CasePrepPlus

June 12, 2020

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FIRST DEPARTMENT

APPEALS, CIVIL PROCEDURE.

NO APPEAL LIES FROM DECLINING TO SIGN AN ORDER TO SHOW CAUSE.

The First Department noted that no appeal lies from declining to sign an order to show cause: "No appeal lies from an order declining to sign an order to show cause, since it is an ex parte order that does not decide a motion made on notice (CPLR 5701[a][2] ...). To the extent defendant seeks review of the ex parte order pursuant to CPLR 5704, such relief is denied. Review under CPLR 5704 would not, in any event, address the merits of the motion defendant sought to make by order to show cause ... . To the extent defendant contends that we should review the order or grant leave to appeal in the interest of justice, we decline to do so." ***Chi Young Lee v. Osorio*, 2020 N.Y. Slip Op. 03186, First Dept 6-4-20**

CRIMINAL LAW, EVIDENCE.

CROSS-EXAMINATION OF A POLICE OFFICER ABOUT MISCONDUCT IN A CIVIL SUIT SHOULD HAVE BEEN ALLOWED; CONVICTION REVERSED.

The First Department, reversing defendant's conviction, determined cross-examination of a police officer about misconduct in a civil suit should have been allowed: "The trial court erred in denying defendant's request to cross-examine a police Sergeant regarding allegations of misconduct in a civil lawsuit in which it was claimed that this police Sergeant and a police detective arrested the plaintiff without suspicion of criminality and lodged false charges against him ... . The civil complaint contained allegations of falsification specific to this officer (and another officer), which bore on his credibility at the trial. Contrary to the People's allegations, the error was not harmless. The police sergeant's credibility was critical because he was the only eyewitness to the crime ... . Although the sergeant's testimony was corroborated by other evidence, none of this corroborating evidence was sufficient, on its own, to prove defendant's guilt, as all of it relied on the sergeant's testimony for context." ***People v. Conner*, 2020 N.Y. Slip Op. 03200, First Dept 6-4-20**

FAMILY LAW, IMMIGRATION LAW, EVIDENCE.

FAMILY COURT SHOULD HAVE MADE FINDINGS ENABLING THE CHILD TO PETITION FOR SPECIAL IMMIGRANT JUVENILE STATUS (SIJS).

The First Department, reversing Family Court, determined Family Court should have made findings enabling the child to petition for special immigrant juvenile status (SIJS): "The evidence establishes that the child was unmarried and under the age of 21 at the time of the special findings hearing and order (see 8 CFR 204.11[c]). The Family Court's appointment of a guardian (petitioner) rendered the child dependent on a juvenile court ... . The evidence that the child had had no contact with his parents, and received no support from them, since at least September 2014 established that reunification with the parents was not viable due to neglect or abandonment ... . The parents' consent to the appointment of a guardian and waiver of service also demonstrate an intent to relinquish their parental rights. In determining whether reunification was viable, the Family Court should not have refused to consider evidence of circumstances that occurred after the child's 18th, but before his 21st, birthday ... . The record demonstrates that it is not in the best interests of the child to return to Albania ... . The evidence shows that the child suffered political persecution in Albania that his parents were unable to prevent ... , that he had had no recent contact with his parents and was not sure if they would accept him if he returned ... , and that he was doing well in petitioner's care ...". ***Matter of Lavdie H. v. Saimira V.*, 2020 N.Y. Slip Op. 03177, First Dept 6-4-20**

HUMAN RIGHTS LAW, MUNICIPAL LAW, CIVIL PROCEDURE.

COMPLAINT IN PUTATIVE CLASS ACTION ALLEGING DISCRIMINATION AGAINST PERSONS WHO CANNOT USE STAIRS PROPERLY SURVIVED MOTIONS TO DISMISS; 360 OF 427 N.Y.C. SUBWAY STATIONS ARE ACCESSIBLE ONLY BY STAIRS.

The First Department, in a full-fledged opinion by Justice Gische, determined that the transit authority's and the city's motions to dismiss the complaint in this putative class action were properly denied. The complaint, brought pursuant to the N.Y.C. Human Rights Law (NYCHRL), alleged discrimination against persons with disabilities which prevent them from using stairs. 360 of the 427 subway stations in N.Y.C. are accessible only by stairs. The First Department held: (1) the

action was not time-barred because the continuous violation doctrine applied; (2) the action was not preempted by either Transportation Law § 15-b or Public Authorities Law § 1266(8); (3) the controversy is justiciable; and (4) the city, which owns the stations, was not entitled to pre-discovery dismissal. With respect to the continuous violation doctrine, the court wrote: "... [T]he reach of the continuous violation doctrine under NYCHRL is broader than under either federal or state law. A broad interpretation is consistent with a 'rule that neither penalizes workers who hesitate to bring an action at the first sign of what they suspect could be discriminatory trouble, nor rewards covered entities that discriminate by insulating them[-selves] from challenges to their unlawful conduct that continues into the limitation period' ... . Thus, defendants' claimed failure to provide an accessible subway system is a continuous wrong for purposes of tolling the statute of limitations under the NYCHRL" ***Center for Independence of the Disabled v. Metropolitan Transp. Auth.*, 2020 N.Y. Slip Op. 03203, First Dept 6-4-20**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

UNSUPPORTED CEILING COLLAPSED DURING DEMOLITION; PLAINTIFF PROPERLY GRANTED SUMMARY JUDGMENT ON HIS LABOR LAW § 240(1) CAUSE OF ACTION.

The First Department determined plaintiff's summary judgment motion on his Labor Law § 240(1) cause of action was properly granted where an unsupported ceiling collapsed during demolition: "Supreme Court properly granted plaintiff's motion for summary judgment on his Labor Law § 240(1) claim arising from the collapse of a ceiling that was not braced or shored during demolition operations. Regardless of whether the entire ceiling or only a portion of it collapsed, it was not the intended target of demolition at the time of the accident ... . At the time of the accident, upon his supervisor's instruction, plaintiff had descended from the ladder upon which he was working and walked under the ceiling that collapsed in order to inspect or remove a sprinkler head. Plaintiff's supervisor acknowledged the ceiling would not have collapsed on plaintiff had he remained on the ladder. Moreover, because no safety devices were provided to brace or shore the ceiling, the fact that plaintiff may have pulled on it with a hook while inspecting or attempting to remove the sprinkler head at most amounts to comparative negligence, which is not a defense to a Labor Law § 240(1) claim ...". ***Sinchi v. HWA 1290 III LLC*, 2020 N.Y. Slip Op. 03176, First Dept 6-4-20**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY, CIVIL PROCEDURE, EVIDENCE.

RARE CASE WHERE PLAINTIFF'S SUMMARY JUDGMENT MOTION ON LABOR LAW § 200 AND COMMON-LAW NEGLIGENCE CAUSES OF ACTION WAS APPROPRIATELY GRANTED.

The First Department determined this was a rare case where summary judgment was appropriate on a Labor Law § 200, common-law negligence cause of action: "Here, PSJV, the entities responsible for site cleanliness and trade coordination, at a time when the project was open to the elements, covered a recessed area of the third floor, where rainwater regularly collected, with non-waterproof planking, and never inspected it for water accumulation. Further, PSJV did not warn plaintiff or his employer that he was working under the recessed area, and when he drilled into the second floor ceiling to affix electrical equipment, the sludgy, oily water poured down onto him, causing him to lose his balance and injure himself. Thus, plaintiffs made a prima showing that the accident occurred due to a defective condition on the premises of which PSJV had actual notice, having caused and created it ... . In response, PSJV failed to adduce credible evidence that anyone else, including plaintiff electrician, negligently caused the accident ...". ***Langer v. MTA Capital Constr. Co.*, 2020 N.Y. Slip Op. 03171, First Dept 6-3-20**

SECOND DEPARTMENT

ARBITRATION, CONTRACT LAW, CONSTITUTIONAL LAW.

THE ARBITRATION AGREEMENT CALLED FOR NOTIFICATION OF AN ARBITRATION BY CERTIFIED MAIL; ALTHOUGH THE APPELLANT APPARENTLY NEVER PICKED UP THE MAILED NOTICE AND DID NOT APPEAR AT THE ARBITRATION, HER DUE PROCESS RIGHTS WERE NOT VIOLATED; THE PARTIES' AGREEMENT ON THE METHOD OF SERVICE CONTROLS.

The Second Department, in a full-fledged opinion by Justice Miller, determined the appellant, a registered broker with the Financial Industry Regulatory Authority (FINRA), was bound by the notice requirements in the arbitration agreement. The agreement called for notification of an arbitration by certified mail. The appellant did not appear and her former client was awarded over $3 million. The appellant sought to vacate the award arguing that notification by mail deprived her of due process because she was often away from her residence and the client was aware she could be contacted by email. The certified mail notification was never picked up by the appellant: "… [I]n the context of binding arbitration, it is the parties' consent which vests the authority in the arbitrator to decide a particular dispute. Accordingly, although the CPLR provides that a demand for arbitration, or a notice of intention to arbitrate, must be served 'in the same manner as a summons or by registered or certified mail, return receipt requested' (CPLR 7503[c]), New York courts have long recognized that 'parties to an arbitration agreement may prescribe a method of service different from that set forth in the CPLR' ... . Indeed, 'the

parties may agree to other methods for service, either by stipulating the manner in the arbitration clause or, more generally, by adopting the arbitration rules of an arbitration agency' ... . 'Where . . . parties agree to the manner in which a demand for arbitration can be served, they do not have to comply with the service requirements established by CPLR 7503(c)' ... . * * * Where parties to an arbitration agreement have consented to an alternative method of service, '[t]he method of service by which parties have agreed to be bound must be complied with according to the exact terms thereof in order that the requirements of due process be satisfied' ...". ***Matter of New Brunswick Theol. Seminary v. Van Dyke*, 2020 N.Y. Slip Op. 03114, Second Dept 6-3-20**

FAMILY LAW, EVIDENCE.

RETURN OF THE CHILDREN TO MOTHER AFTER A TEMPORARY REMOVAL WAS NOT SUPPORTED BY A SOUND AND SUBSTANTIAL BASIS.

The Second Department, reversing Family Court, determined the return of children to mother after a temporary removal was not supported by a sound and substantial basis: " 'An application pursuant to Family Court Act § 1028 to return a child who has been temporarily removed shall' be granted unless the Family Court finds that 'the return presents an imminent risk to the child's life or health' ... . The court's determination will not be disturbed if it is supported by a sound and substantial basis in the record ... . In making its determination, the court ' must weigh, in the factual setting before it, whether the imminent risk to the child can be mitigated by reasonable efforts to avoid removal' ... .The court 'must balance that risk against the harm removal might bring, and it must determine factually which course is in the child's best interests' ... . 'Evidence that the children who are the subject of the proceeding were previously harmed while in the parent's care is not required where it is shown that the parent demonstrated such an impaired level of parental judgment with respect to one child so as to create a substantial risk of harm to any child in that parent's care' ... . The child services agency bears the burden of establishing that the subject child would be at imminent risk and therefore should remain in its custody ... . The evidence at the hearing demonstrated that, after one of the subject children reported to the mother that her older brother had been sexually abusing her since she was 10 years old, the mother did not address the sexual abuse and did not provide increased supervision for the subject children. Further, the petitioner demonstrated that the mother left one of the subject children in the older brother's care, for at least a period of time, while she gave birth to the third subject child, in violation of an order dated March 23, 2018. Under the circumstances, we cannot agree that the return of two of the subject children to the mother's custody, notwithstanding the conditions that were imposed, would not present an imminent risk to the children's life or health ...". ***Matter of Carter R. (Camesha B.)*, 2020 N.Y. Slip Op. 03118, Second Dept 6-3-20**

FORECLOSURE, CIVIL PROCEDURE.

NOTICE OF DEFAULT DID NOT ACCELERATE THE MORTGAGE DEBT; THE STATUTE OF LIMITATIONS DID NOT BEGIN TO RUN IN THIS FORECLOSURE ACTION.

The Second Department, reversing Supreme Court, determined the mortgage debt was never accelerated and therefore the six-year statute of limitations did not begin to run in this foreclosure action: "An action to foreclose a mortgage is subject to a six-year statute of limitations (see CPLR 213[4]). '[E]ven if a mortgage is payable in installments ..., once a mortgage debt is accelerated, the entire amount is due and the Statute of Limitations begins to run on the entire debt' ... . [T]he May 3, 2007, notice of default, which advised that the loan would be accelerated if the default was not cured by June 7, 2007, was 'nothing more than a letter discussing acceleration as a possible future event, which [did] not constitute an exercise of the mortgage's optional acceleration clause' ...". ***U.S. Bank N.A. v. Mongru*, 2020 N.Y. Slip Op. 03137, Second Dept 6-3-20**

FORECLOSURE, CIVIL PROCEDURE.

THE MERE DISCONTINUANCE OF THE PRIOR FORECLOSURE ACTION DID NOT DE-ACCELERATE THE MORTGAGE DEBT; EXPLICIT NOTICE OF DE-ACCELERATION IS REQUIRED EITHER IN THE MOTION TO DISCONTINUE ITSELF OR IN A SEPARATE NOTICE; THEREFORE THE INSTANT FORECLOSURE ACTION IS TIME-BARRED.

The Second Department, reversing Supreme Court, in a full-fledged opinion by Justice Dillon, over an extensive partial dissent, determined the discontinuance of a prior foreclosure action did not, standing alone, de-accelerate the debt. Therefore the instant foreclosure action was time-barred. The Second Department noted that the plaintiff did not submit the motion papers for the discontinuance and therefore did not submit any evidence that the debt was explicitly de-accelerated in those papers, or in any other notice to the defendant. Such explicit notice is required: "A de-acceleration of the full debt revives the borrower's right to make the monthly payments that became due between the time the loan was accelerated and the time the acceleration was revoked, together with the right to make future monthly installment payments. Since the borrower may continue to assume that its lender or servicer will not accept post-acceleration monthly payments, the lender, in order to effectively rescind the acceleration, should be required to notify the borrower that the right to make monthly payments is restored and that the lender will accept the tender of such payments ... . * * * A bare discontinuance of litigation does not nullify the fact that a contractual right to accelerate has been unilaterally exercised pursuant to the terms of a note. An acceleration of loan debt by the transmittal of a letter or by the commencement of an action in a court of law has legal

implications, such as the financial penalties authorized under the note, the potential negative effect upon the borrower's credit rating, and reliance by the borrower that monthly payments will no longer be expected or accepted and thereby prevent any pay-down of the balance owed. To occur, none of these or other consequences of an acceleration require any permission, ruling, stipulation, decision, or order of a court, as they are independent of the litigation ...". ***Trust v. Barua*, 2020 N.Y. Slip Op. 03095, Second Dept 6-3-20**

LANDLORD-TENANT, CONTRACT LAW.

THE OPTION TO RENEW THE LEASE WAS NOT ENFORCEABLE; IT WAS MERELY AN AGREEMENT TO AGREE.

The Second Department, applying the "doctrine of definiteness" determined the option to renew the lease was not enforceable and the lease had therefore expired: " 'The doctrine of definiteness or certainty is well established in contract law. In short, it means that a court cannot enforce a contract unless it is able to determine what in fact the parties have agreed to' ... . Among the terms of a lease that must be known is the amount of rent that is to be paid ... . The doctrine of definiteness, however, is not applied rigidly, and 'where it is clear from the language of an agreement that the parties intended to be bound and there exists an objective method for supplying a missing term, the court should endeavor to hold the parties to their bargain' ... . In the absence of an explicit contract term, the requirement of definiteness may be satisfied where: (1) the agreement itself sets forth an agreed methodology for determining the missing term within its four corners or (2) the agreement invites recourse to an objective extrinsic event, condition, or standard to ascertain the term ... . Here, the parties' failure to set forth either the amount of rent to be paid during the renewal period, or an agreed formula, methodology, or objective extrinsic event by which that rent could be determined, rendered the option to renew an unenforceable agreement to agree ...". ***Vizel v. Vitale*, 2020 N.Y. Slip Op. 03140, Second Dept 6-3-20**

PERSONAL INJURY, CIVIL PROCEDURE, EVIDENCE, PRIVILEGE.

PLAINTIFF, A NURSE ASSAULTED BY A PSYCHIATRIC PATIENT, WAS ENTITLED TO DEPOSE THE DEFENDANT TREATING PSYCHIATRISTS WITH RESPECT TO ANY NON-PRIVILEGED INFORMATION; THE DEFENDANTS SHOULD NOT HAVE REFUSED TO ATTEND THE DEPOSITIONS.

The Second Department, reversing Supreme Court, determined plaintiff's motion to compel the defendant-psychiatrists' depositions should have been granted. Plaintiff, a nurse in a psychiatric facility, was seriously injured in an assault by a patient. She sought to depose the defendant psychiatrists who had treated the patient. Although the defendants may legitimately invoke the doctor-patient privilege, there maybe be non-privileged information which can be the subject of a deposition. The proper procedure is for the defendants to attend the depositions and invoke the privilege where appropriate: "Generally, '[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof, by . . . a party' (CPLR 3101[a][1]). However, even relevant discovery is subject to preclusion if the requested information is privileged (see CPLR 3101[b] ...). Information relating to the nature of medical treatment and the diagnoses made, including 'information communicated by the patient while the physician attends the patient in a professional capacity, as well as information obtained from observation of the patient's appearance and symptoms,' is privileged and may not be disclosed (... see CPLR 4504; Mental Hygiene Law § 33.13[c][1] ...). However, '[t]he physician-patient privilege generally does not extend to information obtained outside the realms of medical diagnosis and treatment' ... . [T]he plaintiff is entitled to inquire into any nonprivileged information regarding the patient ... . [T]he prospect that a witness may be asked questions at a deposition as to which an objection based on privilege may be asserted is not a proper reason for declining to appear for a deposition." ***Jayne v. Smith*, 2020 N.Y. Slip Op. 03101,Second Dept 6-3-20**

ZONING, ENVIRONMENTAL LAW.

THE QUARRY OWNER HAD, AS A PRE-EXISTING NONCONFORMING USE, A VESTED RIGHT TO MINE THAT PORTION OF ITS LAND SUBJECT TO A PENDING APPLICATION FOR A PERMIT FROM THE DEPARTMENT OF ENVIRONMENTAL PROTECTION (DEP); ZONING BOARD AND SUPREME COURT REVERSED.

The Second Department, reversing Supreme Court, determined petitioner had a vested right to mine that portion of its land subject to a pending application for a mining permit from the Department of Environmental Protection (DEP). Petitioner operated a quarry, which was an allowed pre-existing use of the land, and had a DEC permit to mine 37.5 acres (the entire parcel is 241 acres) The petitioner was seeking a permit from the DEC to expand the number of acres to be mined from 37.5 acres to 94 acres. While the application for the permit was pending, the town enacted a new zoning law that allowed mining on only those lands subject to an existing DEC permit. Petitioner sought a declaration that it had a vested right to mine its entire parcel as a prior nonconforming use and Supreme Court dismissed the proceeding: " '[N]onconforming uses or structures, in existence when a zoning ordinance is enacted, are, as a general rule, constitutionally protected and will be permitted to continue, notwithstanding the contrary provisions of the ordinance' ... . ' By its very nature, quarrying involves a unique use of land. . . . [A]s a matter of practicality as well as economic necessity, a quarry operator will not excavate his entire parcel of land at once, but will leave areas in reserve, virtually untouched until they are actually needed' ... . '[W]here . . . the owner engages in substantial quarrying activities on a distinct parcel of land over a long period of time and

these activities clearly manifest an intent to appropriate the entire parcel to the particular business of quarrying, the extent of [the] protection afforded by the nonconforming use will extend to the boundaries of the parcel even though extensive excavation may have been limited to only a portion of the property' ... . [T]he petitioner demonstrated that it has a vested right to mine those 94 acres as a prior nonconforming use ... . In opposition, the respondents/defendants failed to raise a triable issue of fact. Further, for the same reasons, the petitioner demonstrated that so much of the ZBA's determination as found that the petitioner does not have a vested right to mine those 94 acres was affected by an error of law, arbitrary, and capricious ... . Accordingly, the Supreme Court should have granted the petitioner's motion to the extent of declaring that the petitioner has a vested right to mine 94 acres of its property as a prior nonconforming use ...". ***Matter of Red Wing Props., Inc. v. Town of Rhinebeck*, 2020 N.Y. Slip Op. 03119, Second Dept 6-3-20**

ZONING, ENVIRONMENTAL LAW, MUNICIPAL LAW, CONTRACT LAW.

THE TOWN'S SEQRA NEGATIVE DECLARATION REGARDING THE EXPANSION OF A CAMPGROUND WAS ARBITRARY AND CAPRICIOUS; THE DEVELOPMENT AGREEMENT BETWEEN THE TOWN AND THE CAMPGROUND CONSTITUTED ILLEGAL CONTRACT ZONING.

The Second Department, reversing Supreme Court, determined the town planning board's adoption of negative declaration pursuant to the State Environmental Quality Review Act (SEQRA) with respect to the expansion of a campground (BBFC) was arbitrary and capricious. The Second Department further found that the development contract between the town and BBFC constituted illegal contract zoning: "The Planning Board failed to adequately assess and consider the potential environmental impacts of the construction and expansion of the campground from 74 campsites to 154 campsites, and adopted the negative declaration based largely upon its finding that the campground had been operating 154 campsites—albeit illegally—for many years. Under the circumstances, the Planning Board's adoption of the negative declaration was arbitrary and capricious. ... [T]he development agreement entered into between the Town Board and BBFC constituted illegal contract zoning. '[N]o municipal government has the power to make contracts that control or limit it in the exercise of its legislative powers and duties' ... . The test is whether the development agreement committed the Town to a specific course of action with respect to a zoning amendment ... . The Town Board agreed to amend the zoning code to permit 210-day occupancy limit, a change from the current 120-day occupancy limit, in exchange for BBFC's agreement that the 210-day occupancy limit would apply to all of the campsites, including the original 74 approved campsites. This was an agreement binding on BBFC to give a form of consideration in exchange for legislative action and to limit the Town Board's authority to change the bulk requirements in the zoning code until such time as BBFC would not be negatively affected by such change ...". ***Matter of Neeman v. Town of Warwick*, 2020 N.Y. Slip Op. 03112, Second Dept 6-3-20**

In the same matter, the Second Department determined the granting of an area variance for the campground, based upon the nonconforming campsites which had already been constructed, was arbitrary and capricious. ***Matter of Neeman v. Town of Warwick*, 2020 N.Y. Slip Op. 03113, Second Dept 6-3-20**

THIRD DEPARTMENT

CRIMINAL LAW, APPEALS.

ABSENCE OF APPROXIMATE TIME OF THE OFFENSE IN THE SUPERIOR COURT INFORMATION (SCI) WAS NOT JURISDICTIONAL AND WAS THEREFORE WAIVED BY THE GUILTY PLEA; ABSENCE OF DA'S SIGNATURE ON THE WAIVER OF INDICTMENT DID NOT INVALIDATE IT; CONSECUTIVE SENTENCES FOR CRIMES ARISING FROM ONE CONTINUOUS INCIDENT WERE NOT ILLEGAL.

The Third Department determined: (1) the failure to include the approximate time of the offense in the Superior Court Information (SCI) was not a jurisdictional defect and the defect was waived by the guilty plea; (2) the district attorney's failure to sign the waiver of indictment did not invalidate it; and (3) consecutive sentences for possession of a stolen car and damage caused to a police car (by the stolen car) were appropriate: "... [W]here, as here, the approximate time of the offenses is nonelemental and the defendant makes no argument that he or she lacked notice of the precise crimes for which he or she waived prosecution by indictment, the omission of such information is a nonjurisdictional defect, and, thus, any challenge with respect thereto is forfeited by a guilty plea ... . We also note that, here, the approximate time of the offenses is readily ascertainable from the local court accusatory instruments ... . [T]he record contains a copy of defendant's written waiver of indictment, which, although signed by defendant in open court in the presence of counsel, reveals a blank signature line intended for the District Attorney's endorsement. However, the record also reveals that an order approving that waiver was entered by County Court thereafter (see CPL 195.30), and, therein, the court expressly found, among other things, that the waiver was consented to by the District Attorney (see CPL 195.10 [1] [c]). Under these circumstances, we view the absence of the District Attorney's endorsement on the written waiver of indictment to be a technical violation of the statute that in no way infringed upon defendant's right to indictment by a grand jury ... . [W]hile the ... crimes occurred in the course of one continuous criminal incident, the charges arose from separate, distinct acts ... . County Court's imposition of consecu-

tive sentences with respect to those crimes was therefore not illegal." ***People v. Light*, 2020 N.Y. Slip Op. 03148, Third Dept 6-4-20**

CRIMINAL LAW, APPEALS, CONSTITUTIONAL LAW.

14-MONTH DELAY IN THE TRANSCRIPTION OF THE RECORD DID NOT DEPRIVE DEFENDANT OF HIS RIGHT TO APPEAL.

The Third Department determined the 14-month stenographic delay, which prevented the perfection of defendant's appeal until after his release, did not deprive him of due process of law. Defendant contested his resentence after pleading guilty to a probation violation: "Defendant argues that he was deprived of his right to appeal — and, thus, his right to due process — by approximately 14 months of stenographic delays prior to him obtaining the complete record in this matter so as to perfect his appeal ... . He asserts that, because he has since been released from custody, and, thus, may no longer reasonably challenge the propriety of the resentence imposed — apparently the only issue taken with regard to the underlying proceedings — this Court should vacate, with prejudice, Supreme Court's finding that he violated his probation and dismiss the associated declaration of delinquency ... . Despite the unfortunate appellate delay, defendant has failed to establish that it resulted in prejudice so as to warrant the summary remedy he seeks ... ; his sole argument regarding his resentence would have been equally unpersuasive had it been before us on any earlier date. * * * Without some showing of how he has been prejudiced by this singular claim being rendered moot, we cannot conclude that defendant suffered a deprivation of due process by the delays alleged ...". ***People v. McCray*, 2020 N.Y. Slip Op. 03154, Third Dept 6-4-20**

CRIMINAL LAW, CONSTITUTIONAL LAW, APPEALS.

HABEAS CORPUS PETITION ORDERING THE RELEASE OF A PRISONER BECAUSE OF THE RISK POSED BY COVID-19 SHOULD NOT HAVE BEEN GRANTED; THE PETITION DID NOT DEMONSTRATE THE PRISON OFFICIALS WERE DELIBERATELY INDIFFERENT TO THE RISK.

The Third Department, in a full-fledged opinion by Justice Devine, reversing Supreme Court, determined the habeas corpus petition seeking the release from prison of a 68-year-old prisoner because of the danger of contracting COVID-19 should not have been granted. At the time the appeal was heard, the inmate, Muntaqim, was hospitalized with COVID-19. The appeal was heard as an exception to the mootness doctrine because the situation is likely to recur. Although the petition established Muntaqim was incarcerated under conditions which could cause him serious harm, the petition did not demonstrate the prison personnel were deliberately indifferent to the risk. The prison respondents outlined the steps taken and the prison to reduce the spread of the disease: "Petitioner arguably established that Muntaqim was 'incarcerated under conditions posing a substantial risk of serious harm' ... . Annexed to the petition is a letter from a physician who discussed Muntaqim's medical condition and opined that he was at extreme risk of 'a serious and possible fatal outcome if infected with the novel coronavirus' responsible for causing COVID-19, as well as a letter from a group of physicians who explained that the novel coronavirus is quite infectious and that serious outbreaks in prisons were inevitable given the close contact between individuals inherent to the prison setting. ... What petitioner failed to demonstrate, however, was deliberate indifference on the part of prison officials. Petitioner provided nothing from anyone with firsthand knowledge — including Muntaqim, who neither verified the petition nor submitted an affidavit in support of it — as to what was being done to combat the spread of the novel coronavirus at SCF [Sullivan Correctional Facility] or to protect inmates at high risk from COVID-19. In contrast, respondents came forward with the affidavit of respondent Superintendent of SCF, who detailed the steps that had been taken up to that point to prevent the introduction of the novel coronavirus into the facility and reduce the risks of potential transmission. ... Supreme Court determined that DOCCS had 'done nothing wrong' in its response to the burgeoning threat. Petitioner has not demonstrated the subjective element of deliberate indifference required to establish an Eighth Amendment violation." ***People ex rel. Carroll v. Keyser*, 2020 N.Y. Slip Op. 03169, Third Dept 6-4-20**

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