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CasePrepPlus

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FIRST DEPARTMENT

CIVIL PROCEDURE, NEGLIGENCE, MUNICIPAL LAW, EVIDENCE.

CITY DEFENDANTS SHOULD HAVE BEEN SANCTIONED FOR FAILURE TO PRESERVE PRE-ACCIDENT POLICE COMMUNICATIONS IN THIS POLICE-VEHICLE TRAFFIC ACCIDENT CASE BECAUSE THE CITY DEFENDANTS WERE AWARE THEY WOULD PROBABLY ASSERT AN EMERGENCY DEFENSE.

The First Department, reversing Supreme Court, determined the City defendants should have been sanctioned for spoliation of evidence. The action stemmed from a traffic accident involving a police vehicle and the city defendants were put on notice they would assert an emergency defense by the notice of claim. But the pre-accident police communications were not preserved: "Defendants had an obligation to preserve the pre-accident audio recordings at the time they were destroyed because the Police Department (NYPD) internal report and plaintiff's notice of claim, which attached the public police accident report, put defendants on notice that they would likely assert an emergency operation defense. Therefore, pre-accident audio communication between the dispatcher and the NYPD vehicle or officers involved in the accident should have been preserved in case it was needed for future litigation ... . Under the circumstances presented, the imposition of an adverse inference charge would be an appropriate sanction ...". ***Sanchez v. City of New York*, 2020 N.Y. Slip Op. 01970, First Dept 3-18-20**

CRIMINAL LAW. APPEALS.

FAILURE TO INFORM DEFENDANT OF THE PERIOD OF POST RELEASE SUPERVISION REQUIRED VACATION OF THE SENTENCE; PRESERVATION OF THE ERROR NOT NECESSARY.

The First Department, vacating defendant's guilty plea, determined defendant should have been informed his sentence would include a period of post release supervision (PRS). Because defendant was not put on notice, there was not need to preserve the issue for appeal: "At the plea proceeding, the court advised defendant that under the plea agreement, he would plead guilty to third-degree possession, a class B felony, and fifth-degree possession, a class D felony, with the understanding that if he complied with the terms of the plea agreement, he would be allowed to withdraw his plea to the B felony, and be sentenced, solely on the D felony, to 3½ years in prison, followed by two years of postrelease supervision. The court stated that if defendant violated the terms of the plea agreement, he could be sentenced to up to 15 years in prison on the B felony, but it neglected to state that any enhanced sentence would include a period of PRS. Defendant violated the plea agreement by, among other things, failing to appear for sentencing, and the court imposed an enhanced sentence that included two years of post release supervision concurrent on the B and D felonies. The court was required to advise defendant that his potential sentence in the event he violated the plea conditions would include PRS, and it was also required to specify the length of the term of PRS ... . The prosecutor's brief reference to PRS immediately before sentencing was not the type of notice under People v. Murray (15 NY3d 725 [2010]) that would require defendant to preserve the issue ...". ***People v. Jamison*, 2020 N.Y. Slip Op. 01955, First Dept 3-19-20**

SECOND DEPARTMENT

CIVIL PROCEDURE, EVIDENCE.

A HEARING IS NECESSARY TO DETERMINE WHETHER SERVICE OF THE SUMMONS AND COMPLAINT ON THE DOORMAN OF DEFENDANT'S APARTMENT BUILDING IS VALID.

The Second Department, reversing Supreme Court, determined a hearing should have been held about the validity of the service of the summons and complaint; i.e., whether service on the doorman of the defendant's (Freeman's) apartment building was valid service: "The plaintiff asserted that service of process was properly made pursuant to CPLR 308(2), relying on an affidavit of service indicating that service upon Freeman was effected by delivering the summons and complaint to a 'doorman' in the apartment building where Freeman resided and by subsequently mailing the summons and complaint to Freeman ... . While the affidavit of service constituted prima facie evidence of service of the summons and complaint pursuant to CPLR 308(2) ... , the evidence submitted by Freeman in support of her motion, inter alia, to dismiss the complaint sufficiently rebutted the presumption of proper service to warrant a hearing. Freeman's submissions included

specific and detailed averments, as well as the affidavit of a security guard who worked in Freeman's apartment building. The security guard averred that the summons and complaint were delivered to him at his desk on ... , but that he was not authorized to receive packages or deliveries, that he did not deny the process server access to Freeman's apartment, and that he did not inform Freeman of the delivery. Under these circumstances, the court should have conducted a hearing to determine whether the security guard was a person of suitable age and discretion within the meaning of CPLR 308(2), and whether the outer bounds of Freeman's dwelling place extended to the security guard's desk in her apartment building ...". ***Edwards-Blackburn v. City of New York*, 2020 N.Y. Slip Op. 01907, Second Dept 3-18-20**

CIVIL PROCEDURE, REAL ESTATE, CONTRACT LAW.

IN THE CONTEXT OF AN APPLICATION FOR A PRELIMINARY INJUNCTION SUPREME COURT SHOULD NOT HAVE GRANTED THE ULTIMATE RELIEF SOUGHT; THE CRITERIA FOR A PRELIMINARY INJUNCTION WERE NOT MET.

The Second Department, reversing Supreme Court, determined Supreme Court should not have ordered the return of the down payment to the buyer (Berman) pursuant to the purchase contract in the context of granting a preliminary injunction. First, by granting the ultimate relief requested Supreme Court had effectively granted summary judgment before issue was joined. Second the criteria for a preliminary injunction were not met. The purchase contract allowed the termination of the agreement and the return of the down payment if three conditions were met. Berman alleged two of the conditions were met and the third was impossible: "Berman failed to demonstrate his entitlement to temporary injunctive relief pursuant to CPLR 6301, as he failed to establish any of the three required elements for such relief: (1) likelihood of ultimate success on the merits, (2) irreparable injury absent granting of a preliminary injunction, (3) and a balancing of equities in his favor ... . Berman failed to demonstrate irreparable injury, as the loss of a down payment is not an irreparable harm since the injured party could be made whole by a money judgment ... . While Berman contends that it was impossible to obtain a Phase II Assessment within the required time, he failed to demonstrate a likelihood of success in establishing that it was impossible to obtain the report. ... Finally, Berman failed to show that the balancing of equities was in his favor." ***Berman v. TRG Waterfront Lender, LLC*, 2020 N.Y. Slip Op. 01902, Second Dept 3-18-20**

FORECLOSURE, CIVIL PROCEDURE, EVIDENCE.

THE REFEREE'S FAILURE TO PROVIDE NOTICE AND A HEARING TO THE DEFENDANT DID NOT REQUIRE REVERSAL OF THE JUDGMENT OF FORECLOSURE.

The Second Department determined the referee's failure to provide notice and a hearing to the defendant in this foreclosure action did not require reversal of the judgment of foreclosure: "It is undisputed that the referee failed to provide notice to the defendant pursuant to CPLR 4313, or to hold a hearing on the issues addressed in the referee's report. However, as long as a defendant is not prejudiced by the inability to submit evidence directly to the referee, a referee's failure to notify a defendant and hold a hearing is not, by itself, a basis to reverse a judgment of foreclosure and sale and remit the matter for a hearing and a new determination of amounts owed ... . Where, as here, a defendant had an opportunity to raise questions and submit evidence directly to the Supreme Court, which evidence could be considered by the court in determining whether to confirm the referee's report, the defendant is not prejudiced by any error in failing to hold a hearing ...". ***Bank of N.Y. Mellon v. Viola*, 2020 N.Y. Slip Op. 01895, Second Dept 3-18-20**

MEDICAL MALPRACTICE, PERSONAL INJURY, EVIDENCE.

CONFLICTING EXPERT OPINIONS PRECLUDED SUMMARY JUDGMENT IN THIS MEDICAL MALPRACTICE ACTION.

The Second Department, reversing Supreme Court, determined conflicting expert opinions in this medical malpractice action created a question of fact: "... [T]he plaintiff's submissions were sufficient to raise a triable issue of fact. The expert affirmations of two board-certified urologists submitted by the plaintiff contradicted the conclusion of the NYCHH defendants' experts that the RUMC defendants and other defendants caused the plaintiff's injuries. The plaintiff's experts concluded, with a reasonable degree of medical certainty, that the plaintiff's injuries occurred intra-operatively during the prostatectomy performed by Surasi at Woodhull Medical Center. Summary judgment is not appropriate in a medical malpractice action where, as here, the parties adduce conflicting medical expert opinions. 'Such credibility issues can only be resolved by a jury' ...". ***Castillo v. Surasi*, 2020 N.Y. Slip Op. 01903, Second Dept 3-18-20**

PERSONAL INJURY.

DRIVER/OWNER OF THE MIDDLE VEHICLE IN THIS CHAIN-REACTION REAR-END TRAFFIC ACCIDENT CASE IS NOT LIABLE.

The Second Department, reversing Supreme Court, determined the summary judgment motion by the driver/owner of the middle vehicle in this chain-reaction accident should have been granted. The rear-most driver pushed the stopped middle vehicle into the plaintiff's vehicle: " 'A rear-end collision with a stopped or stopping vehicle establishes a prima facie case of negligence on the part of the operator of the rear vehicle, requiring that operator to come forward with evidence of a

nonnegligent explanation for the collision to rebut the inference of negligence' ... . 'Evidence that a vehicle was struck in the rear and propelled into the vehicle in front of it may provide a sufficient non-negligent explanation' ... . Thus, '[i]n a chain collision accident, the operator of the middle vehicle may establish prima facie entitlement to judgment as a matter of law by demonstrating that the middle vehicle was properly stopped behind the lead vehicle when it was struck from behind by the rear vehicle and propelled into the lead vehicle' ...". ***Bardizbanian v. Bhuiyan*, 2020 N.Y. Slip Op. 01897, Second Dept 3-18-20**

PERSONAL INJURY.

SCHOOL BUS DRIVER ALLEGEDLY GESTURED TO PLAINTIFF TO MAKE A TURN AND PLAINTIFF'S VEHICLE WAS THEN STRUCK BY ANOTHER VEHICLE; THE SCHOOL DISTRICT'S MOTION FOR SUMMARY JUDGMENT WAS PROPERLY DENIED.

The Second Department determined the school district's motion for summary judgment in this intersection traffic accident case was properly denied. Plaintiff alleged the school bus driver gestured to plaintiff to make a turn and plaintiff's car was then struck by another car (driven by defendant Mallon) going through the intersection: " 'When one driver chooses to gratuitously signal to another person, indicating that it is safe to proceed or that the signaling driver will yield the right-of-way, the signaling driver assumes a duty to do so reasonably under the circumstances' ... . Here, the School District failed to establish, prima facie, that the plaintiff did not rely on the bus driver's gesture that it was safe for the plaintiff to make his left turn ... . The School District also failed to establish, prima facie, that the defendant driver's alleged negligent conduct in operating Mallon's vehicle constituted an intervening and superseding act which broke the causal nexus between the bus driver's alleged negligence and the plaintiff's injuries ...". ***Pittman v. Ball*, 2020 N.Y. Slip Op. 01944, Second Dept 3-18-20**

PERSONAL INJURY, MUNICIPAL LAW, VEHICLE AND TRAFFIC LAW.

QUESTION OF FACT WHETHER THE 'RECKLESS DISREGARD' STANDARD APPLIES TO THIS POLICE-CAR TRAFFIC ACCIDENT CASE.

The Second Department, reversing Supreme Court, determined plaintiff's motion for summary judgment in this police-car traffic accident case should not have been granted. The Second Department held there was a question of fact whether the police officer was an "authorized emergency vehicle" triggering the "reckless disregard" standard of care: "The plaintiff commenced this action to recover damages for personal injuries she allegedly sustained when a vehicle she was operating collided with a police vehicle operated by the defendant Moira T. Larmour, a police officer. According to Larmour's deposition testimony, the collision occurred when Larmour, who had been traveling west, made an 'exaggerated u-turn' in an attempt to conduct a traffic stop of an unrelated vehicle for an allegedly expired inspection sticker and accelerated her vehicle, which spun on wet pavement and came into contact with the plaintiff's vehicle, which was traveling east. * * * Vehicle and Traffic Law § 1104 qualifiedly exempts drivers of authorized emergency vehicles from certain traffic laws when they are involved in an 'emergency operation' ... . An 'emergency operation' is defined under Vehicle and Traffic Law § 114-b as, among other things, pursuing an 'actual or suspected violator of the law.' Those privileges set forth in Vehicle and Traffic Law § 1104 include passing through red lights and stop signs, exceeding the speed limit, and disregarding regulations governing the direction of movement or turning in specified directions ... . However, pursuant to Vehicle and Traffic Law § 1104(e), '[t]he foregoing provisions shall not relieve the driver of an authorized emergency vehicle from the duty to drive with due regard for the safety of all persons, nor shall such provisions protect the driver from the consequences of his [or her] reckless disregard for the safety of others.' This is commonly referred to as the reckless disregard standard of care, which requires a plaintiff to establish that a police officer acted in reckless disregard for the safety of others in order to impose civil liability upon that officer ...". ***Anderson v. Suffolk County Police Dept.*, 2020 N.Y. Slip Op. 01894, Second Dept 3-18-20**

ZONING, LAND USE, CIVIL PROCEDURE, MUNICIPAL LAW, ENVIRONMENTAL LAW.

PLAINTIFF DID NOT HAVE STANDING TO CONTEST PERMITS GRANTING THE CONVERSION OF DEFENDANT'S PROPERTY FROM MANUFACTURING TO RETAIL; PROXIMITY TO DEFENDANT'S PROPERTY WAS NOT ENOUGH.

The Second Department, reversing Supreme Court, determined plaintiff did not have standing to contest the defendant City's issuing permits allowing defendant CAB to convert property from manufacturing to retail. Plaintiff operated a grocery store 450 feet from CAB's property. The Second Department held proximity was not enough to confer standing on plaintiff: " 'In land use matters, . . . [the plaintiff] must show that it would suffer direct harm, injury that is in some way different from that of the public at large' ... . 'An allegation of close proximity may give rise to an inference of damage or injury that enables a nearby property owner to challenge a land use decision without proof of actual injury' ... . 'However, this does not entitle the property owner to judicial review in every instance' ... . 'Rather, in addition to establishing that the effect of the proposed change is different from that suffered by the public generally, the [property owner] must establish that the interest asserted is arguably within the zone of interests the statute protects' ... . Thus, 'even where [the property owner's] premises are physically close to the subject property, an ad hoc determination may be required as to whether a particular [property owner] itself has a legally protectable interest so as to confer standing' ... . Here, the plaintiff alleged standing on

the basis of proximity, issues and interests within the zone of interests, and adverse impacts. We disagree with the Supreme Court's finding that the plaintiff had standing to commence this action. The plaintiff failed to allege any harm distinct from that of the community at large ...". ***159-MP Corp. v. CAB Bedford, LLC*, 2020 N.Y. Slip Op. 01892, Second Dept 3-18-20**

THIRD DEPARTMENT

CRIMINAL LAW, EVIDENCE ATTORNEYS.

WAIVER OF APPEAL INVALID; THERE WAS PROBABLE CAUSE FOR THE DWI ARREST EVEN THOUGH NO FIELD SOBRIETY TESTS WERE CONDUCTED; BETTER PRACTICE WOULD BE FOR THE PROSECUTOR TO PLACE THE EVIDENCE OF DEFENDANT'S GUILT ON THE RECORD AT THE TIME OF AN *ALFORD* PLEA.

The Third Department, affirming defendant's DWI conviction by guilty plea, determined the waiver of appeal was insufficient. The Third Department noted that the better practice would have been to place the evidence of defendant's guilt on the record at the time of the *Alford* plea, and found the arresting officer had probable cause without conducting field sobriety tests. With regard to the waiver of appeal, the court wrote: "During the brief colloquy with defendant, County Court did not sufficiently distinguish the waiver of the right to appeal from the trial-related rights that defendant was forfeiting by virtue of his guilty plea, and the record does not reflect that defendant executed a written waiver. Additionally, in response to County Court's inquiry regarding defendant's willingness to waive his right to appeal, defendant replied, 'Yes, if that's what I gotta do, yes. If that's what you're making me do, I'll do it.' Under these circumstances, we are unable to conclude that defendant knowingly, intelligently and voluntarily waived his right to appeal." ***People v. Crandall*, 2020 N.Y. Slip Op. 01857, Third Dept 3-16-20**

UNEMPLOYMENT INSURANCE.

SECURITIES TRADER IS AN EMPLOYEE ENTITLED TO UNEMPLOYMENT INSURANCE BENEFITS.

The Third Department determined claimant, a securities trader who worked for Quad Capital, LLC, was an employee entitled to unemployment benefits: "The record establishes that claimant submitted a resume and was interviewed by a managing partner at Quad Capital. After certain criteria, such as a trading license, fingerprints and background check were completed, claimant entered into an Ordinary Member Agreement and was given a trader handbook. The record also establishes that, despite being designated by the contract as a member of the limited liability company, claimant did not make a monetary investment in the company, was paid based upon the net profit only from his portfolio, did not have any managerial duties, did not make any financial or managerial decisions and was not liable for any losses from the company — unlike managing members of Quad Capital. Further, claimant had regularly-scheduled work hours in Quad Capital's office and was required to notify his manager if he would be absent. Claimant was expected to attend morning meetings, his work was regularly reviewed and monitored by a manger and he was subject to a dress code for which a fine would be imposed if violated." ***Matter of Giampa (Quad Capital, LLC--Commissioner of Labor)*, 2020 N.Y. Slip Op. 01877, Third Dept 3-20-20**

WORKERS' COMPENSATION.

THE CARRIER'S FAILURE TO INDICATE WHEN IT OBJECTED TO THE RULING OF THE WORKERS' COMPENSATION LAW JUDGE JUSTIFIED THE DENIAL OF THE CARRIER'S APPLICATION FOR REVIEW.

The Third Department determined the Workers' Compensation Board did not abuse its discretion when it denied the carrier's application for review because question 15 on the application form did not indicate when the relevant objection to the Workers' Compensation Law Judge (WCLJ) was made: "When the carrier filed its application for Board review ... , question number 15 on that form, as well as the accompanying instructions in effect at that time, requested that it '[s]pecify the objection or exception interposed to the ruling and when the objection or exception was interposed as required by 12 NYCRR 300.13 (b) (2) (ii).' In response to question number 15, the carrier stated, 'Please note the carrier's objection to not finding a transfer of liability to the Special Funds Conservation Committee pursuant to [Workers' Compensation Law §] 25-a.' The Board found that the carrier's response was incomplete because there were 'several hearings [that] had taken place prior to the hearing [on] July 3, 2018,' and the carrier's response to question number 15 did 'not include the date of the hearing at which the exception to the WCLJ's ruling was interposed, as required.' Both the regulation itself and the instructions in effect at the time that the carrier filed its application for Board review unambiguously required the carrier to 'specify the objection or exception that was interposed to the [WCLJ's] ruling, and when the objection or exception was interposed' ... . As such, a complete response to question number 15 required the carrier to specify the nature of its objections or exceptions and indicate when such objections or exceptions were interposed. Although the carrier satisfied the first prong of the regulation by articulating specific objections to the WCLJ's rulings, it failed to satisfy the temporal element of the regulation by indicating when such objections were made. Accordingly, under the circumstances presented here, in which the carrier failed to provide the requisite temporal element in its response to question number 15, we find that the Board did not abuse

its discretion in denying the carrier's application for Board review ... ." ***Matter of Barrera v. Corinthian Cast Stone, Inc.*, 2020 N.Y. Slip Op. 01880, Third Dept 3-16-20**
Similar issue and result in ***Matter of Currie v. Rist Transp. Ltd.*, 2020 N.Y. Slip Op. 01874, Third Dept 3-16-20**
Similar issue and result in ***Matter of Perry v. All Am. Sch. Bus Corp.*, 2020 N.Y. Slip Op. 01869, Third Dept 3-16-20**

WORKERS' COMPENSATION.

THE BOARD HAS THE AUTHORITY TO CHOOSE BETWEEN TWO CONFLICTING MEDICAL OPINIONS, HERE DEALING WITH WEANING CLAIMANT FROM OPIOID PAIN KILLERS.
The Third Department determined the Workers' Compensation Board has the authority to chose between two conflicting medical opinions. Here claimant had significant pain and was taking high doses of opioids. The independent medical examiner (IME) had one opinion about how the claimant should be weaned from the opioids and claimant's own physician had a different opinion. The Board sided with the IME: "Although claimant's physician and the IME gave differing opinions regarding the advisability of weaning claimant from his opiate medications, as well as the manner in which it should be accomplished, the Board is vested with the authority to resolve conflicting medical opinions ... . Thus, the Board could choose to credit the opinion of the IME, which was in accordance with the applicable guidelines, over that of claimant's treating physician. Therefore, inasmuch as substantial evidence supports the Board's decision, we find no reason to disturb it ...". ***Matter of Forte v. Muccini*, 2020 N.Y. Slip Op. 01881, Third Dept 3-16-20**

WORKERS' COMPENSATION.

CLAIMANT WAS WRONGFULLY TERMINATED AFTER TELLING HIS BOSS HE WAS GOING TO FILE A WORKERS' COMPENSATION CLAIM, A VIOLATION OF WORKERS' COMPENSATION LAW SECTION 120.
The Third Department determined claimant was terminated because he told the executive manager he would be filing a workers' compensation claim and taking time off after a slip and fall injury, a violation of Workers' Compensation Law § 120: " 'Workers' Compensation Law § 120 prohibits an employer from discriminating against an employee who has filed or who has attempted to file a claim for workers' compensation benefits by discharging him or her' ... . In enacting this statute, 'the Legislature intended 'to insure that a claimant [could] exercise his [or her] rights under the [Workers'] Compensation Law . . . without fear that doing so [might] endanger the continuity of [his or her] employment' ... . 'The burden of proving a retaliatory discharge in violation of the statute lies with the claimant, who must demonstrate a causal nexus between the claimant's activities in obtaining compensation and the employer's conduct against him or her' ... . With regard to 'questions of fact and factual inferences to be drawn therefrom, . . . a decision of the [B]oard is conclusive upon the courts if supported by substantial evidence' ...". ***Matter of Markey v. Autosaver Ford*, 2020 N.Y. Slip Op. 01876, Third Dept 3-16-20**

WORKERS' COMPENSATION.

SPECULATIVE MEDICAL OPINION DID NOT SUPPORT FINDING CLAIMANT'S PRIOR EMPLOYER LIABLE FOR ASBESTOS-RELATED MESOTHELIOMA, DESPITE EVIDENCE OF EXPOSURE AT THE PRIOR EMPLOYER.
The Third Department determined the Workers' Compensation Board properly found that claimant's mesothelioma was due to asbestos exposure at Kodak, even though claimant was exposed to asbestos in his prior employment at International Paper. Kodak unsuccessfully sought apportionment of the liability with International Paper. Claimant's employment at International Paper ended in 1967 and claimant worked at Kodak from 1967 to 1985. He was diagnosed in 2013: "... Workers' Compensation Law § 44 states that, when a worker's disability due to an occupational disease is established and benefits are awarded, '[t]he total compensation due shall be recoverable from the employer who last employed the employee in the employment to the nature of which the disease was due and in which it was contracted. If, however, such disease . . . was contracted while such employee was in the employment of a prior employer, the employer who is made liable for the total compensation . . . may appeal to the [B]oard for an apportionment of such compensation among the several employers who since the contraction of such disease shall have employed such employee in the employment to the nature of which the disease was du' … . 'Importantly, liability under this provision is premised upon employment at the time of or following the contraction of the compensable occupational disease, not upon the disablement that ensues' ... The determination of when an employee contracted the disease, which refers to 'when the disease process begins, as evidenced by symptoms, diagnosis or other medical evidence that shows [that the] disease process must have existed' ... , is a question of fact to be determined by the Board, which will be upheld if supported by substantial evidence ... . * * * While the Board recognized that there may be a delay of up to 50 years between exposure to asbestos and a mesothelioma diagnosis, it correctly found that the medical opinions that decedent's prior employment contributed to his condition were speculative and insufficient ...". ***Matter of Gimber v. Eastman Kodak Co.*, 2020 N.Y. Slip Op. 01875, Third Dept 3-16-20**

WORKERS' COMPENSATION.

CLAIMANT'S FAILURE TO COMPLY WITH THE FORMATTING REQUIREMENTS SUPPORTED THE DENIAL OF CLAIMANT'S APPLICATION FOR BOARD REVIEW.

The Third Department determined claimant's failure to comply with the formatting requirements supported the denial of claimant's application for Board review: "The Board's instructions for the RB-89 form regarding question number 13 required that claimant specify the date and document ID numbers of 'the transcripts, documents, reports, exhibits, and other evidence in the Board's file that are relevant to the issues and grounds being raised for review.' In response, claimant answered, '[a]ll hearings, transcripts and documents in [the Board] file are pertinent to the outstanding issue.' By merely referencing the entire Board case file in response to question number 13, claimant failed to comply with the prescribed formatting and completion requirements ... . Accordingly, the Board did not abuse its discretion in denying claimant's application for Board review, and its decision will not be disturbed ...". ***Matter of Hirschbeck v. Office of the Commr. of Major League Baseball*, 2020 N.Y. Slip Op. 01870, Third Dept 3-16-20**

FOURTH DEPARTMENT

CIVIL PROCEDURE.

NEW YORK PLAINTIFF, NORTH CAROLINA DEFENDANT, TORTS ALLEGEDLY OCCURRED IN GEORGIA; UNDER A CONFLICT OF LAWS ANALYSIS GEORGIA LAW CONTROLS.

The Fourth Department determined Supreme Court properly ruled that Georgia law controlled the action which alleged Bank of America's employees or agents notarized documents with false signatures. The torts were alleged to have occurred in Georgia. Plaintiff was a domiciliary of New York and Bank of America was a domiciliary of North Carolina: "If the conflicting laws regulate conduct, the law of the place of the tort applies because of the 'locus jurisdiction's interests in protecting the reasonable expectations of the parties' and 'the admonitory effect that applying its law will have on similar conduct in the future' ... . Where [, as here], however, the conflicting laws relate to the allocation of losses, then 'considerations of the State's admonitory interest and party reliance are less important' ... . Nevertheless, pursuant to the third rule set forth in Neumeier v. Kuehner (31 NY2d 121, 128 [1972]), i.e., where the parties are domiciled in different states with conflicting laws, the law of the place of the tort normally applies, unless displacing it 'will advance the relevant substantive law purposes without impairing the smooth working of the multi-state system or producing great uncertainty for litigants' ... . We conclude that plaintiff 'failed to establish that the exception applies to warrant a departure from the locus jurisdiction rule' ... , and thus the third Neumeier rule warrants the application of the law of Georgia in this action ...". ***Durham Commercial Capital Corp. v. Arunachalam*, 2020 N.Y. Slip Op. 02024, Fourth Dept 3-20-20**

CIVIL PROCEDURE, EVIDENCE.

SELF-SERVING AFFIDAVIT FROM DEFENDANT DID NOT REBUT THE PRESUMPTION OF THE VALIDITY OF THE SERVICE OF PROCESS.

The Fourth Department determined defendant did not rebut the presumption of valid service of process: "... [P]laintiff submitted, in addition to evidence establishing the default of defendant and 'proof of the facts constituting the claim' (CPLR 3215 [f] ...), the affidavit of a process server, who averred that he served defendant by delivering a copy of the summons and complaint to the office of the Secretary of State pursuant to Business Corporation Law § 306 (b) (1), and an affidavit of additional mailing establishing that a copy of the summons and complaint was also sent to defendant's mailing address pursuant to CPLR 3215 (g) (4). In opposition, defendant asserted that it was entitled under CPLR 317 to be relieved from its default in pleading, and defendant submitted an affidavit in which its president averred, insofar as relevant to the issue of service, that defendant had not received the summons and complaint prior to receipt of plaintiff's initial notice of motion for a default judgment. ... [I]n order to be relieved of a default in pleading under CPLR 317, defendant was required to show, among other things, that it did not receive actual notice of the process in time to defend the action ... . It is well settled that a 'process server's affidavit constitute[s] prima facie evidence of proper service on the Secretary of State' ... , and thus defendant was required to rebut the presumption of proper service ... . Here, the 'self-serving affidavit [of defendant's president], which merely denied receipt, is insufficient to rebut [that] presumption' ...". ***Lechase Constr. Servs., LLC v. JM Bus. Assoc. Corp.*, 2020 N.Y. Slip Op. 01977, Fourth Dept 3-20-20**

CRIMINAL LAW, ATTORNEYS.

DEFENDANT'S MOTION TO VACATE HIS CONVICTION BY GUILTY PLEA ON INEFFECTIVE ASSISTANCE GROUNDS WAS PROPERLY DENIED WITHOUT A HEARING; THE TWO DISSENTERS ARGUED THE PRO SE MOTION WAS SUFFICIENT TO WARRANT A HEARING, DESPITE THE TECHNICAL DEFECTS.

The Fourth Department, over a two-justice dissent, determined defendant's pro se motion to vacate his conviction by guilty plea, on ineffective assistance of counsel grounds, was properly denied without a hearing. The dissenters argued defendant raised the issue sufficiently to warrant a hearing: "Defendant contends that defense counsel was ineffective because he

failed to advise defendant, prior to the guilty plea, of a potentially viable affirmative defense concerning the operability of the firearm used in the robberies ... . Defendant did not submit, however, the statutorily-required 'sworn allegations' of 'the existence or occurrence of facts' in support of his motion to warrant such a hearing ... . The rule that a CPL 440.10 motion must be predicated on sworn allegations is a fundamental statutory requirement that a defendant must satisfy to be entitled to a hearing ... . Absent sworn allegations substantiating defendant's contentions, the court did not abuse its discretion in summarily denying the motion ... . Specifically, defendant did not aver in his initial motion papers that he would have rejected the favorable plea deal and insisted on proceeding to trial had he been made aware of the potentially viable affirmative defense. Inasmuch as defendant 'must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial' ... , his failure to swear that he would have done so is fatal to his motion, and thus the court did not err in denying it without a hearing ...". ***People v. Dogan*, 2020 N.Y. Slip Op. 02021, Fourth Dept 3-20-20**

CRIMINAL LAW, ATTORNEYS.

BECAUSE THE ISSUE WAS NOT PRESERVED, THE APPELLATE COURT DID NOT ADDRESS DEFENDANT'S OBJECTION TO THE TRIAL JUDGE'S PROHIBITING DEFENDANT FROM COMMUNICATING WITH HIS ATTORNEY DURING OVERNIGHT RECESSES WHEN DEFENDANT WAS ON THE STAND.

The Fourth Department determined the defendant did not preserve for appeal his objection to the trial judge's prohibiting defendant from communicating with his lawyer during overnight recesses when defendant was testifying. The legitimacy of the objection was not addressed: "Defendant ... contends in his main brief that the court committed reversible error by depriving him of the constitutional right to counsel when it prohibited him from communicating with defense counsel about his testimony during overnight recesses while defendant was in the midst of testifying in his defense. Defendant failed to preserve that contention for our review inasmuch as defense counsel was 'present and available to register a protest' to [the] restriction on communication that would [have] provide[d] the court with an opportunity to rectify its error' but did not make a timely protest ... . Under the circumstances of this case, we decline to exercise our power to review that contention as a matter of discretion in the interest of justice ... . Contrary to defendant's related contention in his main brief, we conclude under the circumstances of this case that defense counsel's failure to timely object to the prohibition on communication was not so 'egregious and prejudicial as to compromise . . . defendant's right to a fair trial' ...". ***People v. Tetro*, 2020 N.Y. Slip Op. 01973, Fourth Dept 3-20-20**

CRIMINAL LAW, ATTORNEYS.

THE DEFENSE ATTORNEY HAD BEGUN WORKING FOR THE DISTRICT ATTORNEY'S OFFICE AT THE TIME DEFENDANT ENTERED HIS PLEA; DEFENDANT WAS THEREBY DEPRIVED OF HIS RIGHT TO COUNSEL; PLEA VACATED.

The Fourth Department, vacating defendant's guilty plea, determined defendant was deprived of his right counsel because defense counsel had become employed by the district attorney's office at the time of the plea: "It is well established that a criminal defendant's right to counsel is violated when a defense attorney who actively participated in the preliminary stages of the defendant's defense becomes employed as an assistant district attorney by the office that is prosecuting the defendant's ongoing case ... . In those circumstances, the defendant and the public are given 'the unmistakable appearance of impropriety and [the situation] create[s] the continuing opportunity for abuse of confidences entrusted to the attorney during the [period] of his [or her] active representation of defendant' ... . Disqualification is required when there is 'the appearance of impropriety and the risk of prejudice attendant on abuse of confidence, however slight' ... . 'The rule is necessary to prevent situations in which [a] former client[] must depend on the good faith of [his or her] former [attorney] turned adversar[y] to protect and honor confidences shared during the now extinct relationship. In those situations the risk of abuse is obvious' ... . Here, we conclude that defendant's right to counsel was violated ... . The People concede that the attorney who had represented defendant with respect to the misdemeanor charges was employed by the District Attorney's Office at the time defendant entered into the plea agreement that resolved those misdemeanor charges as well as the felony charges. Thus, on this record, we conclude that there is an 'appearance of impropriety and . . . risk of prejudice attendant on abuse of confidence' ... , and defendant should not have been required to 'depend on the good faith of [his] former [attorney] turned adversar[y] to protect and honor confidences shared during the now extinct relationship' ...". ***People v. Sears*, 2020 N.Y. Slip Op. 01974, Fourth Dept 3-20-20**

CRIMINAL LAW, ATTORNEYS, EVIDENCE.

BECAUSE DEFENDANT INVOKED HIS RIGHT TO COUNSEL WHEN HE WAS NOT IN CUSTODY HE COULD VALIDLY WITHDRAW HIS REQUEST WITHOUT THE PRESENCE OF COUNSEL.

The Fourth Department determined defendant invoked his right to counsel when he was not in custody and therefore defendant could validly withdraw his request for counsel without the presence of counsel: "The Court of Appeals has stated that a defendant who asserts his or her right to counsel while out of custody may later withdraw that assertion without an attorney present and speak to law enforcement agents ... . A hearing court may infer that a defendant has withdrawn

a request for counsel when the defendant's conduct unambiguously establishes such a withdrawal, which requires consideration of all relevant factors, including 'whether defendant was fully advised of his or her constitutional rights before invoking the right to counsel and subsequently waiving it, whether the defendant who has requested assistance earlier has initiated the further communication or conversation with the police . . . , and whether there has been a break in the interrogation after the defendant has asserted the need for counsel with a reasonable opportunity during the break for the suspect to contact an attorney' ... . Here, defendant was repeatedly advised of his rights, including twice immediately before he resumed speaking with the police. Moreover, after an overnight break in questioning, defendant initiated the conversation with the police to inquire about taking a polygraph examination, and he provided his own transportation to the investigators' office. Consequently, we conclude that the court properly determined that defendant withdrew his assertion of his right to counsel ... . We reject defendant's contention that a different result is required because he did not cause the break in the interrogation. The relevant consideration is not which party caused the break in the questioning, rather it is whether there was 'a reasonable opportunity during the break for the suspect to contact an attorney' ... , and in this case defendant had such an opportunity during the overnight break in questioning." ***People v. Brown*, 2020 N.Y. Slip Op. 01981, Fourth Dept 3-20-20**

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

AN ENTRY IN THE CASE SUMMARY ALONE IS NOT A SUFFICIENT BASIS FOR AN ASSESSMENT OF POINTS.

The Fourth Department, reducing defendant's risk level, determined that an entry in the case summary alone is not sufficient to justify an assessment of points: "We agree with defendant that the People failed to prove by the requisite clear and convincing evidence that he had committed a continuing course of sexual misconduct, i.e., risk factor 4 on the risk assessment instrument (RAI) ... . The sole evidence presented by the People in support of that risk factor was the case summary prepared by the Board of Examiners of Sex Offenders. At the SORA hearing, however, defendant specifically denied the allegation within the case summary that he engaged in a continuing course of sexual misconduct, and instead testified that he engaged in one instance only. Indeed, it is undisputed that defendant was charged with and pleaded guilty to one count of rape in the third degree ... stemming from a specific instance of intercourse that occurred on one specified day. We conclude that 'the case summary alone is not sufficient to satisfy the People's burden of proving the risk level assessment by clear and convincing evidence where, as here, defendant contested the factual allegations related to [the] risk factor' ...". ***People v. Maund*, 2020 N.Y. Slip Op. 02011, Fourth Dept 3-20-20**

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA). JUDGES, CONSTITUTIONAL LAW.

JUDGE SHOULD NOT HAVE, SUA SPONTE, ASSESSED POINTS ON A THEORY NOT RAISED BY THE BOARD OF EXAMINERS OF SEX OFFENDERS OR THE PEOPLE; DEFENDANT WAS THEREBY DEPRIVED OF HIS RIGHT TO DUE PROCESS OF LAW.

The Fourth Department, reversing County Court, determined the judge should not have, sua sponte, assessed points on a theory not raised by the Board of Examiners of Sex Offenders or the People: "... [D]efendant contends, and the People correctly concede, that County Court violated his right to due process by sua sponte assessing points on a theory not raised by the Board of Examiners of Sex Offenders or the People ... . The due process guarantees in the United States and New York Constitutions require that a defendant be afforded notice of the hearing to determine his or her risk level pursuant to SORA and a meaningful opportunity to respond to the risk level assessment ... . Here, no allegations were made either in the risk assessment instrument (RAI) or by the People at the SORA hearing that defendant should be assessed 30 points under risk factor 3, and defendant learned of the assessment of the additional points under that risk factor for the first time when the court issued its decision ... . The court stated that, if defendant were a presumptive level one risk, an upward departure to level two would be warranted based on certain aggravating factors stemming from the nature of the crimes. Because those factors were not presented as bases for departure in the RAI or by the People at the hearing, defendant was not afforded notice and a meaningful opportunity to respond to them ...". ***People v. Wilke*, 2020 N.Y. Slip Op. 02002, Fourth Dept 3-20-20**

FAMILY LAW.

THERE IS NO LEGAL SUPPORT FOR A 'TRI-PARENT' ARRANGEMENT WHERE A FORMER SAME-SEX PARTNER OF MOTHER, MOTHER AND FATHER SHARE VISITATION AND CUSTODY OF THE CHILD.

The Fourth Department, in a full-fledged opinion by Justice Centra, over a two-justice concurrence and a dissent, determined petitioner, the former same-sex partner of mother, did not have standing to seek custody and visitation of the child, despite mother's support of the petition. The petitioner moved out of mother's residence in 2010. Mother thereafter conceived a child with father. At first father wanted nothing to do with the child, but he has visited the child since 2014. Petitioner participated in the birth and naming of the child and assumed the role of a parent, but the romantic relationship with mother ended in 2012. Father opposed petitioner's 2017 petition for custody and visitation. Mother did not want to terminate father's rights. Family Court granted father's motion to dismiss the petition. The Fourth Department affirmed finding no legal support for a "tri-parent" custody and visitation arrangement: "The wording of Domestic Relations Law § 70 (a) is clear and straightforward. It states that 'either' parent may seek custody or visitation (id.). It is a well-settled prin-

ciple of statutory construction that '[w]ords of ordinary import used in a statute are to be given their usual and commonly understood meaning' ... . The common dictionary definition of 'either' when used as an adjective has two senses, i.e., 'being the one and the other of two' and 'being the one or the other of two' ... . In addition, when the Court of Appeals stated in Brooke S.B. that section 70 does not define the critical term 'parent,' it added the following in a footnote: 'We note that by the use of the term either,' the plain language of Domestic Relations Law § 70 clearly limits a child to two parents, and no more than two, at any given time' (Brooke S.B., 28 NY3d at 18 n 3). In our view, the clear wording of section 70 (a), which was expressly recognized by the Court of Appeals, precludes any relief to petitioner here because there are already two parents: the mother and the father. Under section 70 (a), there simply can be no more. We are therefore in agreement with the Third Department's recent decision determining that to allow three parents to 'simultaneously have standing to seek custody . . . does not comport with the holding in Matter of Brooke S.B.' "(Matter of Shanna O. v. James P., 176 AD3d 1334, 1335 [3d Dept 2019]). ***Matter of Tomeka N.H. v. Jesus R.*, 2020 N.Y. Slip Op. 02015, Fourth Dept 3-20-20**

FAMILY LAW, APPEALS, ATTORNEYS, CIVIL PROCEDURE.

BECAUSE FATHER'S ATTORNEY APPEARED IN THE CUSTODY PROCEEDING FATHER WAS NOT IN DEFAULT AND THE ORDER WAS THEREFORE APPEALABLE.

The Fourth Department determined father was not in default because his attorney appeared. Therefore the custody order was appealable: "Petitioner father commenced this proceeding seeking to modify a prior order of custody that, inter alia, awarded sole legal and physical custody of the subject child to respondent mother. The father now appeals from an order that, inter alia, continued sole legal and physical custody of the subject child with the mother. We agree with the father that Family Court erred in entering the order upon his default based on his failure to appear in court. The record establishes that the father 'was represented by counsel, and we have previously determined that, [w]here a party fails to appear [in court on a scheduled date] but is represented by counsel, the order is not one entered upon the default of the aggrieved party and appeal is not precluded' ...". ***Matter of Williams v. Richardson*, 2020 N.Y. Slip Op. 01975, Fourth Dept 3-20-20**

HUMAN RIGHTS LAW.

JAIL IS NOT A 'PUBLIC ACCOMMODATION' WITHIN THE MEANING OF THE NYS HUMAN RIGHTS LAW; THE STATE DIVISION OF HUMAN RIGHTS THEREFORE DID NOT HAVE JURISDICTION TO HEAR PETITIONER'S ADMINISTRATIVE COMPLAINT ALLEGING UNLAWFUL DISCRIMINATION IN JAIL.

The Fourth Department determined jail is not a "public accommodation" within the meaning of the Human Rights Law. Therefore petitioner's administrative complaint alleging unlawful discrimination in the jail was properly dismissed by the NYS Division of Human Rights (SDHR) for lack of jurisdiction: "SDHR has jurisdiction to, inter alia, investigate and adjudicate complaints of unlawful discrimination in the provision of any 'public accommodation, resort or amusement' (Executive Law § 296 [2] [a]; see § 295 [6] ...). For purposes of the Human Rights Law, a 'public accommodation, resort or amusement' offers 'conveniences and services to the public' ' and is 'generally open to all comers' ... , and it defies logic to suggest that law enforcement is providing ' conveniences' ' or ' services' ' to those arrested and detained ... . Nor is arrest and detention 'open to all comers' in any sense ... . Indeed, it well established that 'prison facilities do not cater or offer [their] goods to the general public' ... . To the contrary, arrest and detention is imposed upon a person by law enforcement and the criminal courts, not provided to those arrested and detained as a service for their benefit. The process of arresting and incarcerating a person is, 'by its very nature,' a governmentally decreed 'separat[ion of] the general public from the individuals who are compelled by our penal system to be confined' ... . In short, although we note SDHR's concession at oral argument that governmental entities such as police agencies could provide public accommodations within the meaning of the Human Rights Law under certain circumstances, we join the consensus of courts nationwide in concluding that arrest and incarceration are 'properly viewed as the antithesis of a . . . public accommodation' ' ...". ***Matter of LeTray v. New York State Div. of Human Rights*, 2020 N.Y. Slip Op. 01978, Fourth Dept 3-20-20**

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