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COURT OF APPEALS

CRIMINAL LAW.

THE ERRONEOUSLY UNSEALED RECORD OF A CRIMINAL PROCEEDING TERMINATED IN FAVOR OF THE DEFENDANT SHOULD NOT HAVE BEEN CONSIDERED BY THE SENTENCING COURT, MATTER REMITTED FOR RESENTENCING.

The Court of Appeals, in a full-fledged opinion by Judge Rivera, reversing the Appellate Division, over a three-judge dissenting opinion, determined the sentencing court should not have considered the erroneously unsealed records of a prior criminal action which was terminated in favor of the defendant. The matter was sent back for resentencing: "A court is without authority to consider for sentencing purposes erroneously unsealed official records of a prior criminal action or proceeding terminated in favor of the defendant. Where violation of the sealing mandate of CPL 160.50 impacts the ultimate sentence, the error warrants appropriate correction. Such is the case here, where the court imposed on defendant a higher sentence than promised at his plea, based on its finding that the unsealed trial record—which the court mistakenly believed it could consider—established defendant's violation of a pre-sentence condition of his plea. * * * Before sentencing, defendant was arrested and prosecuted for a crime allegedly committed after entering his plea. At defendant's request, the sentencing court agreed to adjourn defendant's sentencing pending resolution of the matter. The jury acquitted defendant of the new charge and the official record, including the trial transcript, was sealed in accordance with CPL 160.50. The day following that acquittal, the prosecutor informed the court which had accepted defendant's criminal possession plea that the People would be requesting an enhanced sentence on the criminal possession conviction because defendant violated a pre-sentence condition of the plea by engaging in criminal conduct during the sentencing adjournment, as made clear by defendant's trial testimony in the other case. The prosecutor then moved to unseal the records in the prior criminal action terminated by acquittal, arguing 'justice requires' unsealing because the trial testimony was relevant to defendant's request to be sentenced under the terms of his plea. The court granted the motion." ***People v. Anonymous*, 2020 N.Y. Slip Op. 01113, CtApp 2-18-20**

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

'RELIABLE HEARSAY' IN A PRESENTENCE INVESTIGATION (PSI) REPORT IS A SUFFICIENT BASIS FOR A FINDING DEFENDANT USED VIOLENCE IN THE COMMISSION OF A SEX OFFENSE; LEVEL TWO RISK ASSESSMENT UPHELD.

The Court of Appeals, over an extensive two-judge dissent, determined documentary evidence of "reliable hearsay" was sufficient for a finding defendant used violence to coerce the child victim in this "course of sexual conduct against a child" case, Therefore defendant was properly adjudicated a level two risk of reoffense: "At a SORA hearing conducted as defendant was nearing completion of his prison sentence, he was adjudicated a level two risk of reoffense due, in part, to the assessment of ten points under risk factor one, use of violence. That finding was based on information in the Presentence Investigation (PSI) report prepared in connection with the offense stating that '[o]n one or more occasions, he used physical force to coerce the victim into cooperation,' information also included in the case summary prepared by the Board of Examiners of Sex Offenders. Defendant argues that this evidence was insufficient to supply evidence of use of violence because it constituted hearsay and did not more specifically describe his conduct. ... SORA adjudications, by design, are typically based on documentary evidence under the statute's 'reliable hearsay' standard. Case summaries and PSI reports meet that standard ... , meaning they can provide sufficient evidence to support the imposition of points. PSI reports are prepared by probation officers who investigate the circumstances surrounding the commission of the offense, defendant's record of delinquency or criminality, family situation and social, employment, economic, educational and personal history, analyzing that data to provide a sentencing recommendation (see CPL 390.30[1]). Their primary function is to assist a criminal court in determining the appropriate sentence for the particular defendant based on the specific offense. Defendants have a right to review the report prior to sentencing (see CPL 390.50[2][a]) and may challenge the accuracy of any facts contained therein at that time (see CPL 400.10). * * * Because there is record support for the imposition of points under risk factor one, there is no basis to disturb the Appellate Division order." ***People v. Diaz*, 2020 N.Y. Slip Op. 01114, CtApp 2-18-20**

LABOR LAW-CONSTRUCTION LAW, EVIDENCE.

PLAINTIFF WAS INJURED ATTEMPTING TO ENTER A BUILDING FROM A SCAFFOLD THROUGH A WINDOW CUT-OUT; THERE WAS A QUESTION OF FACT WHETHER PLAINTIFF WAS AWARE THAT METHOD OF ENTERING THE BUILDING WAS PROHIBITED BY DEFENDANTS; THE LABOR LAW § 240(1) CAUSE OF ACTION SHOULD NOT HAVE BEEN DISMISSED.

The Court of Appeals, reversing (modifying) the Appellate Division, over a three-judge dissent, determined defendants' motion for summary judgment should not have been granted in this Labor Law § 240(1) action. Plaintiff was injured when he fell attempting to enter a building from a scaffold through a window cut-out. Although there was evidence of a standing order prohibiting use of that method for entering the building, other workers used that method: "A defendant has no liability under Labor Law § 240 (1) when plaintiffs: (1) 'had adequate safety devices available,' (2) 'knew both that' the safety devices "were available and that [they were] expected to use them,' (3) 'chose for no good reason not to do so,' and (4) would not have been injured had they 'not made that choice' ... . Here, a triable issue of fact exists as to whether plaintiff knew he was expected to use the safety devices provided to him, despite the apparent accepted practice of entering the building through the window cut-outs from the scaffolding. Indeed, as the Appellate Division dissent concluded, the Appellate Division majority (and the dissent here) 'ignore[] the evidence in the record that workers on this job site used the scaffold to go through window cut-outs to enter the interior of the building and that the scaffold was clearly inadequate for that purpose' ... . Given defendants' purported acquiescence to this alleged practice, the general contractor's standing order directing workers not to enter the building through the cut-outs is insufficient to entitle defendants to summary judgment ... . Further, the accepted practice could have negated the normal and logical inclination to use the scaffold, stairs, or hoist instead of the cut-outs ... . Finally, in context and given the other conflicting evidence in the record, a factfinder should determine whether plaintiff's statement that he 'wasn't supposed to pass through there' unambiguously establishes that he knew he was expected to use the safety devices." ***Biaca-Neto v. Boston Rd. II Hous. Dev. Fund Corp.*, 2020 N.Y. Slip Op. 01116, CtApp 2-18-20**

FIRST DEPARTMENT

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

PLAINTIFF WAS INJURED WHEN THE CEILING COLLAPSED WHILE HE WAS TAKING OUT WALLS, THE LABOR LAW §§ 240(1), 241(6) AND 200 CAUSES OF ACTION SHOULD NOT HAVE BEEN DISMISSED.

The First Department, reversing (modifying) Supreme Court, determined that plaintiff's Labor Law §§ 240(1), 241(6) and 200 causes of action should not have been dismissed. Plaintiff was in the process of taking down two bathroom walls when the ceiling collapsed: "To prevail on a Labor Law § 240(1) claim based on an injury resulting from the failure of a completed and permanent building structure (in this case, the collapse of a ceiling), a plaintiff must show that the failure of the structure in question was a foreseeable risk of the task he was performing, creating a need for protective devices of the kind enumerated in the statute ... . Here, there are issues of fact as to whether the ceiling was in such an advanced state of disrepair due to water damage that plaintiff's work on the bathroom walls exposed him to a foreseeable risk of injury from an elevation-related hazard, the fall of the ceiling, and whether the absence of a type of protective device enumerated under Labor Law § 240(1) was a proximate cause of his injuries. Because the evidence of water stains on the bathroom ceiling could provide constructive notice of a dangerous condition, summary judgment dismissing plaintiff's common-law negligence and Labor Law § 200 claims was also improperly granted. ... Defendants failed to show that plaintiff was not engaged in demolition work to trigger Labor Law § 241(6). His task was part of a larger project that included the demolition of interior walls, 'which altered the structural integrity of the building' (... Industrial Code § 23-1.4[b][16]). Issues of fact exist as to whether Industrial Code § 23-3.3(b)(3) and (c), pertaining to demolition, were violated or whether any such violation was a proximate cause of plaintiff's injuries." ***Clemente v. 205 W. 103 Owners Corp.*, 2020 N.Y. Slip Op. 01117, First Dept 2-18-20**

PERSONAL INJURY, EVIDENCE, LANDLORD-TENANT.

THERE WAS EVIDENCE THE WATER ON THE FLOOR WAS A RECURRENT DANGEROUS CONDITION; PLAINTIFF SHOULD HAVE BEEN ALLOWED TO PRESENT AS A WITNESS DEFENDANT'S EMPLOYEE, THE BUILDING SUPERINTENDENT AT THE TIME OF THE SLIP AND FALL, DESPITE LATE NOTIFICATION; THE DIRECTED VERDICT WAS REVERSED.

The First Department, reversing the directed verdict, determined the proof demonstrated water leaking from the ceiling onto the floor was a recurrent dangerous condition which was not addressed by the landlord. The First Department also held that a witness for the plaintiff, who was defendant's employee at the time of the accident, should have been allowed to testify: "Plaintiff's trial evidence established prima facie that defendant had constructive notice of the water on the floor of the lobby of its building on which plaintiff allegedly slipped and fell ... . Plaintiff testified that at least four times before his accident, every few months, he observed water leaking from the ceiling onto the floor below in the area where he fell. His former girlfriend, with whom he lived in the building, testified that before the date of the accident 'there were leaks

and then afterward it was leaking again.' This testimony established that 'an ongoing and recurrent dangerous condition existed in the area of the accident that was routinely left unaddressed by the landlord' ... . Issues of credibility were for the jury. The trial court improvidently exercised its discretion in precluding the testimony of Henry Soto, defendant's building superintendent at the time of the accident, on the ground that it was prejudicial to defendant. Defendant could not have been prejudiced or surprised by plaintiff's disclosure of Soto as a witness on the eve of trial, since Soto was defendant's employee at the time of the accident ...". ***Monzac v. 1141 Elder Towers LLC*, 2020 N.Y. Slip Op. 01243, First Dept 2-20-20**

SECURITIES, CONTRACT LAW, ARBITRATION.

RESPONDENT WAS A CUSTOMER OF PETITIONER SECURITIES CORPORATION WITHIN THE MEANING OF FINANCIAL INDUSTRY REGULATORY AUTHORITY (FIRA) RULES AND THEREFORE COULD COMPEL ARBITRATION.

The First Department, reversing Supreme Court, over an extensive dissent, determined respondent was a customer of petitioner (LekUS) and therefore could compel FINRA (Financial Industry Regulatory Authority) arbitration. Petitioner had been sued by FINRA in connection with shares of Cannabis Science, Inc. (CBIS) purchased by respondent and held by petitioner for trading: "The record establishes that respondent was a customer of nonparty Lek Securities UK, Ltd. (LekUK), where he had his account, and was also a client of petitioner Lek Securities Corp. (LekUS), with which he had a series of direct agreements. Under those agreements, LekUS conditioned its provision of depository and execution services for certain trades on respondent's providing certain representations and an indemnity ... . Specifically, respondent purchased shares of Cannabis Science, Inc. (CBIS) in a series of transactions in 2015 and 2016 that required that the shares be held and sold in the United States. For each transaction, respondent executed an agreement (Deposit Agreement) directly with LekUS pursuant to which LekUS deposited the shares in its account at the Depository Trust & Clearing Corporation (DTCC). In each Deposit Agreement, (1) respondent represented that his answers to certain questions were true and acknowledged that LekUS would rely on those representations; (2) LekUS agreed to act as the 'Processing Broker' to provide the services of depositing and reselling the shares; and (3) LekUS accepted respondent's 'Deposit Securities Request' on certain conditions, including that any claims by respondent or disputes arising from respondent's representations in the Deposit Agreement 'shall be governed by New York law and subject to the exclusive venue and jurisdiction of the courts and arbitration forums in the City and State of New York,' and that respondent would indemnify LekUS in connection with claims arising from respondent's representations in the Deposit Agreement or from 'the deposit process or the subsequent sale of the securities.' When respondent sought to trade the CBIS shares deposited with LekUS, he communicated with Michael Mainwald, who was located at the office of LekUS, had a LekUS phone number and email address, and was registered with FINRA as the 'principal operating officer' of LekUS. ... LekUS notified respondent that it had been sued by FINRA in connection with CBIS transactions and that LekUS sought indemnification by defendant pursuant to the Deposit Agreements. ... [R]espondent was a 'customer' of LekUS within the meaning of FINRA Rule 12200, and was therefore entitled to demand arbitration." ***Matter of LEK Sec. Corp. v. Elek*, 2020 N.Y. Slip Op. 01134, First Dept 2-18-20**

SECOND DEPARTMENT

CIVIL PROCEDURE, PERSONAL INJURY.

ALTHOUGH PLAINTIFF'S REPEATED FAILURE TO APPEAR FOR THE CONTINUATION OF HER DEPOSITION WAS WILLFUL, STRIKING THE COMPLAINT WAS TOO SEVERE A SANCTION.

The Second Department, reversing (modifying Supreme Court) determined striking the complaint was too severe a sanction for plaintiff's repeated failure to appear for the continuation of her deposition: "... [T]he plaintiff's repeated failure to appear for her continued deposition, coupled with her failure to demonstrate a reasonable excuse for that failure, supports an inference that her conduct was willful ... . The plaintiff proffered the health condition of her attorney as an excuse for failing to appear for the continued deposition. However, the plaintiff's attorney did not submit medical evidence or sufficient documentary facts to support the claim, or explain why his per diem attorney was unable to attend the deposition ... . Even so, given that the plaintiff had complied with disclosure except for completing the continued deposition relating to newly alleged injuries, we find that the striking of the complaint was too drastic a remedy. Accordingly, we modify the order appealed from by deleting the provision thereof granting the defendant's motion, in effect, pursuant to CPLR 3126(3) to strike the complaint, and substitute therefor a provision granting the defendant's motion only to the extent of precluding the plaintiff from offering evidence at trial with respect to any of the new injuries alleged in the plaintiff's supplemental verified bill of particulars ...". ***Turiano v. Schwaber*, 2020 N.Y. Slip Op. 01200, Second Dept 2-19-20**

COURT OF CLAIMS, CIVIL PROCEDURE, UTILITIES.

ALTHOUGH SOME MONETARY RELIEF WAS SOUGHT, THE ESSENTIAL NATURE OF THE CLAIM WAS A DECLARATION VERIZON HAD WRONGFULLY DISCONTINUED CLAIMANT'S LIFELINE SERVICE; THEREFORE THE ACTION WAS PROPERLY DISMISSED AS OUTSIDE THE JURISDICTION OF THE COURT OF CLAIMS.

The Second Department noted that the jurisdiction of the Court of Claims is generally limited to money damages. Therefore the action, which was seeking a ruling that claimant's Verizon Lifeline Service was wrongfully discontinued, was properly dismissed: "The Court of Claims is a court of limited jurisdiction determined by the Constitution and statute (see NY Const art VI, § 9; Court of Claims Act § 9). Its jurisdiction is generally limited to money damage awards against the State ... . 'Whether the essential nature of the claim is to recover money, or whether the monetary relief is incidental to the primary claim, is dependent upon the facts and issues presented in a particular case' ... . Here, while the claimant alleges certain monetary losses, the essential nature of his claim is one seeking to compel the PSC [NYS Public Service Commission] to investigate and issue a determination on his complaint that Verizon wrongfully discontinued his Lifeline Service, which he alleges the PSC is required to do. The money damages sought are merely incidental to the primary question of the PSC's investigation and regulation of Verizon with respect to the Lifeline Service program." ***Aliksanyan v. State of New York*, 2020 N.Y. Slip Op. 01137, Second Dept 2-19-20**

CRIMINAL LAW.

COUNTY COURT SHOULD HAVE HELD A HEARING ON DEFENDANT'S MOTION TO DISMISS ON SPEEDY TRIAL GROUNDS; THE PROSECUTION WAS NOT STARTED UNTIL 22 MONTHS AFTER THE INCIDENT; MATTER REMITTED.

The Second Department, remitting the matter for a hearing, determined defendant should have been afforded a hearing on his motion to dismiss for a speedy trial violation. Defendant was charged with damaging his wife's computer in a domestic incident. The charge was not brought for 22 months: " '[U]nder state due process principles, lengthy and unjustifiable delay in commencing the prosecution may require dismissal even though no actual prejudice to the defendant is shown' ... . However, ' a determination made in good faith to defer commencement of the prosecution for further investigation or for other sufficient reasons, will not deprive the defendant of due process of law even though the delay may cause some prejudice to the defense' ... .. 'Where there has been extended delay, it is the People's burden to establish good cause' ... . Here, the County Court failed to appropriately balance the requisite factors and improperly denied, without a hearing, the defendant's motion to dismiss the indictment on the ground that he was deprived of due process by the People's unjustified delay in prosecution. Under the circumstances presented, which included a delay of approximately 22 months from the time of the incident to the filing of the indictment and arraignment, the People's failure on the record to establish a good faith legitimate reason for the delay, and the defendant's claim of prejudice, the County Court should have conducted a hearing before determining that the delay in prosecution was not in violation of the defendant's due process rights ...". ***People v. Clark*, 2020 N.Y. Slip Op. 01180, Second Dept 2-19-20**

CRIMINAL LAW.

PEOPLE'S REQUEST TO DENY DISCLOSURE BECAUSE OF CONCERNS FOR WITNESS SAFETY SHOULD HAVE BEEN GRANTED IN ITS ENTIRETY.

The Second Department determined the prosecutor's request to deny disclosure of certain exhibits should have been granted: "Pursuant to CPL 245.70(6), a party who has unsuccessfully sought, or opposed the granting of, a protective order relating to the name, address, contact information, or statements of a person may obtain expedited review by an individual justice of the intermediate appellate court to which an appeal from a judgment of conviction would be taken. Although the statute does not specify what standard the intermediate appellate justice is to apply in performing the expedited review, I concur that where, as here, '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' ... . Applying these standards to the matters at hand, I conclude that the Supreme Court's determination to grant the People's request only to the extent indicated was an improvident exercise of discretion. Under the particular facts and circumstances presented, concerns for witness safety and protection far outweigh the usefulness of the discovery of the material or information in question. Consequently, I grant the People's application to review pursuant to CPL 245.70(6) and modify the protective order accordingly." ***People v. Reyes*, 2020 N.Y. Slip Op. 01275, Second Dept 2-21-20**

CRIMINAL LAW, APPEALS, ATTORNEYS.

'ANDERS' BRIEF DEFICIENT; NEW COUNSEL ASSIGNED FOR THE APPEAL.

The Second Department determined the "Anders" appellate brief submitted by counsel was deficient and assigned new counsel for the appeal: "The brief submitted by the appellant's counsel pursuant to Anders v. California (386 US 738) is

deficient because it fails to contain an adequate statement of facts and fails to analyze potential appellate issues or highlight facts in the record that might arguably support the appeal ... . The statement of facts does not review, in any detail, the Supreme Court's advisements to the appellant regarding the rights he was waiving, the inquiries made of the appellant to ensure that the admission was knowingly and voluntarily entered, or the appellant's responses to any of those advisements and inquiries ... . Since the brief does not demonstrate that assigned counsel fulfilled his obligations under Anders v. California, we must assign new counsel to represent the appellant ...". ***People v. Morales*, 2020 N.Y. Slip Op. 01188, Second Dept 2-19-20**

Similar issues and result in ***People v. Santos*, 2020 N.Y. Slip Op. 01193, Second Dept 2-19-20**

CRIMINAL LAW, ATTORNEYS, APPEALS, MENTAL HYGIENE LAW.

DEFENSE COUNSEL INEFFECTIVE FOR CONCEDING DEFENDANT SUFFERS FROM A DANGEROUS MENTAL DISORDER; COUNTY COURT SHOULD HAVE HELD THE MANDATORY STATUTORY HEARING; APPEAL IS NOT ACADEMIC BECAUSE OF LASTING CONSEQUENCES OF THE 'DANGEROUS MENTAL DISORDER' FINDING.

The Second Department, reversing County Court, determined defendant did not receive effective assistance of counsel because the attorney conceded defendant suffered from a dangerous mental disorder. County Court should have held the mandatory statutory hearing. The appeal is not academic because of the lasting effect of the finding defendant suffers from a dangerous mental disorder: "Although the commitment order has expired by its own terms, the appeal is not academic because the County Court's determination that the defendant has a dangerous mental disorder has lasting consequences that will affect all future proceedings regarding his commitment and release ... . The initial hearing under CPL 330.20(6) is a critical stage of the proceedings during which the defendant is entitled to the effective assistance of counsel ... . Here, there was simply no legitimate strategy that could have warranted defense counsel's concession that the defendant suffered from a dangerous mental disorder, implicitly consenting to the defendant's confinement in a secure facility ... . As defense counsel failed to provide meaningful representation, the defendant was deprived of the effective assistance of counsel ... . Neither the defendant's nor defense counsel's concession to a finding of dangerous mental disorder can relieve the County Court from the obligation to provide the initial statutory hearing, which is mandatory (see CPL 330.20[6] ...)." ***People v. Juan R.*, 2020 N.Y. Slip Op. 01190, Second Dept 2-19-20**

CRIMINAL LAW, EVIDENCE.

JURY SHOULD NOT HAVE BEEN CHARGED ON THE 'COMBAT BY AGREEMENT' EXCEPTION TO THE JUSTIFICATION DEFENSE, CRITERIA EXPLAINED; ERROR DEEMED HARMLESS HOWEVER.

Although the error was deemed harmless, the Second Department determined the jury should not have been instructed on the "combat by agreement" exception to the justification defense. Defendant was on a bus when rival gang members got on the bus. Defendant (14 years old) pulled out a gun and shot, killing an innocent passenger: "Supreme Court should not have charged the jury with respect to the combat by agreement exception to the justification defense. The court granted the People's request for the instruction based upon generalized evidence that the defendant was a member of a gang which had a rivalry with other local gangs, including the gang with which the persons who approached the defendant were affiliated. However, any evidence of an alleged agreement in this case was tacit, open-ended as to time and place, and applicable to all members of the gangs of the parties involved as well as to all members of their affiliate gangs. The combat by agreement exception to justification is generally limited to agreements to combat between specific individuals or small groups on discrete occasions ... . As there was no evidence of a combat agreement between the defendant and the specific persons who approached him on the bus, or among rival gang members during a discrete period of time or at a specific location, there was no reasonable view of the evidence that the combat by agreement exception applied to negate a justification defense in this case ...". ***People v. Anderson*, 2020 N.Y. Slip Op. 01179, Second Dept 2-19-20**

CRIMINAL LAW, EVIDENCE, APPEALS.

PROOF OF THE VALUE OF THE STOLEN ITEMS WAS INSUFFICIENT; GRAND LARCENY 3RD DEGREE CONVICTION NOT SUPPORTED BY THE WEIGHT OF THE EVIDENCE.

The Second Department determined the grand larceny third degree charged was against the weight of the evidence because the value of the stolen items was not proven: "The People were required to establish that the market value of the stolen items at the time of the crime exceeded $3,000 (see Penal Law § 155.20[1]). Here, the stolen property consisted of two handguns, several items of jewelry, and a computer tablet. The complainant testified that (1) the purchase price of the .40 caliber Smith & Wesson automatic handgun was $800 and that he purchased it '[a]pproximately four years' before the burglary; (2) the purchase price of the .380 Ruger automatic handgun was $600 and that he purchased it '[t]wo years' before the burglary; and (3) he cleaned both guns regularly, and they were both operable. The People's ballistics expert testified that the retail value of each firearm was 'anywhere from $500 to $1,000.' However, the only evidence of the value of the remaining stolen items was the complainant's testimony regarding the purchase price of some of those items, and he did not testify as to when he purchased those items, their market value, or the cost to replace them. Although a 'victim is competent to supply

evidence of original cost' ... , 'evidence of the original purchase price, without more, will not satisfy the People's burden' ... . On this record, we cannot conclude that the fact-finder could 'reasonably infer, rather than merely speculate' that the value of all of the stolen goods exceeded the statutory threshold of $3,000 ... . Accordingly, we find that the evidence was insufficient to establish that the value of the property taken exceeded $3,000 ...". ***People v. Rivera*, 2020 N.Y. Slip Op. 01192, Second Dept 2-19-20**

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

SCHOOL-GROUNDS-PROXIMITY-RESIDENCE PROHIBITION APPLIED TO PETITIONER, A LEVEL THREE SEX OFFENDER, EVEN THOUGH THE OFFENSE FOR WHICH HE WAS BEING PAROLED WAS BURGLARY; SECOND DEPARTMENT DISAGREED WITH THE RESOLUTION OF THIS ISSUE BY THE THIRD AND FOURTH DEPARTMENTS; APPEAL WAS HEARD AS AN EXCEPTION TO THE MOOTNESS DOCTRINE.

The Second Department, reversing Supreme Court and disagreeing with the Third and Fourth Departments, determined Executive Law § 259-c(14), which prohibits sex offenders from entering school grounds, applied to petitioner in this habeas corpus proceeding. Petitioner had been designated a level three sex offender and was subsequently arrested and incarcerated for burglary. He was not released on parole for the burglary conviction when his sentence was complete because housing which complied with the school-grounds condition could not be found. Although the habeas corpus petition was moot because defendant had been released at the time of the appeal, the exception to the mootness doctrine allowed appellate review: "Executive Law § 259-c(14) provides, in relevant part, that 'where a person serving a sentence for an offense defined in [Penal Law articles 130, 135, or 263, or Penal Law §§ 255.25, 255.26, or 255.27] and the victim of such offense was under the age of [18] at the time of such offense or such person has been designated a level three sex offender pursuant to [Correction Law § 168-l(6)], is released on parole or conditionally released pursuant to [Executive Law § 259-c(1) or (2)], the [Board of Parole] shall require, as a mandatory condition of such release, that such sentenced offender shall refrain from knowingly entering into or upon any school grounds, as that term is defined in [Penal Law § 220.00(14)], . . . while one or more of such persons under the age of [18] are present.' As a result of its inartful wording and use of the term 'such person,' Executive Law § 259-c(14) has been interpreted in opposing fashion by the Appellate Division, Third Department (see People ex rel. Negron v. Superintendent Woodbourne Corr. Facility, 170 AD3d 12) and the Appellate Division, Fourth Department (see People ex rel. Garcia v. Annucci, 167 AD3d 199). Inasmuch as the statute is amenable to competing interpretations, we agree with the appellants that the language of the statute is ambiguous and should be interpreted with reference to its legislative history and the purpose of the enactment of the 2005 amendment ... . The legislative history clearly supports an interpretation that imposes the SARA [Sexual Assault Reform Act]-residency requirement based on either an offender's conviction of a specifically enumerated offense against an underage victim or the offender's status as a level three sex offender ... ". ***People ex rel. Rosario v. Superintendent, Fishkill Corr. Facility*, 2020 N.Y. Slip Op. 01178, Second Dept 2-19-20**

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

NOTICE REQUIREMENTS OF RPAPL 1304 NOT PROVEN; PLAINTIFF BANK'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED IN THIS FORECLOSURE ACTION.

The Second Department, reversing Supreme Court, determined the proof of compliance with the RPAPL 1304 notice requirements was deficient: "... [T]he plaintiff failed to submit an affidavit of service or any evidence of mailing by the post office demonstrating that it properly served the defendant pursuant to the terms of RPAPL 1304 ... . Contrary to the plaintiff's contention, the affidavit of a representative of its loan servicer was insufficient to establish that the notice was sent to the defendant in the manner required by RPAPL 1304, as the representative did not provide evidence 'of a standard office mailing procedure designed to ensure that items are properly addressed and mailed' ... , and provided no independent evidence of the actual mailing ...". ***U.S. Bank N.A. v. Herzberg*, 2020 N.Y. Slip Op. 01201, Second Dept 2-19-20**

INSURANCE LAW, PERSONAL INJURY.

PLAINTIFF'S CLAIM IN THIS PEDESTRIAN HIT-AND-RUN ACTION WAS NOT AUTOMATICALLY ASSIGNED TO THE MOTOR VEHICLE ACCIDENT INDEMNIFICATION CORPORATION WHEN PLAINTIFF ACCEPTED A SETTLEMENT; PLAINTIFF'S ACTION AGAINST THE DEFENDANT TAXICAB COMPANY AND THE DRIVERS WHO WERE ON DUTY WHEN PLAINTIFF WAS STRUCK SHOULD NOT HAVE BEEN DISMISSED.

The Second Department, reversing Supreme Court, determined the plaintiff's acceptance of a settlement from the Motor Vehicle Accident Indemnification Corporation (MVAIC) did not automatically assign plaintiff's claim to the MVAIC. Therefore plaintiff's action against a taxi company and eight drivers who were on duty when plaintiff, a pedestrian, was struck by a taxicab, should not have been dismissed. It was a hit-and-run accident and plaintiff had not yet identified the driver: "Insurance Law § 5213(b) provides: 'As a condition to the payment of the amount of the settlement the qualified person . . . shall assign his claim to the corporation which shall then be subrogated to all of the rights of the qualified person against the financially irresponsible motorist.' Thus, the statute provides that, upon payment of the settlement amount by MVAIC, the 'qualified person,' i.e., the plaintiff, shall assign his personal injury claim to MVAIC. ... '[T]he text does not say that acceptance of payment operates as an assignment by operation of law; neither does it make execution of an assignment a

condition precedent to the receipt of payment. Rather, the statute obligates an individual who receives payment to assign her claim to MVAIC, giving MVAIC the enforceable right to obtain such assignment.' Thus, although the plain language of Insurance Law § 5213(b) requires the plaintiff to assign his claim to MVAIC as a condition of receiving a settlement from MVAIC, such language does not make the assignment automatic. * * * ... MVAIC ... chose not to take an assignment from the plaintiff, but rather rely upon the plaintiff's reimbursement from any damages award he receives as a result of the instant action. MVAIC's determination as to how best to proceed to recoup the amount it paid to the plaintiff in settlement, while also being assured that the plaintiff was pursuing an action against a potential financially irresponsible driver, was within the broad powers granted to MVAIC, and was consistent with the purpose of the Motor Vehicle Accident Indemnification Corporation Act." ***Archer v. Beach Car Serv., Inc.*, 2020 N.Y. Slip Op. 01138, Second Dept 2-19-20**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

GENERAL CONTRACTOR DID NOT EXERCISE ANY SUPERVISORY CONTROL OVER PLAINTIFF'S WORK AND THEREFORE WAS NOT LIABLE FOR AN INJURY ARISING FROM THE MANNER OF PLAINTIFF'S WORK FOR A SUBCONTRACTOR; LABOR LAW § 200 CAUSE OF ACTION SHOULD HAVE BEEN DISMISSED.

The Second Department, reversing Supreme Court, determined the Labor Law § 200 action against the general contractor, El Sol. should have been dismissed. The accident involved the manner in which the work was done, not a dangerous condition. Plaintiff was employed by a subcontractor. Because El Sol did not exercise any supervisory control over plaintiff's work, El Sol was not liable: " 'Cases involving Labor Law § 200 fall into two broad categories: namely, those where workers are injured as a result of dangerous or defective premises conditions at a work site, and those involving the manner in which the work is performed' ... . Where 'a claim arises out of alleged defects or dangers arising from a subcontractor's methods or materials, recovery against the owner or general contractor cannot be had unless it is shown that the party to be charged exercised some supervisory control over the operation' ... . 'A defendant has the authority to supervise or control the work for purposes of Labor Law § 200 when that defendant bears the responsibility for the manner in which the work is performed' ... . '[M]ere general supervisory authority at a work site for the purpose of overseeing the progress of the work and inspecting the work product is insufficient to impose liability under Labor Law § 200' ... . Contrary to the plaintiff's contentions, El Sol established, prima facie, that the accident did not arise from a dangerous or defective premises condition but from the method and manner of the work ... . El Sol further established that it did not exercise supervision or control over the performance of the work giving rise to the accident ...". ***Boody v. El Sol Contr. & Constr. Corp.*, 2020 N.Y. Slip Op. 01140, Second Dept 2-19-20**

PERSONAL INJURY, EVIDENCE.

PLAINTIFF COULD NOT IDENTIFY THE CAUSE OF HER STAIRWAY SLIP AND FALL; DEFENDANT'S SUMMARY JUDGMENT MOTION IN THIS NEGLIGENT MAINTENANCE CASE SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined defendant's motion for summary judgment should have been granted in this stairway slip and fall case. Plaintiff could not identify the cause of her fall and handrails were not required: "In a premises liability case, a defendant moving for summary judgment can establish its prima facie entitlement to judgment as a matter of law on the issue of negligent maintenance by showing that the plaintiff cannot identify the cause of his or her accident ... . 'Although proximate cause can be established in the absence of direct evidence of causation [and] . . . may be inferred from the facts and circumstances underlying the injury, [m]ere speculation as to the cause of a fall, where there can be many causes, is fatal to a cause of action' ... . Where it is just as likely that some factor other than a dangerous or defective condition, such as a misstep or a loss of balance, could have caused an accident, any determination by the trier of fact as to causation would be based upon sheer speculation ... . Here, in support of its motion for summary judgment, the defendant submitted, inter alia, the transcript of the plaintiff's deposition testimony. Based upon the plaintiff's testimony that she did not know what caused her to lose her footing, the defendant established its prima facie entitlement to judgment as a matter of law dismissing the complaint on the issue of negligent maintenance ...". ***Gaither-Angus v. Adelphi Univ.*, 2020 N.Y. Slip Op. 01147, Second Dept 2-19-20**

PERSONAL INJURY, EVIDENCE, CIVIL PROCEDURE.

THE JURY SHOULD HAVE BEEN INSTRUCTED ON THE IMPLIED ASSUMPTION OF RISK DOCTRINE IN THIS SKIING ACCIDENT CASE, DEFENDANTS' MOTION TO SET ASIDE THE $3,000,000/$15,000,000 VERDICT SHOULD HAVE BEEN GRANTED; THE DAMAGES AMOUNT IS NOT SUPPORTED BY THE RECORD.

The Second Department, ordering a new trial, determined defendants' motion to set aside the verdict should have been granted. The jury should have been instructed on implied assumption of risk in this skiing accident case involving a nine-year-old novice skier. Plaintiff struck a pole and fractured her femur. The jury awarded $3,000,000 in past damages and $15,000,000 in future damages. If defendants are found liable in the second trial, there will be a trial on damages unless the plaintiff stipulates to $950,000 past damages and $1,250,000 future damages: "... [O]n their motion for summary judgment dismissing the complaint, the movants failed to establish their entitlement to judgment as a matter of law on the ground that the action was barred by the doctrine of assumption of the risk ... . The evidence submitted in support of the motion

demonstrated that the injured plaintiff was a nine-year-old novice skier on a bunny slope, which is a part of the ski area specifically designed for beginners who are learning how to ski. The evidence submitted also included the injured plaintiff's deposition testimony that she believed it was safer to continue beyond the devices than to be struck by a passing skier if she fell. The devices warned skiers to slow down but did not warn them to stop. These facts presented a triable issue of fact as to whether the injured plaintiff was aware of and fully appreciated the risk involved in downhill skiing and the terrain of the bunny slope such that she assumed the risk of injury ... . At the close of the trial on the issue of liability, the Supreme Court denied the defendants' request to instruct the jury on express assumption of the risk and implied assumption of the risk. While there was no evidence elicited at trial that the injured plaintiff expressly assumed the risk of injury, the evidence did support an instruction on implied assumption of risk. Specifically, a factual issue was presented regarding whether the injured plaintiff assumed the risk of skiing in the area where the PVC pipe was located. Although the injured plaintiff testified that the PVC pipe 'blended with the snow,' the pipe had a brightly colored guide-rope attached to it on the day of the accident and was behind warning devices past which the injured plaintiff skiied ... . Therefore, the court should have granted the defendants' request to instruct the jury on implied assumption of the risk. Under the facts of this case, the failure to instruct the jury on implied assumption of the risk is an error warranting a new trial ...". ***Zhou v. Tuxedo Ridge, LLC*, 2020 N.Y. Slip Op. 01206, Second Dept 2-19-20**

PERSONAL INJURY, MUNICIPAL LAW.

SIDEWALK DAMAGE CAUSED BY TREE ROOTS DOES NOT CONSTITUTE AFFIRMATIVE NEGLIGENCE BY THE CITY; THEREFORE THE CITY'S MOTION FOR SUMMARY JUDGMENT IN THIS SIDEWALK SLIP AND FALL CASE SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined the city's alleged failure address sidewalk defects caused by tree roots was not affirmative negligence and therefore was not actionable in this slip and fall case: " 'Administrative Code of the City of New York § 7-210, which became effective September 14, 2003, shifted tort liability for injuries arising from a defective sidewalk from the City to the abutting property owner, except for sidewalks abutting one-, two-, or three-family residential properties that are owner occupied and used exclusively for residential purposes' ... . Administrative Code § 7-210, however, 'does not shift tort liability for injuries proximately caused by the City's affirmative acts of negligence' ... . Here, the defendants established, prima facie, that the abutting building at issue was not a one-, two-, or three-family residence, and that they did not affirmatively cause or create the alleged defect in the sidewalk ... . Moreover, even assuming that the defendants were responsible for the maintenance of the tree and that the tree's roots caused the alleged sidewalk defect, the defendants' alleged failure to maintain the roots would, at most, constitute nonfeasance, not affirmative negligence ...". ***Dragonetti v. 301 Mar. Ave. Corp.*, 2020 N.Y. Slip Op. 01144, Second Dept 1-19-20**

PERSONAL INJURY, VEHICLE AND TRAFFIC LAW.

PLAINTIFF WAS LEANING INSIDE THE OPEN DOOR OF A VAN WHEN THE VAN SUDDENLY MOVED FORWARD; THE RELATED VIOLATION OF THE VEHICLE AND TRAFFIC LAW CONSTITUTED NEGLIGENCE PER SE; PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined plaintiff's summary judgment motion in this vehicle-injury case should have been granted. Plaintiff was leaning into the open sliding door of a van when the van suddenly moved forward. Plaintiff sued the owner of the van (J & D) and the driver. The related violation of the Vehicle and Traffic Law constituted negligence per se: "A violation of the Vehicle and Traffic Law constitutes negligence as a matter of law ... . Here, the plaintiff established her prima facie entitlement to judgment as a matter of law by presenting uncontroverted evidence that the driver stepped on the gas pedal while she was leaning into the vehicle, causing the vehicle to move forward and her to be injured by the sliding of the minivan's door into her back (see Vehicle and Traffic Law § 1162 ...). This negligence can be imputed to J & D, which was the owner of the vehicle, through the presumption that the operator was driving the vehicle with the owner's express or implied consent (see Vehicle and Traffic Law § 388[1])." ***Edwards v. J&D Express Serv. Corp.*, 2020 N.Y. Slip Op. 01145, Second Dept 2-19-20**

THIRD DEPARTMENT

FAMILY LAW, APPEALS, ATTORNEYS, MENTAL HYGIENE LAW.

ALTHOUGH CONSENT ORDERS ARE GENERALLY NOT APPEALABLE, HERE THERE WAS A QUESTION WHETHER MOTHER WAS ABLE TO CONSENT IN THIS CUSTODY PROCEEDING; THE ATTORNEY FOR THE CHILD CANNOT VETO THE CONSENT OF THE PARTIES.

The Third Department, reversing Family Court, determined the consent custody order, involving mother, aunt and great-aunt, may have been invalid because mother may have been unable to consent due to some unspecified disability, The Third Department noted that consent orders are generally not appealable, but here there was a question about the validity of the consent. The Third Department also noted that the attorney for the child (AFC), who disagreed with the consent order, does not have the power to veto a the consent of the parties: "We must first note that, as a general rule, no appeal lies from an

order entered on consent ... . Further, although Family Court cannot relegate the AFC to a meaningless role, the AFC cannot veto a proposed settlement reached by the parties, particularly after the AFC, as here, was given a full and fair opportunity to list objections to the proposed arrangement on the record ... . Here, however, we find substantial cause to question the validity of the mother's consent to Family Court's order. In the course of the appearances, the parties all appeared to acknowledge that the mother lacks the ability to care for the child on her own due to some disability, although the mother's attorney objected to such a characterization in the absence of a legal determination. The AFC expressed concern about the effect of this disability on the mother's 'ability to . . . consent to anything.' Further, Family Court stated that '[the mother is] not in a position to make decisions.' In our view, this statement directly and expressly calls into question the mother's ability to consent to the modification order ... . In this context, the troubling allegations of inappropriate sexual contact raised by the AFC are particularly serious and significant. Our limited record thus does not demonstrate that the mother's consent to the order was valid and, if not, that the court had 'sufficient information to undertake a comprehensive independent review of the child's best interests' ... . Accordingly, in these highly unusual circumstances, we remit for a hearing and further development of the record on the issue of the mother's ability to consent, and, if necessary, as to whether the custody proposal meets the requisite standard of promoting the best interests of the child." ***Matter of Erica X. v. Lisa X.*, 2020 N.Y. Slip Op. 01224, Third Dept 2-20-20**

FAMILY LAW, CIVIL PROCEDURE.

NEW YORK SHOULD NOT HAVE BEEN RULED AN INCONVENIENT FORUM FOR THIS VISITATION/CONTACT ENFORCEMENT PROCEEDING, CRITERIA EXPLAINED.

The Third Department, reversing Family Court, determined Family Court should not have ruled that New York was an inconvenient forum for a visitation/contact enforcement petition where mother is in New York and father is in Arizona with the child: "As Family Court acknowledged, it had exclusive continuing jurisdiction over the matter pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act ... . However, '[a] court of this state which has jurisdiction under this article . . . may decline to exercise its jurisdiction at any time if it determines that it is an inconvenient forum under the circumstances and that a court of another state is a more appropriate forum' ... . An inconvenient forum determination 'depends on the specific issues to be decided in the pending litigation' ... . This is an enforcement petition, and the sole issue concerns the conduct of the parents vis-À-vis the current order. The vast amount of testimony as to whether the father violated the order, which is central to the issue in this proceeding, will come from the mother, who is located in New York, and any witnesses that she may call. Any testimony from the father can be presented by telephone, audiovisual means or other electronic means. Moreover, Family Court has presided over numerous proceedings between the parties related to this child ... .That court is far more familiar with the case than the Arizona court and is in a better position to interpret the meaning of its own order ... . Additionally, the mother submitted an affidavit evidencing that she will not be able to travel to or retain counsel in Arizona, yet she has legal representation in New York. Family Court acknowledged her indigency and that it was unable to conclude whether Arizona could provide indigent legal representation to her." ***Matter of Sadie HH. v. Darrin II.*, 2020 N.Y. Slip Op. 01219, Third Dept 2-20-20**

FAMILY COURT, CIVIL PROCEDURE.

DEFAULT IN THIS NEGLECT/CUSTODY PROCEEDING SHOULD HAVE BEEN ANALYZED UNDER FAMILY COURT ACT 1042, NOT CPLR 5015 AND 5511; BECAUSE RESPONDENT WAS NEVER NOTIFIED THAT A FACT-FINDING HEARING, AS OPPOSED TO A CONFERENCE, WAS GOING TO BE HELD THE DEFAULT ORDER SHOULD HAVE BEEN VACATED.

The Third Department, reversing Family Court, determined: (1) the proper analysis of a default in this neglect/custody proceeding is under Family Court Act 1042, not CPLR 5015 and 5511; (2) respondent was never notified of the fact-finding; and (3) the default order must be vacated: "To begin, although Family Court and the parties assessed whether respondent was entitled to vacatur under 'the default mechanism of CPLR 5015 and 5511,' the standard set forth by Family Ct Act § 1042 controls in this Family Ct Act article 10 proceeding ... .. If a 'person legally responsible for the child's care' has been notified of a pending fact-finding hearing and fails to attend ... . Family Court is free to conduct the hearing so long as the child is represented by counsel ... . Respondent is such a person and, upon her timely motion to vacate the fact-finding order, Family Court was obliged to grant vacatur and reopen the hearing if she showed 'a meritorious defense to the petition . . . [unless she] willfully refused to appear at the hearing' ... . It was an impossibility for respondent to default in attending a hearing that she did not know was going to happen and did not, in fact, happen. Respondent was further unable to challenge details of petitioner's evidence in the absence of a hearing and, the strength of petitioner's proof remaining a mystery, we deem the denials in respondent's affidavit sufficient to set forth a meritorious defense." ***Matter of Lila JJ. (Danelle KK.)*, 2020 N.Y. Slip Op. 01216, Third Dept 2-20-20**

FAMILY LAW, EVIDENCE, CIVIL PROCEDURE.

FATHER'S INCARCERATION CONSTITUTED A CHANGE IN CIRCUMSTANCES RE FATHER'S VISITATION/CONTACT PETITIONS; HEARING REQUIRED TO DETERMINE BEST INTERESTS OF THE CHILD; VISITATION PETITIONS NEED NOT BE VERIFIED.

The Third Department, reversing Family Court, determined: (1) father's incarceration constituted a change in circumstances; (2) father's petition for visitation and contact triggered the need for a hearing to determine the best interests of the child; and (3) verification of a visitation petition is not required by CPLR 3020 or Family Ct Act article 6: "... [W]e find that the father demonstrated a change in circumstances arising from his incarceration ... . We note that '[v]isitation with a noncustodial parent, even one who is incarcerated, is presumed to be in the best interests of the child[]' . Further, 'as a general matter, custody determinations ... be rendered only after a full and plenary hearing' ... . This guideline applies to requests for visitation and contact, as presented here ... . Accordingly, in the absence of sufficient information allowing a comprehensive review of the child's best interests, Family Court erred in dismissing the petitions without a hearing ... . Finally, it was not necessary for Family Court to dismiss the petitions because they were unsworn, given that verification of a visitation petition is not required by either CPLR 3020 or Family Ct Act article 6 ...". ***Matter of Shawn MM. v. Jasmine LL.*, 2020 N.Y. Slip Op. 01223, Third Dept 2-20-20**

FAMILY LAW, EVIDENCE, CIVIL PROCEDURE, APPEALS.

PETITION ALLEGED MOTHER FAILED TO GIVE ADHD MEDICATION TO THE CHILDREN; THE NEGLECT PETITION SHOULD NOT HAVE BEEN DISMISSED WITHOUT A HEARING; BECAUSE FAMILY COURT ADDRESSED THE MERITS OF THE MOTION TO REARGUE THE MOTION WILL BE DEEMED TO HAVE BEEN GRANTED RENDERING THE ORDER APPEALABLE AS OF RIGHT.

The Third Department, reversing Family Court, determined the neglect proceeding should not have been dismissed without a hearing. The petition alleged mother was not providing ADHD medication to the children and the children were unable to focus in school as a result. The Third Department noted that, although the denial of a motion to reargue is not appealable, here Family Court addressed the merits of the motion to reargue and will be deemed to have granted the motion: "Although, generally, no appeal lies from an order denying a motion to reargue, where 'the court actually addresses the merits of the moving party's motion, we will deem the court to have granted reargument and adhered to its prior decision — notwithstanding language in the order indicating that reargument was denied' ... . Considering that Family Court scheduled and heard oral argument on the motion to reargue and, thereafter, issued a decision addressing the merits, we deem the court to have granted reargument, such that the December 2018 order adhering to the October 2018 order is appealable as of right ... . 'A parent's unwillingness to follow a recommended course of psychiatric therapy and medication, resulting in the impairment of a child's emotional health[,] may support a finding of neglect. However, what constitutes adequate medical care cannot be judged in a vacuum. The critical factor in this determination is whether the parent[has] provided an acceptable course of medical treatment for [his or her] child in light of all the surrounding circumstances' ... . Here, the petition and corresponding affidavit stated, among other things, that respondent failed to properly administer prescribed ADHD medication to the two oldest children and failed to bring them to scheduled doctor appointments, and that those children were struggling in school and were unable to focus because they were not receiving the proper dosage of medication. The petition states that these allegations are supported, in part, by information received from the children and their school. Petitioner further alleged its concern that respondent was either taking the children's medication herself or selling it, along with the reasons for such concern. * * * Despite the lack of allegations in the petition directly concerning the youngest child, the petition's allegations could support a finding of derivative neglect of that child." ***Matter of Aydden OO. (Joni PP.)*, 2020 N.Y. Slip Op. 01232, Third Dept 2-20-20**

FAMILY LAW, JUDGES.

FAMILY COURT, SUA SPONTE, SHOULD NOT HAVE DISMISSED INCARCERATED FATHER'S PETITION ALLEGING MOTHER'S NONCOMPLIANCE WITH AN ORDER MANDATING COMMUNICATION WITH THE CHILD WITHOUT HOLDING A HEARING.

The Third Department, reversing Family Court, should not have, sua sponte, dismissed, without a hearing, father's petition alleging mother's noncompliance with provisions of an order requiring communication between child and father, who is incarcerated: "Where, as here, a petition sets forth facts of willful noncompliance which, if established at a hearing would provide a basis for the relief sought, Family Court must afford the petitioner an opportunity to be heard ... . The father alleged that he is being denied his routine monthly phone call, as well as calls at Christmas and the child's birthday, as required by the consent order. Accepting the representations from counsel for the mother and the attorney for the child that missed calls were made up and that the child no longer wishes to communicate with the father and chooses not to respond to his correspondence, Family Court concluded that there were no contested facts and dismissed the petition. In doing so, the court failed to address the mother's obligation under the consent order to encourage the child to communicate with the

father. Whether she failed to do so as alleged remains a disputed contention necessitating relevant testimony, not simply the arguments of counsel. Nor did the court address the father's claim that the mother failed to provide updated photographs and school records. In our view, the court erred in dismissing the petition without a hearing ...". ***Matter of Shannon X. v. Koni Y.*, 2020 N.Y. Slip Op. 01215, Third Dept 2-20-20**

FAMILY LAW, JUDGES, CIVIL PROCEDURE.

COURT SHOULD NOT HAVE DISMISSED, SUA SPONTE, FATHER'S MODIFICATION OF CUSTODY PETITION FOR FAILURE TO STATE A CAUSE OF ACTION BECAUSE MOTHER DID NOT REQUEST THAT RELIEF; THE THIRD DEPARTMENT CONSIDERED AND DENIED MOTHER'S MOTION FOR SUMMARY JUDGMENT.

The Third Department, reversing Family Court, determined the judge, sua sponte, should not have dismissed father's modification of custody petition for failure to state a cause of action because mother did not request that relief. The Third Department went on to consider mother's motion for summary judgment and deny it: " '[A] motion for summary judgment may be utilized in a Family Ct Act article 6 proceeding, but such a motion should be granted only when there are no material facts disputed sufficiently to warrant a trial' ... . 'In a custody modification proceeding, the controlling 'material fact' is whether or not there is a change in circumstances so as to warrant an inquiry into whether the best interests of the children would be served by modifying the existing custody arrangement' ... . Here, the mother failed to meet her initial summary judgment burden. There can be no dispute that only five months had elapsed since entry of the March 2018 order and, as such, the 'automatic' change in circumstances provision incorporated in that order had not been triggered. The father, however, sought modification based upon several other alleged changes in circumstance, including that the mother had been disparaging the father in front of the children in violation of the March 2018 order and that she is living in a homeless shelter. The mother, in her motion for summary judgment, makes no mention of these allegations or otherwise attempts to refute them in any way." ***Matter of Anthony F. v. Christy G.*, 2020 N.Y. Slip Op. 01228, Third Dept 2-20-20**

FAMILY LAW, JUDGES, CIVIL PROCEDURE.

ALTHOUGH FATHER MISSED PLEADING AND DISCLOSURE DEADLINES, THERE WAS NO EVIDENCE THE OMISSIONS WERE WILLFUL; THEREFORE PRECLUDING FATHER FROM PRESENTING EVIDENCE IN THE CUSTODY MODIFICATION PROCEEDING WAS TOO SEVERE A SANCTION.

The Third Department, reversing Family Court, determined father should not have been precluded from offering evidence in the modification of custody proceeding. Although father missed several court-imposed deadlines for responding papers and disclosure, the sanction was too severe: "... [A]lthough the father failed to comply with court-ordered deadlines for responsive pleadings and discovery, the record lacks any evidence of willfulness on the part of the father to warrant a drastic sanction of complete preclusion ... . The father was represented by assigned counsel at the May 7, 2018 conference during which the initial discovery schedule was established. Shortly thereafter, the mother served a first demand for interrogatories and combined discovery demand. ... In the meantime, the father was assigned new counsel who appeared for the July 16, 2018 conference, at which time the deadlines were extended. At the fact-finding hearing, the father's counsel stated that delay in responding 'is predominantly my fault and I will make that very explicitly clear on the record.' In light of the preliminary conference orders, counsel also made the meritless assertion that the mother's discovery demands were ineffective for lacking court authorization. On the other hand, counsel did serve a response to the interrogatories — although that response was unverified. In light of the foregoing, we cannot conclude that the father's conduct was willful. Additionally, 'modification of custody determinations requires a full and comprehensive hearing with the parties given the opportunity to present in open court evidence as to the best interest[s] of the child' ... . Here, the preclusion of all of the father's testimony renders it difficult to determine the best interests of this child (see id.). Based on the foregoing, we remit the matter for a new hearing." ***Matter of Tara DD. v. Seth CC.*, 2020 N.Y. Slip Op. 01227, Third Dept 2-20-20**

FAMILY LAW, JUDGES, SOCIAL SERVICES LAW, MENTAL HYGIENE LAW, EVIDENCE.

FAMILY COURT SHOULD NOT HAVE, SUA SPONTE, TERMINATED MOTHER'S PARENTAL RIGHTS ON MENTAL-ILLNESS GROUNDS IN THE ABSENCE OF THE STATUTORILY-REQUIRED PSYCHOLOGICAL EVALUATION.

The Third Department, reversing Family Court, determined Family Court should not have terminated mother's parental right on mental-illness grounds without the results of the statutorily-required examination. The psychologist appointed to evaluate mother (Horenstein) did not do so and rendered his opinion based upon a review of records of her hospitalization: "Pursuant to Social Services Law § 384-b (6) (e), the court is required to order the parent, alleged to be mentally ill, to be examined by a qualified psychiatrist or psychologist and shall take testimony from the appointed expert ... . Significantly, paragraph (c) of subdivision 6 prohibits a determination as to the legal sufficiency of the proof until such testimony is taken ... . An exception exists '[i]f the parent refuses to submit to such court-ordered examination, or if the parent renders himself [or herself] unavailable . . . by departing from the state or by concealing himself [or herself] therein' ... . In such instance, 'the appointed psychologist or psychiatrist, upon the basis of other available information, . . . may testify without an examination of such parent, provided that such other information affords a reasonable basis for his [or her] opinion' ...

. * * * ... [W]e conclude that Family Court erred in proceeding with the termination of respondent's parental rights without the statutorily-required examination. Horenstein pointed out that there was no basis to find that respondent refused to be evaluated. Nor did respondent make herself unavailable 'by departing from the state or by concealing [herself] therein' ... . To the contrary, her placement in [hospital] was involuntary and, despite her release by December 1, 2017, no further attempt was made to schedule an evaluation. Because the statutory exception does not apply, Family Court lacked authority to determine the legal sufficiency of the proof without a contemporaneous evaluation ... . Even though respondent raised no objection at the hearing, this statutory mandate requires that we remit the matter to Family Court for a new hearing and determination ...". ***Matter of Rahsaan I. (Simone J.)*, 2020 N.Y. Slip Op. 01212, Third Dept 2-20-20**

NEGLIGENCE, CONTRACT LAW.

ALTHOUGH PLAINTIFF WAS A THIRD-PARTY BENEFICIARY OF A CONTRACT BETWEEN THE DEFENDANT AND THE COUNTY, PLAINTIFF SUED ON A NEGLIGENCE THEORY ONLY; THE NEGLIGENCE COMPLAINT PROPERLY SURVIVED SUMMARY JUDGMENT, CRITERIA EXPLAINED.

The Third Department determined plaintiff's negligence claim arising from a contract properly survived summary judgment. Plaintiff qualified for the Home Energy Assistance Program. Pursuant to that program, defendant installed a chimney liner pursuant to a contract with the county. Although plaintiff was a third-party beneficiary of the that contract and could have sued on that ground, plaintiff's complaint sounded only in negligence: "Plaintiff could have ... asserted a claim for breach of contract, but limited herself to a claim for negligence that will not lie 'unless a legal duty independent of the contract itself has been violated' ... . It must, as a result, be shown that defendants owed a duty of care to plaintiff 'spring[ing] from circumstances extraneous to, and not constituting elements of, the contract, although it may be connected with and dependent upon the contract' ... . In assessing whether such a duty existed, we note that defendants were engaged to install a stainless steel liner in plaintiff's chimney 'in a professional manner.' Plaintiff alleges that the contracted-for work was done improperly and prevented the adequate venting of furnace exhaust. She also alleges deficiencies beyond that work, however, contending that defendants negligently failed to address visible deterioration of the chimney and surrounding roof that allowed water to infiltrate the home and caused mold growth that damaged both the home and the personalty within it. In response to defendants' motion for summary judgment, plaintiff provided the affidavit of an engineer who opined that the obvious problems with the roof and chimney should have been addressed by defendants while they were repairing adjacent parts of the chimney. ... It is further notable that the work was paid for by public funds and aimed at helping plaintiff meet her 'immediate home energy needs' (42 USC § 8621 [a]), both of which show a 'public interest in seeing it performed with reasonable care' ...". ***Jones v. County of Chenango*, 2020 N.Y. Slip Op. 01229, Third Dept 2-20-20**

TRUSTS AND ESTATES, CONTRACT LAW, REAL PROPERTY LAW, EVIDENCE.

QUESTIONS OF FACT PRECLUDED SUMMARY JUDGMENT IN THIS CONSTRUCTIVE TRUST AND UNJUST ENRICHMENT ACTION.

The Third Department, reversing Supreme Court, determined that summary judgment was not available in this dispute about ownership of land and personal property. Plaintiff alleged that land, personal property and the proceeds of the timber business were his, despite the fact that the land, personal property and bank account, based upon the documentary evidence, appeared to belong to defendant. There were questions of fact whether a constructive trust had been created and whether defendant had been unjustly enriched: " 'The elements of a constructive trust are a confidential relationship, a promise, a transfer in reliance on that promise and unjust enrichment. As a constructive trust is an equitable remedy, courts do not rigidly apply the elements but use them as flexible guidelines. In this flexible spirit, the promise need not be express, but may be implied based on the circumstances of the relationship and the nature of the transaction. Similarly, courts have extended the transfer element to include instances where funds, time and effort were contributed in reliance on a promise to share in some interest in property, even though no transfer actually occurred' ... . Here, both parties concede that they had a confidential relationship. However, it is sharply disputed whether there was a promise, a transfer or unjust enrichment. * * * 'A person is unjustly enriched when his [or her] retention of the benefit received would be unjust considering the circumstances of the transfer and the relationship of the parties' ... . Plaintiff claims this is his business, that he worked full time and utilized all funds earned in the business to purchase the equipment, personal property and the vacant land. On the other hand, defendant argues it was their business, she held title to all assets, paid for all assets and debts and paid for plaintiff's services by paying his expenses, housing and cash." ***Baker v. Harrison*, 2020 N.Y. Slip Op. 01233, Third Dept 2-20-20**

WORKERS' COMPENSATION LAW.

THE PERIODS OF TIME WHEN CLAIMANT WAS DEEMED TEMPORARILY PERMANENTLY DISABLED AFTER SURGERY SHOULD NOT HAVE BEEN COUNTED AGAINST THE 300-WEEK CAP FOR HIS PERMANENT PARTIAL DISABILITY BENEFITS.

The Third Department, in a full-fledged opinion by Justice Mulvey, reversing the Worker's Compensation Board, determined the periods of time when claimant was deemed temporarily totally disabled following surgery should not have been counted against the 300-week cap for his permanent partial disability payments. The Third Department also held that a claimant need not seek reclassification before the exhaustion of the permanent partial disability award, as the Board had ruled: "We note that the WCLJs [Workers' Compensation Law Judges] classified claimant as temporarily totally disabled following his two surgeries, which findings were supported by medical proof. Therefore, the Board did not comply with the statute when it counted the weeks during which claimant was classified as temporarily totally disabled against the cap for his nonschedule award for a permanent partial disability. Instead, the duration of his permanent partial disability nonschedule award (the running of the 300 weeks) should have been tolled while claimant was classified with a temporary total disability. ... [T]he durational benefit caps for nonschedule awards under Workers' Compensation Law § 15 (3) (w) apply to 'all compensation payable under this paragraph' ... . However, benefits paid during a period of temporary total disability are payable under a separate paragraph, section 15 (2) ... . * * * Accordingly, temporary total disability benefits do not count towards the benefit caps for nonschedule awards under Workers' Compensation Law § 15 (3) (w)." ***Matter of Sanchez v. Jacobi Med. Ctr.*, 2020 N.Y. Slip Op. 01235, Third Dept 2-20-20**

ZONING, LAND USE, CIVIL PROCEDURE.

LOCAL LAW CREATING A SENIOR LIVING DISTRICT (SLD) WAS INVALID BECAUSE APPROVAL BY A SUPERMAJORITY OF THE TOWN BOARD WAS REQUIRED; BECAUSE THE COMPLAINT SOUGHT A DECLARATORY JUDGMENT DISMISSAL OF THE COMPLAINT WAS NOT PROPER, SUPREME COURT SHOULD HAVE RULED ON THE DECLARATORY JUDGMENT.

The Third Department, reversing Supreme Court, in a full-fledged opinion by Justice Garry, in a matter of first impression, determined a local law rezoning agricultural land as a senior living district (SLD) where a senior living community could be constructed was invalid. In order to avoid the requirement that the local law be approved by a supermajority (as opposed to a simple majority) of the town board, the local law called for a 100-foot buffer between the SLD and the surrounding properties. However, in this case, the land in the 100-foot buffer was to be used for access roads and other purposes which exclusively served the SLD. In that situation, the Third Department held, the approval of the local law requires a supermajority and the local law was therefore invalid. The Third Department also noted that, because the complaint sought a declaratory judgment, dismissal of the complaint was not proper. A ruling on the declaratory judgment was required: "... [T]he SLD cannot be used for its intended purpose without improvements in the buffer zone that will serve only uses in the SLD and will provide no public benefit. Under these circumstances, we do not find that the purported buffer zone is sufficient to defeat the supermajority requirements of Town Law § 265. Notably, in holding that the distance of a buffer zone from neighboring properties should be measured from the boundary of the rezoned area rather than that of the buffer zone, the Court of Appeals found that this statutory interpretation 'is fair, because it makes the power to require a supermajority vote dependent on the distance of one's property from land that will actually be affected by the change' (Matter of Eadie v. Town Bd. of Town of N. Greenbush, 7 NY3d at 315 [emphasis added]). Here, land within the buffer zone will actually be affected by the rezoning in such a way that it would neither be fair nor consistent with the spirit and intent of Town Law § 265 to deprive neighboring landowners of the power to require a supermajority vote. We find that where, as here, a proposed buffer zone will contain improvements that benefit only the rezoned area and are necessary to the intended uses of the rezoned area, Town Law § 265 should be interpreted to require the 100-foot distance to opposing and adjacent properties to be measured from the boundary of the buffer zone rather than that of the rezoned area ...". ***Dodson v. Town Bd. of the Town of Rotterdam*, 2020 N.Y. Slip Op. 01234, Third Dept 2-20-20**

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