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Editor: **Bruce Freeman**

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FIRST DEPARTMENT

BANKING LAW, UNIFORM COMMERCIAL CODE.

BANK WHICH ISSUED AN "OFFICIAL CHECK" DRAWN ON A DIFFERENT BANK, AFTER THE CUSTOMER'S FUNDS WERE WIRED TO THAT OTHER BANK (PURSUANT TO AN AGREED ARRANGEMENT), WAS NOT LIABLE UNDER THE UNIFORM COMMERCIAL CODE OR UNDER A MONEY HAD AND RECEIVED THEORY FOR THE SUBSEQUENT MISAPPROPRIATION OF THE CHECK.

The First Department, reversing Supreme Court, in a full-fledged opinion by Justice Friedman, determined the defendant Signature Bank was not liable under the Uniform Commercial Code or under a money had and received theory for the misappropriation of an "official check" for $292,000: "According to the affidavit of Patrick Manzi, Signature's senior vice president and director of bank operations, '[a]t the time in question, Signature did not issue its own official checks.' ... [U]nder an agreement between Signature and Integrated Payment Systems Inc. (IPS), Signature customers were provided by IPS with computer software and check forms that gave them the capability, upon Signature's approval, to print out a Signature 'Official Check' at their own offices. Although such a check bore Signature's logo and the signatures of Signature officers, and designated Signature as the 'Drawer,' the check also indicated in the lower left corner that it was 'Issued by Integrated Payment Systems Inc., Englewood, Colorado' through 'JPMorgan Chase Bank, N.A., Denver, Colorado.' In addition, the check bore Chase's ABA routing number. In sum, when a Signature customer requested the issuance of an official check, Signature would debit the customer's account in the requested amount, wire the same amount to the IPS account at Chase, and notify the customer that it had permission to print out the check. In essence, official checks of this kind were drawn by Signature, not on its own account, but on the IPS account at Chase. Using the above-described procedure, R & L [the Signature customer] procured the issuance of a Signature 'Official Check' in the amount of $292,000, payable to ... settlement agent, Steven J. Baum P.C.. The check identified R & L as the 'Remitter.'... According to a principal of R & L, R & L 'forwarded the $292,000 bank check to Kim Saunders, the title closer, who undertook on behalf of the title company . . . to forward this check to Steven J. Baum, P.C. to pay off the seller's [sic] mortgage.' It is undisputed that Steven J. Baum P.C., the payee of the check, never received it. The check was, through some unknown chain of events, misappropriated, improperly endorsed, and deposited into the joint account that the sellers of the underlying real property (defendants Richards and Massias) maintained at defendant TD Bank, N.A. The check was subsequently presented for payment to Chase, the drawee bank, which paid it ...". ***OneWest Bank, FSB v. Deutsche Bank Natl. Trust Co.*, 2020 N.Y. Slip Op. 03483, First Dept 6-18-20**

CIVIL PROCEDURE, APPEALS.

SELF-EXECUTING CONDITIONAL DISCOVERY ORDER BECAME ABSOLUTE UPON NON-COMPLIANCE; A MOTION TO VACATE, NOT AN APPEAL, IS THE PROPER PROCEDURE TO CONTEST THE ORDER ON THE GROUND OF EXCUSABLE DEFAULT; DEFENDANTS TOOK NO ACTION TO AVOID THE DEFAULT.

The First Department noted that defendants' failure to comply with a self-executing, conditional order striking the answer became absolute. The proper way to contest such an order is to move to vacate, not appeal: "When defendants failed to comply with the self-executing, conditional order striking their answer if they did not produce a witness for deposition by a date certain, the order became absolute (... CPLR 3126[3]). Defendants' proper recourse was to move to vacate the conditional order on the ground of excusable default (... CPLR 5015[a]). They did not seek that relief. In any event, the excuses for failing to comply with the court's order that defendants asserted in opposition to plaintiff's motion were not reasonable, and defendants failed to seek an adjournment from the court or take any other action to avoid their knowing default." ***Humble Monkey, LLC v. Rice Sec., LLC*, 2020 N.Y. Slip Op. 03470, First Dept 6-18-20**

CIVIL PROCEDURE, APPEALS, TAX LAW.

DEFENDANT'S MOTION TO COMPEL THE PRODUCTION OF TAX RETURNS AFTER THE PARTIES' FAILURE TO RESPOND TO THE DEMAND FOR PRODUCTION SHOULD HAVE BEEN DENIED; THE FAILURE TO RESPOND TO A PALPABLY IMPROPER DEMAND FOR PRODUCTION, I.E. A DEMAND FOR TAX RETURNS, DOES NOT WAIVE THE ABILITY TO OBJECT TO THE DEMAND ON APPEAL; DEFENDANT MAY RENEW THE MOTION TO COMPEL PRODUCTION OF THE TAX RETURNS IF THE REQUIRED SHOWINGS ARE MADE.

The First Department noted that the failure to respond to defendant-Mazal's demands for production waived any objections to the demands. Mazal's motion to compel discovery therefore was properly granted. However objections to demands which are palpably improper are not waived by a failure to respond and Mazal's demand for tax returns may be in the palpably-improper category. Mazal's motion to compel the production of tax returns should therefore have been denied. But the First Department denied that portion of the motion to compel without prejudice and granted leave to renew if Mazal can make the required showing of need: "The motion court providently deemed the appealing parties' objections waived under CPLR 3122 as a result of their failure to respond timely to Mazal's demands for production ... . We modify, however, with respect to Mazal's demands for the appealing parties' tax returns, as objections to 'palpably improper' demands are not waived ... . A demand for the production of tax returns is disfavored and requires 'a strong showing of necessity,' and the inability to obtain the information from other sources ... . Here, the failure 'to identify the particular information the tax returns . . . will contain and its relevance to the claims made' ... should have been sufficient to deny Mazal's motion to compel. Indeed, the tax returns were not necessary to determine whether plaintiffs acquired an interest in the properties in 1994 or retained it thereafter — the reason the motion court gave for granting the motion. However, Mazal argues that the tax returns could be relevant to its affirmative defenses of laches, estoppel, waiver, ratification, and consent, and the motion court did not pass on this issue. As a result, although Mazal did not sufficiently show the inability to obtain the information sought from other sources or, indeed, what specific information the appealing parties' tax returns will show, we grant leave to renew upon a proper showing ...". ***Demurjian v. Demurjian*, 2020 N.Y. Slip Op. 03479, First Dept 6-18-20**

CRIMINAL LAW.

DEFENDANT WAS ADJUDICATED A YOUTHFUL OFFENDER AND SENTENCED TO 60 DAYS IN JAIL AND FIVE YEARS PROBATION FOR STEALING A BREAKFAST SANDWICH FROM A RESTAURANT; EXTENSIVE DISSENT ARGUED THE SENTENCE WAS HARSH AND EXCESSIVE.

The First Department upheld the defendant's sentence as a youthful offender to 60 days in jail and five years probation. Defendant stole a breakfast sandwich from a restaurant after throwing a banana at an employee, jumping over the counter, saying he had gun, and leaving the restaurant with the sandwich. This decision is significant because of the extensive dissent arguing the sentence was too harsh. ***People v. Guilermo P.*, 2020 N.Y. Slip Op. 03464, First Dept 6-18-20**

FAMILY LAW, APPEALS.

THE ORDER WAS NOT ENTERED ON CONSENT AND THEREFORE WAS APPEALABLE; GRANDPARENTS' PETITIONS FOR VISITATION SHOULD NOT HAVE BEEN GRANTED ABSENT A FULL TRIAL.

The First Department, after noting the order was not entered on consent and was therefore appealable, determined the grandparents should not have been awarded visitation absent a full trial: "In the absence of consent, Family Court should not have awarded the paternal grandparents visitation without conducting a full trial. The decision was based only on the grandmother's partial testimony. The separately petitioning grandfather did not testify. The mother was not present due to a medical procedure she was undergoing in North Carolina. Even if the court was justified in drawing a negative inference from her failure to give testimony ... , the court failed to afford the attorney for the child (AFC) an opportunity to ascertain the seven-year-old child's position ... . Although the Family Court appropriately appointed an AFC, he did not let her do her job. The child's position in this case was particularly important because of the mother's representations that the child did not want to see the grandparents so soon following her father's death and would be traumatized by such visitation. In addition, each of the grandparents brought separate petitions and each was separately represented in this matter. Although there is some indication that the grandparents are separated, because of the truncated record, there is insufficient information to support the court's having jointly awarded jointly awarded them visitation with the child. Without a full hearing, the record is insufficient to determine whether visitation with the paternal grandparents is in the child's best interests ... . If after a full hearing upon remand the Family Court determines that grandparental visitation is in the child's best interest, it should also clarify the award of visitation rights vis-a-vis each grandparent, given that they filed separate petitions and were not jointly represented by counsel, and thus in fact may be separated." ***Matter of Donna F.T.*, 2020 N.Y. Slip Op. 03469, First Dept 6-18-20**

FAMILY LAW, IMMIGRATION LAW.

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

The First Department, reversing Family Court, determined the court should have made findings which would allow the child to petition for Special Immigrant Juvenile Status (SIJS): "The evidence shows that the subject child was unmarried and under the age of 21 at the time of the special findings hearing and order (see generally 8 USC § 1101[a][27][J]; 8 CFR 204.11[c] ...). The Family Court's appointment of a guardian rendered the child dependent on a juvenile court ... . The evidence also established that reunification with the child's parents was not viable due to neglect or abandonment. The child testified that, with no prior warning, his father left him in the United States with his uncle (petitioner), and that his parents later told him that they could not support him and did not want him back. The child further stated, and petitioner corroborated, that he had only occasional contact with his parents, and received no gifts or support from them, since coming here. This was sufficient to 'evince[] an intent to forego . . . parental rights and obligations' or a failure to exercise a minimum degree of care to supply the child with adequate food, clothing, shelter, education, or supervision ... . In determining whether reunification was viable, the Family Court should not have refused to consider evidence of circumstances which occurred after the child's 18th, but before his 21st, birthday ... . The evidence also demonstrated that it is not in the best interests of the child to return to Thailand, where his parents reside, or to be sent to live in Bangladesh, where he has citizenship but has never resided. The child presented evidence that his parents would not accept him if he returned to Thailand, that his Thai visa was on the verge of expiring and he had no way to renew it, and that he had no other place to live or way to support himself in Thailand or Bangladesh ... . He also presented evidence that he was doing well in petitioner's care ...". ***Matter of Khan v. Shahida Z.*, 2020 N.Y. Slip Op. 03480, First Dept 6-18-20**

HUMAN RIGHTS LAW, EMPLOYMENT LAW.

PLAINTIFF'S DISABILITY DISCRIMINATION CAUSES OF ACTION UNDER THE STATE AND CITY HUMAN RIGHTS LAW PROPERLY SURVIVED SUMMARY JUDGMENT; THE DIFFERENT REQUIREMENTS OF THE STATE VERSUS CITY HUMAN RIGHTS LAW IN THIS CONTEXT EXPLAINED IN SOME DEPTH.

The First Department, in a full-fledged opinion by Justice Acosta, determined plaintiff's disability discrimination claims under the NYS and NYC Human Rights Law (HRL) properly survived summary judgment. Issues of fact were raised about whether defendant sufficiently engaged in dialogue about accommodating plaintiff's needs prior to terminating her employment. The decision explains the different proof requirement for disability discrimination and accommodation under the NYSHRL and the NYCHRL, noting that the NYCHRL imposes a heavier burden on the employer than the NYSHRL: "Under both the State and City HRLs, 'the first step in providing a reasonable accommodation is to engage in a good faith interactive process that assesses the needs of the disabled individual and the reasonableness of the accommodation requested. The interactive process continues until, if possible, an accommodation reasonable to the employee and employer is reached' ... . * * * Unlike the State HRL where the employer must 'engage[] in interactions with the employee revealing at least some deliberation upon the viability of' an accommodation ... , the City HRL clearly requires a more rigorous process ... . Indeed, to emphasize the seriousness by which employers must engage in the interactive process, the City Council amended the City HRL in 2018 ... . The Committee Report ... states: 'This bill would clarify the reasonable accommodation requirement by expressly requiring, as a part of the reasonable accommodation process, that covered entities engage in a cooperative dialog with individuals who they know or should know may require accommodation.' * * * Here, defendant cannot prevail in its summary judgment motion seeking to dismiss plaintiff's State HRL disability claim because there are issues of fact as to whether defendant engaged plaintiff in a good faith interactive process to ascertain the viability of an appropriate accommodation. * * * Given that the City HRL is even broader than the State HRL ... , defendant has likewise failed to show that it engaged in an interactive process with plaintiff." ***Hosking v. Memorial Sloan-Kettering Cancer Ctr.*, 2020 N.Y. Slip Op. 03484, First Dept 6-18-20**

PERSONAL INJURY, EVIDENCE, MUNICIPAL LAW.

JURY SHOULD HAVE BEEN CHARGED ON THE RES IPSA LOQUITUR DOCTRINE AND INSTRUCTED THAT THE VIOLATION OF THE NYC ADMINISTRATIVE CODE IS SOME EVIDENCE OF NEGLIGENCE IN THIS FALLING OBJECT CASE, NEW TRIAL ORDERED.

The First Department, reversing Supreme Court and ordering a new trial, determined the jury should have been instructed on the res ipsa loquitur doctrine and the violation of the NYC Administrative Code was some evidence of negligence. Plaintiff was allegedly injured when a towel dispenser/trash receptacle (TD/TR) fell out of the wall: "... [W]e find that the trial court improvidently exercised its discretion in declining to charge the jury on res ipsa loquitur. A res ipsa charge 'merely permits the jury to infer negligence from the circumstances of the occurrence' ... . The doctrine does not require 'sole physical access to the instrumentality causing the injury' ... . The trial court should also have charged that a violation of Administrative Code of the City of New York § 28-301.1, which requires property owners to maintain their buildings in a safe condition, constitutes 'some evidence of negligence' ... . To the extent that the TD/TR unit allegedly fell out of the wall

eight months after installation by defendant John Spaccarelli, the court erred by failing to allow plaintiff to fully question the credentials of Mr. Spaccarelli and his qualifications as an expert ...". ***Galue v. Independence 270 Madison LLC*, 2020 N.Y. Slip Op. 03463, First Dept 6-18-20**

SECOND DEPARTMENT

CIVIL PROCEDURE, ATTORNEYS.

ALTHOUGH AN INCOMPLETE CHANGE-OF-ATTORNEY STIPULATION WAS FILED BEFORE THE STIPULATION OF DISCONTINUANCE WAS FILED, THE STIPULATION OF DISCONTINUANCE REMAINED VALID AND ENFORCEABLE.

The Second Department, reversing Supreme Court, determined a stipulation of discontinuance executed by the plaintiff's then attorney, and filed after plaintiff's change-of-attorney stipulation was filed, was valid and enforceable. Plaintiff's change-of-attorney stipulation was not signed by an agent or representative of the plaintiff: " '[A]n attorney of record in an action may only withdraw or be changed or discharged in the manner prescribed by statute' ... . Pursuant to CPLR 321(b), an attorney of record may be changed either by filing with the clerk a consent to the change signed by the retiring attorney and signed and acknowledged by the party, with notice of the change given to the attorneys for all parties in the action, or by order of court upon notice to all parties. ' Until an attorney of record withdraws or is changed or discharged in the manner prescribed by CPLR 321, his [or her] authority as attorney of record for his [or her] client continues, as to adverse parties, unabated' ... . Here, the stipulation of discontinuance was executed by an attorney with the plaintiff's then attorney of record ... (hereinafter outgoing counsel). Though the plaintiff's stipulation to change its attorney was filed prior to the date on which the stipulation of discontinuance was filed, and was signed by outgoing counsel and incoming counsel, no agent or representative of the plaintiff signed the change-of-attorney stipulation. Nor does the record establish that notification of the plaintiff's change in attorney was provided to any other party, or to the appellant, prior to the date on which the stipulation of discontinuance was filed. Accordingly, the plaintiff neither filed a properly signed consent to change attorney form nor sought a court order permitting outgoing counsel to withdraw as the plaintiff's attorney of record in accordance with CPLR 321(b) prior to the filing of the stipulation of discontinuance." ***GMAC Mtge., LLC v. Galvin*, 2020 N.Y. Slip Op. 03405, Second Dept 6-17-20**

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

PLAINTIFF SOUGHT ONLY CANCELLATION OF A MORTGAGE; THE JUDGE SHOULD NOT HAVE, SUA SPONTE, CANCELLED THE NOTE AS WELL,

The Second Department, reversing Supreme Court, determined the judge should not have, sua sponte, granted relief that was not asked for by the plaintiff. Plaintiff sought cancellation and discharge of a mortgage pursuant to Real Property Actions and Proceedings Law (RPAPL) 1501(4). The judge cancelled the mortgage and the note: " 'The court may grant relief that is warranted pursuant to a general prayer for relief contained in a notice of motion if the relief granted is not too dramatically unlike the relief sought, the proof offered supports it, and there is no prejudice to any party' ... . Here, the plaintiff only sought cancellation and discharge of the subject mortgage, not cancellation of the note. The Supreme Court should not have granted additional relief sua sponte ... . We note that the plaintiff lacked standing to seek cancellation of the note, as it was not a party to it." ***Trenton Capital, LLC v. Bank of N.Y. Mellon*, 2020 N.Y. Slip Op. 03416, Second Dept 6-17-20**

CRIMINAL LAW.

THE TWO COUNTS OF ROBBERY THIRD WERE CONCURRENT INCLUSORY COUNTS OF THE TWO COUNTS OF ROBBERY SECOND; CONVICTIONS ON THE ROBBERY SECOND COUNTS REQUIRED VACATION OF THE CONVICTIONS ON THE ROBBERY THIRD COUNTS AND THE RELATED SENTENCES.

The Second Department noted that the two robbery third degree counts were concurrent inclusory counts of the two robbery second degree counts and must be dismissed: "The two counts of robbery in the third degree were concurrent inclusory counts of the two counts of robbery in the second degree (see CPL 300.30[4]; People v. Hutson, 43 AD3d 959, 959; People v. Gibson, 295 AD2d 529, 530). A verdict of guilt upon the greater count is deemed a dismissal of every lesser count (see CPL 300.40[3]). Accordingly, we vacate the convictions of robbery in the third degree and the sentences imposed thereon, and dismiss those counts of the indictment ...". ***People v. Wingate*, 2020 N.Y. Slip Op. 03398, Second Dept 6-17-20**

CRIMINAL LAW.

CONVICTION OF COURSE OF SEXUAL CONDUCT AGAINST A CHILD FIRST DEGREE MUST BE VACATED AS A LESSER INCLUDED OFFENSE OF PREDATORY SEXUAL ASSAULT AGAINST A CHILD.

The Second Department noted that defendant's conviction of course of sexual conduct against a child in the first degrees must be vacated as a lesser included offense: "... [T]he defendant's conviction of course of sexual conduct against a child in

the first degree under Penal Law § 130.75(1)(a) must be vacated and that count of the indictment dismissed, since that count is a lesser included offense of the crime of predatory sexual assault against a child under Penal Law § 130.96 ...". ***People v. Jones*, 2020 N.Y. Slip Op. 03406, Second Dept 6-17-20**

CRIMINAL LAW, APPEALS.

WHERE A TRIAL JUDGE DEMANDS A WAIVER OF APPEAL, THE JUDGE SHOULD PLACE HIS OR HER REASONS ON THE RECORD SO THE DEMAND IS NOT SEEN AS A TOOL FOR AVOIDING APPELLATE REVIEW; THE JUDGE-DEMANDED WAIVER WAS NOT ENFORCED IN THIS CASE.

The Second Department, in a full-fledged opinion by Justice Scheinkman, determined defendant's waiver of appeal was not enforceable for two reasons: (1) the waiver was demanded by the judge, not the People; and (2) the waiver was demanded after the guilty plea and the sentence promise (therefore defendant did not receive a material benefit from the waiver). The court noted that a waiver demanded by a judge could be seen a tool for avoiding appellate review. Therefore, the Second Department held the judge should put his or her reasons for demanding a waiver on the record. Turning to the merits, the Second Department affirmed the conviction: "We do not foreclose the possibility that there may be circumstances where the trial court has a legitimate interest in conditioning its acceptance of a plea and determination of a sentence upon an appeal waiver that the prosecution has not requested. While the prosecution need not articulate any reason for including a demand for an appeal waiver in its settlement offer, where it is the court that makes the demand, the court should articulate on the record its reasons for doing so in order to dispel any concern that the court's demand is motivated solely as a means of avoiding appellate review of its decisions. Here, the Supreme Court did not set forth any reason for demanding an appeal waiver, and none is apparent on the record. Accordingly, we will not enforce the defendant's purported waiver of the right to appeal." ***People v. Sutton*, 2020 N.Y. Slip Op. 03400, Second Dept 6-17-20**

CRIMINAL LAW, APPEALS.

SUPPRESSION COURT'S FAILURE TO EXPLAIN THE BASIS FOR DENYING THE MOTION TO SUPPRESS PRECLUDED DETERMINATION OF THE APPEAL; MATTER REMITTED.

The Second Department, holding the appeal and remitting the matter, noted that the suppression court's failure to provide the basis for its denial of defendant's suppression motion precluded determination of the appeal: "The defendant's appeal from the order must be dismissed, as no appeal lies, as of right or by permission, from an order denying a motion to suppress evidence (see CPL 450.10, 450.15 ...). The issues raised on the appeal from the order are brought up for review on the appeal from the judgment. 'Upon an appeal to an intermediate appellate court from a judgment, sentence or order of a criminal court, such intermediate appellate court may consider and determine any question of law or issue of fact involving error or defect in the criminal court proceedings which may have adversely affected the appellant' (CPL 470.15[1]). The Court of Appeals 'has construed CPL 470.15(1) as a legislative restriction on the Appellate Division's power to review issues either decided in an appellant's favor, or not ruled upon, by the trial court' ... . 'CPL 470.15(1) bars [the Appellate Division] from affirming a judgment, sentence or order on a ground not decided adversely to the appellant by the trial court' ... . [W]e must hold the appeal from the judgment in abeyance and remit the matter to the Supreme Court ... to articulate the basis or bases for its denial of those branches of the defendant's omnibus motion which were to suppress physical evidence and his statement to law enforcement officials." ***People v. Rice*, 2020 N.Y. Slip Op. 03402, Second Dept 6-17-20**

CRIMINAL LAW, EVIDENCE.

WARRANTLESS MANUAL SEARCH OF DEFENDANT'S IPAD AT JFK AIRPORT PROPER; CRITERIA FOR SEARCHES OF ELECTRONIC DEVICES AT BORDERS EXPLAINED.

The Second Department determined defendant's iPad was properly searched by a Department of Homeland Security (DHS) agent at JFK airport after defendant, an airline pilot, had flown from Montreal to JFK. Based upon an investigation in Texas, DHS believed defendant may have had child pornography on his iPad. Defendant was asked to provide the password after he was told the iPad would be seized if he did not provide the password. Defendant provided the password and child pornography was found: "Because '[t]he Government's interest in preventing the entry of unwanted persons and effects is at its zenith at the international border,' and 'the expectation of privacy is less at the border than it is in the interior'... , border searches are generally deemed reasonable 'simply by virtue of the fact that they occur at the border' ... . Thus, '[r]outine searches of the persons and effects of entrants are not subject to any requirement of reasonable suspicion, probable cause, or warrant' ... . However, 'highly intrusive searches' may require reasonable suspicion in light of the significance of the individual 'dignity and privacy interests' infringed ... . While federal circuit courts are split as to whether reasonable suspicion or something less than that is required to justify a manual search of an electronic device for contraband at the border, no court has required a warrant or probable cause for either a manual or forensic search of an electronic device for contraband at the border ... . Even assuming reasonable suspicion was required, here, the DHS Agents possessed reasonable suspicion to search the defendant's iPad for child pornography ... . Further, contrary to the defendant's contention, the defendant was not coerced into entering the password to unlock his iPad, in violation of his right against self-incrimination, his right

to due process, or CPL 60.45. The defendant, who was told that he was free to leave, was not in custody when he was asked to enter the password ... . The fact that the defendant's iPad would be detained if he did not enter the password did not mean that he was ;subjected to the coercive atmosphere of a custodial confinement'... . Further, since the DHS Agents had reasonable suspicion that contraband could be found on the iPad, the Agents could perform a forensic search of the iPad without a warrant ...". ***People v. Perkins*, 2020 N.Y. Slip Op. 03425, Second Dept 6-17-20**

CRIMINAL LAW, EVIDENCE.

DEFENDANT WAS ENTITLED TO A JURY INSTRUCTION ON THE INTOXICATION DEFENSE; DEFENDANT SHOULD HAVE BEEN ALLOWED TO ATTEMPT TO LAY FOUNDATIONS FOR THE ADMISSION OF POLICE AND DISTRICT ATTORNEY BUSINESS RECORDS IN SUPPORT OF HIS INTOXICATION DEFENSE; NEW TRIAL ORDERED DESPITE DEFENDANT'S COMPLETION OF HIS SENTENCE.

The Second Department, reversing defendant's forcible touching and sexual abuse convictions and ordering a new trial, despite defendant's having completed his sentence, determined defendant was entitled to a jury instruction on the intoxication defense, and defendant was wrongly precluded from attempting to lay foundations for the admission of certain police and district-attorney's-office business records supporting the intoxication defense: "The defendant also sought to introduce as a business record a Desk Appearance Ticket Investigation form (hereinafter the DAT form) which contains information from the arresting officer at the time of the arrest. Specifically, the DAT form contains the arresting officer's notation, 'intox,' and a box checked by the arresting officer indicating 'under the influence of drugs/marihuana to the degree that he may endanger himself or others.' The arresting officer testified that he had completed the form in his own handwriting. As the defendant contends, the trial court should have allowed the defendant to introduce the DAT form as an admissible business record of the Police Department ... . The defendant likewise sought to introduce an Early Case Assessment Bureau sheet (hereinafter the ECAB sheet) apparently created by the Police Department or the District Attorney's office, as well as the testimony of the individual who created it to establish the foundation for its admission as a business record. The ECAB sheet supports the defendant's request for an intoxication charge and also provides a basis for impeachment of the arresting officer's testimony as to his perceptions of the defendant's condition at the time of the arrest. * * * Had the defendant been permitted to explore the circumstances under which the ECAB sheet was created, the defendant may have established that the statements contained in the ECAB sheet were admissible for the truth of those statements ...". ***People v. Sabirov*, 2020 N.Y. Slip Op. 03378, Second Dept 6-17-20**

CRIMINAL LAW, EVIDENCE, JUDGES.

EXCULPATORY (BRADY) EVIDENCE IN THE COMPLAINANT'S MENTAL HEALTH RECORDS WAS REDACTED BY THE JUDGE; TWO INDICTMENT COUNTS WERE MULTIPLICITOUS; NEW TRIAL ORDERED IN THIS SEXUAL ABUSE CASE.

The Second Department, reversing defendant's sexual abuse convictions, determined the defendant was entitled to exculpatory (Brady) evidence in the complainant's mental health records which was redacted by the judge. The Second Department noted that, upon retrial, two counts of sexual abuse related to a continuous incident were multiplicitous and one of the counts must be dismissed: "The complainant and the defendant each testified and presented sharply divergent accounts of the events that were alleged to have occurred during the summer of 2009. The record shows that a determination of credibility was key to the jury's consideration of this case, as the jury acquitted the defendant of the charge of rape in the first degree but convicted him of the charges alleging sexual abuse in the first degree. Thus, the redacted portion of the complainant's mental health records which contains the statement '[s]exual abuse denied' and the portion of the checklist reflecting that '[s]exual abuse (lifetime)' was not checked off could be viewed by the jury as exculpatory and materially relevant to the matter ... . Since the jury had to weigh the credibility of the complainant and the defendant, this evidence, if disclosed, may have changed the result of the proceeding. Accordingly, the judgment must be reversed and the matter remitted for a new trial." ***People v. Butler*, 2020 N.Y. Slip Op. 03374, Second Dept 6-17-20**

FAMILY LAW, CONTRACT LAW.

THE MEANING OF 'GROSS EARNED INCOME' IN THE STIPULATION OF SETTLEMENT AFFECTED THE CALCULATION OF CHILD SUPPORT; THE TERM WAS AMBIGUOUS REQUIRING A HEARING TO DETERMINE THE INTENT OF THE PARTIES.

The Second Department, reversing Family Court, determined the settlement agreement was ambiguous. The meaning of the term "gross earned income" in the agreement affected the child support calculation. The court should have held a hearing to ascertain the intent of the parties. Instead, the court deferred to the definition of "income" in the Child Support Standards Act (CSSA): " 'A stipulation of settlement entered into by parties to a divorce proceeding constitutes a contract between them subject to the principles of contract interpretation' ... . 'Where the intention of the parties is clearly and unambiguously set forth, effect must be given to the intent as indicated by the language used' ... . 'A court may not write into a contract conditions the parties did not insert or, under the guise of construction, add or excise terms, and it may not construe the language in such a way as would distort the apparent meaning' ... . 'Whether a writing is ambiguous is a matter

of law for the court, and the proper inquiry is whether the agreement on its face is reasonably susceptible of more than one interpretation' ... . In making this determination, the court also should examine the entire contract and consider the relation of the parties and the circumstances under which the contract was executed ... . Where a contract is ambiguous, 'the court may consider the construction placed on the contract by the parties to help ascertain the meaning' ... . 'The role of the court is to determine the intent and purpose of the stipulation based on the examination of the record as a whole' ... . Here, the term 'gross earned income,' in the context of the parties' stipulation, is ambiguous ... . However, instead of deferring to the CSSA's definition of 'income,' the Support Magistrate should have held a hearing to determine the parties' intent in including the word 'earned' ...". ***Matter of Abramson v. Hasson*, 2020 N.Y. Slip Op. 03418, Second Dept 6-17-20**

FAMILY LAW, CRIMINAL LAW.

FAMILY COURT SHOULD HAVE GRANTED THE APPLICATION FOR AN ADJOURNMENT IN CONTEMPLATION OF DISMISSAL IN THIS JUVENILE DELINQUENCY PROCEEDING.

The Second Department determined Family Court should have granted the application for an adjournment in contemplation of dismissal in this juvenile delinquency proceeding: " 'The Family Court has broad discretion in determining whether to adjourn a proceeding in contemplation of dismissal' ... . Factors that are relevant to a court's discretionary determination of whether to adjourn a proceeding in contemplation of dismissal include a respondent's criminal and disciplinary history, history of drug or alcohol use, academic and school attendance record, association with gang activity, acceptance of responsibility for his or her actions, the nature of the underlying incident, recommendations made in a probation or mental health report, the degree to which the respondent's parent or guardian is involved in the respondent's home and academic life, and the ability of the parent or guardian to provide adequate supervision ... . Here, the Family Court improvidently exercised its discretion in denying the appellant's application pursuant to Family Court Act § 315.3 for an adjournment in contemplation of dismissal. Under the circumstances here, including the fact that this proceeding constituted the appellant's first contact with the court system, he took responsibility for his actions and expressed remorse, he voluntarily participated in counseling during the pendency of the proceeding, and he maintained a strong academic and school attendance record, an adjournment in contemplation of dismissal was warranted ...". ***Matter of Maximo M.*, 2020 N.Y. Slip Op. 03428, Second Dept 6-17-20**

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

PLAINTIFF BANK DID NOT DEMONSTRATE COMPLIANCE WITH THE NOTICE OF DEFAULT PROVISIONS OF THE MORTGAGE AND THE NOTICE REQUIREMENTS OF REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL) 1304; PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined plaintiff bank did not submit sufficient evidence of compliance with the notice-of-default provisions of the mortgage and did not demonstrate the loan was a reverse mortgage exempt from the notice requirement of Real Property Actions and Proceedings Law (RPAPL) 1304: "Although the plaintiff submitted a purported notice of default ... , the plaintiff failed to submit an affidavit attesting to the mailing of the purported ... notice, whether it was mailed at all, and if so, whether the mailing was by first class mail or, if otherwise, whether notice was actually delivered to [defendant's] notice address, as required by the provisions in sections 15 and 22 of the mortgage agreement. ... [T]he attorney's affirmation submitted by the plaintiff which stated that the purported ... notice was 'in full compliance with the terms of the mortgage' was unsubstantiated and conclusory. Neither the attorney's affirmation nor the copy of the purported ... notice established 'that the required notice was mailed by first class mail or actually delivered to the notice address if sent by other means, as required by the mortgage agreement' ... . [T]he plaintiff also failed to establish, as a matter of law, its compliance with the 90-day notice requirements of RPAPL 1304. '[P]roper service of RPAPL 1304 notice on the borrower or borrowers is a condition precedent to the commencement of a foreclosure action, and the plaintiff has the burden of establishing satisfaction of this condition' ...". ***Deutsche Bank Natl. Trust Co. v. Crimi*, 2020 N.Y. Slip Op. 03376, Second Dept 6-17-20**

LANDLORD-TENANT, MUNICIPAL LAW.

PLAINTIFF WAS NOT BARRED FROM SEEKING RENT OVERCHARGES BASED UPON A 1986 RENT REDUCTION ORDER.

The Second Department, reversing Supreme Court, determined plaintiff could seek rent overcharges based upon a 1986 rent reduction order: "... [T]he plaintif's first cause of action to recover damages for rent overcharges based upon the May 1, 1986, rent reduction order was not barred by the then-applicable four-year statute of limitations and the 'look-back rule,' precluding examination of the rental history prior to the four-year period preceding commencement of the action (see former Rent Stabilization Law of 1969 [Administrative Code of City of NY] § 26-516[a][2]; former CPLR 213-a; Matter of Regina Metro. Co., LLC v. New York State Div. of Hous. & Community Renewal, _____ NY3d _____, 2020 N.Y. Slip Op. 02127). Since rent reduction orders impose a continuing obligation on landlords, tenants are entitled to recover for any rent overcharges occurring during the applicable limitations period by reference to rent reduction orders that remain in effect during that

period, even if the rent reduction order was initially issued outside the limitations period ...". ***Santana v. Fernandez*, 2020 N.Y. Slip Op. 03383, Second Dept 6-17-20**

PERSONAL INJURY, CIVIL PROCEDURE, UTILITIES.

PLAINTIFF WAS WORKING ON A ROOF WHEN HE ALLEGEDLY CONTACTED AN ELECTRIC WIRE LEADING TO THE HOME AND WAS KILLED; THE UTILITIES' (CON EDISON'S) MOTION TO DISMISS FOR FAILURE TO STATE A CAUSE OF ACTION ON THE GROUND IT OWED NO DUTY TO PLAINTIFF'S DECEDENT SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined the complaint against the Con Edison defendants in this electrocution case should not have been dismissed for failure to state a cause of action. Plaintiff was working on a roof when he alleged came into contact with an electric wire attached to the home and was killed. Con Edison argued it did not owe a duty to plaintiff's decedent: " '[T]he existence and scope of a duty is a question of law requiring courts to balance sometimes competing public policy considerations' .... Contrary to Con Edison's contention, it failed to establish that it owed no duty to the decedent ... . Viewing the allegations in the light most favorable to the plaintiff, since the plaintiff alleged that Con Edison authorized the installation of an improper and non code-compliant connection between its electrical lines and the homeowner's electrical system, such actions gave rise to Con Edison's duty to the decedent who reasonably could be expected to come into contact with the property's electrical wires ... . Thus, Con Edison did not establish that the plaintiff failed to state a cause of action to recover damages for negligence." ***Sucre v. Consolidated Edison Co. of N.Y., Inc.*, 2020 N.Y. Slip Op. 03377, Second Dept 6-17-20**

PERSONAL INJURY, MEDICAL MALPRACTICE, EVIDENCE.

ALTHOUGH PLAINTIFF'S EXPERT, A GENERAL SURGEON, PROVIDED AN OPINION IN THE AREA OF INTERNAL MEDICINE, THE EXPERT'S AFFIRMATION DEMONSTRATED THE EXPERT WAS QUALIFIED TO OFFER THE OPINION; DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined plaintiff's expert's affirmation raised a question of fact in this failure-to-diagnose medical malpractice case, even though the affirmation dealt with an area of medicine outside of the expert's area of practice (general surgery): "... [T]he plaintiffs' expert's affirmation was not lacking in probative value because the plaintiffs' expert was board certified in general surgery rather than internal medicine. A medical expert need not be a specialist in a particular field in order to testify regarding accepted practices in that field; however, the expert must be possessed of the requisite skill, training, education, knowledge or experience from which it can be assumed that the opinion rendered is reliable ... . 'Thus, where a physician opines outside his or her area of specialization, a foundation must be laid tending to support the reliability of the opinion rendered' ... . 'Where no such foundation is laid, the expert's opinion is of no probative value' ... . Here, the plaintiffs' expert's affirmation sufficiently established that the plaintiffs' expert was possessed of the requisite skill, training, education, knowledge and experience from which it can be assumed that the opinion rendered was reliable ... . In particular, the expert demonstrated that he was qualified to render an opinion regarding the symptomology of temporal arteritis, which he characterized as a relatively common disease of the arteries, and as to whether a proper examination and investigation of [the] symptoms was conducted in accordance with accepted medical practices." ***Kiernan v. Arevalo-Valencia*, 2020 N.Y. Slip Op. 03388, Second Dept 6-17-20**

PERSONAL INJURY, MUNICIPAL LAW.

WHETHER THE SIDEWALK DEFECT WHICH ALLEGEDLY CAUSED PLAINTIFF'S SLIP AND FALL IS SHOWN ON A BIG APPLE MAP MUST BE RESOLVED BY A JURY.

The Second Department, reversing Supreme Court, determined there was a question of fact whether the sidewalk defect which allegedly caused plaintiff to fall was depicted on the Big Apple map. Therefore the question whether the city had written notice of the defect was for the jury: "Administrative Code of the City of New York § 7-201(c)(2) 'limits the City's duty of care over municipal streets and sidewalks by imposing liability only for those defects or hazardous conditions which its officials have been actually notified exist at a specified location' ... . Accordingly, 'prior written notice of a defect is a condition precedent which plaintiff is required to plead and prove to maintain an action against the City' ... . 'Big Apple is a corporation established by the New York State Trial Lawyers Association for the purpose of giving notices in compliance with [Administrative Code of City of New York § 7-201(c)(2)]. It does so through maps on which coded symbols are entered to represent defects' ... . 'A Big Apple map submitted to the Department of Transportation may serve as prior written notice of a defective condition' ... . ' Where [, as here,] there are factual disputes regarding the precise location of the defect that allegedly caused a plaintiff's fall, and whether the alleged defect is designated on the [Big Apple] map, the question should be resolved by a jury' ...". ***Harrison v. City of New York*, 2020 N.Y. Slip Op. 03401, Second Dept 6-17-20**

PERSONAL PROPERTY, CIVIL RIGHTS LAW.

PLAINTIFF ENTITLED TO RETURN OF ENGAGEMENT RING AFTER THE ENGAGEMENT AND MARRIAGE WERE CALLED OFF.

The Second Department determined plaintiff was entitled to summary judgment in an action for the return of an engagement ring after the engagement and marriage were called off: "As a general matter, a party not under any impediment to marry may maintain an action to recover property, such as an engagement ring, given in contemplation of marriage where the contemplated marriage does not come to pass (see Civil Rights Law § 80-b ...). Here, the plaintiff established his prima facie entitlement to summary judgment on the cause of action for the return of the ring by establishing that he gave the ring to the defendant in contemplation of their marriage, and thus, he was entitled to its return at the time of the termination of their engagement ... . In opposition, the defendant failed to raise a triable issue of fact. Although the defendant maintained that the plaintiff made an inter vivos gift of the ring to her after the termination of their engagement, the evidence she submitted failed to support this assertion. A valid inter vivos gift requires proof, by clear and convincing evidence, of 'the intent on the part of the donor to make a present transfer; delivery of the gift, either actual or constructive to the donee; and acceptance by the donee' ... . Here, the text messages upon which the defendant relied did not clearly demonstrate a donative intent on the part of the plaintiff with respect to the ring, nor did they establish an acceptance of the ring as a gift by the defendant." ***Rambod v. Tazeh*, 2020 N.Y. Slip Op. 03382, Second Dept 6-17-20**

THIRD DEPARTMENT

CIVIL PROCEDURE, APPEALS, INSURANCE LAW, EMPLOYMENT LAW.

SUPREME COURT WAS BOUND TO FOLLOW A FIRST DEPARTMENT DECISION BECAUSE THERE WERE NO ON-POINT DECISIONS FROM THE THIRD DEPARTMENT OR THE COURT OF APPEALS; HOWEVER THE THIRD DEPARTMENT IS NOT SO BOUND; SUPREME COURT REVERSED.

The Third Department, reversing Supreme Court, dealt with the issue of stare decisis in this dispute between defendant employer and plaintiff employee over the "demutualization" proceeds of an insurance policy. Plaintiff was employed as a certified nurse midwife by defendant. As part of the employment agreement defendant was required to maintain and pay the premiums for a malpractice insurance policy. When the insurance company converted from a mutual insurance company to a stock insurance company (demutualization) the policyholder was entitled to nearly $50,000. Plaintiff-employee claimed the money was hers and brought an action for a declaratory judgment. Supreme Court agreed with plaintiff but, because there was no on-point appellate decision by the Court of Appeals or the Third Department, Supreme Court was required to follow a First Department decision and, based on that decision, found in favor of defendant-employer. The Third Department noted that it, unlike Supreme Court, was not bound by stare decisis and reversed: "Initially, Supreme Court was "bound by the doctrine of stare decisis to apply precedent established in another Department," as no relevant precedent was available from this Court or the Court of Appeals ... . However, this Court is not so bound ... . We agree with Supreme Court's inclinations — although that court was constrained by stare decisis not to follow them — and disagree with the First Department's holding in Matter of Schaffer, Schonholz & Drossman, LLP v. Title (171 AD3d at 465 ...). Therefore, for the reasons stated in our decision in Schoch v. Lake Champlain OB-GYN, P.C. (___ AD3d ___ [decided herewith]), we reverse." ***Shoback v. Broome Obstetrics & Gynecology, P.C.*, 2020 N.Y. Slip Op. 03447, Third Dept 6-18-20**

CIVIL PROCEDURE, ATTORNEYS.

ONCE A STIPULATION OF DISCONTINUANCE WAS FILED SUPREME COURT LACKED ANY SUPERVISORY CONTROL OVER THE PROCEEDING AND THE MOTION PRACTICE SEEKING TO SET ASIDE THE SETTLEMENT SHOULD HAVE BEEN DENIED ON THAT GROUND; A PLENARY ACTION WAS REQUIRED.

The Third Department, reversing Supreme Court, determined once the stipulation of discontinuance was filed Supreme Court lacked any supervisory control over the proceedings. So the subsequent motions dealing with the allocation of settlement proceeds to the plaintiffs and their attorney should have been denied. After the stipulation of discontinuance a plenary action was required to enforce or set aside the settlement: "As contemplated by the stipulation and order, counsel for the parties executed a stipulation of discontinuance that was filed with the Albany County Clerk (see CPLR 3217 [a] [2]). The filing occurred before any of the motion practice at issue and, as a result, a plenary action was required 'to enforce [or set aside] the settlement since the court does not retain the power to exercise supervisory control over previously terminated actions and proceedings' ... . Indeed, '[w]hen an action is discontinued, it is as if it had never been,' and Supreme Court lacked authority to grant any of the requested relief ... . It follows that both motions should have been denied in their entirety." ***DeLap v. Serseloudi*, 2020 N.Y. Slip Op. 03443, Third Dept 6-18-20**

CIVIL PROCEDURE, EMPLOYMENT LAW, CONTRACT LAW.

ALTHOUGH THE RELEASE EXECUTED BY PLAINTIFF WITH RESPECT TO TWO DEFENDANTS PRECLUDED AN ACTION FOR CONTRIBUTION BY A THIRD DEFENDANT WHICH WAS NOT A PARTY TO THE RELEASE, IT DID NOT PRECLUDE AN ACTION FOR COMMON-LAW INDEMNIFICATION.

The Third Department, reversing (modifying) Supreme Court, determined the release executed by plaintiff in this workplace injury case precluded a contribution action by a defendant which was not a party to the release, but did not preclude an action for common-law indemnification: "In 2016, plaintiff was allegedly injured while working at a commercial construction site. Plaintiff accepted $2,000 in settlement of his claims against third-party defendants, Village Air and Electric, Inc. and Jimerico Construction, Inc. — his employer and the contractor that retained it to do work at the construction site, respectively — and executed a release agreeing to hold them harmless. He then commenced this action against defendant, another contractor whose employees had allegedly caused the condition that led to his injuries. Defendant answered and impleaded Village Air and Jimerico, claiming that it was entitled to contribution and/or indemnification. Jimerico moved ... to dismiss the third-party complaint on the ground that the release executed by plaintiff defeated the contribution and indemnification claims (see CPLR 3211 [a] [5]; General Obligations Law § 15-108) ... . [T]he release executed by plaintiff 'relieve[d] [Jimerico] from liability to any other person for contribution' pursuant to CPLR article 14 and, as a result, Supreme Court should have dismissed defendant's contribution claim against Jimerico (General Obligations Law § 15-108 [b] ...). In contrast, Jimerico's 'settlement with . . . plaintiff did not preclude [defendant] from seeking common-law indemnification from' it ...". ***Koretnicki v. Northwoods Concrete, Inc.*, 2020 N.Y. Slip Op. 03445, Third Dept 6-18-20**

CONTRACT LAW, INSURANCE LAW, CIVIL PROCEDURE, EMPLOYMENT LAW.

UNDER THE TERMS OF THE EMPLOYMENT AGREEMENT AND THE APPLICABLE INSURANCE LAW PROVISIONS, AND UNDER THE PRINCIPLES OF UNJUST ENRICHMENT, PLAINTIFF EMPLOYEE, NOT DEFENDANT EMPLOYER, WAS ENTITLED TO THE DEMUTUALIZATION PROCEEDS WHEN THE MEDICAL MALPRACTICE INSURANCE CARRIER CONVERTED FROM A MUTUAL TO A STOCK INSURANCE COMPANY, DESPITE THE FACT THAT THE DEFENDANT EMPLOYER PAID THE POLICY PREMIUMS.

The Third Department, reversing Supreme Court, in a full-fledged opinion by Justice Mulvey, dealt with insurance law, employment law, contract law, unjust enrichment and stare decisis in this dispute between defendant employer and plaintiff employee over the "demutualization" proceeds of an insurance policy. Plaintiff was employed as a certified nurse midwife by defendant. As part of the employment agreement defendant was required to maintain and pay the premiums for a malpractice insurance policy. When the insurance company (MLMIC) converted from a mutual insurance company to a stock insurance company (demutualization) the policyholder was entitled to nearly $75,000. Plaintiff-employee claimed the money was hers and brought an action for a declaratory judgment. Supreme Court agreed with plaintiff but, because there was no on-point appellate decision by the Court of Appeals or the Third Department, Supreme Court was required to follow a First Department decision and, based on that decision, found in favor of defendant-employer. The Third Department noted that it, unlike Supreme Court, was not bound by stare decisis and reversed: "... [P]er the relevant statute [(Insurance Law § 7307 [e] [3])] and the conversion plan's definitions, plaintiff was entitled to the cash consideration ... . * * * ... [T]he parties' employment agreement provided that plaintiff would perform professional services for defendant. In exchange, defendant would pay her a stated salary and provide specified benefits including, as relevant here, obtaining and paying the premiums for professional liability insurance covering plaintiff. The record indicates that defendant purchased, controlled and maintained such a policy from MLMIC in plaintiff's favor. Defendant was the policy administrator, selected the coverage and terms, and was responsible for all financial aspects of the policy. Notably, defendant paid annual premiums of approximately $25,710; plaintiff paid nothing toward the premiums and those amounts were not counted as income to plaintiff. Defendant received from MLMIC dividends, premium reductions and the return of premiums when the policy was canceled upon plaintiff leaving defendant's employ, all without any objection by plaintiff. * * * The reality is that neither party here bargained for the demutualization proceeds. Moreover, neither party actually paid for them, because membership interests in a mutual insurance company are not paid for by policy premiums; such rights are 'acquired . . . at no cost, but rather as an incident of the structure of mutual insurance policies,' through operation of law and the company's charter and bylaws ... . * * * Neither party changed its position based on demutualization and plaintiff's conduct was neither tortious nor fraudulent. ... [W]e conclude that defendant failed to meet its burden to establish its affirmative defense and counterclaim alleging unjust enrichment." ***Schoch v. Lake Champlain OB-GYN, P.C.*, 2020 N.Y. Slip Op. 03444, Third Dept 6-18-20**

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA).

PETITIONER SOUGHT A REDUCTION OF HIS 1996 LEVEL THREE SEX OFFENDER CLASSIFICATION BUT COUNTY COURT DENIED THE PETITION WITHOUT REQUESTING AN UPDATED RECOMMENDATION FROM THE BOARD OF EXAMINERS OF SEX OFFENDERS IN VIOLATION OF THE CORRECTION LAW; ORDER REVERSED AND MATTER REMITTED.

The Third Department, reversing County Court, determined County Court's failure to request an updated recommendation from the Board of Examiners of Sex Offenders violated the Correction Law. Petitioner was classified a level three sex offender in 1996 and filed a petition to reduce his classification to level one: "The Correction Law requires that, upon receipt of such petition to modify a sex offender's level of notification, 'the court shall forward a copy of the petition to the [B]oard and request an updated recommendation pertaining to the sex offender' (Correction Law § 168-o [4]). Upon such a request, the Board must provide an updated recommendation ... . Generally, only '[a]fter reviewing the recommendation received from the [B]oard and any relevant materials and evidence' may the court grant or deny the petition for modification ... . Notwithstanding these statutory mandates, the record reflects that County Court failed to comply with them. The parties acknowledged at oral argument that an updated recommendation from the Board was not requested. Furthermore, the court did not review an updated recommendation before denying defendant's petition. Given that these procedural requirements of Correction Law § 168-o (4) were not met, the order must be reversed ...". ***People v. Kaminski*, 2020 N.Y. Slip Op. 03431, Third Dept 6-18-20**

UNEMPLOYMENT INSURANCE, LABOR LAW.

CRITERIA FOR DETERMINING WHETHER A CLAIMANT IS A SEPARATE BUSINESS ENTITY PURSUANT TO THE FAIR PLAY ACT CLARIFIED; MATTER REMITTED TO THE UNEMPLOYMENT INSURANCE APPEAL BOARD FOR A DECISION WHETHER CLAIMANT WAS AN EMPLOYEE OR AN INDEPENDENT CONTRACTOR USING THE CORRECT ANALYTICAL CRITERIA.

The Third Department, in a full-fledged opinion by Justice Devine, reversing the Unemployment Insurance Appeal Board and remitting the matter, clarified the meaning of the first criterion for determining whether claimant is an employee or an independent contractor pursuant to the so-called separate business entity test under the Fair Play Act. Here, the Board found that the claimant was an employee of Adelchi entitled to unemployment benefits, but the Third Department, agreeing with Adelchi's argument, held the Board had not applied the proper criteria to its analysis: "The issue [is] whether claimant could be viewed as a separate business entity and, in that regard, Adelchi argues that the Board misconstrued the first criterion of the separate business entity test by demanding proof of a total lack of direction or control over a business entity (see Labor Law § 861-c [2] [a]). Adelchi contends that this criterion of the separate business entity test instead codifies the common-law rule that '[a]n employer-employee relationship exists when the evidence demonstrates that the employer exercises control over the results produced by claimant or the means used to achieve the results' ... , which involves a fact-specific inquiry where 'the relevant indicia of control will necessarily vary depending on the nature of the work' ... . * * * We ... conclude that the first criterion in the separate business entity test does not require a contractor to show a total lack of direction or control over a business entity, but instead that their relationship as a whole did not show sufficient 'control over the results produced or the means used to achieve the results' by the contractor to reflect an employer-employee relationship ... . Although the factual findings already made by the Board would appear to permit the determination that Adelchi did not meet the first criterion under the proper analysis, we are constrained to reverse and remit so that the Board may answer that question in the first instance ...". ***Matter of Tuerk (Adelchi Inc.--Commissioner of Labor)*, 2020 N.Y. Slip Op. 03441, Third Dept 6-18-20**

ZONING, LAND USE, ENVIRONMENTAL LAW.

THE IMMEDIATE NEIGHBORS HAD STANDING TO CONTEST THE APPROVAL OF THE CONSTRUCTION OF A DOLLAR STORE; THE PLANNING BOARD DID NOT NEED TO SEND THE MATTER TO THE ZONING BOARD OF APPEALS TO INTERPRET A ZONING ORDINANCE WHICH WAS ONLY A GUIDELINE CONCERNING THE ALLOWED LENGTH OF A BUILDING FACADE; THE PLANNING BOARD TOOK THE REQUISITE HARD LOOK PURSUANT TO THE STATE ENVIRONMENTAL QUALITY REVIEW ACT (SEQRA).

The Third Department, reversing Supreme Court, noting that the abutting neighbors (Cady and Crawley) had standing to contest the town planning board's approval of the construction of a Dollar Store, determined Supreme Court should not have found that the matter must be sent to the Zoning Board of Appeals (ZBA) for a variance proceeding. Because the zoning ordinance in question, concerning the length of a building facade, was only a guideline, it was not necessary to involve the ZBA to interpret it: "Cady and Cawley's residence is directly adjacent to the proposed construction site, and the proposed retail store would be directly across the woods from their property. The store's main parking lot, which is located behind the store, is in the line of sight of Cady and Cawley's property. As a result, the store is likely to obstruct or interfere with the scenic views within the scenic viewshed overlay district from Cady and Cawley's property. Cady and Cawley have standing because they have demonstrated that they would suffer an "injury in fact - i.e., actual harm by the action challenged that differs from that suffered by the public at large — and that such injury falls within the zone of inter-

ests, or concerns sought to be promoted or protected by the statutory provision under which the agency has acted" ... . * * * ... [T]he Town zoning code states that "the length of any faÇade *should generally* not exceed 50 feet maximum [horizontal dimension]". Insofar as the subject provision lacks any compulsory language, ... this provision is deliberately phrased ... as a guideline, rather than as a prohibition; in other words, there was no requirement for a referral to the ZBA to determine the plain language of the statute. ... [O]ur review of the record reveals that the Planning Board underwent a nearly four-year process that involved in-depth environmental impact reports, multiple draft EISes [environmental impact statements] and public hearings, which formed the basis of the FEIS [final environments impact statement] and SEQRA [State Environmental Quality Review Act] findings statement. Accordingly, we find that the Planning Board complied with its procedural and substantive requirements under SEQRA ...". ***Matter of Arthur M. v. Town of Germantown Planning Bd.*, 2020 N.Y. Slip Op. 03440, Third Dept 6-18-20**

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