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COURT OF APPEALS

CRIMINAL LAW, ATTORNEYS, APPEALS, CONSTITUTIONAL LAW.

THE RECORD DID NOT SUPPORT DEFENDANT'S ARGUMENT THAT DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO CHALLENGE AN ALLEGEDLY BIASED JUROR; THE RECORD DID NOT SUPPORT A CONSTITUTIONAL INEFFECTIVE ASSISTANCE CLAIM; THEREFORE DIRECT APPEAL, AS OPPOSED TO A MOTION TO VACATE THE CONVICTION, WAS NOT AVAILABLE.

The Court of Appeals, in a full-fledged opinion by Judge DiFiore, over a comprehensive, extended dissenting opinion, determined defendant's constitutional ineffective assistance argument based upon defense counsel's failure to challenge an allegedly biased juror was properly rejected. The record was deemed insufficient to support the constitutional challenge. A motion to vacate the conviction, pursuant to Criminal Procedure Law § 440, based upon matters not in the record, may be the only avenue available to the defendant here. The defendant was charged with depraved indifference murder stemming from a drive-by shooting: "We reject defendant's argument here that prospective juror number 10's statements during voir dire reflect actual bias against defendant predicated on any evidence precluding the juror from rendering an impartial verdict, as opposed to general discomfort with the case based on media coverage. Contrary to defendant's assertion, the juror's verbatim statements did not reveal what about the case gave rise to his uneasiness — whether it be the seemingly random nature of the shooting, the defendant's or victim's identity, or the manner in which the police investigated ... . Nor did this juror convey that his uneasiness was connected to any particular personal experience or relationship, ... or whether his impressions risked predisposition toward the prosecution or defense. Moreover, as both the prosecutor and trial court indicated in questioning the juror, this case turned not on a dispute about the nature of the crime but on the prosecutor's ability to prove that this defendant committed it — an issue not impacted by the juror's apprehension. * * * A defendant's views at trial about a prospective juror as conveyed to counsel are relevant to an ineffectiveness claim based on the joint decision to accept that juror. Here, where we do not know what was said between defendant and his counsel or how that conversation may have affected counsel's impression of prospective juror number 10, the ineffective assistance claim cannot be resolved on direct appeal." ***People v. Maffei*, 2020 N.Y. Slip Op. 02680, CtApp 5-7-20**

CRIMINAL LAW, APPEALS, EVIDENCE.

ALTHOUGH DEFENDANT'S SUPPRESSION MOTION RELATED TO A THEFT ON OCTOBER 3 AND DEFENDANT PLED GUILTY TO A DIFFERENT THEFT ON OCTOBER 1 IN SATISFACTION OF BOTH, DEFENDANT WAS ENTITLED TO APPELLATE REVIEW OF HIS SUPPRESSION MOTION; THE APPELLATE DIVISION'S DENIAL OF REVIEW REVERSED.

The Court of Appeals, in a full-fledged opinion by Judge Fahey, reversing the Appellate Division, determined defendant was entitled to appellate review of the denial of his suppression motion even though the suppression motion did not relate to the offense to which defendant pled guilty. The defendant was charged with two thefts from the same residence on different days, a laptop computer taken on October 1 and jewelry taken on October 3. The police stopped the defendant on the street on October 3 and seized the jewelry. The suppression hearing related to that street stop. The defendant pled guilty to the theft of the computer and the jewelry-theft was satisfied by the plea. The Fourth Department held defendant was not entitled to appellate review of the jewelry-related suppression motion because defendant pled to the computer-theft. The case was sent back for review of the denial of the suppression motion: "Defendant, a predicate felony offender who was facing a maximum sentence of 30 years in prison if convicted of both counts of burglary, pleaded guilty to one count of burglary in the second degree, in satisfaction of the entire indictment. ... [D]efendant pleaded guilty to the October 1 burglary, as charged in the count pertaining to the theft of the laptop computer, in satisfaction of the count charging the October 3 burglary of jewelry, which was the subject of his motion to suppress. * * * '[W]hen a conviction is based on a plea of guilty an appellate court will rarely, if ever, be able to determine whether an erroneous denial of a motion to suppress contributed to the defendant's decision, unless at the time of the plea he states or reveals his reason for pleading guilty' ... . * * * A defendant who pleads guilty to one count will invariably take into consideration that other counts are satisfied by the plea. Importantly, a count satisfied by a guilty plea bears the double jeopardy consequences of a judgment of conviction. The

judgment in this case prevents the People from prosecuting defendant again for the October 3, 2014 burglary, even though defendant did not plead to that count ...". ***People v. Holz*, 2020 N.Y. Slip Op. 02682, CtApp 5-7-20**

MUNICIPAL LAW, PERSONAL INJURY.

PLAINTIFFS, THE DRIVER AND PASSENGER IN THIS TRAFFIC ACCIDENT CASE, REPRESENTED BY THE SAME ATTORNEY, REFUSED TO PARTICIPATE IN THE GENERAL MUNICIPAL LAW § 50-h HEARING(S) UNLESS EACH PLAINTIFF WAS PRESENT WHEN THE OTHER TESTIFIED; THE COURT OF APPEALS AFFIRMED THE DISMISSAL OF ACTION BASED UPON PLAINTIFFS' FAILURE TO APPEAR FOR THE § 50-h HEARING(S).

The Court of Appeals, in a full-fledged opinion by Judge Stein, over a concurring opinion, determined plaintiffs, the driver and passenger n this traffic accident case, did not have the right to observe each other's testimony at a General Municipal Law § 50-h hearing. Both plaintiffs were represented by the same attorney. The action was dismissed because plaintiffs refused to appear for the hearing(s) after plaintiffs' counsel insisted that both plaintiffs be present during the testimony. The Court of Appeals affirmed the dismissal of the action: "As General Municipal Law § 50-h (5) makes clear on its face, compliance with a municipality's demand for a section 50-h examination is a condition precedent to commencing an action against that municipality ... . A claimant's failure to comply with such a demand generally warrants dismissal of the action ... . Requiring claimants to comply with section 50-h before commencing an action augments the statute's purpose, which 'is to afford the city an opportunity to early investigate the circumstances surrounding the accident and to explore the merits of the claim, while information is readily available, with a view towards settlement' ...". ***Colon v. Martin*, 2020 N.Y. Slip Op. 02681, CtApp 5-7-20**

FIRST DEPARTMENT

CIVIL PROCEDURE.

THE STANDARD FOR VACATING A DEFAULT JUDGMENT IS A 'REASONABLE' EXCUSE, NOT A 'PLAUSIBLE' EXCUSE; IF NO REASONABLE EXCUSE IS OFFERED THE MERITS NEED NOT BE CONSIDERED; SUPREME COURT REVERSED.

The First Department, reversing Supreme Court, determined that defendant Swanston's motion to vacate the default judgment should not have been granted. The excuse was not deemed reasonable and, therefore, the merits of the case need not be considered: "The motion court thought that Swanston's excuses might not be valid but that they were 'plausible.' However, plausibility is not the standard; rather, on a CPLR 5015(a)(1) motion, the movant must show a reasonable excuse for his default ... . Swanston's one-sided understanding that plaintiffs would refrain from prosecuting their lawsuit while defendant JackFromBrooklyn Inc. (JFB) negotiated to sell itself did not constitute a reasonable excuse for failing to answer ... . Given the absence of a reasonable excuse, we 'need not determine whether a meritorious defense exists' ...". ***Kowal v. JackFromBrooklyn Inc.*, 2020 N.Y. Slip Op. 02715, First Dept 5-7-20**

CRIMINAL LAW.

APPELLANT, WHO HAD PUT UP HER OWN MONEY FOR DEFENDANT'S BAIL, WAS ENTITLED TO REMISSION OF THE BAIL FORFEITED WHEN DEFENDANT MISSED HIS COURT DATE; SUPREME COURT SHOULD HAVE CONSIDERED THE AFFIDAVITS AND PSYCHIATRIST'S LETTER EXPLAINING THE MENTAL-HEALTH-RELATED REASONS FOR DEFENDANT'S FAILURE TO APPEAR.

The First Department, in a full-fledged opinion by Justice Gesmer, reversing Supreme Court, determined the appellant's pro se application for remission of the forfeited bail should have been granted. Appellant put up her own money for the bail. In support of her application for remission of the bail she submitted her own affidavit, defendant's affidavit and a letter from a psychiatrist who had treated the defendant. Supreme Court refused to consider the affidavits and letter which explained defendant had become depressed upon the death of his younger brother, began abusing drugs and went off his mental health medication, resulting in his missing his court date. Instead Supreme Court relied on the court's form application for remission of bail which was submitted by the appellant. The form application did not have any space for an explanation of the reasons for defendant's missing his court date: "A court may forfeit a bail bond '[i]f, without sufficient excuse, a principal does not appear when required or does not render himself amenable to the orders and processes of the criminal court wherein bail has been posted' (CPL 540.10[1]). When this occurs, the surety may make an application for remission of the forfeited bail, which the court may grant 'upon such terms as are just' (CPL 540.30[2]). '[S]uch an application should be granted only under exceptional circumstances and to promote the ends of justice. In making the application, a defendant or surety has the burden of proving that the defendant's failure to appear was not deliberate and willful, and that the failure did not prejudice the People or deprive them of any rights' ... . We find that appellant met all of these requirements." ***People v. Nichols*, 2020 N.Y. Slip Op. 02741, First Dept 5-7-20**

CRIMINAL LAW, APPEALS, IMMIGRATION.

DEFENDANT WAS NOT INFORMED OF THE DEPORTATION CONSEQUENCES OF HIS GUILTY PLEA, MATTER REMANDED; DEFENDANT WAS NOT INFORMED THAT BY PLEADING GUILTY TO A PROBATION VIOLATION HE WAS GIVING UP HIS RIGHT TO A HEARING; APPEAL CONSIDERED IN THE INTEREST OF JUSTICE.

The First Department, remanding the matter, determined defendant was not advised he could be deported based on his guilty plea, and further determined defendant's plea to a probation violation was defective because he was not informed he was giving up his right to a hearing. Although the issue was not preserved by a motion to withdraw the plea, the appeal was heard in the interest of justice: "When defendant, a noncitizen, pleaded guilty to criminal possession of a firearm, the court did not advise him that if he was not a citizen, he could be deported as a consequence of his plea. Even though he did not move to withdraw his guilty plea, there is no evidence that defendant knew about the possibility of deportation during the plea and sentencing proceedings. As such, the claim falls within the 'narrow exception' to the preservation doctrine (*People v. Peque*, 22 NY3d 168, 183 [2013], cert denied 574 US 850 [2014]). Therefore, defendant should be afforded the opportunity to move to vacate his plea upon a showing that there is a 'reasonable probability' that he would not have pleaded guilty had the court advised him of the possibility of deportation (id. at 198). Accordingly, we remit for the remedy set forth in Peque (id. at 200-201), and we hold the appeal in abeyance for that purpose. Furthermore, defendant's guilty plea to violation of probation was defective because there was no allocution about whether defendant understood that he was giving up his right to a hearing on the violation. While there is no mandatory catechism, Supreme Court failed to 'advise defendant of his rights or the consequences regarding an admission to violating probation, including that he understood that he was entitled to a hearing on the issue and that he was waiving that right' ... . Although defendant never moved to withdraw this plea and his claim is unpreserved, we review it in the interest of justice." ***People v. Pinnock*, 2020 N.Y. Slip Op. 02731, First Dept 5-7-20**

CRIMINAL LAW, EVIDENCE.

ALTHOUGH THERE WAS EVIDENCE DEFENDANT WAS SELLING TICKETS TO A SPORTING EVENT OUTSIDE THE ARENA, THE EVIDENCE DEFENDANT KNEW THE TICKETS WERE FORGED WAS LEGALLY INSUFFICIENT; DEFENDANT'S FLIGHT WHEN HE SAW THE POLICE WAS EQUIVOCAL.

The First Department, reversing defendant's convictions of criminal possession of a forged instrument, determined the evidence that defendant knew the Rangers tickets were forged was legally insufficient. The defendant briefly held an envelope containing the tickets and fled when he say the police: "Defendant approached Rangers fans outside of Madison Square Garden before a game, and at one point said 'tickets, tickets.' He was on a cell phone call for a few seconds with an unspecified caller, the substance of which was not overheard. Defendant then met an unapprehended man, who gave defendant an envelope, which he immediately passed to a codefendant. The envelope, which the police recovered from the codefendant, contained a birthday card and the four forged Rangers tickets. The evidence suggested that defendant sought to buy or sell tickets, but it did not show that he knew the tickets in question were forged. Even if the evidence established that defendant knowingly acted in concert with one or more other persons to sell tickets, in the circumstances presented this failed to support an inference that he knew he was selling forged tickets. His momentary possession of the envelope as he took it from one man and handed it to another, without looking inside or otherwise seeing the tickets, and the lack of any evidence of the codefendant's conduct, besides his walking with defendant and receiving the tickets, does not suffice to establish that defendant knew the tickets were forged, either personally or while acting in concert with the codefendant. Defendant's flight from a plainclothes officer, whom defendant may have recognized, was too equivocal to prove that he knew the tickets inside the envelope were forged. There are other reasonable explanations for defendant's flight, such as his potential awareness that it is unlawful to sell tickets, even if genuine, in the vicinity of the Garden ...". ***People v. Johnson*, 2020 N.Y. Slip Op. 02708, First Dept 5-7-20**

SECOND DEPARTMENT

CRIMINAL LAW, EVIDENCE.

THE PEOPLE DID NOT DEMONSTRATE THAT THE ANALYST WHO TESTIFIED ABOUT THE GENERATION OF THE DNA PROFILE HAD FIRST-HAND KNOWLEDGE OF THE PROCEDURE USED OR INDEPENDENTLY ANALYZED THE RAW DATA; NEW TRIAL ORDERED.

The Second Department, reversing defendant's conviction, determined the defendant was deprived of the opportunity to cross-examine a witness who had first-hand knowledge of the generation of the DNA profile: "When confronted with testimonial DNA evidence at trial, a defendant is entitled to cross-examine 'an analyst who witnessed, performed or supervised the generation of defendant's DNA profile, or who used his or her independent analysis on the raw data' ... . As the defendant contends, the People failed to establish that the analyst who testified in this case performed such a role in the testing or analysis of the testimonial DNA evidence introduced against him at trial ... . Since the error was not harmless, the defendant is entitled to a new trial ...". ***People v. Butler*, 2020 N.Y. Slip Op. 02676, Second Dept 5-6-20**

ELECTION LAW.

PETITION SIGNATURES SHOULD NOT HAVE BEEN INVALIDATED ON THE GROUND THAT A VOTER'S ADDRESS ON THE PETITION WAS DIFFERENT FROM THAT VOTER'S ADDRESS ON THE VOTER REGISTRATION RECORD.

The Second Department, reversing Supreme Court, determined petition signatures should not have been invalidated because a voter's address on the petition differed from the address on a voter's registration: "Contrary to the Supreme Court's determination, '[t]hat the address appearing on a voter's registration record differs from the address provided by that voter on the petition he or she signed does not provide a basis for invalidating that voter's signature' ... . It is undisputed that of the 15 voters whose signatures were invalidated on that ground, the respective addresses provided on the designating petition by 11 of those voters, and the addresses listed on their respective registration cards, though different, were all located within the 23rd Senatorial District. It is also undisputed that the signatures on the registration cards of those 11 voters matched their respective signatures on the designating petition." ***Matter of Robleto v. Gowda*, 2020 N.Y. Slip Op. 02745, Second Dept 5-7-20**

ELECTION LAW, CIVIL PROCEDURE.

THE PETITION SIGNATURES WERE GATHERED BEFORE THE DEADLINE SET BY THE COVID-19-RELATED EXECUTIVE ORDER BUT THE SIGNATURES WERE WITNESSED AFTER THE DEADLINE; THE SIGNATURES SHOULD NOT HAVE BEEN INVALIDATED.

The Second Department, reversing Supreme Court, determined the witnessing of petition signatures need not be done prior to the deadline for gathering the signatures: "These are unusual times occasioned by the onset of the COVID-19 virus. The State has undertaken various measures to protect the health and safety of its residents by limiting the face-to-face contact of persons and thereby minimizing the extent of human transmission of the virus. Some of the State's measures are set forth in Executive Orders of the Governor, including, as relevant here, Executive Order No. 202.2. Executive Order No. 202.2, dated March 14, 2020, modified article 6 of the Election Law to reduce the number of petition signatures required for placing candidates' names on ballots, and to suspend the 'gathering of signatures' after 5:00 p.m. on March 17, 2020. The Executive Order is consistent with the State's policy of limiting social and professional interactions and community contact transmissions of COVID-19 (see Executive Order 202.2). ... The language of the Executive Order plainly directs that only the 'gathering of signatures' was subject to the deadline of 5:00 p.m. on March 17, 2020. The signatures contained in the appellant's designating petition were all 'gathered' prior to that deadline. The language of the Executive Order provides no truncated deadline for the witnessing of those signatures. Indeed, since the witnessing of signatures is a ministerial task unrelated to the face-to-face interactions that Executive Order No. 202.2 was issued to minimize, there would be no reason for the Governor to have intended, or for the Executive Order itself to provide, that the witnessing of signatures also be suspended as of 5:00 p.m. on March 17, 2020. Thus, we disagree with the Supreme Court's determination granting the petition, inter alia, to invalidate the appellant's designating petition on the ground that the executions of the Statement of Witness on March 19, 2020, violated the signature gathering deadline of Executive Order No. 202.2 ...". ***Matter of Parascando v. Monheit*, 2020 N.Y. Slip Op. 02744, Second Dept 5-7-20**

FAMILY LAW, ATTORNEYS.

THE SUPPORT MAGISTRATE SHOULD HAVE INQUIRED FURTHER WHEN FATHER SAID HE WISHED TO HAVE AN ATTORNEY BUT COULD NOT AFFORD ONE; THE SUPPORT MAGISTRATE TOLD FATHER HE WAS NOT ENTITLED TO APPOINTED COUNSEL BECAUSE HE WAS WORKING; FATHER WAS DEPRIVED OF HIS RIGHT TO COUNSEL.

The Second Department, reversing Family Court, determined the Support Magistrate should have inquired further when father said he wanted an attorney but could not afford one. The Support Magistrate told father he was not entitled to an appointed attorney because he was employed: "The Support Magistrate should have inquired further into the father's financial circumstances, including, but not limited to, inquiring about his expenses because the father expressed a desire to have an attorney appointed ... . Where a party indicates an inability to retain private counsel, the court must make inquiry to determine whether the party is eligible for court-appointed counsel ... . Here, despite the father's statements at the pretrial appearance that he could not afford to hire private counsel and would like to have an attorney appointed, the Support Magistrate adjourned the matter for a hearing. Under these circumstances, the father was deprived of his right to counsel and reversal is required ...". ***Matter of Goodine v. Evans*, 2020 N.Y. Slip Op. 02668, Second Dept 5-6-20**

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

THE BANK DID NOT DEMONSTRATE COMPLIANCE WITH THE NOTICE REQUIREMENTS OF RPAPL 1304 AND A CONDITION PRECEDENT IN THE MORTGAGE IN THIS FORECLOSURE ACTION; THE BANK'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined the bank did not demonstrate compliance with the notice requirements of RPAPL 1304 and a condition precedent in the mortgage and therefore was not entitled to summary judg-

ment in this foreclosure action: "Here, the plaintiff failed to establish, prima facie, that it complied with the requirements of RPAPL 1304 ... . Contrary to the plaintiff's contention, its submission of an affidavit of an employee of the loan servicer was not sufficient to establish that the notice was sent to the defendant in the manner required by RPAPL 1304. The affiant did not aver that he had personal knowledge of the purported mailings, that he was familiar with the mailing practices and procedures of the plaintiff, which allegedly sent the notice, or that the plaintiff's records had been incorporated into the records of the loan servicer and were routinely relied upon by the loan servicer in its business ... . Further, the plaintiff's submission of an affidavit of its own employee was insufficient to establish the plaintiff's strict compliance with RPAPL 1304, since that employee had no personal knowledge of the purported mailings, and his unsubstantiated and conclusory statements failed to establish that the notice was mailed to the defendant not only by certified or registered mail, but also by first-class mail ... . Although the plaintiff submitted tracking information from the United States Postal Service for certified mailings of the notice, the redacted proof of first-class mailing did not contain any information linking a first-class mailing to the RPAPL 1304 notice, and thus, failed to establish that the notice was mailed by first-class mail ... . Likewise, the plaintiff's submission of a 'Proof of Filing' statement pursuant to RPAPL 1306 contained no information indicating that the mailing was done by both registered or certified mail and first-class mail as required by RPAPL 1304 ... . The plaintiff similarly failed to establish, prima facie, that it mailed a notice of default to the defendant by first-class mail as required by the terms of the mortgage as a condition precedent to acceleration of the loan ...". ***JPMorgan Chase Bank, N.A. v. Nellis*, 2020 N.Y. Slip Op. 02621, Second Dept 5-6-20**

Similar issues and result in ***Deutsche Bank Natl. Trust Co. v. Nelson*, 2020 N.Y. Slip Op. 02604, Second Dept 5-6-20**

PERSONAL INJURY, EVIDENCE.

DEFENDANT DID NOT OFFER PROOF OF WHEN THE AREA WHERE PLAINTIFF SLIPPED AND FELL ON WATER WAS LAST CLEANED OR INSPECTED; THEREFORE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined defendant's motion for summary judgment in this slip and fall case should not have been granted. The defendant failed to demonstrate it did not have constructive notice of the water on the floor because it did not offer any proof of when the area had last been cleaned or inspected: " 'A defendant who moves for summary judgment in a slip-and-fall case has the initial burden of making a prima facie showing that it did not create the hazardous condition which allegedly caused the fall, and did not have actual or constructive notice of that condition for a sufficient length of time to discover and remedy it' ... . 'A defendant has constructive notice of a dangerous condition when the dangerous condition is visible and apparent, and existed for a sufficient length of time before the accident that [it] could have been discovered and corrected' ... . 'To meet its initial burden on the issue of lack of constructive notice, the defendant must offer some evidence as to when the area in question was last cleaned or inspected relative to the time when the plaintiff fell' ... . Here, the defendant failed to meet its initial burden as the movant to affirmatively demonstrate that it did not have constructive notice of the condition that allegedly caused the plaintiff to fall, because the defendant did not proffer any evidence as to when the subject area was last cleaned or inspected ...". ***Merchant v. New York City Tr. Auth.*, 2020 N.Y. Slip Op. 02666, Second Dept 5-6-20**

PERSONAL INJURY, VEHICLE AND TRAFFIC LAW.

ALTHOUGH THE CAR DEALER, DUE TO AN ERROR, DID NOT SUBMIT THE CORRECT REGISTRATION DOCUMENTS TO THE DEPARTMENT OF MOTOR VEHICLES WITHIN THE MANDATED FIVE-DAY PERIOD, THAT DEFECT DID NOT INVALIDATE THE TRANSFER OF OWNERSHIP OF THE CAR TO THE DRIVER INVOLVED IN THE ACCIDENT; THE DEALER WAS NOT THE OWNER OF THE CAR AT THE TIME OF THE ACCIDENT.

The Second Department, reversing Supreme Court, determined the dealer (Zaki's) which sold a car to the hit-and-run driver (Marcial) in this pedestrian traffic accident case demonstrated it was not the owner of the car at the time of the accident. The transaction was complete and the driver was insured. When the dealer submitted the title paperwork to the Department of Motor Vehicles (DMV) a mistake was discovered requiring that the dealer submit corrected paperwork. Therefore, technically, the dealer was not in compliance with requirement that the title paperwork be submitted to the DMV within five days. That technical defect did not affect the validity of the transfer of ownership to the driver: "Vehicle and Traffic Law § 420-a authorizes qualified automobile dealers to issue a temporary vehicle registration to a person to whom the dealer has sold or transferred a vehicle ... . The temporary registration is valid for a period of 30 days after the date of issuance (see Vehicle and Traffic Law § 420-a[1]). Before issuing the temporary registration, the dealer must comply with certain statutory requirements, and, upon issuing the temporary registration, the dealer must send the permanent vehicle registration application to the commissioner of the DMV within five calendar days ... . A dealer who fails to comply with the statutory requirements regarding vehicle registration procedures may be estopped from denying ownership of the vehicle and be held liable as if it were, in fact, the owner of the vehicle ... . It is not disputed that Zaki's complied with all of the statutory requirements before issuing the temporary registration, and that Marcial had obtained insurance on the vehicle before being issued the temporary registration and taking the vehicle into his possession ... . Further, Zaki's evidence established that

Zaki's was diligent in its efforts to comply with the statutory requirements concerning the permanent registration, and that its failure to do so within the statutory five days was because of an error in the title that required correction, and not any negligence by Zaki's in its statutory obligations ... . In addition, there is no evidence that Zaki's engaged in any act whereby it held itself out as the owner of the vehicle on the date of the accident or that it gained any financial advantage by failing to submit the permanent registration application within the five days following the issuance of the temporary registration ...". ***Gonzalez v. Zaki's Auto Sales Corp.*, 2020 N.Y. Slip Op. 02644 Second Dept 5-6-20**

REAL PROPERTY LAW, CONTRACT LAW, TRUSTS AND ESTATES.

GENERAL OBLIGATIONS LAW § 5-703 GIVES AN EQUITY COURT THE POWER TO ENFORCE AN ORAL CONTRACT FOR THE PURCHASE OF REAL PROPERTY; THE CAUSES OF ACTION SEEKING TO ENFORCE AN ALLEGED ORAL AGREEMENT GIVING PLAINTIFFS THE OPTION TO PURCHASE THE PROPERTY UPON THE OWNER'S DEATH SHOULD NOT HAVE BEEN DISMISSED.

The Second Department, reversing Supreme Court, held that the general statute of frauds statute, General Obligations Law (GOL) § 5-701, did not apply to the alleged oral agreement to give plaintiffs the option to buy the decedent's property upon her death. Rather GOL § 5-703, which carves out an exception for specific performance of a real estate contract, applied. Decedent owned a two-unit property and plaintiffs rented the second unit. Plaintiffs alleged decedent asked them to care for her in exchange for the option to purchase. Plaintiffs did in fact care for decedent until her death. The executor refused to honor the alleged oral agreement and plaintiffs sued: "General Obligations Law § 5-701, the general statute of frauds provision outlining which agreements must be in writing, contains no explicit statutory authority for a court, exercising its equitable powers, to grant specific performance of an oral agreement insufficiently memorialized in writing so as to satisfy the statute of frauds. Notably, in Messner Vetere Berger McNamee Schmetterer Euro RSCG v. Aegis Group (93 NY2d 229, 234 n 1), the Court of Appeals clarified that New York has not adopted a judicially created common-law exception to General Obligations Law § 5-701, which would permit a court to direct specific performance of an oral agreement in cases of part performance. By contrast, General Obligations Law § 5-703, the more specific statute of frauds provision relating to contracts concerning real property, contains an explicit carve-out, which provides that '[n]othing contained in [General Obligations Law § 5-703] abridges the powers of courts of equity to compel specific performance of agreements in cases of part performance'... . Here, the plaintiffs' allegations that they entered into an oral option agreement ... to purchase the subject property from her estate describe, in sum and substance, '[a] contract to devise real property . . . or any interest therein or right with reference thereto' ... , and therefore, this action is governed by General Obligations Law § 5-703 ... . Accordingly, since the action is governed by General Obligations Law § 5-703, the plaintiffs are not foreclosed, as a matter of law, from obtaining the remedy of specific performance ...". ***Korman v. Corbett*, 2020 N.Y. Slip Op. 02637, Second Dept 5-6-20**

THIRD DEPARTMENT

CRIMINAL LAW, EVIDENCE, APPEALS.

THE CONCEPTS OF 'OVERWHELMING EVIDENCE' AND 'HARMLESS ERROR' DISCUSSED IN DEPTH; THE MAJORITY FOUND THE EVIDENCE OVERWHELMING AND THE ERROR HARMLESS; THE CONCURRENCE FOUND THE EVIDENCE WAS NOT OVERWHELMING BUT FOUND THE ERROR HARMLESS UNDER A DIFFERENT ANALYSIS; THE DISSENT FOUND THE EVIDENCE WAS NOT OVERWHELMING AND THE ERROR WAS NOT HARMLESS.

The Third Department reached different conclusions about how the erroneous denial of defendant's motion to suppress the cell site location data should be treated on appeal under a harmless error analysis. The majority and the concurrence applied different harmless error analyses but concluded the conviction should be affirmed. The dissent argued the error was not harmless requiring a new trial. The decision includes useful, comprehensive discussions "overwhelming evidence" and "harmless error." The dissent summarized the three positions as follows: "In essence, the majority applies the longstanding New York test of first assessing whether the evidence adduced at trial was overwhelming in favor of conviction, concludes that it was, and therefore the admission of the cell phone location data was harmless since it could not have influenced the result of the trial. The concurrence disagrees with the finding that the evidence of guilt was overwhelming, but finds the error of admitting the cell phone location data nonetheless harmless; the concurrence maintains that, since its effect was to favor, or disfavor, the contentions of each side equally, this is one of the exceedingly rare cases where, despite the absence of overwhelming evidence of guilt, the admission of tainted evidence, however misguided, was, in the words of the leading Court of Appeals case of People v. Crimmins (36 NY2d 230, 242 [1975]), nothing more than the 'sheerest technicality.' Because I believe that the other evidence of defendant's guilt was not overwhelming, and the effect of admitting the cell phone location data not necessarily neutral, I dissent and would reverse the judgment of conviction." ***People v. Perez*, 2020 N.Y. Slip Op. 02684, Third Dept 5-7-20**

FORECLOSURE CIVIL PROCEDURE.

THE NOTICES INFORMED DEFENDANTS THAT THE MORTGAGE PAYMENTS ACCELERATED ON JANUARY 21, 2011; THE FACT THAT NOTICES REITERATING THAT SAME ACCELERATION DATE WERE SENT AS LATE AS NOVEMBER 2013 DID NOT CHANGE THE OPERATIVE DATE; THE FORECLOSURE ACTION COMMENCED IN MARCH 2017 WAS TIME-BARRED.

The Third Department, reversing Supreme Court, determined the mortgage payments were accelerated on January 21, 2011. The defendants were notified of the acceleration date in December 2010. Additional notices were sent to defendants as late as November 2013, but all the notices reiterated that January 21, 2011 was the acceleration date. The foreclosure action commenced in March 2017 was deemed time-barred: "The December 2010 notice stated that, on January 21, 2011, 'the mortgage payments will be accelerated with the full amount remaining accelerated and becoming due and payable in full, and foreclosure proceedings will be initiated at that time.' Between July 2012 and November 2013, five additional notices were sent to defendants, each reiterating that '[t]he acceleration date of January 21, 2011 . . . remains in effect.' * * * ... [T]he December 2010 notice states that, '[i]f the default is not cured on or before January 21, 2011, the mortgage payments will be accelerated with the full amount remaining accelerated and becoming due and payable in full, and foreclosure proceedings will be initiated at that time.' This language, particularly the underlined language in the notice, indicates the date on which the debt was to be accelerated. A plain reading of the notice does not provide any suggestion that, except for curing the default, the outstanding debt would not be accelerated on that date. As such, the notice clearly and unequivocally indicates that the outstanding mortgage payments would be accelerated on January 21, 2011 ... . The reiteration of this acceleration date in five subsequent letters only further evinces the acceleration date of January 21, 2011 ...". ***MTGLQ Invs., LLP v. Lunder*, 2020 N.Y. Slip Op. 02690, Third Dept 5-7-20**

REAL ESTATE, CONTRACT LAW.

STANDARD PRACTICE OF USING THE SALE PROCEEDS TO PAY OFF THE EXISTING MORTGAGES ON THE SELLER'S PROPERTY AFTER THE CLOSING UPHELD BY THE MAJORITY; THE DISSENT ARGUED THE STANDARD PRACTICE VIOLATES THE TERMS OF THE STANDARD PURCHASE AND SALE AGREEMENT WHICH REQUIRES THE PROPERTY TO BE UNENCUMBERED AT THE CLOSING.

The Third Department, affirming the grant of summary judgment to plaintiff seller, over a partial dissent, determined the standard real estate purchase and sale contract incorporates the standard practice of using the sale proceeds to pay off any mortgages on the property, even though those the liens are not removed until after the closing. The defendant argued the plaintiff's failure to turn over the property free of the mortgages at the time of the closing was a breach of the explicit terms of the contract. The dissent agreed. The decision includes a detailed and comprehensive discussion of the standard purchase and sale agreement and the standard closing practice: "Defendant argues that plaintiff did not have a marketable title at closing, as she could only provide a marketable title, as required under the contract, by providing a satisfaction of each mortgage lien at closing. However, this position would necessarily have required plaintiff to pay off each mortgage in advance and secure each satisfaction, and, in our view, is inconsistent with both the contract and the conduct of the parties. It is significant that the parties used a 'Standard Form Contract for Purchase and Sale of Real Estate' produced by the Capital Region Multiple Listing Service, Inc. ... . Use of this standard form reflects the parties' intent to embrace the common practice developed over the years in the real estate closing realm ... . This common practice with respect to the existing mortgage liens is as follows — the seller obtains payoff letters from respective lenders, the purchaser brings corresponding bank checks to the closing payable to each lender, and either the title insurance agent or the seller's counsel processes those payments to secure the required mortgage satisfaction ... . Within 30 days of receipt of payment, the lenders are statutorily mandated to have a mortgage satisfaction 'presented for recording to the recording officer of the county where the mortgage is recorded' (RPAPL 1921 [1] [a]). This protocol is consistent with the reality that the pertinent closing documents — the deed and the mortgage satisfactions — are recorded after the closing (see Real Property Law § 291). * * * The concluding point is that defendant had documented assurance that the marketable title was being provided. Under these circumstances, we find that plaintiff duly performed under the contract. Defendant's refusal to complete the transaction constituted a breach of contract. As such, Supreme Court properly granted plaintiff's motion for summary judgment." ***Prendergast v. Swiencicky*, 2020 N.Y. Slip Op. 02686, Third Dept 5-7-20**

WORKERS' COMPENSATION.

FAILURE TO SPECIFY WHEN THE OBJECTION TO BE REVIEWED WAS MADE IN ANSWER TO QUESTION 15 OF THE APPLICATION JUSTIFIED THE BOARD'S REFUSING TO REVIEW IT, DESPITE THE FACT THAT THE DATE OF THE RELEVANT HEARING WAS INDICATED ELSEWHERE IN THE APPLICATION.

The Third Department determined the Workers' Compensation Board properly refused the employer's application for review because the application did not indicate when the objection to be reviewed was made. The application indicated the objection was made at the hearing, but there were several hearings. The fact that the date of the hearing in question was indicated elsewhere in the application did affect the validity of the Board's ruling: "The pertinent regulation, as well as the

instructions in effect at the time that the employer filed its application for review, unambiguously required the employer to 'specify the objection or exception that was interposed to the ruling [of the Workers' Compensation Law Judge], and when the objection or exception was interposed' ... . In response to question number 15 on the application for Board review, the employer set forth the specific objection but, in answering when such objection was interposed, indicated 'at the hearing on the record.' As noted by the Board, because there were multiple hearings held in this matter, we cannot say that the Board abused its discretion in deeming the employer's response to question number 15 to be incomplete based upon its failure to specify when such objection was interposed in order to satisfy the temporal element of the regulation .... Further, the fact that the date of the hearing at which the objection or exception was allegedly interposed appeared elsewhere on the application did not obviate the requirement for the employer to provide a complete response to question number 15, as the Board was not required to deduce when the employer's objection or exception was interposed ...". ***Matter of Rzeznik v. Town of Warwick*, 2020 N.Y. Slip Op. 02702, Second Dept 5-7-20**

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