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FIRST DEPARTMENT

ARBITRATION, CONTRACT LAW, PRIVILEGE, HUMAN RIGHTS LAW.

ARBITRATOR'S AWARD IN FAVOR OF DONALD J. TRUMP FOR PRESIDENT, INC. VACATED AS VIOLATING PUBLIC POLICY AND EXCEEDING THE ARBITRATOR'S AUTHORITY.

The First Department, reversing Supreme Court, determined the arbitrator's award in this action based upon a non-disclosure, non-disparagement agreement (NDA) was against public policy and exceeded the arbitrator's authority. Plaintiff was employed by defendant, Donald J. Trump For President, Inc. She signed the NDA as a condition of her employment. Plaintiff brought an employment discrimination action in Supreme Court alleging a hostile work environment, sexual discrimination, defamation and intentional and negligent infliction of emotional distress. Pursuant to the NDA defendant demanded arbitration. Plaintiff then started a federal lawsuit seeking a declaration that the NDA was void and unenforceable and defendant, pursuant to the NDA again demanded arbitration. The arbitrator found plaintiff had breached the NDA by disclosing confidential information in the federal action and making disparaging comments on her GoFundMe pages and on her Twitter account. The First Department held the information disclosed in the federal action was protected by privilege and the comments posted on the Internet were not part of the defendant's demand for arbitration: "Plaintiff's negative statements about defendant, for which the arbitrator made an award, were made in the context of the federal action in which she sought a declaration that the NDA was unenforceable ... . By concluding that the allegations in the federal action are tantamount to disclosure of confidential information violative of the NDA, the arbitrator improperly punished plaintiff for availing herself of a judicial forum. Defendant is hard-pressed to explain how plaintiff could have pursued her rights without setting forth necessary factual statements for the federal court to consider. The remainder of the award was based upon certain Twitter 'Tweets' and statements on a GoFundMe page. The nature of the Demand to Arbitrate, however, was limited to statements made 'in connection' with this state action. * * * Defendant relies on plaintiff's actions subsequent to the date of its Demand to Arbitrate in an effort to have the arbitration award confirmed. Since the award takes into account events occurring after the demand, which could not have been legitimately considered at arbitration, the award was made in excess of the arbitrator's enumerated authority." ***Denson v. Donald J. Trump for President, Inc.*, 2020 N.Y. Slip Op. 00923, First Dept 2-6-20**

CRIMINAL LAW, EVIDENCE, APPEALS.

SEX TRAFFICKING CONVICTION AGAINST THE WEIGHT OF THE EVIDENCE.

The First Department, reversing the sex trafficking conviction, determined there was insufficient evidence defendant used force or participated in a scheme to compel the alleged victim to engage in prostitution by threat of physical harm. The sex trafficking conviction was deemed to be against the weight of the evidence: "The evidence showed that the alleged victim, her mother, and a third woman, sought to earn more money than they were earning in Florida, that they voluntarily traveled with defendant to New York to earn money as prostitutes, and that defendant left them alone at times in Florida and New York. There was no evidence presented at trial that defendant ever threatened to harm the alleged victim if she failed to begin or continue working as a prostitute. A detective described a call he overheard between defendant and the alleged victim, after she was apprehended, in which defendant was angry because he believed that she did not get money from a client. However, this does not suffice to prove any use of force or a 'scheme' to compel her to work as a prostitute. Similarly, although the third woman in the group that came with defendant from Florida testified that she was a 'little intimidated' by an argument over money between defendant and another man, this does not establish the required threat of harm, even assuming the alleged victim also saw and heard the argument." ***People v. Hayes*, 2020 N.Y. Slip Op. 00832, First Dept 2-4-20**

FORECLOSURE, CIVIL PROCEDURE.

BY NOT SEEKING THE FULL AMOUNT OF THE DEBT IN THE 90-DAY NOTICE PLAINTIFF MAY HAVE DE-ACCELERATED THE DEBT MAKING THE FORECLOSURE ACTION TIMELY.

The First Department, reversing Supreme Court, determined plaintiff, by demonstrating it did not demand the full debt, but rather demanded only the amount needed to cure the default, presented sufficient proof that the debt had not been accelerated, and therefore the action was timely, to warrant restoring the matter to the calendar. The action had been dis-

missed when plaintiff did not appear at a scheduled conference. Defendant had moved to dismiss alleging the debt had been accelerated and the action was time-barred: "Plaintiff ... moved, pursuant to CPLR 5015(a)(1), to vacate the dismissal order and reinstate the claim. * * * ... [P]laintiff provided evidence that it took affirmative action to de-accelerate the mortgage, which would have stopped the running of the statute of limitations on the mortgage debt. The 90-day notice provided to defendant sought an amount lower than the accelerated amount, which may evidence an intent to de-accelerate. While seeking a lower amount in and of itself is not enough to establish, as a matter of law, that the 90-day notice 'destroy[ed] the effect of the sworn statement that the plaintiff had elected to accelerate the maturity of the debt' ... . it is sufficient to meet the "minimal showing" required on a motion to restore ...". ***Federal Natl. Mtge. Assn. v. Rosenberg*, 2020 N.Y. Slip Op. 00814, First Dept 2-4-20**

SECOND DEPARTMENT

CIVIL PROCEDURE, NEGLIGENCE.

DEFENDANT DEFAULTED; SUPREME COURT SHOULD NOT HAVE CONSIDERED LIABILITY ISSUES AT THE INQUEST TO DETERMINE DAMAGES.

The Second Department, reversing Supreme Court, determined the court should not have considered issues of liability because defendant had defaulted and thereby admitted liability: "In this action, inter alia, to recover damages for personal injuries, the defendant failed to appear or answer the complaint. In an order ... , the Supreme Court granted the plaintiff's unopposed motion for leave to enter a default judgment against the defendant and directed an inquest on the issue of damages. After conducting the inquest, the court ... determined that the plaintiff had failed to establish, prima facie, that the defendant was negligent and that her negligence was a substantial factor in causing the plaintiff's injuries, and thereupon, sua sponte, directed the dismissal of the complaint. By defaulting, the defendant admitted 'all traversable allegations in the complaint, including the basic allegation of liability' ... . As such, the sole issue to be determined at the inquest was the extent of the damages sustained by the plaintiff, and the Supreme Court should not have considered issues of liability ...". ***Arluck v. Brezinska*, 2020 N.Y. Slip Op. 00839, Second Dept 2-5-20**

CRIMINAL LAW, EVIDENCE.

RECORD DOES NOT DEMONSTRATE DEFENSE COUNSEL WAS MADE AWARE OF A JUROR'S COMPLAINTS ABOUT THE DELIBERATIONS AND THE CONTENTS OF A NOTE FROM THE JURY; THE FOR CAUSE CHALLENGES TO TWO JURORS SHOULD HAVE BEEN GRANTED; DNA TESTING OF GUM DISCARDED BY THE DEFENDANT WHILE IN CUSTODY WAS PROPER.

The Second Department, reversing defendant's conviction, determined the for cause challenges to two jurors should have been granted and the record does not indicate defense counsel was made aware of a juror's complaint to the judge about the deliberations and the contents of a note from the jury. The decision dealt with several suppression issues, including the finding that DNA testing of a piece of gum discarded by the defendant when he was in custody was proper: "At the commencement of the second day of deliberations, the court met with counsel and deliberating juror C.H., who had left the court a telephone message expressing concerns about deliberations. This conversation took place outside the defendant's presence. Although the court properly attempted to keep its communication with C.H. ministerial by simply directing her to put her concerns in writing, C.H. refused to accept the court's directions, expressing concerns about the course of deliberations, including a concern that someone was 'stirring the jury' and that other jurors had been 'influenced.' The court eventually directed a court officer to return C.H. to the jury room and provide her with writing materials. * * * After the colloquy with C.H. and following an off-the-record discussion, the defendant was returned to the courtroom, and the court stated that it had received a note from the jury which had been marked as Court Exhibit X and 'sealed with the consent of all parties.' No further discussion of Court Exhibit X appears on the record. * * * We cannot assume, from the County Court's statement that the parties agreed to seal the note, that counsel was made aware of the exact contents of the note since 'an insufficient record cannot be overcome with speculation about what might have occurred. The presumption of regularity cannot salvage an O'Rama error of this nature' ... . Moreover, since the failure to disclose a jury note to counsel is a mode of proceedings error, it cannot be overlooked as harmless even where the evidence is otherwise overwhelming ...". ***People v. Kluge*, 2020 N.Y. Slip Op. 00878, Second Dept 2-5-20**

CRIMINAL LAW, EVIDENCE.

EVIDENCE DID NOT SUPPORT CONSECUTIVE SENTENCES FOR CRIMINAL POSSESSION OF A WEAPON AND MURDER.

The Second Department determined the trial evidence did not support consecutive sentences for criminal possession of a weapon and murder: "We agree with the defendant that the sentencing court could not lawfully direct that the sentence imposed upon one of the convictions of criminal possession of a weapon in the second degree run consecutive to the sentence imposed upon the conviction of murder in the second degree. As the defendant correctly contends, it is impossible, based

on the indictment or the trial court's charge, to determine whether the act that formed the basis of the jury's verdict on the criminal possession of a weapon in the second degree counts was not the basis for its conviction on the murder in the second degree count. Therefore, the People have failed to meet their burden of proving the validity of consecutive sentences ...". ***People v. McClinton*, 2020 N.Y. Slip Op. 00879, Second Department 2-5-20**

DEBTOR-CREDITOR, TRUSTS AND ESTATES, CIVIL PROCEDURE.

AN EMAIL EXCHANGE WAS INSUFFICIENT TO RESTART THE STATUTE OF LIMITATIONS FOR AN OTHERWISE TIME-BARRED DEBT PURSUANT TO GENERAL OBLIGATIONS LAW § 17-101.

The Second Department, reversing Surrogate's Court, determined that an email exchange did not acknowledge a debt owed to decedent such that the statute of limitations started anew when the exchange took place in 2015. Any action on the debt was time barred: "Jean M. Hollis (hereinafter Jean) died in October 2015, and was survived by six children. Jean's will, which was admitted to probate in February 2016, provided that '[i]n the event that any of my surviving children shall be indebted to me at the time of my demise, . . . then such indebtedness shall be deducted from any bequest made to said children.' In January 2016, Paul James Hollis (hereinafter the decedent), one of Jean's children, died, and his wife, Bernadette Hollis (hereinafter Bernadette), was appointed administrator of his estate. In September 2016, the respondent Peter H. Hollis (hereinafter Peter), as an executor of Jean's estate, filed a notice of claim against the decedent's estate alleging that it was indebted to Jean's estate in the sum of $147,265.35, representing the sum of $146,765.35 borrowed by the decedent from Jean between April 2005 and January 2008, and an additional loan made by Jean to the decedent in December 2011 in the sum of $500. ... The subject email arguably acknowledged that the decedent owed a pre-existing debt to Jean, inasmuch as it stated that he had been 'informed; by his sister, Jeanine Hollis, that '[he] owe[s] around $140,000 to Mom.' Although the subject email initially stated that 'I have every intention of paying this debt,' it then went on to state that 'there are some mitigating circumstances that I would like to note sometime in the near future.' In an email sent the next day, the decedent stated 'I just want the process to be fair and not arbitrary.' Since the subject email contained language inconsistent with an intention on the part of the decedent to pay the alleged debt, the court erred in concluding that the subject email renewed the statute of limitations pursuant to General Obligations Law § 17-101 ...". ***Matter of Hollis*, 2020 N.Y. Slip Op. 00860, Second Dept 2-5-20**

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

DEFENDANTS RAISED A QUESTION OF FACT ABOUT WHETHER THEY WERE SERVED WITH THE SUMMONS AND COMPLAINT AND PLAINTIFF FAILED TO PROVE COMPLIANCE WITH THE NOTICE REQUIREMENTS OF RPAPL 1304; PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT IN THIS FORECLOSURE ACTION SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined plaintiff's motion for summary judgment in this foreclosure action should not have been granted. Defendants raised a question of fact whether they were served with the summons and complaint and plaintiff failed to prove compliance with the notice requirements of Real Property Actions and Proceedings Law (RPAPL) 1304: "... [T]he defendants submitted the affidavit of Vicki Erani, in which she expressly averred that she was never served. She also averred that, on Thursdays, which was the day of the week of the alleged service, she customarily was away from her residence, assisting her mother with errands. The defendants also submitted the affidavit of Vicki Erani's mother confirming that Vicki Erani spent every Thursday with her. The defendants also submitted evidence that, in 2016, this particular process server's application to renew his license as an individual process server had been denied by the New York City Department of Consumer Affairs on the basis that he had falsified affidavits of service. The defendants' submissions rebutted the presumption of proper service established by the process server's affidavit ... . * * * ... [T]he plaintiff failed to establish, prima facie, that it complied with RPAPL 1304 because neither of the affidavits submitted by the plaintiff of two of its vice presidents asserted personal knowledge of the purported mailing and neither vice president made the requisite showing that she was familiar with the plaintiff's mailing practices and procedures to establish 'proof of a standard office practice and procedure designed to ensure that items are properly addressed and mailed' ... . The plaintiff failed to attach, as exhibits to the motion, any documents to prove that the mailing actually happened. Since the plaintiff failed to provide evidence of the actual mailing, or evidence of a standard office mailing procedure designed to ensure that items are properly addressed and mailed, sworn to by someone with personal knowledge of the procedure, the plaintiff failed to establish its strict compliance with RPAPL 1304 ...". ***Citimortgage, Inc. v. Erani*, 2020 N.Y. Slip Op. 00843, Second Dept 2-5-20**

MUNICIPAL LAW, CIVIL PROCEDURE.

PETITIONERS, SIMPLY BY VIRTUE OF BEING RESIDENTS OF THE VILLAGE, HAD STANDING TO CHALLENGE THE VILLAGE BOARD'S ALLEGED VIOLATION OF THE OPEN MEETINGS LAW.

The Second Department, reversing Supreme Court, in a full-fledged opinion by Justice Rivera, determined petitioners, as members of the public and residents of the Village of Mamaroneck, had standing to challenge an alleged violation of the Open Meetings Law. Petitioners alleged the Village Board did not provide proper notice of the meeting, improperly entered

a closed executive session and failed to accurately record the minutes of the meeting: "The purpose of the Open Meetings Law and the intent of the Legislature in enacting that law dictate that the harm or injury is the alleged unlawful exclusion of the public from a municipal meeting. The Open Meetings Law plainly confers upon the public the right to attend certain meetings of public bodies (see Public Officers Law § 100). Consistent therewith, the harm or injury of being excluded from municipal meetings that should be open to the public is sufficient to establish standing in cases based upon alleged violations of the Open Meetings Law ... . If the analysis and determination of the Supreme Court were allowed to stand, a petitioner/plaintiff would have to demonstrate an additional personal damage or injury to his or her civil, personal, or property rights in order to assert a violation of the Open Meetings Law. This would, in effect, interject a counterintuitive restriction upon the general citizenry's access and participatory freedoms to attend certain meetings of a public body. Such a requirement or condition would undermine, erode, and emasculate the stated objective of this statute, which was designed to benefit the citizens of this state and the general commonweal, assure the public's right to be informed, and prevent secrecy by governmental bodies." ***Matter of McCrory v. Village of Mamaroneck Bd. of Trustees*, 2020 N.Y. Slip Op. 00864, Second Dept 2-5-20**

PERSONAL INJURY.

ALTHOUGH DEFENDANT PROVED IT IS ENGAGED IN THE BUSINESS OF LEASING VEHICLES AND THE VEHICLE INVOLVED IN THE TRAFFIC ACCIDENT WAS LEASED AT THE TIME, DEFENDANT DID NOT PROVE THE CONDITION OF THE VEHICLE; THEREFORE DEFENDANT WAS NOT ENTITLED TO SUMMARY JUDGMENT UNDER THE GRAVES AMENDMENT.

The Second Department, reversing Supreme Court, determined that the truck rental company's (MTLR's) motion for summary judgment in this traffic accident case should not have been granted. Although MTLR proved that the truck was rented out at the time of the accident, it failed to offer any proof of the condition of the truck: "... [T]he Graves Amendment provides 'that the owner of a leased or rented motor vehicle cannot be held liable for personal injuries resulting from the use of such vehicle by reason of being the owner of the vehicle for harm to persons or property that results or arises out of the use, operation, or possession of the vehicle during the period of the rental or lease if: (1) the owner is engaged in the trade or business of renting or leasing motor vehicles, and (2) there is no negligence or criminal wrongdoing on the part of the owner (or an affiliate of the owner)' ... . However, where 'a plaintiff seeks to hold a vehicle owner liable for the alleged failure to maintain a rented vehicle' ... , the vehicle owner is not afforded protection under the Graves Amendment if it fails to demonstrate that it did not negligently maintain its vehicle ... . Here, MTLR failed to meet its prima facie burden demonstrating its entitlement to judgment as a matter of law dismissing the amended complaint insofar as asserted against it. Although MTLR submitted evidence showing that it owned the subject vehicle, that it was engaged in the business of leasing vehicles, and that the subject accident occurred during the period of the rental ... , MTLR failed to submit any admissible evidence demonstrating the condition of the vehicle at the time of delivery or at any time up to the happening of the accident ...". ***Couchman v. Nunez*, 2020 N.Y. Slip Op. 00844, Second Dept 2-5-20**

PERSONAL INJURY, LANDLORD-TENANT, MUNICIPAL LAW.

ALTHOUGH THE LEASE DID NOT IMPOSE A DUTY ON THE TENANT TO MAINTAIN THE SIDEWALK, THE VILLAGE CODE DID; THE TENANT'S MOTION FOR SUMMARY JUDGMENT IN THIS SIDEWALK SLIP AND FALL CASE SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined defendant tenant's (Invite Health's) motion for summary judgment in this sidewalk slip and fall case should not have been granted. Although, under the lease, the tenant had no duty to maintain the sidewalk, the village code imposed that duty on owners and tenants: "Here, Code of the Village of New Hyde Park § 165-40.1 requires 'owners, tenants or other persons occupying or entitled to the possession and control of any lands, whether vacant or improved' to, among other things, maintain the abutting public sidewalk 'in a good state of repair and free and clear of any physical defects or other unsafe, hazardous or dangerous obstructions, encumbrances or conditions' and imposes joint and several liability upon them for injuries caused by their breach of that duty (see Code of the Village of New Hyde Park §§ 1-18, 165-40.1). Given the Code's imposition of an obligation on a tenant or occupant to maintain an abutting public sidewalk, Invite Health, as a tenant and occupant of the abutting property, had a statutory duty to maintain the public sidewalk where the accident occurred (see Code of the Village of New Hyde Park §§ 1-18, 165-40.1 ...) . As such, the mere fact that Invite Health had no duty under the lease agreement to maintain the abutting sidewalk was not dispositive of the issue of whether it owed the injured plaintiff a duty of care." ***Mule v. Invite Health at New Hyde Park, Inc.*, 2020 N.Y. Slip Op. 00869, Second Dept 2-5-20**

PERSONAL INJURY, MUNICIPAL LAW, CIVIL PROCEDURE.

TOWN DID NOT DEMONSTRATE IT DID NOT RECEIVE WRITTEN NOTICE OF THE ALLEGED SIDEWALK DEFECT IN THIS SLIP AND FALL CASE; THE TOWN'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing (modifying) Supreme Court, determined that the town's motion for summary judgment in this sidewalk slip and fall case should not have been granted because the town did not demonstrate it had not received written notice of the defect. The Second Department noted that Supreme Court properly rejected plaintiff's theory that inadequate lighting was a factor because that theory was not in the notice of claim and permission to amend the notice of claim was not sought by the plaintiff: "To prevail on its motion, it was the Town's burden to establish, prima facie, that no prior written notice of the alleged condition was given to either the Town Clerk or Town Commissioner of Highways (see Code of the Town of Hempstead § 6-3; Town Law § 65-a[2]). In support of its motion for summary judgment, the Town submitted, inter alia, the affidavit of a records access officer for the Town's Highway Department, wherein she specifically averred that she searched the Highway Department records, but did not state that she searched the Town Clerk's records. Thus, the Town failed to establish, prima facie, that neither the Town Clerk nor the Commissioner of Highways received prior written notice of the alleged condition ...". ***Weinstein v. County of Nassau*, 2020 N.Y. Slip Op. 00890, Second Dept 2-5-20**

PRODUCTS LIABILITY, PERSONAL INJURY, CIVIL PROCEDURE.

DEFENDANTS' MOTION TO DISMISS ON FORUM NON CONVENIENS GROUNDS SHOULD NOT HAVE BEEN GRANTED IN THIS PRODUCTS LIABILITY ACTION, DESPITE THE FACT THAT ONLY TWO OF THE 19 PLAINTIFFS RESIDED IN NEW YORK.

The Second Department, reversing Supreme Court, determined defendants' motion to dismiss on forum non conveniens grounds should not have been granted. Nineteen plaintiffs brought this production liability action alleging damage caused by defendants' "Just For Men" dyes and products. Only two plaintiffs resided in New York and defendants' motion to dismiss was granted on that ground, without any further proof: " 'The doctrine of forum non conveniens permits a court to dismiss an action when, although it may have jurisdiction over a claim, the court determines that in the interest of substantial justice the action should be heard in another forum' (... CPLR 327[a]). The burden was on the defendants to show that 'considerations relevant to private or public interest militate against accepting or retaining the litigation' ... . Factors to consider are the residency of the parties, potential inconvenience to proposed witnesses, especially nonparty witnesses, availability of an alternative forum, the situs of the actionable events, the location of the evidence, and the burden that retaining the case would have on New York courts ... . Here, the defendants asserted no facts other than that the nonresident plaintiffs were out-of-state residents. The defendants did not meet their burden of proof on the issue of convenience of the witnesses, since, among other things, there was no statement as to whom the witnesses are and where they reside. Moreover, Just For Men's design, manufacturing, labeling, advertising, and executive decision-making all allegedly occurred in White Plains, where Combe Incorporated has a principal place of business. Further, there is no per se rule stating that out-of-state plaintiffs cannot, on the ground of forum non conveniens, sue in New York based upon products liability ... , despite the fact that evidence of damages would most often be found where the plaintiff resides." ***Albright v. Combe Inc.*, 2020 N.Y. Slip Op. 00837, Second Dept 2-5-20**

REAL PROPERTY LAW, ATTORNEYS, ARBITRATION, DEBTOR-CREDITOR.

QUESTION OF FACT WHETHER AGREEMENT TO ARBITRATE WAS VOID PURSUANT TO REAL PROPERTY LAW § 265-b; NOT CLEAR WHETHER DEFENDANT LAW FIRM WAS ACTING AS A CONSULTANT IN A MATTER CONCERNING A DISTRESSED HOME LOAN; IF SO, THE DEFENDANT CAN VOID THE AGREEMENT TO ARBITRATE.

The Second Department, reversing Supreme Court, determined there was a question of fact whether defendant law firm was acting as a consultant in matters related to distressed home loans such that any related agreement to arbitrate was void pursuant to Real Properly Law § 265-b. Supreme Court had granted the law firm's motion to compel arbitration: "Real Property Law § 265-b governs the conduct of distressed property consultants. 'Distressed property consultant' or 'consultant' is defined as 'an individual or a corporation, partnership, limited liability company or other business entity that, directly or indirectly, solicits or undertakes employment to provide consulting services to a homeowner for compensation or promise of compensation with respect to a distressed home loan or a potential loss of the home for nonpayment of taxes' ... . A consultant does not include, inter alia, 'an attorney admitted to practice in the state of New York when the attorney is directly providing consulting services to a homeowner in the course of his or her regular legal practice' ... . Real Property Law § 265-b further provides, in part, that '[a]ny provision in a contract which attempts or purports to require arbitration of any dispute arising under this section shall be void at the option of the homeowner' ... . Here, the plaintiff raised a question of fact as to whether the Donado defendants directly provided consulting services to the plaintiff in the course of the Donado defendants' regular legal practice ... . The plaintiff asserted in his affidavit, among other things, that he never met with an

attorney from Donado Law Firm, P.C. ... . Inasmuch as the plaintiff raised a question of fact as to whether the Donado defendants were consultants within the meaning of former Real Property Law § 265-b[1][e][i], there is a question of fact as to whether the plaintiff would be allowed to void the arbitration provision ... , and a hearing is required." ***Ventura v. Donado Law Firm, P.C.*, 2020 N.Y. Slip Op. 00888, Second Dept 2-5-20**

THIRD DEPARTMENT

CONSTITUTIONAL LAW.

THE ARTICLE OF THE RACING, PARI-MUTUEL WAGERING AND BREEDING LAW WHICH ALLOWS INTERACTIVE FANTASY SPORTS (IFS) CONTESTS AND EXCLUDES SUCH CONTESTS FROM THE PENAL LAW GAMBLING PROHIBITIONS VIOLATES THE NEW YORK CONSTITUTION.

The Third Department, reversing (modifying) Supreme Court, in a full-fledged opinion by Justice Mulvey, determined that Racing, Pari-Mutuel Wagering and Breeding Law Article 14, which states that interactive fantasy sports (IFS) do not constitute gambling and do not violate the Penal Law, violates the New York Constitution: "It is undisputed that IFS contestants pay an entry fee (something of value) in hopes of receiving a prize (also something of value) for performing well in an IFS contest. Therefore, such contests constitute gambling if their outcomes depend to 'a material degree upon an element of chance, notwithstanding that skill of the contestants may also be a factor therein,' such that they are contests of chance (Penal Law § 225.00 [1]), or if they depend on a 'future contingent event not under [the contestants'] control or influence' (Penal Law § 225.00 [2]). * * * We recognize that the Legislature was sympathetic to and supportive of IFS participants (see e.g. Racing, Pari-Mutuel Wagering and Breeding Law § 1400 [3]). Nevertheless, we have rejected the Legislature's explicitly stated basis for the removal of IFS from the Penal Law definition of gambling (see Racing, Pari-Mutuel Wagering and Breeding Law § 1400 [1]). Moreover, as part of the same legislation that decriminalized IFS, the Legislature clearly intended that IFS contests be heavily regulated (see Racing, Pari-Mutuel Wagering and Breeding Law §§ 1400 [3]; 1402-1406). Hence, we conclude that the Legislature, if it had envisioned the possibility that courts would invalidate the majority of article 14, would not have wished to preserve the decriminalization of IFS located in Racing, Pari-Mutuel Wagering and Breeding Law § 1400 (2). Thus, we refuse to sever that provision, and invalidate it as well." ***White v. Cuomo*, 2020 N.Y. Slip Op. 00895, Third Dept 2-6-20**

UNEMPLOYMENT INSURANCE.

CLAIMANT, A FIELD INSPECTOR FOR A VACANT PROPERTY PRESERVATION COMPANY, WAS AN EMPLOYEE ENTITLED TO UNEMPLOYMENT INSURANCE BENEFITS.

The Third Department determined claimant field inspector was an employee of Safeguard Properties, a property preservation company that preserves vacant properties for lenders on homes that have delinquent loans. Claimant, who performed property occupancy inspections, was not an independent contractor and was therefore entitled to unemployment insurance benefits: "The record establishes that claimant, who did not have an inspection business or any other business entity, applied for the field inspector job upon a recommendation of a friend. Inspectors, such as claimant, were sent work orders to perform inspections on properties and were required to complete such inspections within a time frame set by Safeguard. Field inspectors were assigned a regional supervisor to contact regarding questions and problems that arose in connection with the inspections, or to request extensions of time to complete a work assignment. Safeguard prioritized the work order assignments, required field inspectors to adhere to a dress code, provided instructions as to various aspects of how a work assignment was to be completed and, with regard to claimant, paid her every two weeks. Safeguard provided a replacement if a field inspector could not perform an assignment and required field inspectors to provide 30 days' notice of scheduled vacations, reserving the right to deny such vacation requests. Any complaints by customers or clients were handled by Safeguard. The record also discloses that field inspectors were required to use a computer compatible with software provided by Safeguard. Safeguard provided stickers and door hangers to inspectors and required that stickers bearing Safeguard's name be affixed to vacant properties. Safeguard tracked field inspectors' productivity and required their participation in regular mandatory telephone conferences to discuss work quality. Disciplinary action would be imposed upon field inspectors who failed to respond to Safeguard's contacts." ***Matter of Sischo (Safeguard Props. LLC--Commissioner of Labor)*, 2020 N.Y. Slip Op. 00894, Third Dept 2-6-20**

FOURTH DEPARTMENT

CIVIL PROCEDURE, FAMILY LAW, ATTORNEYS.

STATEMENT MADE IN PRIOR APPELLATE DECISION IN THE SAME MATTER TO THE EFFECT NO ONE QUESTIONED THE NUMBER OF HOURS PUT IN BY THE ATTORNEY FOR THE CHILD WAS DICTA AND THEREFORE SHOULD NOT HAVE BEEN CONSIDERED THE LAW OF THE CASE ON REMITTAL; THE FOURTH DEPARTMENT REDUCED THE NUMBER OF BILLABLE HOURS.

The Fourth Department, reducing the amount of attorney's fees awarded by Supreme Court, noted that a statement made by the Fourth Department in a prior appeal in the same matter was dicta and therefore should not have been treated as the law of the case by Supreme Court. In the prior decision the Fourth Department stated that no one had questioned the number of hours the attorney (Reedy) had worked on the case as the attorney for the child. Supreme Court took that statement to mean the number of hours could not be reduced by the court on remittal: "Our prior order unequivocally directed the court to calculate the amount of Reedy's fees. An award of attorney's fees must be 'calculated on the basis of the . . . hours actually and reasonably spent on the matter by . . . counsel, multiplied by counsel's reasonable hourly rate' ... . In assessing the reasonableness of the hours spent by counsel, the issue 'is not whether hindsight vindicates an attorney's time expenditures, but whether, at the time the work was performed, a reasonable attorney would have engaged in the same time expenditures' ... . Thus, upon remittal the court was, inter alia, to determine an award of attorney's fees that adequately reflected both the time spent and whether such time 'was reasonably related to the issues litigated' ... . Here, especially in light of Reedy's prior concession that the amount sought was excessive, we conclude that the court abused its discretion in fixing the amount of fees without determining the reasonableness of the number of hours included in Reedy's fee request ... . Contrary to respondent's contention, the court's statement in its earlier decision that '[n]o one has questioned the number of hours [Reedy] has claimed' did not become law of the case. The doctrine of law of the case 'applies only to legal determinations that were necessarily resolved on the merits in a prior decision' ... . Consequently, the doctrine does not apply where, as here, the court makes statements that are 'mere dicta' ... . Inasmuch as the court's ultimate ruling in its earlier decision was that Reedy was not entitled to compensation as a private pay AFC, the court's statement about the number of hours that he worked was dictum." ***Stefaniak v. Zulkharnain*, 2020 N.Y. Slip Op. 00961, Fourth Dept 2-7-20**

CRIMINAL LAW, APPEALS.

SUPREME COURT DID NOT RULE ON DEFENDANT'S MOTION FOR A TRIAL ORDER OF DISMISSAL, MATTER REMITTED FOR A RULING.

The Fourth Department, remitting the matter to Supreme Court, noted that Supreme Court did not rule on defendant's motion for a trial order of dismissal: "Defendant ... contends that the evidence is legally insufficient to support the conviction with respect to the weapon possession counts and that the court thus erred in denying his motion for a trial order of dismissal. At the close of the People's case, defendant moved for a trial order of dismissal on the ground that the evidence was legally insufficient to establish his possession of certain weapons, and the court reserved decision. Defendant renewed his motion at the conclusion of all the evidence, and the court again reserved decision. There is no indication in the record that the court ruled on defendant's motion. We do not address defendant's contention because, 'in accordance with *People v. Concepcion* (17 NY3d 192, 197-198 [2011]) and *People v. LaFontaine* (92 NY2d 470, 474 [1998], rearg denied 93 NY2d 849 [1999]), we cannot deem the court's failure to rule on the . . . motion as a denial thereof' ... . We therefore hold the case, reserve decision, and remit the matter to Supreme Court for a ruling on defendant's motion ... . ***People v. Bennett*, 2020 N.Y. Slip Op. 00957, Fourth Dept 2-7-20**

CRIMINAL LAW, APPEALS.

THE COURT, DEFENSE COUNSEL AND THE PROSECUTOR WERE UNDER THE MISCONCEPTION DEFENDANT WAS ELIGIBLE FOR A PAROLE SUPERVISION SENTENCE AT THE TIME DEFENDANT PLED GUILTY; THEREFORE THE MATTER CAN BE CONSIDERED ON APPEAL IN THE ABSENCE OF PRESERVATION; PLEA VACATED.

The Fourth Department, reversing Supreme Court, determined defendant was not eligible for a parole supervision sentence and the court, defense counsel and the prosecutor mistakenly believed defendant was eligible. Defendant's guilty plea was based upon the understanding the court would consider such a sentence (which the court ultimately did not impose). Because all parties misunderstood the law, defendant could not be expected to have preserved the error by moving to withdraw his plea and the matter can therefore be considered on appeal: "... [W]e conclude that defendant's plea should be vacated because '[i]t is impossible to have confidence, on a record like this, that defendant had a clear understanding of what he was doing when he entered his plea' ... . In short, we 'cannot countenance a conviction that seems to be based on complete confusion by all concerned' ... . Where, as here, 'the prosecutor, defense counsel and the court all suffered from the same misunderstanding of the [court's sentencing discretion], it would be unreasonable to conclude that defendant understood it' ... . Although the court did not commit to a sentence of parole supervision under CPL 410.91, it erroneously indicated that defendant was eligible for such a sentence and stated that it would consider such a sentence, among all sen-

tencing options, at sentencing—it did not qualify its statement or advise defendant that there was a possibility that he was not eligible for such a sentence ... . We therefore reverse the judgment, vacate the plea, and remit the matter to Supreme Court for further proceedings on the superior court information. In light of our determination, we do not reach defendant's remaining contentions." ***People v. Work*, 2020 N.Y. Slip Op. 00962, Fourth Dept 2-7-20**

CRIMINAL LAW, APPEALS.

FAILURE TO HOLD A HEARING TO DETERMINE DEFENDANT'S MENTAL CONDITION AFTER TWO PSYCHIATRISTS FOUND DEFENDANT SUFFERED FROM A DANGEROUS MENTAL CONDITION WAS REVERSIBLE ERROR; ALTHOUGH THE ERROR WAS NOT PRESERVED, THE APPEAL WAS CONSIDERED IN THE INTEREST OF JUSTICE.

The Fourth Department, reversing Supreme Court, determined it was reversible error to fail to conduct a hearing to determine defendant's mental condition after defendant had been examined by two psychiatrists who concluded defendant suffered from a dangerous mental condition. The error was not preserved but was reviewed in the interest of justice: "Defendant now appeals, by permission of this Court, from an amended order that, upon the court's finding that defendant suffered from a dangerous mental disorder, committed him to the custody of the Commissioner of Mental Health for confinement in a secure facility. ... CPL 330.20 (6) provides that, '[a]fter the examination reports are submitted, the court must, within [10] days of the receipt of such reports, conduct an initial hearing to determine the defendant's present mental condition' ... . In this case, however, the court did not conduct an initial hearing. We agree with defendant that, as the People correctly concede, the court's failure to conduct the requisite initial hearing constitutes reversible error ... . Although defendant failed to preserve his contention for our review ... , we nevertheless review it in the interest of justice ...". ***People v. David T.*, 2020 N.Y. Slip Op. 00964, Fourth Dept 2-7-20**

CRIMINAL LAW, ATTORNEYS.

DECISION WHETHER TO ADMIT OR DENY ALLEGATIONS IN A PREDICATE FELONY STATEMENT IS RESERVED TO DEFENDANT PERSONALLY, NOT DEFENSE COUNSEL.

The Fourth Department noted that the decision whether to admit or deny the allegations in a predicate felony statement is reserved to the defendant personally, not defense counsel: "... [W]hether to admit or controvert the allegations in a predicate felony statement is a 'fundamental' decision 'comparable to how to plead and whether to waive a jury, take the stand or appeal,' and it is 'therefore reserved to the accused' personally ... . Thus, the court did not violate defendant's right to counsel by accepting his personal decision to controvert the allegations in the People's predicate felony statement notwithstanding defense counsel's contrary views and advice ... . Defendant's related assertion that defense counsel was ineffective for failing to adequately apprise him of the ramifications of contesting the predicate felony statement is belied by the record ...". ***People v. Favors*, 2020 N.Y. Slip Op. 00968, Fourth Dept 2-7-20**

CRIMINAL LAW, EVIDENCE.

SUPREME COURT PROPERLY FOUND THAT THE OFFICER DID NOT HAVE SUFFICIENT GROUNDS TO STOP DEFENDANT ON THE STREET, DETAIN HIM, SEARCH HIS BAG AND TRANSPORT HIM TO THE BURGLARY SCENE FOR A SHOWUP IDENTIFICATION.

The Fourth Department affirmed Supreme Court's ruling that the officer did not have a sufficient basis for detaining the defendant on the street, searching defendant's bag and transporting defendant to the burglary scene: "The evidence at the suppression hearing established that the officer who initiated the encounter with defendant was responding to a radio dispatch of a burglary in progress. Because other officers were already at the scene of the burglary when he arrived, the officer canvassed the nearby area in his patrol car. Shortly thereafter, the officer noticed defendant three blocks from the burglary scene, walking alone and carrying a bag and a cell phone. The officer approached defendant, exited his vehicle, and asked defendant what he was doing, and defendant stated that he was looking through garbage cans. The officer then searched defendant's bag in order to check for weapons and informed defendant that he was going to drive defendant back to the scene of the burglary in order to determine whether defendant was a suspect. The officer placed defendant in the back of the patrol car and drove him to the scene of the crime, where a showup identification was conducted and defendant was identified as the burglar and arrested. The evidence also established that, prior to beginning his shift on the day of the encounter, the officer received a 'be on the lookout' (BOLO) photograph depicting defendant and reflecting that defendant may have been involved in a prior burglary. Contrary to the People's contention, we perceive no basis in the record for disturbing the court's finding that the officer did not recognize defendant as the individual depicted in the BOLO until after he drove defendant to the scene of the burglary for the showup identification ... . Although the officer justified the search of defendant's bag as a check for weapons, the record does not reflect that, at any time during the encounter, the officer 'reasonably suspected that defendant was armed and posed a threat to [his] safety' ... . Further, all the officer could definitively recall of the initial radio dispatch reporting the burglary in progress was that it described the suspect as a male, although the officer also testified that the dispatch might have identified the suspect as Hispanic and wearing a dark hooded sweatshirt. The vague description of the suspect provided by the radio dispatch, as recounted by the officer at the suppression hearing, did not

provide the officer with the requisite reasonable suspicion to effect what was at least a forcible detention of defendant and to transport him to take part in a showup identification ...". ***People v. Nazario*, 2020 N.Y. Slip Op. 00955, Fourth Dept 2-7-20**

EMPLOYMENT LAW, TORTIOUS INTEREFERENCE WITH EMPLOYMENT, DEFAMATION, INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS, ANIMAL LAW, EVIDENCE.

TORTIOUS INTERFERENCE WITH EMPLOYMENT AND DEFAMATION CAUSES OF ACTION SHOULD NOT HAVE BEEN DISMISSED; INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS CAUSE OF ACTION PROPERLY DISMISSED; ELEMENTS EXPLAINED.

The Fourth Department, reversing Supreme Court, determined plaintiff stated causes of action for tortious interference with employment and defamation against a fellow employee of the Central New York Society for the Prevention of Cruelty to Animals (CNYSPCA). The intentional infliction of emotional distress cause of action was properly dismissed. The Fourth Department explained the elements of each cause of action and noted that the documents submitted to prove the truth of the allegedly defamatory statements were not "essentially undeniable" and did not "utterly refute" the allegations: "Plaintiff commenced this action to recover damages for tortious interference with employment, defamation, and intentional infliction of emotional distress (IIED). According to the complaint, at all times relevant to this appeal, plaintiff was the Executive Director of the Central New York Society for the Prevention of Cruelty to Animals (CNYSPCA) and defendant Stacy Laxen, DVM was a veterinarian for the CNYSPCA. During her tenure with the CNYSPCA, plaintiff directed that several cats be euthanized due to an outbreak of ringworm. Soon thereafter, and based on plaintiff's decision to approve euthanasia without input from a veterinarian, defendant Board of Directors of the CNYSPCA terminated plaintiff's employment. ... '[A]n at-will employee may assert a cause of action alleging tortious interference with employment where he or she can demonstrate that the defendant utilized wrongful means to effect his or her termination . . . In such cases, the plaintiff is required to show: (1) the existence of a business relationship between the plaintiff and a third party; (2) the defendants' interference with that business relationship; (3) that the defendants acted with the sole purpose of harming plaintiff or used dishonest, unfair, improper or illegal means that amounted to a crime or an independent tort; and (4) that such acts resulted in the injury to the plaintiff's relationship with the third party' … . ... [W]e conclude that plaintiff sufficiently alleged that Laxen's statements constituted defamation per se inasmuch as they purportedly injured plaintiff in her 'professional standing'... . Furthermore, despite the court's determination that plaintiff was a limited purpose public figure and Laxen was protected by the common interest qualified privilege, accepting the facts as alleged in the complaint as true, and according plaintiff the benefit of every possible favorable inference, we conclude that the complaint sufficiently alleged that Laxen acted with the requisite malice necessary to overcome those defenses ...". ***Conklin v. Laxen*, 2020 N.Y. Slip Op. 00958, Fourth Dept 2-7-20**

PERSONAL INJURY.

PROOF DID NOT DEMONSTRATE THE PLACEMENT OF A RUG CONSTITUTED A DANGEROUS CONDITION IN THIS SLIP AND FALL CASE, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED.

The Fourth Department, reversing Supreme Court, determined the proof did not establish the placement of a rug was a dangerous condition in this slip and fall case: "Plaintiff commenced this action seeking damages for injuries she sustained when she allegedly tripped and fell on a rug while walking through a restaurant owned and operated by defendant. We agree with defendant that Supreme Court erred in denying its motion seeking summary judgment dismissing the complaint. We therefore reverse the order, grant the motion, and dismiss the complaint. 'Although the issue whether a certain condition qualifies as dangerous or defective is usually a question of fact for the jury to decide . . . , summary judgment in favor of a defendant is appropriate where a plaintiff fails to submit any evidence that a particular condition is actually defective or dangerous' ... . Here, defendant established its entitlement to judgment as a matter of law by submitting evidence that the placement of the rug in the restaurant did not constitute a dangerous condition, and in opposition plaintiff failed to raise a triable issue of fact ...". ***Glosek v. Bella Pizza*, 2020 N.Y. Slip Op. 00933, Fourth Dept 2-7-20**

PERSONAL INJURY.

QUESTION OF FACT WHETHER DRIVER OF THE MOTORCYCLE, WHO HAD THE RIGHT OF WAY IN THIS INTERSECTION TRAFFIC ACCIDENT CASE, COULD HAVE AVOIDED THE COLLISION.

The Fourth Department, reversing Supreme Court, determined there was a question of fact whether defendant driver of the motorcycle (Baker) could have avoided this intersection traffic accident case. The motorcycle had the right-of-way and collided with defendants' (Willow Bend's) truck. Plaintiff was a passenger on the motorcycle. Willow Bend's cross motion against the driver of the motorcycle (Baker Estate) should not have been dismissed: "We agree with the Willow Bend defendants that the court erred in granting that part of the motion seeking summary judgment dismissing the Willow Bend defendants' cross claim. In moving for summary judgment, the Baker Estate had the initial burden of establishing, as a matter of law, that Baker 'was operating [the motorcycle] in a lawful and prudent manner and that there was nothing that [Baker] could have done to avoid the collision' ... . '[I]t is well settled that drivers have a duty to see what should be seen and to exercise reasonable care under the circumstances to avoid an accident' ... . '[U]nder the doctrine of comparative neg-

ligence, a driver who lawfully enters an intersection may still be found partially at fault for an accident if he or she fails to use reasonable care to avoid a collision with another vehicle in the intersection' ... . We conclude that the Baker Estate failed to meet that burden, inasmuch as its own submissions in support of the motion raised a triable issue of fact ... Although the Baker Estate established that Baker had the right-of-way as he approached the intersection, the Baker Estate submitted the deposition testimony of Baker and plaintiff, who each testified that, before the collision, Baker applied his brakes but did not attempt to steer around the dump truck. Baker further testified that he did not use his horn. Viewed in the light most favorable to the Willow Bend defendants, that testimony raises an issue of fact whether Baker exercised reasonable care under the circumstances to avoid an accident ...". ***Carroll v. Willow Bend Farm LLC*, 2020 N.Y. Slip Op. 00954, Fourth Dept 2-7-20**

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