focus has been always to remain in the United States. This much is undisputed: his long history in the United States, his efforts to become a citizen, his family circumstances, and his gainful employment in Massachusetts, all signal his strong connection to, and desire to remain in, the United States ...". ***People v. Martinez*, 2020 N.Y. Slip Op. 00252, First Dept 1-14-20**

EMPLOYMENT LAW, CONTRACT LAW, ATTORNEYS.

BECAUSE THE DEFENDANT EMPLOYER SUFFERED NO DAMAGE AS A RESULT OF PLAINTIFF'S BREACH OF THE CONFIDENTIALITY PROVISION OF THE EMPLOYMENT CONTRACT, DEFENDANT EMPLOYER WAS NOT ENTITLED TO ENFORCEMENT OF THE LIQUIDATED DAMAGES PROVISION IN THE CONTRACT; PLAINTIFF'S BREACH-OF-AN-ORAL-CONTRACT CAUSE OF ACTION SHOULD NOT HAVE BEEN DISMISSED BECAUSE PLAINTIFF SUBMITTED EVIDENCE OF PARTIAL PERFORMANCE BY DEFENDANT AND PLAINTIFF'S RELIANCE ON THE ORAL MODIFICATION.

The First Department, reversing (modifying) Supreme Court, determined that, although the law firm defendants demonstrated plaintiff attorney violated the confidentiality provision of her employment contract, the law firm was not entitled to enforcement of the liquidated damages provision of the contract because the law firm did not demonstrate it suffered any damage as a result of plaintiff's breach. In addition, plaintiff's cause of action alleging the law firm defendants violated an oral agreement promising her a five percent bonus related to attorney's fees paid for cases in which she was involved should not have been dismissed because she presented some evidence she had in fact been paid several such bonuses: " 'Liquidated damages constitute the compensation which, the parties have agreed, should be paid in order to satisfy any loss or injury flowing from a breach of their contract' ... . 'A contractual provision fixing damages in the event of breach will be sustained

if the amount liquidated bears a reasonable proportion to the probable loss and the amount of actual loss is incapable or difficult of precise estimation. If, however, the amount fixed is plainly or grossly disproportionate to the probable loss, the provision calls for a penalty and will not be enforced' ... . Although the party challenging the liquidated damages provision has the burden to prove that the liquidated damages are, in fact, an unenforceable penalty ... , the party seeking to enforce the provision must necessarily have been damaged in order for the provision to apply ... . Here, defendants did not identify to the motion court any damages that they sustained as a result of plaintiff's breach of the agreement. ... The law firm defendants met their burden on summary judgment by providing plaintiff's employment agreement which did not include any reference to a 5% nondiscretionary bonus, and which included a general merger clause requiring any modification to be in writing. However, plaintiff raised a triable issue of fact as to this claim. ... [T]he Court of Appeals has held that while generally an oral modification may not be enforced in light of a merger clause, an oral modification may be enforced if there is partial performance that is 'unequivocally referable to the oral modification' or if one party 'induced another's significant and substantial reliance upon an oral modification.' " ***Rubin v. Napoli Bern Ripka Shkolnik, LLP*, 2020 N.Y. Slip Op. 00250, First Dept 1-14-20**

EMPLOYMENT LAW, CONTRACT LAW, CIVIL PROCEDURE, FIDUCIARY DUTY, EVIDENCE.

SANCTIONS IMPOSED FOR A DELAYED RESPONSE TO DISCOVERY DEMANDS WERE TOO SEVERE, EFFECTIVELY PRECLUDING PROOF OF COUNTERCLAIMS CENTRAL TO THE DEFENSE; NEW TRIAL ORDERED.

The First Department, reversing the verdict in favor of plaintiff employees, determined the sanctions imposed upon the employer (appellants) for a delayed response to discovery demands were too severe and ordered a new trial. The plaintiffs alleged appellants breached oral employment contracts. The appellants in their counterclaims alleged plaintiffs breached their fiduciary duty by violating Securities and Exchange Commission (SEC) regulations and destroying and replacing handwritten notes about conversations with one of the appellants. The sanctions effectively prevented the appellants from demonstrating plaintiffs' violation of SEC violations and destruction of evidence: "Pursuant to CPLR 3126, if a party 'refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed . . . , the court may make such orders with regard to the failure or refusal as are just.' Although '[i]t is within the trial court's discretion to determine the nature and degree of the penalty,' '[t]he sanction should be commensurate with the particular disobedience it is designed to punish, and go no further than that' ... . Further, 'the drastic remedy of striking a party's pleading . . . for failure to comply with a discovery order is appropriate only where [it is] conclusively demonstrate[d] that the non-disclosure was willful, contumacious or due to bad faith' ... . Although the court here did not strike a pleading, its ruling could fairly be viewed as having done so, since the precluded evidence was critical to the fiduciary duty claims. Moreover, the court's drastic sanctions were disproportionate to the alleged discovery malfeasance. It is unclear why a short continuance to give plaintiffs time to review the newly-produced documents would not have been a viable option, or why further curative instructions would not have sufficed. The record as a whole does not support a finding of willfulness or bad faith so as to justify the severe sanctions imposed ... . No basis exists to indicate that this was anything other than a disagreement over the scope of discovery. Indeed, the court at trial stated that the alleged discovery omissions 'appear[] not to have been in bad faith.' " ***Beach v. Touradji Capital Mgt., LP*, 2020 N.Y. Slip Op. 00230, First Dept 1-14-20**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

QUESTION OF FACT WHETHER BOARDS OR MASONITE WERE SCATTERED DEBRIS OR DELIBERATELY PLACED AS AN INTEGRAL PART OF THE RENOVATION WORK; PLAINTIFF'S SUMMARY JUDGMENT MOTION ON HIS LABOR § 241(6) CAUSE OF SHOULD NOT HAVE BEEN GRANTED.

The First Department, reversing (modifying) Supreme Court, determined there was a question of fact whether boards/Masonite on the floor of a passageway were placed there as an integral part of the renovation project or were scattered debris constituting a tripping hazard in violation of the Industrial Code (12 N.Y.C.R.R. § 23-1.7(e)(1) or (e)(2)). The court held there was a question of fact on that issue and plaintiff's motion for summary judgment on his Labor Law § 241(6) cause of action should not have been granted. The court noted that its decision to the contrary in *Singh v. 1221 Holdings, LLC* (127 A.D.3d 607 (1st Dep't 2015)) should no longer be followed: "Plaintiff claims that the boards were a tripping hazard and a violation of Industrial Code § 23-1.7 (e)(1) because defendants failed to provide him with a passageway free of obstructions. Defendants argue, however, that there is no liability because the boards were Masonite, not scattered materials or debris, and because they were purposefully laid out upon the floor each day, this being "integral to" the renovation work being performed. At the outset, these arguments require us to address whether the 'integral-to-the work' defense raised by defendants, but rejected by Supreme Court, equally applies to Industrial Code § 23-1.7(e)(1), as well as § 23-1.7(e)(2). We hold that it does. * * * [The facts] raise a triable issue of fact regarding whether the boards were a 'protective covering [that] had been purposefully installed on the floor as an integral part of the renovation project' ... . [S]ummary judgment in favor of plaintiff was improper because it was based on the mistaken supposition that the 'integral-to-work' defense means integral to plaintiff's specific task. The defense applies to things and conditions that are an integral part of the construction, not just to the specific task a plaintiff may be performing at the time of the accident ...". ***Krzyzanowski v. City of New York*, 2020 N.Y. Slip Op. 00232, First Dept 1-14-20**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

PLAINTIFF WAS ON A LADDER WHEN HE RECEIVED AN ELECTRIC SHOCK; THERE WAS NO SHOWING THE LADDER WAS DEFECTIVE AND PLAINTIFF WAS NOT ENTITLED TO SUMMARY JUDGMENT ON HIS LABOR LAW § 240 (1) CAUSE OF ACTION; HOWEVER PLAINTIFF WAS ENTITLED TO SUMMARY JUDGMENT ON HIS LABOR LAW § 241(6) CAUSE OF ACTION AGAINST THE DEFENDANT RESPONSIBLE FOR TURNING OFF THE ELECTRICITY.

The First Department determined questions of fact precluded summary judgment on his Labor Law § 240(1) cause of action and he was entitled to summary judgment on his Labor Law § 241(6) cause of action. Plaintiff on a ladder when he received an electric shock. There was no showing the ladder was defective. ADCO, the company which was responsible for shutting off the was liable pursuant to Labor Law § 241(6): "Plaintiff seeks damages for personal injuries he sustained in a fall from a ladder while installing duct work on a building renovation project after either he received a shock or an arc fault occurred when he came into contact with a live electrical junction box. Summary judgment in plaintiff's favor as to liability on his Labor Law § 240(1) claim is precluded by an issue of fact as to whether the ladder, which was properly set up, provided plaintiff with proper protection ... ; plaintiff had no problem with the ladder prior to the electric shock and questions of fact exist whether a scaffold could have prevented this accident. Plaintiff is entitled to summary judgment on his Labor Law § 241(6) claim predicated on violations of Industrial Code (12 NYCRR) § 23-1.13(b)(2), (3) and (4) against ADCO, the electrical subcontractor, which failed to warn of and de-energize or 'safe off' the junction box so that a worker would not come into contact with it. Because ADCO had been delegated authority to control the electrical work that gave rise to plaintiff's injury, it was a statutory agent subject to liability under the statute ...". ***Higgins v. TST 375 Hudson, L.L.C.*, 2020 N.Y. Slip Op. 00358, First Dept 1-14-20**

LANDLORD-TENANT, MUNICIPAL LAW, ADMINISTRATIVE LAW.

NYC LOFT BOARD SHOULD NOT HAVE REJECTED TENANTS' WITHDRAWAL OF THE LOFT LAW CONVERSION APPLICATION BECAUSE THERE WAS AN ALTERNATIVE WAY TO OBTAIN RENT REGULATION COVERAGE OUTSIDE THE LOFT LAW'S STATUTORY SCHEME.

The First Department, in a full-fledged opinion by Justice Renwick, determined the tenants' request to withdraw the conversion application under the Loft Law should have been granted by the NYC Loft Board: "This article 78 proceeding stems from an application for the legal conversion of certain lofts in New York City from commercial use to residential use pursuant to Article 7-C of the Multiple Dwelling Law (§ 283), commonly known as the Loft Law. Where owners register covered buildings and comply with the Loft Law's requirements, the Loft Law will deem a building an 'interim multiple dwelling (IMD)' (Multiple Dwelling Law § 284[1]), which would allow the owner to collect rent from residential occupants, despite the lack of a residential certificate of occupancy (Multiple Dwelling Law §§ 283, 285, 301). The Loft Law requires landlords to bring converted residences up to code and prevents them from charging tenants for improvements until the issuance of a certificate of occupancy (Multiple Dwelling Law § 284(1)). The Loft Law is administered by the New York City Loft Board (Multiple Dwelling Law § 282). * * * Here, the petitioner tenant claims, and the Loft Board does not dispute, that there is a separate and independent track for the tenants to obtain rent regulation coverage outside the Loft Law's statutory scheme. It is undisputed that the four residential occupancies are legal under New York City Zoning applicable to the area where the subject building is located. While the Rent Stabilization Law usually requires buildings to have six or more residential units, adjacent buildings with common facilities, ownership, and management are treated as one integrated unit, thereby constituting a horizontal multiple dwelling for purposes of rent stabilization ... . In this case, the subject building is a rear building that adjoins a front building that is already subject to rent stabilization. Given that the buildings share common ownership — a sprinkler system, a plumbing system, and their respective electric meters and mailboxes are at the same location — the rear building appears to be part of a horizontal multiple dwelling that would be subject to rent stabilization once the residential certificate of occupancy is procured by the owner." ***Matter of Callen v. New York City Loft Bd.*, 2020 N.Y. Slip Op. 00368, First Dept 1-16-20**

SECOND DEPARTMENT

CIVIL PROCEDURE, FORECLOSURE.

DEFENDANT'S ATTORNEY'S AFFIRMATION STATING HE NEVER RECEIVED THE PLAINTIFF'S SUMMARY JUDGMENT MOTION WAS NOT REBUTTED BY PLAINTIFF; THE COURT NEVER HAD JURISDICTION OVER THE MOTION AND THE RESULTING JUDGMENT WAS A NULLITY.

The Second Department, reversing Supreme Court, determined that defendant's (White's) attorney's affirmation stating he never received the bank's summary judgment motion for a judgment of foreclosure deprived to court of jurisdiction and rendered the judgment a nullity: " 'The failure to give a party proper notice of a motion deprives the court of jurisdiction to entertain the motion and renders the resulting order void' ... . White's opposition to the plaintiff's motion, inter alia, for a judgment of foreclosure and sale included his attorney's affirmation, wherein his attorney stated that the attorney never received the summary judgment motion. In reply, the plaintiff did not submit an affidavit of service or other proof of

service demonstrating that the summary judgment motion had been served on White's counsel. The plaintiff's assertions are insufficient to raise a presumption that White was served with the summary judgment motion ... . At the time White's attorney brought to the Supreme Court's attention that the attorney had not received the motion for summary judgment and, in response, the plaintiff failed to submit any proof of service of the motion, the court was presented with evidence that the order ... , was a nullity ... . Under such circumstances, there was never a default in opposing the motion for summary judgment, and thus, there was no need for White to demonstrate a reasonable excuse or a potentially meritorious opposition to the motion ... . Accordingly, the Supreme Court should have denied the plaintiff's motion, inter alia, for a judgment of foreclosure and sale and vacated so much of the order ... as granted the summary judgment motion ...". ***MTGLQ Invs., L.P. v. White*, 2020 N.Y. Slip Op. 00269, Second Dept 1-15-20**

CRIMINAL LAW, EVIDENCE.

IN PERHAPS THE FIRST APPELLATE-JUSTICE REVIEW OF A PROTECTIVE ORDER UNDER THE NEW PROVISIONS OF CRIMINAL PROCEDURE LAW § 245.70, JUSTICE SCHEINKMAN FOUND THE PEOPLE DID NOT SUBMIT SUFFICIENT EVIDENCE TO JUSTIFY WITHHOLDING FROM THE DEFENSE THE IDENTITIES OF WITNESSES IN THIS RAPE/MURDER CASE.

The Second Department, in one of the first decisions under the new discovery provisions of the Criminal Procedure Law, after an expedited review by Justice Scheinkman pursuant to CPL § 245.70, reversing Supreme Court, determined the protective order prohibiting defense access to the names, addresses and other identifying information of witnesses in this rape/murder case must be vacated without prejudice: "CPL 245.70(1) provides that, upon a showing of good cause by either party, the court may order that disclosure and inspection be denied, restricted, conditioned, or deferred, or make such order as appropriate. The court is now specifically permitted to condition discovery on making the information available only to counsel for the defendant (see CPL 245.70[1]). Alternatively, the court is permitted to order defense counsel, or persons employed by the attorney or appointed by the court to assist in the defense, not to disclose physical copies of discoverable documents to the defendant or anyone else, subject to the defendant being able to access redacted copies at a supervised location ... . Should the court restrict access to discovery by the defendant personally, the court is required to inform the defendant on the record that counsel is not permitted by law to disclose the material or information to the defendant ... . * * * This case is one of the first under this new review procedure. The threshold question is what standard is the intermediate appellate justice to apply in performing the expedited review. The statute is silent on that subject. This Justice accepts the proposition that where a pure question of law is concerned, the reviewing justice decides the question de novo ... . Where, however, the issue involves balancing the defendant's interest in obtaining information for defense purposes against concerns for witness safety and protection, the question is appropriately framed as whether the determination made by the trial court was a provident exercise of discretion ... . [T]he People's affirmation was unaccompanied by any affidavit from anyone with personal or direct knowledge of the relevant circumstances. ... [W]hile alleging that a witness had been approached in person and by use of social media by "associates" of the defendant, the People did not set forth the name of any such associate, the relationship between the defendant and any associate, the date or approximate date of the alleged improper approach, or even a general description of the incident. While the use of social media is alleged, no screen shot or other depiction of the communication was provided. Further, the four corners of the affirmation do not contain the identity of the witnesses subject to the contact that caused concern. In short, the sealed affirmation submitted to justify the issuance of the protective order is vague, speculative, and conclusory. Under these circumstances, the affirmation was legally insufficient to support the granting of the relief sought." ***People v. Beaton*, 2020 N.Y. Slip Op. 00372, Second Dept 1-17-20**

CRIMINAL LAW, EVIDENCE, APPEALS.

THE IDENTIFICATION EVIDENCE WAS TOO WEAK TO PROVIDE PROBABLE CAUSE FOR ARREST, DEFENDANT'S STATEMENTS SHOULD HAVE BEEN SUPPRESSED; THE APPELLATE COURT CAN NOT CONSIDER THE PEOPLE'S ARGUMENT THAT DEFENDANT WAS NOT IN CUSTODY WHEN HE MADE THE STATEMENTS BECAUSE THE ISSUE WAS NOT RULED ON BELOW.

The Second Department, reversing defendant's murder conviction and ordering a new trial, determined the identification evidence was too weak to constitute probable cause for defendant's arrest. Therefore defendant's motion to suppress his statements should have been granted. The court noted that the People's argument that defendant was not in custody when the statements were made could not be considered because the issue was not ruled upon by the trial court: "Contrary to the Supreme Court's finding, no evidence was presented at the hearing that the defendant was identified "from a photographic image taken from one of the videos." Detective John Kenney testified that a witness provided a description of the person she had seen holding a gun after shots were fired, including that the person was riding a bicycle. Kenney indicated that the witness was shown a photograph taken from a video recorded outside a restaurant near the scene of the crime, and that the witness identified the person depicted in the photograph as the individual she had seen holding a gun. Kenney also testified that another witness identified the person depicted in that photograph as the individual he had seen riding a bicycle after hearing the gunshots. However, no testimony was elicited that the person depicted in the photograph was identified as the

defendant. Further, Detective Patrick Henn testified that another video was recorded across the street from the defendant's home 'just before the crime,' showing a person who 'appeared to be the defendant' leaving his home several blocks away from the scene of the crime on a bicycle. However, no testimony was elicited that the witnesses were shown a photograph taken from the video of the defendant's home, let alone that the witnesses identified the person depicted in that video as the person they saw holding a gun or riding a bicycle after the shots were fired. The mere fact that a person believed to be the defendant was observed riding a bicycle several blocks away from the scene of the crime, shortly before the shooting, is too innocuous, standing alone, to support a finding of probable cause ... . Further, Henn's conclusory testimony that the defendant 'became the prime suspect' based on '[v]ideos and canvasses conducted,' without further details, was insufficient to demonstrate the existence of probable cause ... . Consequently, the People failed to establish that the police had probable cause to arrest the defendant, and thus, the court should have suppressed, as fruits of the unlawful arrest, the lineup identification testimony and the defendant's statements made to law enforcement officials on October 24, 2011 ...". ***People v. Kamenev*, 2020 N.Y. Slip Op. 00301, Second Dept 1-15-20**

FAMILY LAW, EVIDENCE.

MOTHER'S PETITION FOR A MODIFICATION OF THE CUSTODY ORDER SHOULD NOT HAVE BEEN DISMISSED AT THE CLOSE OF MOTHER'S CASE; REMITTED FOR A CONTINUED HEARING.

The Second Department, reversing Family Court, determined mother's petition to modify the custody order should not have been dismissed at the close of the mother's case: "A party seeking modification of an existing custody order must demonstrate that there has been a change in circumstances such that modification is required to protect the best interests of the child ... . The best interests of the child are determined by a review of the totality of the circumstances ... . In deciding an application to dismiss a petition for failure to establish a prima facie case, the court must accept the petitioner's evidence as true and afford the petitioner the benefit of every favorable inference that can reasonably be drawn therefrom ... .Here, accepting the mother's evidence as true and affording her the benefit of every favorable inference, the mother presented sufficient prima facie evidence of a change of circumstances which might warrant modification of custody in the best interests of the child ... . There was evidence that the mother had moved from the country of Jamaica and was now living in Staten Island with her husband and family. Further, the mother presented evidence that the stepmother had used corporal punishment on the child between the date of the custody order and the filing of the mother's petition, despite the fact that the custody order expressly prohibited the parties from using or tolerating the use of corporal punishment on the child." ***Matter of Campbell v. Blair*, 2020 N.Y. Slip Op. 00270, Second Dept 1-15-20**

FAMILY LAW, EVIDENCE.

THE EVIDENCE DID NOT SUPPORT THE NEGLECT FINDING.

The Second Department, reversing Family Court, determined the finding of neglect was not supported: "To establish neglect, a petitioner must demonstrate by a preponderance of the evidence, 'first, that [the] child's physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired and second, that the actual or threatened harm to the child is a consequence of the failure of the parent . . . to exercise a minimum degree of care in providing the child with proper supervision or guardianship' . 'Actual or imminent danger of impairment is a prerequisite to a finding of neglect [which] ensures that the Family Court, in deciding whether to authorize state intervention, will focus on serious harm or potential harm to... the child, not just on what might be deemed undesirable parental behavior' ... . The evidence adduced at the fact-finding hearing demonstrated that the mother and the child have a difficult relationship caused, in significant part, by the mother's disapproval of the child's behavior and the child's unwillingness to abide by her mother's rules, and the fact that the child had disciplinary problems at home and at school. Contrary to the court's determination, there was insufficient evidence to prove that the mother ever struck the child at the relevant time. While the petition alleged that the mother, during an argument with the child ... locked the child in a storage room, the child testified that she herself ran into the storage room, locked the door, and was not physically hurt. This argument arose when the mother told the child that she could not go out that night. At that time, when the neglect is alleged to have occurred, the child had been residing with the mother for only one day, having lived in foster care for approximately two years. Moreover, although the petition alleged that the mother was required to make alternate living arrangements for the child since the child could no longer reside with the maternal grandmother and refused to reside with the mother, the mother's desire to have the child reside with her does not support a finding of neglect. Finally, the evidence adduced at the fact-finding hearing of the mother's insults and name-calling, while certainly counterproductive and inappropriate, does not rise to the level of establishing a failure to provide the child with proper supervision or guardianship or demonstrate a resulting impairment or imminent danger of impairment of the child's physical, mental, or emotional condition ...". ***Matter of Alexandra R.-M. (Sonia R.)*, 2020 N.Y. Slip Op. 00280, Second Dept 1-15-20**

FAMILY LAW, EVIDENCE, CIVIL PROCEDURE.

THE EVIDENCE WAS INSUFFICIENT TO JUSTIFY THE RULINGS IN THIS CUSTODY/PARENTAL ACCESS CASE, HEARINGS SHOULD HAVE BEEN HELD; THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THE IMPOSITION OF SANCTIONS FOR FRIVOLOUS CONDUCT.

The Second Department, reversing Supreme Court in this custody/parental access proceeding, determined Supreme Court should have conducted hearings because the evidence relied upon was insufficient. The Second Department further found there was insufficient evidence to support the sanctions imposed for allegedly frivolous conduct: "We disagree with the Supreme Court's determination (1) awarding the defendant sole legal custody of the parties' child, (2) denying that branch of the plaintiff's cross motion which was to direct therapeutic parental access with the child, (3) directing that parental access between the plaintiff and the child 'shall take place in accordance with [the child's] preferences,' and (4) granting the defendant's motion for a restraining order prohibiting the plaintiff from interfering with the child's life at school, without first conducting an evidentiary hearing ... . Here, the record demonstrates unresolved factual issues so as to require a hearing on the issues of custody and parental access ... . Moreover, in making its custody and parental access determination, the Supreme Court relied on the hearsay statements and conclusions of the forensic evaluator, whose opinions and credibility were untested by either party ... . * * * ... [P]ursuant to 22 NYCRR 130-1.1, sanctions may be imposed against a party or the party's attorney for frivolous conduct. Conduct is 'frivolous if: (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) it asserts material factual statements that are false' ... . 'A party seeking the imposition of a sanction or an award of an attorney's fee pursuant to 22 NYCRR 130-1.1(c) has the burden of proof' ... . Here, contrary to the Supreme Court's determination, the defendant failed to establish that the plaintiff's conduct during the underlying motion practice was frivolous ...". ***Brin v. Shady*, 2020 N.Y. Slip Op. 00256, Second Dept 1-15-20**

FORECLOSURE, EVIDENCE.

DEFENDANT DID NOT DEMONSTRATE PLAINTIFF BANK DID NOT HAVE STANDING TO BRING THE FORECLOSURE ACTION, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined the defendant's motion for summary judgment based upon the banks' alleged lack of standing to bring the foreclosure action should not have been granted: "... [T]he defendant, as the moving party, failed to make a prima facie showing that the plaintiff lacked standing to commence this action. In support of his motion, the defendant submitted a copy of the complaint, to which was annexed, among other things, a copy of the consolidated note. The consolidated note was endorsed by Countrywide Bank, N.A., to Countrywide Home Loans, Inc., and, in turn, by Countrywide Home Loans, Inc., in blank. This evidence established that the plaintiff was in physical possession of the consolidated note at the time this action was commenced ... . Under these circumstances, the validity of the purported assignments of the note and mortgage is irrelevant to the issue of the plaintiff's standing ...". ***Deutsche Bank Natl. Trust Co. v. Benson*, 2020 N.Y. Slip Op. 00259, Second Dept 1-15-20**

FORECLOSURE, EVIDENCE, CIVIL PROCEDURE.

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

The Second Department, reversing Supreme Court, determined plaintiff bank did not demonstrate standing to bring the foreclosure action: "Wells Fargo failed to establish, prima facie, that it had possession of the note prior to the commencement of the action, and thus failed to establish that it had standing to foreclose the mortgage ... . Wells Fargo did not attach a copy of the note and allonge to the complaint when the action was commenced to establish, prima facie, that it had possession of the note at that time ... . Moreover, the affidavit of Wells Fargo's vice president of loan documentation was insufficient to establish that Wells Fargo possessed the note at the time the action was commenced ...". ***Wells Fargo Bank, N.A. v. Elsman*, 2020 N.Y. Slip Op. 00321, Second Dept 1-15-20**

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

DEFENDANT'S BARE DENIAL OF THE RECEIPT OF NOTICE OF THE FORECLOSURE ACTION WAS NOT A SUFFICIENT BASIS FOR GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT.

The Second Department, reversing Supreme Court, determined defendant's bare denial of the receipt of notice of the foreclosure action was not a sufficient basis for granting defendant's motion for summary judgment: "The bare denial by the defendant ... of receipt of a notice of default, required to be served by the terms of the mortgage, and a notice required by RPAPL 1304 is insufficient to establish his prima facie entitlement to judgment as matter of law dismissing the complaint insofar as asserted against him ...". ***Deutsche Bank Natl. Trust Co. v. Mendick*, 2020 N.Y. Slip Op. 00262, Second Dept 1-15-20**

INSURANCE LAW.

ALTHOUGH THE TRUCK DRIVER WAS STEPPING OFF A RAMP ATTACHED TO THE BACK OF HIS TRACTOR TRAILER WHEN HE WAS STRUCK BY A VAN, THE DRIVER WAS OCCUPYING THE TRUCK WITHIN THE MEANING OF THE INSURER'S UNINSURED MOTORIST COVERAGE.

The Second Department, reversing Supreme Court, determined the insurer's (Utica's) petition to permanently stay arbitration in this traffic accident case should not have been granted. A truck driver, Steward, was struck by a van when he was stepping down from a ramp attached to the back of the tractor trailer. Utica argued Steward was a pedestrian, not an occupant of the truck and therefore Steward was not covered: "The minivan that hit Steward had minimal insurance coverage, and Steward filed a Request for SUM Arbitration seeking coverage under the New York Supplementary Uninsured/Underinsured Motorists ("SUM") Endorsement of his employer's Utica Mutual commercial automobile liability insurance policy ... . The SUM endorsement in the petitioner's policy, consistent with the statutory requirement, defines 'occupying' as 'in, upon, entering into, or exiting from a motor vehicle' (see Insurance Law § 3420[f][3]). In accordance with the liberal interpretation afforded the term 'occupying' ... , we find, as a matter of law, that Steward was "upon" the tractor-trailer at the time of the accident such that he was "occupying" the tractor-trailer within the meaning of the SUM endorsement. Steward's testimony established that at the time of the accident, he had stepped upon the Moffet ramp which was attached to the tractor-trailer, and that he was struck by the minivan while his right leg was still on the ramp, and while he was stepping down with his left leg. Thus, although Steward had been away from the tractor-trailer during the work day, his testimony established that at the time of the accident, he was in physical contact with the vehicle, such that he was 'occupying' it ...". ***Matter of Utica Mut. Assur. Co. v. Steward*, 2020 N.Y. Slip Op. 00285, Second Dept 1-15-20**

LANDLORD-TENANT.

ALTHOUGH PLAINTIFF COMMERCIAL TENANT DID NOT PROVE IT GAVE TIMELY NOTICE OF ITS INTENT TO RENEW THE LEASE, THE TENANT WAS ENTITLED TO RELIEF IN EQUITY.

The Second Department determined that, although plaintiff commercial tenant did not prove it provided timely notice of its option to renew the lease, the tenant was entitled to relief in equity: "Although the general rule is that a tenant that fails to exercise an option to renew within the time and in the manner provided in the lease is without remedy at law ... , equity will intervene to relieve a commercial tenant's failure to exercise an option to renew within the time and in the manner provided in the lease 'where (1) such failure was the result of inadvertence,' negligence' or honest mistake'; (2) the nonrenewal would result in a forfeiture' by the tenant; and (3) the landlord would not be prejudiced by the tenant's failure to send, or its delay in sending, the renewal notice' ... . ***Laundry Mgt. - N. 3rd St., Inc. v. BFN Realty Assoc., LLC*, 2020 N.Y. Slip Op. 00265, Second D"pt 1-15-20**

MEDICAL MALPRACTICE, NEGLIGENCE, EVIDENCE, CIVIL PROCEDURE.

DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT IN THIS MEDICAL MALPRACTICE ACTION SHOULD HAVE BEEN GRANTED; PLAINTIFF'S EXPERT DID NOT DEMONSTRATE THE NECESSARY EXPERTISE AND THE EXPERT'S AFFIDAVIT WAS CONCLUSORY AND SPECULATIVE; THE COURT NOTED THAT A THEORY RAISED FOR THE FIRST TIME IN OPPOSITION TO SUMMARY JUDGMENT SHOULD NOT BE CONSIDERED.

The Second Department, reversing (modifying) Supreme Court, determined summary judgment should have been granted to several of the defendants in this medical malpractice action because the plaintiff's expert did not raise a triable issue of fact. The expert did not demonstrate expertise in relevant areas and the expert's opinions were conclusory and speculative with respect to three of the defendants. The Second Department noted that a court should not consider a theory of liability raised for the first time in opposition to a summary judgment motion: " 'While it is true that a medical expert need not be a specialist in a particular field in order to testify regarding accepted practices in that field, the witness nonetheless should be possessed of the requisite skill, training, education, knowledge or experience from which it can be assumed that the opinion rendered is reliable' ... . 'Thus, where a physician provides an opinion beyond his or her area of specialization, a foundation must be laid tending to support the reliability of the opinion rendered' ... . Here, the plaintiff's expert, who specialized in general and vascular surgery, did not indicate that he or she had any special training or expertise in orthopaedics or family medicine, and failed to set forth how he or she was, or became, familiar with the applicable standards of care in these specialized areas of practice ... . Further, the conclusions of the plaintiff's expert as to Desai, Anand, and Sveilich were conclusory and speculative ... , improperly based on hindsight reasoning ... , and self-contradictory ...". ***Samer v. Desai*, 2020 N.Y. Slip Op. 00318, Second Dept 1-15-20**

MEDICAL MALPRACTICE, NEGLIGENCE, EVIDENCE, JUDGES.

DEFENDANT PHYSICIAN MAY BE LIABLE FOR FAILURE TO ADVISE DECEDENT AND THE NURSE MIDWIFE AGAINST HOME BIRTH; SUCH FAILURE COULD CONSTITUTE A PROXIMATE CAUSE OF DEATH; JUDGE SHOULD NOT HAVE GRANTED SUMMARY JUDGMENT BASED IN PART ON A GROUND NOT RAISED BY THE PARTIES.

The Second Department, reversing Supreme Court, determined defendant's motion for summary judgment in this medical malpractice action should not have been granted. Defendant, Lascale, is a board-certified obstetrician and gynecologist specializing in maternal-fetal medicine. Plaintiff's decedent died in childbirth when she was assisted at home by a certified nurse midwife (Moss Jones). Plaintiffs alleged Lascale negligently failed to advise decedent and Moss Jones of the dangers of a home birth given the baby's size and the fact decedent had previously given birth by caesarian section. Lascale argued his limited role, analyzing periodic sonograms, did not include advice on delivery. The Second Department noted that the motion court, sua sponte, should not have granted defendant's motion based in part on an issue not raised by the parties: "Although Lescale, a board-certified obstetrician and gynecologist, purported to limit the scope of his duty to the field of maternal-fetal medicine, and the performance and interpretation of ultrasounds, it was within such limited scope of duty to consult with the decedent and Moss Jones ... , concerning his diagnosis of suspected fetal macrosomia [the baby was very large], and how such diagnosis would increase the risks of a VBAC [vaginal birth after caesarian section] home birth, given all of the other risk factors that were present. Given such risks, it was also within the scope of Lescale's duty to advise the decedent and Moss Jones against proceeding with the planned VBAC home birth. * * * 'When a question of proximate cause involves an intervening act, liability turns upon whether the intervening act is a normal or foreseeable consequence of the situation created by the defendant's negligence' . 'It is only where the intervening act is extraordinary under the circumstances, not foreseeable in the norm... al course of events, or independent of or far removed from the defendant's conduct, that it may possibly break the causal nexus' ... . * * * Whether the decedent would have heeded appropriate warnings and advice by Lescale in light of, inter alia, the purported warnings she was given by Moss Jones, or her own views, is for the jury to decide ...". ***Romanelli v. Jones*, 2020 N.Y. Slip Op. 00316, Second Dept 1-15-20**

TRUSTS AND ESTATES, CONTRACTS, NEGLIGENCE.

THE TRUST-ASSET-SUBSTITUTION AGREEMENT, SUBSTITUTING LIFE INSURANCE FOR CERTAIN ASSETS, WAS SUBJECT TO EPTL 11-1.7(a)(1); THEREFORE THE PROVISION OF THE AGREEMENT RELEASING THE TRUSTEE FROM LIABILITY WAS AGAINST PUBLIC POLICY AND THE TRUSTEE IS LIABLE FOR FAILING TO ENSURE THE LIFE INSURANCE PREMIUMS WERE PAID.

The Second Department, reversing Surrogate's Court, determined the 1992 agreement substituting life insurance for trust assets was covered by Estates, Powers and Trusts Law (EPTL) 11-1.7(a)(1) and the trustee, which owned the policies, was liable in negligence for failing to ensure the premiums were paid (the policies had lapsed). The provision of the trust-asset-substitution agreement exonerating the trustee from liability was invalid as against public policy. The matter was remitted for a determination of damages: "The Surrogate's Court found that the 1992 agreement created a 'new trust agreement' funded in part by the life insurance policies, which was not part of the testamentary trust, and therefore not governed by EPTL 11-1.7(a). The court further found that the agreement released the trustee from any promises relating to 'the substitution of property,' which relieved the trustee of any 'liability to monitor the investment owed to the trust,' released the trustee and any successor trustee 'from any future lawsuit,' and released the trustee of any fiduciary duty to act upon Robert's default in paying insurance premiums. Contrary to the conclusion of the Surrogate's Court, the agreement did not create a new trust. Rather, the agreement provided for the substitution of testamentary trust property with life insurance policies. The petitioner included the life insurance policies in its final account of the testamentary trusts as worthless assets. There is no reference to any separate accounting for the life insurance policies as part of a separate trust. Thus, the duty of the trustee was governed by EPTL 11-1.7(a)(1), which states that the exoneration of a testamentary trustee from liability for failure to exercise reasonable care, diligence, and prudence is contrary to public policy." ***Matter of Wilkinson*, 2020 N.Y. Slip Op. 00286, Second Dept 1-15-20**

THIRD DEPARTMENT

CRIMINAL LAW, APPEALS.

IN A SIGNIFICANT DEPARTURE FROM PRECEDENT BASED UPON A NOVEMBER 2019 COURT OF APPEALS DECISION, THE FAILURE TO INCLUDE THE APPROXIMATE DATE, TIME OR PLACE OF A CHARGED OFFENSE IN A SUPERIOR COURT INFORMATION (SCI) OR A WAIVER OF INDICTMENT IS NOT A JURISDICTIONAL DEFECT AND THEREFORE MUST BE PRESERVED FOR APPEAL.

The Third Department, departing from its precedent based upon a recent (November 2019) ruling by the Court of Appeals, determined the failure to include the date, approximate time or place of the charged offense in a superior court information (SCI) and/or a waiver of appeal is not a jurisdictional defect. Any challenge to the SCI or waiver of appeal on this ground must be preserved and, if it is not, the challenge is forfeited by a guilty plea: "... [W]e note that this Court, relying on People

v. Boston (75 NY2d 585, 589 [1990]), has previously held that the failure to strictly comply with the statutory requirements for waiving indictment pursuant to CPL 195.20 — including the failure to include the approximate time of each offense charged in the waiver of indictment or SCI — constitutes a jurisdictional defect that may be raised at any time, is not subject to the preservation requirement and is not precluded by a defendant's guilty plea or waiver of the right to appeal ... . However, the Court of Appeals recently decided People v. Lang (___ NY3d ___, 2019 N.Y. Slip Op. 08545 [2019]) wherein it rejected the argument that omission of the approximate time of the charged offense in the waiver of indictment and/or SCI constitutes a jurisdictional defect — the same argument presently raised by defendant — specifically holding that the omission of such a fact presents a mere 'technical challenge' as it constitutes 'non-elemental factual information that is not necessary for a jurisdictionally-sound indictment' ... . Accordingly, insofar as the subject waiver of indictment and SCI provided defendant with adequate notice of the date and location of the charged offenses, and as omission of the approximate time of the charged offense from the waiver of indictment and/or SCI constituted a nonjurisdictional defect ... to which defendant did not object at a time when Supreme Court could have addressed the alleged deficiency, defendant's present challenge was forfeited by his guilty plea ...". ***People v. Shindler*, 2020 N.Y. Slip Op. 00327, Third Dept 1-16-20**

CRIMINAL LAW, APPEALS.

ANNOUNCING A SIGNIFICANT CHANGE IN ITS APPELLATE-REVIEW CRITERIA, THE 3RD DEPARTMENT NOW HOLDS THE FAILURE TO INCLUDE THE DATE, APPROXIMATE TIME OR PLACE OF A CHARGED OFFENSE IN A SUPERIOR COURT INFORMATION (SCI) OR A WAIVER OF INDICTMENT IS NOT A JURISDICTIONAL DEFECT AND THEREFORE MUST BE PRESERVED FOR APPEAL.

The Third Department, departing from its precedent based upon a recent (November 2019) ruling by the Court of Appeals, determined the failure to include the date, approximate time or place of the charged offense in a superior court information (SCI) and/or a waiver of appeal is not a jurisdictional defect: "Defendant's sole contention on this appeal, which the People have conceded based on this Court's decision in People v. Busch-Scardino (166 AD3d 1314 [2018]), is that the waiver of indictment is invalid and the superior court information (hereinafter SCI) is jurisdictionally defective for failing to set forth the approximate time of the charged offense in accordance with CPL 195.20. Indeed, that has been the standard we have applied since Busch-Scardino, and we further recognize that this is not a case where the time of the offense 'is unknown or, perhaps, unknowable' ... . The Court of Appeals recently addressed the validity of appeal waivers in three consolidated appeals, and, in one of the appeals, the Court also addressed the validity of that defendant's waiver of indictment with respect to charges involving child sexual abuse (People v. Lang, ___ NY3d ___, ___, 2019 N.Y. Slip Op. 08545, *7-9 [2019]). * * * The reasoning of Lang requires this Court to reassess and abandon the standard enunciated in Busch-Scardino. There is no question here that the waiver of indictment was signed in open court with counsel present in accordance with the procedural requirements set forth in NY Constitution, article I, § 6, which 'establishes the prima facie validity of the waiver of the right to prosecution by indictment' ... . The 'approximate time' of the arson charge under review constitutes nonelemental factual information. Lang instructs that we should look not only at the waiver of indictment and the SCI, but also at the local accusatory instruments to ascertain whether adequate notice was provided. Here, the felony complaint mirrors both the waiver and the SCI by providing the date and specific address, but without specifying the approximate time. Nonetheless, defendant raised no objection before County Court, made no demand for a bill of particulars and 'lodges no claim that he lacked notice of the precise crime[] for which he waived prosecution by indictment' ... . In context, we conclude that the defect here was not jurisdictional and that defendant forfeited his challenge upon his plea of guilty ...". ***People v. Elric YY.*, 2020 N.Y. Slip Op. 00326, Third Dept 1-16-20**

CRIMINAL LAW, EVIDENCE, CONSTITUTIONAL LAW.

THE CO-DEFENDANT'S REDACTED STATEMENT SHOULD NOT HAVE BEEN ADMITTED IN EVIDENCE BECAUSE IT WAS CLEAR THE REDACTED PORTIONS REFERRED TO DEFENDANT AND WERE INCULPATORY, NEW TRIAL ORDERED.

The Third Department, reversing defendant's conviction, determined the redacted statement of the co-defendant (Quaile) should not have been admitted in evidence because it was clear the redacted portions referred to the defendant and were inculpatory. Defendant's right to confront the witnesses against him was violated: "... [A]lthough Quaile's statement was redacted, the jury was allowed to see where portions were blacked out and, given that the statement focused upon defendant's arrest and the items found in the trailer, there were 'obvious indications that it was altered to protect the identity of a specific person,' namely, defendant ... . The redacted statement further advised the jury that defendant was Quaile's live-in boyfriend, that she did not know what the plastic bottle and tissues found in their bedroom were used for, that she did not know how to make methamphetamine and that she 'did not know the answers' to some of [a sheriff's] questions at the trailer. When those comments are considered in tandem with the location of the blacked-out text in the statement, they can 'only be read by the jury as inculpating defendant' by suggesting that he had the information and know-how that Quaile lacked and was involved in the charged crimes ... . The admission of the statement therefore violated defendant's right to confront the witnesses against him. In view of County Court's failure 'to give the critical limiting instruction that the jury should not consider the statement itself against anyone but' Quaile, as well as the lack of methamphetamine in the trailer

or test results tying the items found in the trailer to methamphetamine production, we cannot say that the evidence against defendant is overwhelming 'or that 'there is no reasonable possibility that the erroneously admitted [statement] contributed to the conviction' ...". ***People v. Stone*, 2020 N.Y. Slip Op. 00323, Third Dept 1-16-20**

FAMILY LAW, CIVIL PROCEDURE.

FATHER, WHO WAS INCARCERATED IN PENNSYLVANIA, INFORMED FAMILY COURT HE WISHED TO APPEAR BY TELEPHONE IN THE CUSTODY MATTER; FAMILY COURT DENIED THE REQUEST STATING THE COURT DID NOT HAVE JURISDICTION OVER FATHER; THE 3RD DEPARTMENT HELD FATHER, WHO HAD NOT CHALLENGED THE COURT'S JURISDICTION, SHOULD HAVE BEEN ALLOWED TO APPEAR BY PHONE.

The Third Department, reversing Family Court, determined that father, who was incarcerated in Pennsylvania, should have been allowed to appear in the custody proceeding by telephone. Father had informed the court of his wish to appear and had not challenged the court's jurisdiction and informed Family Court he wished to appear by telephone. Family Court denied father's request stating that the court did not have jurisdiction over father: " 'The right to be heard is fundamental to our system of justice' ... . Further, '[p]arents have an equally fundamental interest in the liberty, care and control of their children' ... . '[E]ven an incarcerated parent has a right to be heard on matters concerning [his or her] child, where there is neither a willful refusal to appear nor a waiver of appearance' ... . Here, the father had notice of the proceeding, did not challenge Family Court's jurisdiction and the court could have permitted him to testify telephonically ... . Because the record demonstrates that the father was not given an opportunity to participate in the proceedings, we must reverse and remit for a new hearing ...". ***Matter of Starasia E. v. Leonora E.*, 2020 N.Y. Slip Op. 00334, Third Dept 1-16-20**

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