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CasePrepPlus

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FIRST DEPARTMENT

CIVIL PROCEDURE, FRAUD, CONSUMER LAW, APPEALS.

THE ATTORNEY GENERAL PROPERLY SERVED VALID SUBPOENAS ON THE VIRTUAL CURRENCY COMPANIES PURSUANT TO GENERAL BUSINESS LAW § 352 (MARTIN ACT) IN A FRAUD INVESTIGATION; ONCE THE MOTIONS TO VACATE OR MODIFY THE EX PARTE ORDER RE: THE ISSUANCE OF THE SUBPOENAS WAS DETERMINED, THE COURT NO LONGER HAD ANY AUTHORITY OVER THE ATTORNEY GENERAL'S INVESTIGATION; THEREFORE THE VIRTUAL CURRENCY COMPANIES' SUBSEQUENT MOTION TO DISMISS WAS NOT PROPERLY BEFORE SUPREME COURT OR THE APPELLATE DIVISION.

The First Department, in a full-fledged opinion by Justice Gesmer, determined that the Attorney General (petitioner) properly served subpoenas on the virtual currency companies (respondents) pursuant to General Business Law (GBL) § 352 (Martin Act) in a fraud investigation. The subpoenas were attacked on several grounds, all of which were rejected: (1) subject matter jurisdiction (arguing the virtual currency is not a commodity or a security): (2) long-arm jurisdiction (arguing insufficient contacts with New York); (3) ex parte order was not certified as required by GBL § 352 (court found this a technical not jurisdictional defect). But before addressing the issues raised on appeal, the Second Department held that the court did not have statutory authority under the GBL to address the respondents' motion to dismiss (which was the basis of the appeal). Under the GBL, once the motions to vacate or modify the subpoenas were determined, the court has no authority over the Attorney General's investigation: "... [U]nder the Martin Act's statutory scheme, once Supreme Court has issued an order responding to a GBL 354 application, it has no further role in the Attorney General's investigation, except to rule on a motion by either party to vacate or modify the order, as respondents made here. Accordingly, once the court issued the order authorized by GBL 354 on April 24, 2019, and modified it by order dated May 16, 2019, the proceeding before it was concluded and there was no action or proceeding for Supreme Court to 'dismiss' on May 21, 2019 when respondents filed their motion that resulted in the order now before the court. All that remained was the Attorney General's ongoing investigation, in which, by statute, the courts have no further role at this stage. Indeed, neither party cites to, and this Court is unaware of, any prior case in which the subject of a Martin Act investigation has moved to 'dismiss' an application by the Attorney General for an order pursuant to GBL 354." ***Matter of James v. iFinex Inc.*, 2020 N.Y. Slip Op. 03880, First Dept 7-9-20**

CRIMINAL LAW, EVIDENCE.

POLICE DID NOT HAVE REASONABLE SUSPICION DEFENDANT WAS ENGAGED IN CRIMINAL ACTIVITY AT THE TIME OF THE STOP AND PURSUIT; THEREFORE THE WEAPON DISCARDED BY DEFENDANT SHOULD HAVE BEEN SUPPRESSED.

The First Department, reversing Supreme Court and dismissing the indictment, determined the police who stopped and pursued the defendant did not have reasonable suspicion of criminal activity at the outset. So the weapon discarded by the defendant should have been suppressed: " 'Police pursuit is regarded as significantly impeding a person's freedom of movement, thus requiring justification by reasonable suspicion that a crime has been, is being, or is about to be committed' ... . By contrast, 'mere surveillance need not be justified by reasonable suspicion' … . Although the police actions began as permissible observation, while following defendant slowly in their car without turning on their lights or sirens ... , observation gave way to pursuit when the officers turned on their lights and sirens to cross the street against traffic and pull up ahead of defendant. Even crediting one of the officer's testimony that his intent was to get a better view and alert oncoming traffic, not to cut off, block, or alarm defendant, the objective impact of this maneuver was 'intimidating' and communicated 'an attempt to capture or . . . intrude upon [defendant's] freedom of movement' ... . Because it is undisputed that the circumstances before this police activity were not sufficient to create reasonable suspicion, it was unlawful and could not be validated by any subsequently acquired suspicion ... . When defendant discarded a handgun during the course of the illegal pursuit, he did not voluntarily abandon it and it should have been suppressed ...". ***People v. Collins*, 2020 N.Y. Slip Op. 03852, First Dept 7-9-20**

CRIMINAL LAW, MUNICIPAL LAW, ADMINISTRATIVE LAW, CONSTITUTIONAL LAW.

QUESTION OF FACT WHETHER FORFEITURE OF DEFENDANT'S VEHICLE WOULD BE A CONSTITUTIONALLY IMPERMISSIBLE EXCESSIVE FINE.

The First Department, reversing (modifying) Supreme Court, determined there was a question of fact whether forfeiture of defendant's vehicle would impose an excessive hardship and would constitute a constitutionally impermissible excessive fine. Defendant pled guilty to possession of a weapon which was found in his vehicle: "Plaintiff established by a preponderance of the evidence that defendant, the registered and titled owner of the vehicle, who pleaded guilty to criminal possession of a firearm, used the vehicle as a means of committing the crime of criminal possession of a firearm ... . In opposition, defendant, acting pro se, submitted an affidavit and supporting evidence in support of his argument that forfeiture of the vehicle, which he needed for getting to work with his tools and picking up his children from school, would impose an excessive and tremendous hardship on him and his family, particularly given that this is his sole criminal offense, and in light of other mitigating facts. This evidence is sufficient to raise an issue of fact as to whether, under all the factual circumstances, civil forfeiture of the vehicle would be grossly disproportionate to the offense and therefore a constitutionally impermissible excessive fine ...". ***Property Clerk, N.Y. City Police Dept. v. Nurse*, 2020 N.Y. Slip Op. 03866, First Dept 7-9-20**

PERSONAL INJURY, MUNICIPAL LAW, UTILITIES.

QUESTIONS OF FACT ABOUT THE OWNERSHIP OF A SIDEWALK UTILITIES GRATE PRECLUDED SUMMARY JUDGMENT IN THIS SLIP AND FALL CASE.

The First Department, reversing Supreme Court, in this slip and fall case, determined there were questions of fact about whether: (1) a sidewalk grate belonged to the abutting landowner (11 Madison) or the utility (Con Ed); and (2) whether the installation of the grate by the prior owner of the property constituted a special use of the sidewalk: "The record does not demonstrate conclusively that the owner of the sidewalk vault grate on which plaintiff Marie Saez allegedly tripped was defendant Con Ed, rather than the 11 Madison defendants, who owned the property abutting the sidewalk where the grate was located. There is an affidavit by the president of defendant Sapir Realty Management Corp. averring that the grates were already installed when the 11 Madison defendants acquired the property in 2003 and that the 11 Madison defendants had never been advised by Con Ed that they had any responsibility for maintaining the grates over Con Ed's utility vaults or presented with any plans concerning the grates. There is also evidence that the 11 Madison defendants' predecessor in interest had purchased and installed the non-standard vault gratings, and there is a note on the plot plan for the vault construction stating that this entity was to 'supply, install and maintain' the non-standard gratings it had requested. As issues of fact exist whether Con Ed or the 11 Madison defendants owned the gratings, it cannot be concluded that Con Ed was responsible for maintaining the gratings and the area around them in safe condition ... . Issues of fact also exist as to whether the 11 Madison defendants' predecessor's installation of the non-standard vault grates constitutes a special use of the sidewalk by these defendants. Although there is evidence that they had no access to the grates and the vault, the evidence is not conclusive. Moreover, there is evidence that the transformers in the vaults provided electrical service solely to their property ...". ***Saez v. Sapir Realty Mgt. Corp.*, 2020 N.Y. Slip Op. 03863, First Dept 7-9-20**

SECOND DEPARTMENT

CIVIL PROCEDURE, CORPORATION LAW.

DEFENDANT'S MOTION TO VACATE ITS DEFAULT BECAUSE IT WAS NEVER SERVED WITH THE SUMMONS AND COMPLAINT SHOULD HAVE BEEN GRANTED; THE ADDRESS ON FILE WITH THE SECRETARY OF STATE WAS INCORRECT.

The Second Department, reversing Supreme Court, determined defendant's motion to vacate its default because it was never served with the summons and complaint should have been granted. The defendant demonstrated the address on file with the Secretary of State was incorrect and the failure to update the address was not a deliberate attempt to avoid service: " 'CPLR 317 provides, generally, that a defendant is entitled to vacatur of a default judgment if it is established that he [or she] did not receive personal notice of the summons in time to defend and that he [or she] has a meritorious defense'... . 'It is also well established that service on a corporation through delivery of process to the Secretary of State is not personal delivery' to the corporation or to an agent designated under CPLR 318' ... . While it is not necessary for a defendant moving pursuant to CPLR 317 to show a reasonable excuse for its delay ... , a defendant is not entitled to relief under that statute where its failure to receive notice of the summons 'was a result of a deliberate attempt to avoid such notice' ... . Here, the defendant established its entitlement to relief from its default under CPLR 317 by demonstrating that the address on file with the Secretary of State at the time the summons and complaint were served was incorrect, and that it did not receive actual notice of the summons and complaint in time to defend itself against this action ... . Contrary to the plaintiff's contention, an order dated August 21, 2013, issued in connection with the 2009 action, which was mailed to the defendant at the subject property, did not place the defendant on notice that the address on file with the Secretary of State was incorrect ... . In addition, the evidence does not suggest that the defendant's failure to update its address with the Secretary of State

constituted a deliberate attempt to avoid service of process ... . Moreover, the defendant met its burden of demonstrating the existence of a potentially meritorious defense ...". ***Golden Eagle Capital Corp. v. Paramount Mgt. Corp.*, 2020 N.Y. Slip Op. 03770, Second Dept 7-8-20**

CIVIL PROCEDURE, LANDLORD-TENANT, CONTRACT LAW.

TENANT'S MOTION TO REMOVE AN EVICTION PROCEEDING FROM CIVIL COURT AND CONSOLIDATE IT WITH A BREACH-OF-LEASE ACTION IN SUPREME COURT SHOULD HAVE BEEN GRANTED; LEASE PROVISIONS PRECLUDED THE COUNTERCLAIMS AND EQUITABLE RELIEF IN THE EVICTION PROCEEDING, BUT THAT RELIEF IS AVAILABLE IN THE SUPREME COURT PROCEEDING.

The Second Department, reversing Supreme Court, determined the plaintiff's (tenant's) motion pursuant to CPLR 602(b) to remove a summary proceeding (eviction proceeding) from Civil Court and consolidate it with the breach-of-lease proceeding in Supreme Court should have been granted: "On January 1, 2015, the plaintiff executed a five-year commercial lease with the defendant for a condominium unit in a building in Brooklyn for the purpose of operating a medical practice on the premises. In May 2017, the defendant commenced a summary proceeding against the plaintiff in the Civil Court, Kings County, to recover possession of the premises and unpaid rent. In October 2017, the plaintiff commenced this action against the defendant in the Supreme Court, Kings County, inter alia, to recover damages for breach of the lease. The plaintiff also moved, in effect, pursuant to CPLR 602(b) to remove the summary proceeding from the Civil Court to the Supreme Court and to consolidate it with the instant action. ... Although the Civil Court is the preferred forum for the resolution of landlord-tenant disputes when the tenant may obtain full relief in a summary proceeding ... , here, the lease provisions preclude the plaintiff from asserting counterclaims in the summary proceeding and the equitable relief sought by the plaintiff in the Supreme Court is unavailable to it in the summary proceeding in Civil Court ...". ***Barkagan v. S&L Star Realty, LLC*, 2020 N.Y. Slip Op. 03759, Second Dept 7-8-20**

CRIMINAL LAW, APPEALS.

IN THIS *BATSON* CHALLENGE CASE, THE MAJORITY HELD THE DEFENSE'S FAILURE TO ADDRESS THE PROSECUTOR'S STATED REASON FOR EXCLUDING A PROSPECTIVE JUROR, I.E. THAT THE PROSPECTIVE JUROR WAS NOT AFRICAN-AMERICAN, PRECLUDED APPEAL ON THAT ISSUE; THE DISSENT ARGUED THE THREE-STEP *BATSON* PROCEDURE WAS NOT FOLLOWED WITH RESPECT TO THAT JUROR, REQUIRING REVERSAL.

The Second Department, over an extensive two-justice dissent, determined defendant's *Batson* challenges were properly handled by the court and properly denied. The defense challenged the exclusion of several African-American potential jurors. With respect to one of the potential jurors, Putsam, the prosecutor answered the challenge by simply saying Putsam was not African-American. Although all three stages of a *Batson* challenge were addressed with respect to the other challenged jurors, nothing further was argued with respect to Putsam. The dissent argued the required three-step process was not followed with Putsam, requiring reversal and a new trial: "A review of the trial transcript leads to the inescapable conclusion that the Supreme Court engaged in all three analytical steps required by *Batson v. Kentucky* and our corresponding case authorities. The defendant made no argument of any kind as to juror Pustam during step three. Accordingly, she has failed to preserve the specific argument which she raises for the first time on appeal, which is based, in part, at least, on facts that are outside the record, to wit, that Pustam's Trinidadian heritage qualifies as 'African-American.' Indeed, any appellate consideration of this new argument would require this Court to (1) assume facts not within this record; and (2) more importantly, ignore the fact that defense counsel did not dispute or challenge the People's contention that Pustam was not 'African-American.' The Court of Appeals has been clear that '[w]hen, as here, a party raises an issue of a pattern of discrimination in excluding jurors, and the court accepts the race neutral reasons given, the moving party must make a specific objection to the exclusion of any juror still claimed to have been the object of discrimination ...'. The defendant's failure to discuss juror Pustam at all during step three suggests that counsel was not challenging any comment or determination made by the Supreme Court during step two as to Pustam. Similarly, the court's exception noted unilaterally on the record at the conclusion of step three failed to preserve any 'specific' argument for the defendant on appeal, as is expressly required by the Court of Appeals. Therefore, without preservation, our analysis of this appeal cannot reach the cases of People v. Pescara (162 AD3d 1772) and People v. Chance (125 AD3d 993), cited by the dissent in support of a Batson reversal on the basis of skin color." ***People v. Taylor*, 2020 N.Y. Slip Op. 03807, Second Dept 7-8-20**

CRIMINAL LAW, EVIDENCE.

PROPER FOUNDATION FOR EXPERT OPINION EVIDENCE FINDING THAT THE TESTED SUBSTANCES CONTAINED COCAINE WAS NOT LAID AND THE TESTIMONY WAS THEREFORE INADMISSIBLE; CONVICTIONS ON TWO DRUG-POSSESSION COUNTS REVERSED, NEW TRIAL ORDERED.

The Second Department, reversing defendant's conviction on two drug possession counts, determined the People did not provide a proper foundation for the testimony of two experts who tested the substances alleged to contain cocaine: "The opinion testimony by these experts was inadmissible, because the People failed to lay a foundation for the competence of the testimony. '[A]n expert who tests a substance for the presence of cocaine may not rely solely upon a test involving a

comparison of the substance at issue to a known standard when the accuracy of the known standard is not established' ... . Here, the evidence adduced at trial reflected that Lin and Lopez each tested the purity of a sample of the substance recovered from the defendant by using a test which relied upon a comparison to a known standard. The People failed to introduce any direct evidence as to the accuracy of the standard used for comparison. Although an expert's testimony that a substance contains cocaine is admissible when it is 'not based solely upon comparative tests using a known standard but also on a series of other tests not involving known standards' ... , here, the People failed to establish that either Lin or Lopez performed any other tests that did not involve comparison to a known standard. Thus, the Supreme Court should not have permitted their testimony, and a new trial is required on the counts charging criminal possession of a controlled substance in the fifth degree ..". ***People v. Campbell*, 2020 N.Y. Slip Op. 03800, Second Dept 7-8-20**

FAMILY LAW, CRIMINAL LAW.

FAMILY COURT ABUSED ITS DISCRETION BY DENYING THE REQUEST FOR AN ADJOURNMENT IN CONTEMPLATION OF DISMISSAL IN THIS JUVENILE DELINQUENCY PROCEEDING.

The Second Department, reversing Family Court, determined Family Court abused its discretion in denying appellant's request 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 ... . Although, as it is often stated, a respondent is not entitled to an adjournment in contemplation of dismissal merely because this was his or her 'first brush with the law' ... , a respondent's criminal and disciplinary history is nevertheless relevant to a court's discretionary determination of whether to adjourn a proceeding in contemplation of dismissal ... . Other relevant factors include, but are not necessarily limited to, a respondent's history of drug or alcohol use ... , a respondent's association with gang activity … , a respondent's academic and school attendance record ... , the nature of the underlying incident ... , a respondent's decision to accept responsibility for his or her actions ... , any 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 respondent's 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(1) for an adjournment in contemplation of dismissal. This proceeding constituted the appellant's first contact with the court system, the appellant took responsibility for his actions, and the record demonstrates that he had learned from his mistakes.' ***Matter of Brian M.*, 2020 N.Y. Slip Op. 03785, Second Dept 7-8-20**

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

PLAINTIFF BANK DID NOT STRICTLY COMPLY WITH THE NOTICE PROVISIONS OF REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL) 1304 AND DID NOT DEMONSTRATE DEFENDANT HAD DEFAULTED IN THIS FORECLOSURE ACTION; THE DECISION ILLUSTRATES THE LEVEL OF STRICT COMPLIANCE WITH RPAPL 1304 WHICH IS REQUIRED.

The Second Department, reversing Supreme Court, determined plaintiff bank was not entitled to summary judgment in this foreclosure action. Plaintiff did not demonstrate compliance with the notice provisions of Real Property Actions and Proceedings Law (RPAPL) 1304 and did not demonstrate defendant defaulted. The decision illustrates the level of strict compliance with RPAPL 1304 which is required by the courts: "The version of RPAPL 1304(2) as it existed at that time required that the 90-day notice provide a list of five housing counseling agencies 'that serve the region where the borrower resides.' ... Here, the notice prepared by the plaintiff listed, as one of the required five housing counseling agencies, an agency located more than 300 miles away from the defendants' residence. ... [I]t is the plaintiff's burden, on its motion for summary judgment, to demonstrate its strict compliance with the applicable provisions of RPAPL 1304. By failing to submit evidence that the Watertown agency served the region wherein the defendants resided, the plaintiff failed to establish its prima facie entitlement to judgment as a matter of law and thus its motion for such relief should have been denied ... . Additionally, the affidavit submitted by the plaintiff for the purpose of demonstrating that it properly served its 90-day notice did not specify that the notice was served in an envelope that was separate from any other mailing or notice (see RPAPL 1304 [2]). While the plaintiff attempted to remedy this deficiency in its reply papers, even assuming that its reply affidavit may properly be considered ... , that affidavit contained only a conclusory assertion that the mailing was done in a separate envelope, with no assertion by the affiant that she had any personal knowledge of the actual mailing or proof of a standard office mailing procedure designed to ensure that items are properly addressed and mailed ... . The plaintiff also failed to establish, prima facie, the defendants' default in payment. While the affidavit submitted by the plaintiff made the requisite showing that the affiant was familiar with the plaintiff's recordkeeping practices and procedures with respect to the defendants' payment history, the affiant failed to submit any business record substantiating the alleged default. Conclusory affidavits lacking a factual basis are without evidentiary value ...". ***USBank N.A. v. Haliotis*, 2020 N.Y. Slip Op. 03819, Second Dept 7-8-20**

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

PLAINTIFF DID NOT DEMONSTRATE COMPLIANCE WITH THE NOTICE PROVISIONS OF REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL) 1304 AND 1306 IN THIS FORECLOSURE ACTION; PROOF REQUIREMENTS EXPLAINED IN SOME DEPTH.

The Second Department, reversing Supreme Court, determined the plaintiff loan services company (Aurora/Nationstar) did not demonstrate compliance with the notice requirements of Real Property Actions and Proceedings Law (RPAPL) 1304 and 1306. Therefore, Aurora's motion for summary judgment in this foreclosure action should not have been granted. The court, noting that "lack of notice" may be raised at any time, explained defendant did not waive the "lack of notice" defense because defendant denied the plaintiff's complaint-allegations of compliance and raised the issue in opposition to plaintiff's motion for summary judgment. The Second Department further found defendant was not entitled to summary judgment because "lack of notice" was not demonstrated as a matter of law. The decision provides a valuable explanation of the proof requirements for compliance with RPAPL 1304 and 1306: "In support of its motions, Aurora submitted the affidavit of Jerrell Menyweather, a document execution specialist employed by Nationstar, along with a copy of a 90-day notice addressed to the defendant, and a proof of filing statement pursuant to RPAPL 1306 from the New York State Banking Department. Although Menyweather stated in the affidavit that the RPAPL notices were sent to the defendant at her last known address and the subject property, Menyweather did not have personal knowledge of the mailing, and Aurora failed to provide any documents to prove that the notices were actually mailed ... . Aurora also failed to submit a copy of any United States Post Office document indicating that the notices were sent by registered or certified mail as required by the statute ... . Furthermore, Menyweather did not aver that he was familiar with Aurora's mailing practices and procedures, and therefore did not establish proof of a standard office practice and procedure designed to ensure that items are properly addressed and mailed ...". ***Nationstar Mtge., LLC v. Matles*, 2020 N.Y. Slip Op. 03793, 7-8-20**

PERSONAL INJURY, CIVIL PROCEDURE, EVIDENCE.

ALTHOUGH A *FRYE* HEARING WAS NOT NECESSARY BECAUSE BIOMECHANICAL ENGINEERING IS AN ACCEPTED SCIENTIFIC THEORY, THE BIOMECHANICAL ENGINEER'S TESTIMONY SHOULD NOT HAVE BEEN ADMITTED IN THIS REAR-END COLLISION CASE; NO FOUNDATION WAS LAID FOR THE ENGINEER'S TESTIMONY; PLAINTIFF'S MOTION TO SET ASIDE THE DEFENSE VERDICT SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined plaintiff's motion to set aside the defense verdict in this rear-end collision traffic accident case should have been granted. Although Supreme Court was correct in finding that a *Frye* hearing was not necessary because biomechanical engineering is an accepted scientific theory, no proper foundation was laid for the defense expert's (Toosi's) testimony: "The court properly relied upon a decision of this Court and a decision of the Appellate Term, First Department, in determining that biomechanical engineering is a scientific theory accepted in the field ... . Separate and distinct from the *Frye* inquiry is the 'admissibility question applied to all evidence—whether there is a proper foundation—to determine whether the accepted methods were appropriately employed in a particular case' ... . "The question is whether the expert's opinion sufficiently relates to existing data or is connected to existing data only by the ipse dixit of the expert" ... . Here, the defendant failed to establish that Toosi's opinions related to existing data and were the result of properly applied accepted methodology ... . Thus, Toosi's testimony should have been precluded." ***Guerra v. Ditta*, 2020 N.Y. Slip Op. 03771, Second Dept 7-8-20**

PERSONAL INJURY, EVIDENCE, JUDGES.

DEFENDANT DID NOT DEMONSTRATE WHEN THE AREA WHERE PLAINTIFF ALLEGEDLY SLIPPED AND FELL WAS LAST INSPECTED OR CLEANED; SUPREME COURT SHOULD NOT HAVE GRANTED DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ON A GROUND NOT RAISED BY THE PARTIES, I.E., FINDING THE DEFECT TRIVIAL.

The Second Department, reversing Supreme Court, determined defendant's motion for summary judgment in this staircase slip and fall case should not have been granted. The defendant did not demonstrate it did not have constructive notice of salt (used to melt ice) on the steps. Supreme Court should not have granted the motion on the ground the salt constituted a trivial defect because the parties did not raise that issue: "To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it' ... . To meet its burden on the issue of lack of constructive notice, a defendant must offer some evidence as to when the accident site was last cleaned or inspected prior to the accident ... . 'Mere reference to general cleaning practices, with no evidence regarding any specific cleaning or inspection of the area in question, is insufficient to establish a lack of constructive notice' ... . Here, in support of the motion, the defendant submitted, inter alia, the deposition testimony of the part-time porter and the deposition testimony of the property manager of the defendant's building, which merely provided evidence as to the defendant's general cleaning practices, with no evidence as to when the area at issue was last inspected or cleaned prior to the accident. The Supreme Court should not have granted the defendant's motion on the ground that

the presence of the salt on the step at issue constituted a trivial defect since the parties did not raise this issue ...". ***Johnson v. 101-105 S. Eighth St. Apts. Hous. Dev. Fund Corp.*, 2020 N.Y. Slip Op. 03773, Second Dept 7-8-20**

PERSONAL INJURY, MUNICIPAL LAW, EDUCATION-SCHOOL LAW.

PLAINTIFF'S MOTION FOR LEAVE TO FILE A LATE NOTICE OF CLAIM IN THIS NEGLIGENT SUPERVISION AND NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS ACTION AGAINST THE DEPARTMENT OF EDUCATION STEMMING FROM THE ALLEGED RAPE OF PLAINTIFF ON SCHOOL GROUNDS SHOULD HAVE BEEN GRANTED.
The Second Department, reversing (modifying) Supreme Court, determined plaintiff's motion for leave to file a late notice of claim should have been granted for the negligent supervision and negligent infliction of emotional distress causes of action against the Department of Education stemming from the the sexual assault of the plaintiff on school grounds: "The DOE had actual knowledge, within the statutory period or a reasonable time thereafter, of the facts constituting [the] claims, which arose as a result of the alleged rape that occurred on September 28, 2017 ... . Furthermore, in light of the DOE's actual knowledge of the essential facts constituting the claims of negligent supervision and negligent infliction of emotional distress, the plaintiff met her initial burden of establishing a lack of substantial prejudice to the DOE in maintaining a defense with respect to those claims ... . In opposition, the DOE failed to make a particularized evidentiary showing that it would be substantially prejudiced if the late notice with respect to those claims was allowed ... . '[W]here there is actual notice and an absence of prejudice, the lack of a reasonable excuse will not bar the granting of leave to serve a late notice of claim' ...". ***Doe v. City of New York*, 2020 N.Y. Slip Op. 03768, Second Dept 7-8-20**

PERSONAL INJURY, MUNICIPAL LAW, VEHICLE AND TRAFFIC LAW.

QUESTION OF FACT WHETHER THE POLICE OFFICER, ANSWERING A CALL, ACTED RECKLESSLY IN THIS TRAFFIC ACCIDENT CASE.
The Second Department, reversing Supreme Court, determined there was a question of fact whether the defendant police officer (McMahon) acted recklessly in this traffic accident case. The officer, responding to a call, passed a line of cars by straddling the yellow line without siren or lights and struck plaintiff as plaintiff was attempting to make a left turn: " '[T]he reckless disregard standard of care in Vehicle and Traffic Law § 1104(e) only applies when a driver of an authorized emergency vehicle involved in an emergency operation engages in the specific conduct exempted from the rules of the road by Vehicle and Traffic Law § 1104(b). Any other injury-causing conduct of such a driver is governed by the principles of ordinary negligence'... . Conduct exempted from the rules of the road by Vehicle and Traffic Law § 1104(b) includes disregarding regulations governing the direction of movement or turning in specified directions ... . Here, the defendants established that the reckless disregard standard of Vehicle and Traffic Law § 1104 was applicable to McMahon's conduct because he was responding to a radio call of a motor vehicle accident with unknown injuries ... . However, the defendants failed to establish their prima facie entitlement to judgment as a matter of law because their moving papers presented a triable issue of fact regarding whether McMahon was reckless in straddling the double-yellow line to pass a row of vehicles without using his warning siren or lights when he collided with the plaintiff's vehicle ...". ***Rodriguez-Garcia v. Southampton Police Dept.*, 2020 N.Y. Slip Op. 03813, Second Dept 7-8-20**

THIRD DEPARTMENT

ADMINISTRATIVE LAW.

THE ADMINISTRATIVE LAW JUDGE AND THE HEARING COMMITTEE HAD THE DISCRETION TO ACCEPT A LATE ANSWER FROM PETITIONER-PHYSICIAN WHO WAS FACING REVOCATION OF HER MEDICAL LICENSE; THE REJECTION OF THE ANSWER ON THE GROUND THE ALJ AND HEARING COMMITTEE DID NOT HAVE THE DISCRETION TO ACCEPT IT AS A MATTER OF LAW WAS ARBITRARY AND CAPRICIOUS.
The Third Department determined the Administrative Law Judge's (ALJ's) and the Bureau of Professional Medical Conduct (BPMC) Hearing Committee's rejection of the petitioner-physician's attempt to file a late answer to the charges was arbitrary and capricious. The ALJ and the Hearing Committee determined they did not have discretion, as a matter of law, under Public Health Law section 230 to accept the late answer. The Third Department held the ALJ and the Hearing Committee could have exercised discretion and accepted the answer: "... [T]he ALJ and the Hearing Committee concluded that they were precluded, as a matter of law, from accepting petitioner's answer. We do not read the statute as imposing such a bar. Under the circumstances presented, we conclude that the ALJ and the Hearing Committee had the discretion to decide whether to accept the answer. The statutory language mandating the timely filing of an answer was added to Public Health Law § 230 (10) (c) (2) in 1996 ... . Prior to the amendment, the filing of an answer was discretionary. The legislative history indicates that the amendment's purpose in mandating the filing of an answer was to 'expedite proceedings by focusing the proceedings on matters in dispute' ... . Allowing a licensee to submit an answer prior to the first hearing date does not compromise this statutory objective. Notably, in *Matter of Tribeca Med., P.C. v. New York State Dept. of Health* (83 AD3d 1135 [2011], lv denied 17 NY3d 707 [2011]), this Court determined that the ARB [Administrative Review Board for Professional

Medical Conduct] possessed the discretionary authority to relieve a licensee of a default in answering charges of professional conduct ... . It follows that the ALJ and the Hearing Committee had the discretionary authority to accept an answer filed after the 10-day deadline, but before the hearing. The flaw here is that the ALJ and the Hearing Committee failed to exercise any discretion in rejecting the answer, simply concluding that they lacked the legal authority to do so. Moreover, the ARB incorrectly declined to even address the issue as a procedural matter for the ALJ to resolve. These errors of law render the ARB's determination arbitrary and capricious." ***Matter of Offor v. Zucker*, 2020 N.Y. Slip Op. 03835, Third Dept 7-9-20**

CRIMINAL LAW, EVIDENCE.

GRAND JURY EVIDENCE WAS LEGALLY SUFFICIENT IN THIS AGGRAVATED UNLICENSED OPERATION CASE; THE INDICTMENT SHOULD NOT HAVE BEEN DISMISSED.

The Third Department, reversing County Court, determined, on the People's appeal, the evidence presented to the grand jury was legally sufficient to support the charged crimes (aggravated unlicensed operation of a motor vehicle). One issue was whether the ID defendant showed to the officer at the traffic stop was sufficient to connect the defendant to the Department of Motor Vehicles abstract: "In view of defendant's admission to the police officer during the stop that he did not have a driver's license, as well as the information in the certified abstract from the Department of Motor Vehicles, the evidence was legally sufficient to support the charges in the indictment ... . Furthermore, by producing the identification card to the police officer, defendant adopted the information therein, including his date of birth ... . Accordingly, contrary to defendant's assertion ... , there was admissible evidence connecting defendant to the abstract. Because the record discloses that the evidence before the grand jury was legally sufficient to support the charged crimes, the indictment must be reinstated ...". ***People v. Reid*, 2020 N.Y. Slip Op. 03827, Third Dept 7-9-20**

CRIMINAL LAW, EVIDENCE.

ALL THE ITEMS IN DEFENDANT'S CAR WERE NOT LISTED IN A WRITTEN INVENTORY, IN VIOLATION OF THE POLICE DEPARTMENT'S INVENTORY-SEARCH POLICY; THEREFORE THE FIREARM WAS NOT FOUND DURING A VALID INVENTORY SEARCH AND SHOULD HAVE BEEN SUPPRESSED.

The Third Department, reversing Supreme Court, over a dissent, determined the firearm seized from defendant's car before the car was towed from a crash scene was not found in a valid inventory search. No written inventory was created. The Third Department held that, under the Albany Police inventory search policy, which the court found reasonable, all items in the vehicle should be listed in written inventory. The dissent argued the policy only required "valuable" property to be listed: "Despite the reasonableness of the policy, [Officer] Elliott's testimony reveals that he did not comply with it and, therefore, Supreme Court erred in denying defendant's suppression motion. To that end, Elliott testified that it is the Albany Police Department's policy, as related to inventory searches, that '[a]nything valuable is . . . logged and placed into our property for safekeeping.' Elliott further testified that, because nothing of value was found in the car, nothing was seized and an inventory list was not created relative to the contents of the vehicle. This testimony conflates the requirement that a written inventory always be created with the discretion given to police officers to determine which property is valuable and, as such, must be taken into custody for safekeeping. Thus, from his testimony, it is apparent that Elliott did not comply with the policy regarding inventory searches, as it clearly mandates that an inventory search always be completed and the vehicle be 'completely inventoried,' not allowing for discretion of the individual officers ...". ***People v. Jones*, 2020 N.Y. Slip Op. 03826, Third Dept 7-9-20**

CRIMINAL LAW, EVIDENCE, ATTORNEYS, JUDGES, IMMIGRATION LAW.

DESPITE HAVING MADE A PRIOR MOTION TO VACATE HIS CONVICTION ON INEFFECTIVE ASSISTANCE GROUNDS, DEFENDANT WAS ENTITLED TO A HEARING ON THE INSTANT MOTION WHICH WAS SUPPORTED BY AN AFFIDAVIT BY HIS ATTORNEY WHO ACKNOWLEDGED HE TOLD DEFENDANT A GUILTY PLEA WOULD NOT RESULT IN DEPORTATION.

The Third Department, reversing County Court, determined defendant was entitled to a hearing on his motion to vacate his conviction on ineffective assistance grounds. The fact that defendant had made a similar motion which was denied did not preclude the instant motion which, unlike the prior motion, was supported by an affidavit from the attorney who handled defendant's guilty plea. Defendant argued he would not have pled guilty had he been aware of the deportation consequences: "Contrary to the People's contention, defendant's failure to include an affidavit from this attorney on the first CPL article 440 motion did not preclude him from filing the second CPL article 440 motion that did contain such an affidavit (see CPL 440.10 [3] [c]...). We further note that County Court's denial of defendant's motion was not mandatory as CPL 440.10 (3) provides that 'in the interest of justice and for good cause shown [the court] may in its discretion grant the motion if it is otherwise meritorious and vacate the judgment' … . In that vein, we note the numerous statements made in the supporting affidavit of defendant's former attorney with respect to his representation of defendant in his 2000 criminal matter. The affidavit indicates that, upon being retained by defendant, his sole focus was on negotiating a favorable split sentence that would allow defendant to be released from custody as soon as possible. He admits that, in pursuing a favorable sentence, he did not conduct any investigation of the facts surrounding the underlying criminal offense, initiate any preindictment

discovery or otherwise raise what he now identifies are arguably fatal deficiencies in the charges brought against defendant. With respect to defendant's allegation that he was affirmatively misinformed regarding the potential immigration consequences of entering a guilty plea to a class C drug felony, the attorney candidly concedes that, despite being aware of the fact that defendant was only a lawful permanent resident and not a citizen of the United States at the time that defendant entered his September 2000 guilty plea, he specifically advised defendant that his guilty plea would have no effect on his lawful permanent resident status and that he would not be deported from the country." ***People v. Perez*, 2020 N.Y. Slip Op. 03825, Third Dept 7-9-20**

FAMILY LAW, CIVIL PROCEDURE.

FAMILY COURT ALLOWED MOTHER TO TESTIFY BY TELEPHONE WITHOUT WARNING HER A NOTARY SHOULD BE PRESENT SO SHE COULD BE SWORN AND THEN REJECTED MOTHER'S TESTIMONY BECAUSE IT WAS NOT SWORN; NEW HEARING ORDERED.

The Third Department, reversing Family Court in this child support violation proceeding, determined that mother's testimony by telephone should not have been rejected because it was unsworn. Family Court allowed mother to testify and mother, who was facing incarceration for the child-support violation, had not been warned to have a notary present so her testimony could be sworn: "In noting the lack of a notary present with the mother to swear her in, Family Court correctly identified a critical issue about to unfold at the hearing, but then took no timely corrective action to address the issue, permitted the unsworn questioning to occur and then, in its written decision, found fault with the very unsworn testimony methodology that it had permitted to occur at the hearing. The correct course of action would have been for the court to explain up front that, if the mother wished to testify, she would have to do so under oath and then administer the oath itself if the mother had not made other suitable arrangements. Given that the mother was facing a potential period of incarceration of up to six months in the event that Family Court determined that her failure to pay child support was willful (see Family Ct. Act § 454 [3] [a]), the mother's testimony was essential to the court's determination as to whether she had had the ability to pay or willfully disobeyed the prior support order. Thus, having permitted the mother to give unsworn testimony telephonically, it was error for Family Court to thereafter sua sponte rule, nearly 1½ months after the hearing, that it would not credit the mother's testimony given that it was not sworn." ***Matter of Burnett v. Andrews-Dyke*, 2020 N.Y. Slip Op. 03838, Third Dept 7-9-20**

FAMILY LAW, EVIDENCE, JUDGES.

MOTHER PRESENTED SUFFICIENT EVIDENCE IN SUPPORT OF HER PRO SE PETITION FOR A MODIFICATION OF CUSTODY TO WARRANT A HEARING.

The Third Department, reversing Family Court, determined that mother presented enough evidence in her pro se petition for a modification of custody to warrant a hearing: " 'A parent seeking to modify an existing custody order first must demonstrate that a change in circumstances has occurred since the entry thereof that is sufficient to warrant the court undertaking a best interests analysis in the first instance; assuming this threshold requirement is met, the parent then must show that modification of the underlying order is necessary to ensure the child's continued best interests' ... . '[I]n determining whether a pro se petitioner made a sufficient evidentiary showing to warrant a hearing, we construe the pleadings liberally and afford the petitioner the benefit of every favorable inference. As a general matter, custody determinations should be rendered only after a full and plenary hearing' ... . In her petition, the mother alleged, among other things, that the father repeatedly attempted to take the child with him to a prison to visit an inmate who was convicted of murder and on at least one occasion was successful. She also asserted that the child had no desire to accompany the father on these visits and, in fact, they caused the child significant distress. Furthermore, the mother alleged in her petition that the father has refused to allow any additional parenting time, despite numerous requests, and that he has threatened to take away her court-ordered parenting time. Finally, the mother averred that she has completed therapeutic counseling, is continuing with further therapy and is a fit parent. We find that the pro se petition is sufficient to warrant an evidentiary hearing based on these allegations. 'We also note that the prior custody order was entered upon consent of the parties and there has not . . . been a plenary hearing regarding custody' since 2014 ...". ***Matter of Kimberly H. v. Daniel I.*, 2020 N.Y. Slip Op. 03830, Third Dept 7-9-20**

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