CasePrepPlus

July 31, 2020

An advance sheet service summarizing recent and significant New York appellate cases

Editor: **Bruce Freeman**

NEW YORK STATE BAR ASSOCIATION
Serving the legal profession and the community since 1876

FIRST DEPARTMENT

ATTORNEYS, ARBITRATION.

THE ATTORNEY'S FAILURE TO NOTIFY THE CLIENT OF THE CLIENT'S RIGHT TO ARBITRATE A FEE DISPUTE WITHIN TWO YEARS OF WHEN THE LEGAL SERVICES WERE RENDERED PRECLUDES THE ATTORNEY'S ACTION FOR PAYMENT OF THE FEE.

The First Department, in a full-fledged opinion by Justice Webber, in a matter of first impression, determined plaintiff-attorney's failure to timely notify defendant-client of the right to arbitrate a fee dispute required dismissal of the attorney's action seeking attorney's fees. The Committee on Fee Disputes and Conciliation (Committee) cannot hear fee disputes more that two years after legal services were rendered. Plaintiff-attorney did not notify defendant within two years and the Committee refused to hold the arbitration on that ground: "22 NYCRR 137 gives clients the right to demand arbitration of any fee dispute in an amount between $1,000 and $50,000 (22 NYCRR 137.1[b][2]). The failure of an attorney to participate in fee arbitration is a violation of the ethical rules (Rules of Professional Conduct 22 NYCRR 1200.00) rule 1.4; (see 22 NYCRR 137.11). 137.1 sets out the limitations on the disputes that will be heard by the Committee. This includes matters outside the dollar range, claims inextricably intertwined with malpractice claims, and as relevant here, claims where no legal services have been performed in the prior two years (22 NYCRR 137.1[b][6]). ... Fee arbitration is mandatory if requested by a client or a former client. It is a right of the client. Where, as in this case, an attorney, through their own delay deprives the client of that right, the attorney cannot in good faith claim compliance with the procedures of Part 137. Not only would this effectively give counsel the option of whether to arbitrate, because counsel could control whether the dispute began in two years or less, it would also be directly contrary to the rules, which provide that it is the client's choice." ***Filemyr v. Hall*, 2020 N.Y. Slip Op. 04238, First Dept 7-23-20**

CIVIL PROCEDURE, INSURANCE LAW, PERSONAL INJURY.

ALTHOUGH DEFENDANTS' INSURER OBTAINED A DECLARATORY JUDGMENT (BY DEFAULT) THAT IT WAS NOT OBLIGATED TO PAY NO-FAULT BENEFITS TO PLAINTIFF PEDESTRIAN IN THIS TRAFFIC ACCIDENT CASE, THE DECLARATORY JUDGMENT DID NOT PRECLUDE, UNDER EITHER CLAIM OR ISSUE PRECLUSION, PLAINTIFF'S PERSONAL INJURY ACTION AGAINST DEFENDANTS.

The First Department, in a full-fledged opinion by Justice Renwick, after a comprehensive analysis of res judicata and collateral estoppel, refusing to follow the Second Department, determined a default judgment in a declaratory judgment action brought against plaintiff by defendant driver/owner's insurer (Nationwide) did not preclude plaintiff's subsequent personal injury action against defendants. Plaintiff alleged he was walking his motorcycle across a street when he was struck by defendants' vehicle. Nationwide brought the declaratory judgment action to obtain a ruling it was not obligated to pay no-fault benefits to plaintiff and plaintiff did not appear in that action: "Claim preclusion prevents relitigation between the same parties, or those in privity with them, of a cause of action arising out of the same transaction or series of transactions that either were raised or could have been raised in the prior proceeding ... . As the Court of Appeals has stressed, this 'identity' requirement is a 'linchpin of res judicata,' which applies 'only when a claim between the parties has been previously brought to a final conclusion' ... . Stated differently, the 'doctrine of res judicata only bars additional actions between the same parties on the same claims based upon the same harm' ... . Issue preclusion prohibits the relitigation of issues argued and decided in a previous case, even if the second suit raises different causes of action ... . Under issue preclusion, the prior judgment conclusively resolves an issue actually litigated and determined in the first action ... . There is a limit to the reach of issue preclusion, however. In accordance with due process, it can be asserted only against a party to the first lawsuit, or one in privity with a party ... .'An issue is not actually litigated' for collateral estoppel purposes 'if, for example, there has been a default' ... . Claim preclusion cannot apply here, because plaintiff and defendants are litigating a claim against each other for the first time. * * * Defendants' rights to be defended and indemnified by Nationwide remained intact regardless of the outcome of the no-fault benefits dispute." ***Rojas v. Romanoff*, 2020 N.Y. Slip Op. 04237, First Dept 7-23-20**

CONSTITUTIONAL LAW, CRIMINAL LAW.

THE PETITIONS FOR WRITS OF HABEAS CORPUS SEEKING RELEASE FROM RIKERS ISLAND BASED UPON THE RISK OF CONTRACTING COVID-19 PROPERLY DENIED.

The First Department determined the petitions for writs of habeas corpus brought by inmates at Rikers Island, arguing the risk of contracting COVID-19 at the jail required release, were properly denied. State and Federal constitutional arguments were raised. The analysis, which is too complex to fairly summarize here, came down to weighing the danger to the inmates against the danger to the public entailed by release: "Far from acting recklessly, respondents [city and state] have demonstrated great care to ensure the safety of everyone who enters the facility. By any objective measure, they have been anything but indifferent to the risk that COVID-19 poses to the jail population. Even petitioners admit that respondents have taken substantial measures to reduce the spread of the virus on Rikers Island, and have had success in doing so. Moreover, petitioners have not cited to any controlling authority to establish that anything short of release constitutes deliberate indifference. ... That the State has agreed to release a significant number of detainees to help control the spread of the virus actually demonstrates that it has given a great deal of consideration to who should and should not be released, and its decision not to release petitioners based on their criminal history backgrounds is thus persuasive. Coupled with what the State and City have done to protect detainees, discussed above, we conclude that the weighing of interests falls in respondents' favor." ***Matter of People ex rel. Stoughton v. Brann*, 2020 N.Y. Slip Op. 04236, First Dept 7-23-20**

LANDLORD-TENANT, MUNICIPAL LAW, TAX LAW, CIVIL PROCEDURE.

THE 2009 ROBERTS CASE APPLIES RETROACTIVELY TO RENT OVERCHARGES STEMMING FROM THE RENTAL OF DEREGULATED APARTMENTS BY LANDLORDS RECEIVING J-51 TAX BENEFITS; THE OVERCHARGES HERE MUST BE RE-CALCULATED IN ACCORDANCE WITH A RECENT RULING BY THE COURT OF APPEALS; THE CLASS OF TENANTS IN THIS RENT OVERCHARGE ACTION SHOULD NOT HAVE BEEN EXPANDED BY SUPREME COURT.

The First Department, modifying Supreme Court, in a full-fledged opinion by Justice Richter, determined: (1) *Roberts v. Thishman*, 13 N.Y.3d 270 applies retroactively to landlords who rent deregulated apartments while receiving J-51 tax benefits; (2) the class of tenants bringing the rent-overcharge action should not have been expanded by Supreme Court; and (3) Supreme Court must re-calculate the rent overcharges in accordance with the recent Court of Appeals ruling in *Matter of Regina*, 2020 N.Y. Slip Op. 02127: "In *Gersten v. 56 7th Ave. LLC* (88 AD3d 189, 198 [1st Dept 2011]), this Court held that Roberts should be applied retroactively because the decision simply interpreted a statute that had been in effect for a number of years, and did not establish a new principle of law. * * * In Matter of Regina ... , the Court of Appeals determined that 'the overcharge calculation amendments [in the HSTPA (Housing Stability and Tenant Protection Act)] cannot be applied retroactively to overcharges that occurred prior to their enactment.' The Court also resolved a split in this Department as to what rent records can be reviewed to determine rents and overcharges in Roberts cases ... . Regina concluded that 'under pre-HSTPA law, the four-year lookback rule and standard method of calculating legal regulated rent govern in Roberts overcharge cases, absent fraud' ... .Accordingly, we ... remand the matter for the court to set forth a methodology consistent with the Rent Stabilization Law as interpreted by the Court of Appeals in Regina. ... [T]he motion court improvidently exercised its discretion in expanding the class. The court's order failed to analyze whether class action status was warranted based on the criteria set forth in CPLR 901 and CPLR 902. Conducting that analysis ourselves, we find that the redefined class represents such a fundamental change in the theory of plaintiffs' case that expansion of the class would be improper." ***Dugan v. London Terrace Gardens, L.P.*, 2020 N.Y. Slip Op. 04239, First Dept 7-23-20**

ZONING, LAND USE, ENVIRONMENTAL LAW.

CITY TOOK THE REQUISITE HARD LOOK AT THE ENVIRONMENTAL IMPACTS OF THE REDEVELOPMENT PLAN, INCLUDING ITS EFFECTS ON RENTER DISPLACEMENT; SUPREME COURT SHOULD NOT HAVE ANNULLED THE ADOPTION OF THE PLAN.

The First Department, reversing Supreme Court, ruled that the City Council, in approving the redevelopment plan, had taken the requisite hard look pursuant to the State Environmental Quality Review Act (SEQRA) and the City Environmental Quality Review Act (CEQRA) at the environmental impacts of the plan as described in the Final Environmental Impact Statement (FEIS): "Petitioners argued that the City violated SEQRA and CEQR by failing to take a 'hard look' at eight issues: (1) impact of rezoning on existing preferential rents and effect on renter displacement; (2) impact on area racial makeup; (3) impact on minority and women-owned businesses (MWBEs); (4) accuracy of prior City FEIS projections on rezoning impacts; (5) impact of loss of the existing Inwood library; (6) impact on emergency response times; (7) cumulative impact of other potential area rezonings, including the adjacent 40-acre MTA railyard; and (8) speculative purchase of residential buildings in the wake of the rezoning. ... We find that the City's decision was not arbitrary and capricious, unsupported by the evidence, or contrary to law. The City took the requisite 'hard look' at all the issues requiring study under SEQRA/CEQR ... , but did not have to parse every sub-issue as framed by petitioners ... . Moreover, the City was 'entitled to rely on the accepted methodology set forth in the [CEQR] Technical Manual' ... , including in determining what issues were beyond

the scope of SEQRA/CEQR review." ***Matter of Northern Manhattan Is Not for Sale v. City of New York*, 2020 N.Y. Slip Op. 04235, First Dept 7-23-20**

SECOND DEPARTMENT

CIVIL PROCEDURE.

MOTION TO AMEND THE SUMMONS AND COMPLAINT TO ADD AN APPARENTLY MISNAMED PARTY AFTER THE STATUTE OF LIMITATIONS HAD RUN SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined plaintiff's motion to amend the summons and complaint to add an apparently misnamed party after the statute of limitations had run should not have been granted: "On March 27, 2014, the plaintiff allegedly was injured while boarding a ski lift at Hunter Mountain in Hunter. On March 23, 2016, the plaintiff commenced this action against the defendants, Hunter Mountain and Hunter Mountain Resort, LLC, to recover damages for personal injuries. After the defendants failed to appear or answer the complaint, a default judgment dated April 18, 2018, was entered against the defendants. By notice of motion dated September 15, 2018, the plaintiff moved, inter alia, in effect, pursuant to CPLR 305(c) and 3025(b) for leave to amend the summons, complaint, and caption to name Hunter Mountain Ski Bowl, Inc., doing business as Hunter Mountain (hereinafter HMSB), as a defendant instead of the named defendant Hunter Mountain. ... Relief pursuant to CPLR 305(c) may be granted only where there is evidence that the correct defendant was served, albeit misnamed in the original process, and the correct defendant would not be prejudiced by the granting of the amendment ... . While CPLR 305(c) may be used to cure a misnomer in the description of a party defendant, it cannot be used after the expiration of the statute of limitations as a device to add or substitute an entirely new defendant who was not properly served ... . There is no evidence that HMSB and Hunter Mountain are one and the same entity ... . [T]he plaintiff failed to establish that he properly served HMSB or that the Supreme Court obtained jurisdiction over it ... ... [T]he plaintiff was not entitled to relief pursuant to CPLR 3025(b) for leave to amend the summons, complaint, and caption to add HMSB as a defendant, since he did not provide a copy of his proposed amended summons and complaint, ... The proposed amendments are patently devoid of merit because the statute of limitations bars any claim against HMSB, a new party to this action ... , and the plaintiff failed to establish that the relation-back doctrine pursuant to CPLR 203(f) applied ...". ***Nossov v. Hunter Mtn.*, 2020 N.Y. Slip Op. 04175, Second Dept 7-22-20**

CONTRACT LAW, CIVIL PROCEDURE.

THE ACTION ALLEGING DEFECTIVE CONSTRUCTION OF A CONDOMINIUM ACCRUED WHEN THE WORK WAS COMPLETED, I.E., WHEN THE CERTIFICATE OF OCCUPANCY WAS ISSUED; THE ACTION WAS TIME-BARRED.

The Second Department, reversing Supreme Court, determined that the action alleging defective construction of a condominium was time-barred. The action accrued the work was completed, i.e., when the certificate of occupancy was issued: "A claim for damages arising from defective construction accrues on the date of completion of the work ... . 'This rule applies no matter how a claim is characterized in the complaint' because all liability' for defective construction has its genesis in the contractual relationship of the parties' ... . Here, the corporate defendants demonstrated their prima facie entitlement to judgment as a matter of law dismissing the first through third and fifth through seventh causes of action insofar as asserted against them. The corporate defendants established that the causes of action accrued on October 5, 2007, the date the certificate of occupancy was issued ... , and that this action was not commenced until June 2016, more than eight years later, at which time the applicable statutes of limitations had expired." ***Board of Mgrs. of the 23-23 Condominium v. 210th Place Realty, LLC*, 2020 N.Y. Slip Op. 04143, Second Deptp 7-22-20**

CONTRACT LAW, TORTIOUS INTERFERENCE WITH PROSPECTIVE BUSINESS RELATIONS.

ONE DEFENDANT BREACHED A CONTRACT; THE OTHER DEFENDANT TORTIOUSLY INTERFERED WITH PLAINTIFF'S PROSPECTIVE BUSINESS RELATIONS; THE JURY AWARDED SEPARATE DAMAGE-AMOUNTS FOR EACH DEFENDANT; SUPREME COURT SHOULD NOT HAVE HELD BOTH DEFENDANTS JOINTLY AND SEVERALLY LIABLE FOR THE COMBINED AMOUNT OF DAMAGES.

The Second Department, in a full-fledged opinion by Justice Cohen, reversing Supreme Court, determined the defendants, one of which was found by the jury to have breached a contract, and the other which was found to have tortiously interfered with plaintiff's prospective business relations, should not have been deemed jointly and severally liable. Each was separately liable for the separate damage-amounts assigned by the jury: "The jury determined that the plaintiff sustained damages in the amount of $60,000 resulting from [defendant] DIG's interference with the plaintiff's prospective business relationship with [defendant] B1 Advanced, and that the plaintiff sustained damages in the amount of $657,000 resulting from B1 Advanced's breach of contract. Contrary to the Supreme Court's determination, the damages arising out of DIG's tortious interference could, in fact, differ from the damages arising out of B1 Advanced's breach of contract. The jury assessed the amount of damages against DIG based on the plaintiff's loss of prospective profits resulting from DIG's tortious interference with the plaintiff's ongoing business relationship with B1 Advanced ... . Conversely, '[d]amages for breach of

contract include general (or direct) damages, which compensate for the value of the promised performance, and consequential damages, which are indirect and compensate for additional losses incurred as a result of the breach, such as lost profits' ... . The jury's apportionment of damages reflects its finding that DIG was not responsible for all of the damages caused by B1 Advanced's breach of contract." ***Achieve It Solutions, LLC v. Lewis*, 2020 N.Y. Slip Op. 04137, Second Dept 7-22-20**

DISCIPLINARY HEARINGS (INMATES), CORRECTION LAW.

A CORRECTION LAW PROVISION INSULATED THE PETITIONER-INMATE FROM DISCIPLINE FOR SENDING A LETTER REQUESTING AN INSTITUTIONAL POLICY CHANGE REGARDING VENDORS WHICH SUPPLY PACKAGES TO PRISONS.

The Second Department, reversing Supreme Court, determined petitioner-inmate should not have been disciplined for a letter to vendors which supply packages to prisons. Petitioner was opposed to a pilot program awarding eights vendors the exclusive right to supply packages to prisons. Petitioner sent a letter urging excluded vendors to "fight back" and was disciplined under a provision of the Institutional Rules of Conduct which prohibits inmates from soliciting goods or services from businesses. The Second Department held that the letter was subject a Correction Law provision which prohibits discipline for requests for policy changes: "... [B]ecause the letter did not solicit goods or services from any business, the record does not support the hearing officer's determination that rule 103.20 (7 NYCRR 270.2[B][4][ii]) was violated. Moreover, even if construed to violate the rule, the petitioner's conduct was insulated from discipline by Correction Law § 138, which provides that '[i]nmates shall not be disciplined for making written . . . requests involving a change of institutional conditions, policies, rules, regulations, or laws affecting an institution' (Correction Law § 138[4]). The petitioner's December 15, 2017, letter was a 'request[ ] involving a change of institutional . . . policies' (id.) in that he invited certain organizations adversely affected by the DOCCS's [NYS Department of Corrections and Community Supervision's] new policy to undertake action in opposition to that new policy. The respondents thus disciplined the petitioner in contravention of Correction Law § 138(4)." ***Matter of Miller v. Annucci*, 2020 N.Y. Slip Op. 04167, Second Dept 7-22-20**

ELECTION LAW.

BECAUSE THE DESIGNATING PETITIONS OF THE INITIAL CANDIDATE FOR STATE SENATE WERE INVALIDATED, THE PETITION TO VALIDATE CERTIFICATES OF SUBSTITUTION FOR ANOTHER CANDIDATE SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined the petition to validate certificates of substitution for a candidate (Sammut) for State Senate after the designating petitions of the initial candidate (LaLota) was invalidated should not have been granted. Because there was no valid designating petition, substitution was barred: " '[P]ursuant to Election Law § 6-148(1), a valid designating petition is a prerequisite to the creation of a vacancy' ... . Where a designating petition is 'invalid,' another candidate may not be substituted by a committee to fill vacancies ... . On the prior appeal, we specifically granted the appellants' petition to invalidate LaLota's designating petitions. * * * Moreover, Election Law § 3-200(6) provides: 'An election commissioner shall not be a candidate for any elective office which he [or she] would not be entitled to hold under the provisions of [Election Law article 3], unless he [or she] has ceased by resignation or otherwise, to be commissioner prior to his [or her] nomination or designation therefor. Otherwise such nomination or designation shall be null and void' ... . Where an original nomination or designation is void, no vacancy is created which can be filled by substitution ...". ***Matter of Ferrandino v. Sammut*, 2020 N.Y. Slip Op. 04229, Second Dept 7-23-20**

FALSE IMPRISONMENT, CRIMINAL LAW, MUNICIPAL LAW, EVIDENCE.

THE CITY NEED NOT PROVE THE POLICE CORROBORATED INFORMATION PROVIDED BY AN INFORMANT IN A CIVIL ACTION FOR FALSE ARREST STEMMING FROM THE EXECUTION OF A SEARCH WARRANT BASED UPON "BAD CI INFORMATION."

The Second Department determined that, in the context of a civil trial alleging false imprisonment stemming from police officers entering plaintiffs' apartment to execute a search warrant, the city does not have to prove the police properly corroborated the informant's allegations on which the warrant was based. Apparently, the informant provided "bad ... information:" "To prevail on a cause of action alleging false arrest or false imprisonment, a plaintiff must prove (1) intentional confinement by the defendant, (2) of which the plaintiff was aware, (3) to which the plaintiff did not consent, and (4) which was not otherwise privileged ... . 'The existence of probable cause constitutes a complete defense to a cause of action alleging false arrest and false imprisonment' ... . Unlike in a criminal prosecution, where the hearsay statements of an informant can only constitute probable cause if it is demonstrated that the informant is reliable and had a sufficient basis for his or her knowledge, in a trial in a civil action alleging false arrest or false imprisonment, it is not 'appropriate for a jury to determine, as a factual matter, whether the police obtained sufficient corroboration of the information provided by an informant' … . In a civil action resulting from the detention of the occupants of premises searched pursuant to a search warrant, 'there is a presumption of probable cause for the detention which the plaintiff must rebut with evidence that the warrant was pro-

cured based upon the false or unsubstantiated statements of a police officer' ...". ***Ali v. City of New York*, 2020 N.Y. Slip Op. 04138, Second Dept 7-23-20**

FORECLOSURE, CIVIL PROCEDURE.

PLAINTIFF MOVED FOR AN ORDER OF REFERENCE WITHIN ONE YEAR OF DEFENDANT'S DEFAULT IN THIS FORECLOSURE ACTION; EVEN THOUGH THE MOTION WAS WITHDRAWN, THE COMPLAINT SHOULD NOT HAVE BEEN DISMISSED AS ABANDONED.

The Second Department, reversing Supreme Court, determined defendant's (US Bank's) motion to dismiss the complaint as abandoned pursuant to CPLR 3215(c) should not have been granted in this foreclosure action. Plaintiff had moved for an order of reference within one year of defendant's default but then withdrew the motion: "CPLR 3215(c) provides that '[i]f the plaintiff fails to take proceedings for the entry of judgment within one year after [a] default, the court shall not enter judgment but shall dismiss the complaint as abandoned, without costs, upon its own initiative or on motion, unless sufficient cause is shown why the complaint should not be dismissed.' 'It is not necessary for a plaintiff to actually obtain a default judgment within one year of the default in order to avoid dismissal pursuant to CPLR 3215(c)' ... . 'As long as the plaintiff has initiated proceedings for the entry of a judgment within one year of the default, there is no basis for dismissal of the complaint pursuant to CPLR 3215(c)' ... . Moreover, 'the withdrawal of the plaintiff's motion for an order of reference [does] not demonstrate that the plaintiff failed to initiate proceedings for entry of a judgment of foreclosure and sale' ... . Here, the Supreme Court should have denied that branch of US Bank's motion which was pursuant to CPLR 3215(c) to dismiss the complaint insofar as asserted against it as abandoned, because the plaintiff moved for an order of reference within one year of US Bank's default ... . 'In such cases, the complaint should not be dismissed, even if, as here, the plaintiff's motion is later withdrawn' ...". ***Bank of Am., N.A. v. Wessen*, 2020 N.Y. Slip Op. 04141, Second Dept 7-22-20**

LABOR LAW-CONSTRUCTION LAW, NEGLIGENCE, EVIDENCE, CIVIL PROCEDURE.

DEFENDANT HOME OWNER DEMONSTRATED HE DID NOT HAVE SUPERVISORY CONTROL OVER PLAINTIFF'S WORK AND DID NOT HAVE ACTUAL OR CONSTRUCTIVE KNOWLEDGE OF THE DANGEROUS CONDITION WHICH ALLEGEDLY RESULTED IN PLAINTIFF'S INJURIES IN THIS LABOR LAW § 200 ACTION; SUPREME COURT SHOULD NOT HAVE CONSIDERED AN AFFIDAVIT FROM A NOTICE WITNESS WHO WAS NOT DISCLOSED PRIOR TO THE SUMMARY JUDGMENT MOTION.

The Second Department, reversing Supreme Court, determined defendant home owner's motion for summary judgment in this Labor Law § 200 action should have been granted. Defendant was not home when plaintiff fell through an open hole in the deck while removing a window. The defendant demonstrated he did not have any control over the manner of plaintiff's work and did not have actual or constructive knowledge of the dangerous condition. Supreme Court should not have considered the affidavit of a nonparty who was not previously disclosed as a witness who had actual notice of the condition: "... [T]he defendant established, prima facie, that he did not exercise supervision or control over the performance of the work giving rise to the accident ... . Further, to the extent that the accident could be viewed as arising from a dangerous or defective premises condition at the work site, the defendant established, prima facie, that he did not create or have actual or constructive notice of the alleged dangerous condition ... . In opposition, the plaintiffs failed to raise a triable issue of fact. We disagree with the Supreme Court's determination to consider the affidavit of a nonparty witness submitted by the plaintiffs in opposition to the defendant's motion. In his discovery demands, the defendant sought disclosure of, inter alia, the name of any witness who had actual notice of the alleged condition, or the nature and duration of such condition. The nonparty witness was not disclosed in the plaintiffs' discovery responses, the plaintiffs failed to offer an excuse for their failure to do so, and nothing that transpired during discovery would have alerted the defendant of the potential significance of the nonparty's testimony ... " ***Casilari v. Condon*, 2020 N.Y. Slip Op. 04146, Second Dept 7-22-20**

MUNICIPAL LAW.

DEFENDANTS DID NOT REQUEST THAT PLAINTIFFS GRANT A LICENSE FOR EXCAVATION WORK NEXT DOOR TO PLAINTIFFS' BUILDING; N.Y.C. BUILDING CODE 3309.4 IMPOSES STRICT LIABILITY FOR DAMAGE CAUSED BY SUCH EXCAVATION WORK; OVERRULING PRECEDENT, PLAINTIFFS DID NOT NEED TO SHOW EITHER THAT A LICENSE WAS GRANTED OR THAT PLAINTIFFS TOOK OTHER STEPS TO PROTECT THEIR PROPERTY TO BE ENTITLED TO SUMMARY JUDGMENT FOR DEFENDANTS' VIOLATION OF BUILDING CODE SECTION 3309.4.

The Second Department, in a full-fledged opinion by Justice Leventhal, overruling precedent, determined plaintiffs were entitled to summary judgment in this action alleging damage to plaintiffs' building caused by defendants' excavation for a new building next door. The New York City Building Code (BC) section 3309.4 imposes strict liability for damage caused by such excavation work. Here the defendants did not ask plaintiffs for a license in accordance with BC 3309.4 and no license was granted by the plaintiffs. Prior decisions held a plaintiff must show it granted a license for the work, or otherwise took steps to protect the property, before the plaintiff would be entitled to summary judgment on an action alleging a violation of BC 33309.4. Those decisions should no longer be followed: "We hold that where, as here, a plaintiff presents evidence

showing, prima facie, that no request for a license was made to the plaintiff in accordance with section BC 3309 before the excavation work began, a plaintiff moving for summary judgment on the issue of liability on a cause of action alleging a violation of section BC 3309.4 need not demonstrate, prima facie, that the plaintiff granted the requisite license, or, in the absence of a license, what, if any, actions it took to protect its premises." ***211-12 N. Blvd. Corp. v. LIC Contr., Inc.*, 2020 N.Y. Slip Op. 04134, Second Dept 7-22-20**

PARTNERSHIP LAW, CONTRACT LAW, FIDUCIARY DUTY. ATTORNEYS.

FORMER LAW FIRM PARTNER WAS ENTITLED TO AN ACCOUNTING; IN DETERMINING THE BUYOUT PRICE UPON THE PARTNER'S WITHDRAWAL FROM THE PARTNERSHIP, THE TERMS OF THE PARTNERSHIP AGREEMENT, RATHER THAN PARTNERSHIP LAW, CONTROL.

The Second Department determined plaintiff, a former partner in a law firm, was entitled to an accounting and a buyout price calculated pursuant to the provisions of the partnership agreement: " 'The right to an accounting is premised upon the existence of a confidential or fiduciary relationship and a breach of the duty imposed by that relationship respecting property in which the party seeking the accounting has an interest' ... . A plaintiff seeking an accounting has to show that he or she entrusted money or property to the defendant with respect to which he or she has an interest or which, in equity, ought to be divided ... . Here, we agree with the Supreme Court's determination awarding the plaintiff summary judgment on the cause of action for an accounting to determine the amount due to him pursuant to the terms of the partnership agreement. ' ... [W]here . . . there is a fiduciary relationship between the parties, there is an absolute right to an accounting notwithstanding the existence of an adequate remedy at law' ... Here, it is undisputed that there was a fiduciary relationship between the plaintiff and the defendants. ... '[A] partnership is a voluntary, contractual association in which persons carry on a business for profit as co-owners. In the agreement establishing a partnership, the partners can chart their own course' ... . [W]hile New York's Partnership Law provides certain default provisions where a partnership agreement is silent, where the agreement clearly sets forth the terms between the partners, it is the agreement that governs ... . Here, the partnership agreement expressly provides that the partnership 'shall not be dissolved' upon the resignation of a partner. The terms of the partnership agreement take precedence over Partnership Law § 62, which permits a partnership to be dissolved at any time by any partner. The firm was not dissolved, but rather, the plaintiff withdrew from the firm on August 3, 2010. Accordingly, pursuant to the terms of the partnership agreement, the plaintiff was entitled to the buyout price, as defined in that agreement, and payable in accordance with the terms of that agreement." ***Zohar v. LaRock*, 2020 N.Y. Slip Op. 04202, Second Dept 7-22-20**

PERSONAL INJURY, CIVIL PROCEDURE.

ALTHOUGH THE MOTION TO DISMISS FOR FAILURE TO SERVE A DEFENDANT SHOULD HAVE BEEN DENIED AND THE MOTION TO EXTEND TIME TO SERVE GRANTED, THE MOTION TO DISMISS ON FORUM NON COVENIENS GROUNDS WAS PROPERLY GRANTED.

The Second Department, reversing (modifying) Supreme Court, determined the motion to dismiss the complaint based upon the failure to serve defendant (Bryan) should have been denied and plaintiff's motion to extend the time to serve defendants (Bryan and Carroll) should have been granted. However the action was properly dismissed on forum non conveniens grounds: "... [T]he plaintiff promptly sought an extension after Bryan challenged the court's jurisdiction, the respective insurance carriers for Bryan and Carroll had actual notice of this action within 120 days of its commencement, there was evidence of a potentially meritorious cause of action, and there was no demonstrable prejudice to Bryan and Carroll ... . Accordingly, that branch of the respondents' motion which was pursuant to CPLR 3211(a)(8) to dismiss the complaint insofar as asserted against Bryan must be denied, and the plaintiff's cross motion pursuant to CPLR 306-b to extend the time to serve both Bryan and Carroll must be granted. However, the Supreme Court providently exercised its discretion in granting that branch of the respondents' motion which was pursuant to CPLR 327(a) to dismiss the complaint insofar as asserted against them on the ground of forum non conveniens. In granting that branch of the respondents' motion, the court properly considered all the relevant factors ... , including that the plaintiff and the respondents are residents of New Jersey, Carroll was also a resident of New Jersey at the time of the accident, Bryan's insurance policy was issued in New Jersey, and both vehicles involved in the accident were registered in New Jersey ... . The fact that the accident occurred in New York is insufficient by itself to provide the substantial nexus required to warrant the retention of jurisdiction in the State of New York ... . Considering all of the relevant factors, including the fact that the plaintiff primarily received medical treatment for her alleged injuries in New Jersey, we find no basis to disturb the court's determination to dismiss the action insofar as asserted against the respondents on forum non conveniens grounds ... . ***DelGrosso v. Carroll*, 2020 N.Y. Slip Op. 04148, Second Dept 7-22-20**

PERSONAL INJURY, MEDICAL MALPRACTICE.

THE HOSPITAL DEFENDANTS' EXPERT'S AFFIDAVIT DID NOT LAY A SUFFICIENT FOUNDATION FOR THE EXPERT'S OPINIONS ON MATTERS OUTSIDE OF OBSTETRICS AND GYNECOLOGY; THE HOSPITAL DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing (modifying) Supreme Court, determined the hospital defendants' expert's affidavit did not establish that the expert (D'Amico) was qualified to offer an opinion on several issues surrounding the birth process and therefore did not provide sufficient evidence to support the hospital defendants' motion for summary judgment: "... [T]he expert affirmation offered by the hospital defendants lacked probative value, because the expert, a physician who was board-certified in the fields of obstetrics and gynecology, failed to lay a foundation for the reliability of his opinions in the fields of pediatrics, orthopedics, or anesthesia. ' While it is true that a medical expert need not be a specialist in a particular field in order to testify regarding accepted practices in that field . . . the witness nonetheless should 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,' and is therefore insufficient to meet a party's burden on a summary judgment motion ... . We reject the hospital defendants' contention that D'Amico's professed familiarity with 'postpartum and neonatal care,' through his extensive experience delivering newborns, was sufficient, without more, to establish his qualifications to render reliable opinion testimony on issues including, inter alia: (1) whether [defendant] De Jesus, an orthopedic intern, acted in an appropriate and timely manner in diagnosing and treating Roizman's [plaintiff's] pubic bone diastasis; (2) whether [defendant] Naves-Ruiz, a pediatrician, properly responded to the infant's neonatal oxygen desaturation, properly ruled out sepsis and treated the infant with antibiotics for presumed pneumonia and infection, and performed all appropriate tests; (3) whether the staff of the Lenox Hill Hospital Department of Anesthesiology properly performed Roizman's epidural; and, (4) whether the staff of Lenox Hill Hospital was negligent and in any way contributed to the plaintiffs' alleged injuries ...". ***Roizman v. Stromer*, 2020 N.Y. Slip Op. 04196, Second Dept 7-22-20**

PERSONAL INJURY, MUNICIPAL LAW.

THE DEFENDANTS DEMONSTRATED THE CITY DID NOT NOTIFY THEM OF THE NEED TO REPAIR THE ABUTTING PUBLIC SIDEWALK AND THEREBY DEMONSTRATED THEY HAD NO STATUTORY DUTY TO REPAIR THE SIDEWALK; DEFENDANTS' MOTION FOR SUMMARY JUDGMENT IN THIS SLIP AND FALL CASE PROPERTY GRANTED.

The Second Department determined defendant abutting property owner demonstrated it was not responsible for the repair of any alleged defects in the public sidewalk in this slip and fall case. The city code imposed liability only if the landowner was notified of the need for repair: "Section 167-50(A) of the Code of the City of Rye provides that '[i]t shall be the duty of the Department of Public Works to require the owner of property abutting upon a street to repair or replace any sidewalk in front thereof that is required to be repaired or replaced,' and '[w]here the owner of such property shall fail to neglect to repair or replace such sidewalk for five days after notice to do so has been served upon the owner . . . the Department of Public Works shall repair or replace such sidewalk, and a statement of 100% of the cost incurred thereby shall be served upon the owner.' Section 167-50(B) imposes tort liability upon landowners for injuries resulting 'from the failure of any owner or other responsible person to comply with the provisions of this section.' ... [Defendants] established [they did not receive] notice from the Department of Public Works requiring them to perform sidewalk repairs. Accordingly, the ... defendants demonstrated, prima facie, that they had no statutory duty to repair the sidewalk ... The ... defendants' submissions also demonstrated, prima facie, that ... the ... defendants [did not create] the defective condition that allegedly caused the injured plaintiff's fall ...". ***DeBorba v. City of Rye*, 2020 N.Y. Slip Op. 04147, Second Dept 7-22-20**

PERSONAL INJURY, MUNICIPAL LAW, VEHICLE AND TRAFFIC LAW.

ALTHOUGH THE EMERGENCY HAD DIMINISHED AND THE POLICE OFFICER HAD TURNED OFF HIS SIREN AND LIGHTS WHEN THE ACCIDENT OCCURRED, THE OFFICER WAS STILL ENGAGED IN AN EMERGENCY OPERATION AND DID NOT ACT IN RECKLESS DISREGARD FOR THE SAFETY OF OTHERS, SUPREME COURT REVERSED.

The Second Department, reversing Supreme Court, determined the defendant police officer (Hurley) was engaged in an emergency operation when the officer's car struck the plaintiffs' car as the officer made a turn onto the street where plaintiffs' car was at a stop sign. Although the officer thought the urgency had diminished and had turned off the siren and lights, he was awaiting word that the emergency was over. The police had been called by a resident who saw someone on her porch who then ran into the woods. Another officer had stopped a man who explained he was looking for his dog. That story was being checked out when the accident occurred: "The fact that Hurley believed the call was no longer a "high" priority and had deactivated the lights and siren on his vehicle does not, as the plaintiffs contend, mean that Hurley was no longer engaged in an emergency operation ... . An 'emergency operation' is statutorily defined to mean, among other things,

'[t]he operation . . . of an authorized emergency vehicle, when such vehicle is . . . responding to . . . the scene of a[ ] . . . police call' (Vehicle and Traffic Law § 114-b ...). Since Hurley was responding to the scene of a police call at the time of the accident, he was engaged in an emergency operation ... . Hurley was engaged in privileged conduct at the time of the accident, as the driver of an authorized emergency vehicle is permitted to, inter alia, '[d]isregard regulations governing directions of movement' (Vehicle and Traffic Law § 1104[b][4] ...). As such, Hurley's conduct was governed by the reckless disregard standard ... . The reckless disregard standard 'demands more than a showing of a lack of due care under the circumstances'—the showing typically associated with ordinary negligence claims. It requires evidence that the actor has intentionally done an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow' and has done so with conscious indifference to the outcome' ... . 'This standard requires a showing of more than a momentary lapse in judgment' ... . Here, although Hurley's conduct may have constituted a momentary lapse in judgment, it did not rise to the level of reckless disregard for the safety of others ...". ***Proce v. Town of Stony Point*, 2020 N.Y. Slip Op. 04195, Second Dept 7-22-20**

SEPULCHER, MUNICIPAL LAW.

THERE ARE QUESTIONS OF FACT WHETHER THE CITY'S DELAY IN NOTIFYING THE NEXT OF KIN OF THE IDENTIFICATION OF DECEDENT'S BODY AND THE LOCATION OF DECEDENT'S REMAINS ENTITLES THE NEXT OF KIN TO DAMAGES PURSUANT TO THE COMMON-LAW RIGHT OF SEPULCHER.

The Second Department determined there were questions of fact in this right of sepulcher action stemming from city's delay in notifying decedent's next of kin if the identification and location of decedent's remains. "On June 27, 2003, the plaintiff reported to the police that his 16-year-old son (hereinafter the decedent) was missing, and the New York City Police Department (hereinafter NYPD) commenced a missing person investigation. The decedent's body was found 10 days later on July 7, 2003. The Office of the Chief Medical Examiner (hereinafter OCME) conducted an autopsy, but the medical examiner incorrectly determined that the body belonged to a 25 to 30 year old Asian male. Therefore, the body was not identified as that of the decedent. Because the decedent's body remained unidentified, it was buried in the City public cemetery known as "Potter's Field" on Hart Island in the Bronx. ... In September or October 2009, the plaintiff and his daughter, the decedent's sister, provided their DNA samples to the NYPD as part of the missing person investigation. On January 10, 2011, the OCME confirmed that the unidentified body buried in Potter's Field was that of the decedent. ... Approximately one month after the OCME confirmed the identification of the decedent's body, on February 16, 2011, the NYPD notified the plaintiff of the identification, and further informed him that the decedent had drowned and that the body had been found on July 7, 2003. The next day, the plaintiff was informed by the OCME that the decedent had been buried in Potter's Field, but he was not informed of the exact location of the burial until 2015. ... 'The common-law right of sepulcher affords the deceased's next of kin an absolute right to the immediate possession of a decedent's body for preservation and burial . . . , and damages may be awarded against any person who unlawfully interferes with that right or improperly deals with the decedent's body' ... . [W]hen a municipal defendant has all of the necessary identifying information, the obligation of informing the next of kin of the decedent's death is a ministerial function that creates a special duty running to the decedent's next of kin rather than to the public at large ... . [T]here are triable issues of fact as to whether the delays in informing the plaintiff that the decedent had been identified and in informing the plaintiff of the location of the decedent's burial interfered with the plaintiff's right of sepulcher ... . However, we note that triable issues of fact exist only with respect to the City's delay in notifying the plaintiff about the identification and the delay in informing him of the location of the burial. Therefore, the plaintiff is not entitled to damages with respect to the delay from the time the decedent was first reported missing in 2003 until the identity of the decedent's body was confirmed on January 10, 2011." ***Cansev v. City of New York*, 2020 N.Y. Slip Op. 04145, Second Dept 7-22-20**

THIRD DEPARTMENT

LABOR LAW-CONSTRUCTION LAW, CONTRACT LAW, PERSONAL INJURY.

DEFENDANT ARGUED THE INSURANCE COMPANY WHICH REPRESENTED THE PROPERTY OWNER AND THE GENERAL CONTRACTOR IN THIS CONSTRUCTION ACCIDENT CASE UNFAIRLY APPORTIONED THE PAYMENT OF THE SETTLEMENT BETWEEN THEM SUCH THAT THE NON-NEGLIGENT, VICARIOUSLY LIABLE PARTY PAID $2 MILLION, AND THE NEGLIGENT PARTY PAID $200,000; AFTER INDEMNIFYING THE PROPERTY OWNER IN THE AMOUNT OF $2 MILLION DEFENDANT SOUGHT TO BE INDEMNIFIED BY THE NEGLIGENT PARTY; THE ATTEMPT WAS REJECTED UNDER BOTH CONTRACTUAL AND COMMON LAW INDEMNIFICATION THEORIES.

The Third Department, over a concurrence, determined Lamela & Sons, Inc. (Lamela), the employer of plaintiffs James and Robert Lamela, was required to indemnify the property owner, Satin, for Satin's portion of the $3.2 million settlement in this construction accident case. The settlement agreement required payment of $2,1999,999 by Satin and Verticon, the general contractor. Lamela paid Satin $2 million in satisfaction of its contractual indemnity obligation to Satin. The insurance company which represented both Verticon and Satin apportioned a larger portion of the settlement to Satin, which was not negligent but was vicariously liable, and a lesser portion to Verticon, which was negligent. Lamela argued that a larger por-

tion of the settlement should have been apportioned to the negligent party, Verticon. Lamela's indemnity obligation to Satin, therefore, should have been less. On that basis, Lamela sought indemnity from Verticon. Lamela's argument was rejected: "Verticon submitted the construction contract ... between Verticon and Lamela, which provides for indemnity flowing from Lamela to Verticon, specifically stating, 'To the fullest extent permitted by law, [Lamela] shall indemnify, defend and save harmless [Verticon] . . . against any and all suits [or] actions . . . arising from the use or operation by [Lamela] of construction equipment, tools, scaffolding or facilities furnished to [Lamela] to perform the [w]ork.' The provision, as expected, does not provide for indemnification flowing the other way, from Verticon to Lamela, as is being sought by Lamela. Thus, as 'the subject of indemnification [is] clearly contemplated and expressly addressed by [Lamela and Verticon] in their contract, . . . there [can] only be a one-way obligation to indemnify by [Lamela] as the indemnitor, and any reciprocal obligation is extinguished' ... . * * * ... . [C]ommon-law indemnity is not the appropriate relief here because Lamela is not responsible by operation of law ... ; rather, its payment to Satin was based solely upon a voluntarily assumed obligation that it undertook by virtue of the contract. There has been no case cited that permits common-law indemnity under this scenario. Although we are mindful that Lamela's motivation for seeking common-law indemnity stems from its concern that the settlement was unfairly apportioned, to attempt to remedy this by way of common-law indemnity is unavailing." ***Lamela v. Verticon, Ltd.*, 2020 N.Y. Slip Op. 04214, Third Dept 7-23-20**

ZONING, LAND USE, ENVIRONMENTAL LAW, CIVIL PROCEDURE, VEHICLE AND TRAFFIC LAW.

LOCAL LAW REVISING ZONING DISTRICTS AND ALLOWING MINING WAS VALIDLY ENACTED; CONTRARY TO SUPREME COURT'S FINDING, TWO PETITIONERS HAD STANDING BY VIRTUE OF THEIR OWNING PROPERTY SUBJECT TO THE NEW ZONING PROVISIONS; ONE PORTION OF THE LOCAL LAW USURPED THE POWERS OF THE STATE ENVIRONMENTAL QUALITY REVIEW ACT (SEQRA) AND WAS ANNULLED; ANOTHER PORTION ADDRESSING TRUCK TRAFFIC VIOLATED THE VEHICLE AND TRAFFIC LAW AND WAS ANNULLED.

The Third Department, in a comprehensive and detailed decision which cannot be fairly summarized here, determined a local law which included and new zoning map, revised zoning districts and allowed mining on properties with existing permits was validly enacted. Disagreeing with Supreme Court, the Third Department noted that two of the petitioners, Holser and Hastings, had standing to challenge the State Environmental Quality Review Act (SEQRA) review by virtue of owning property subject to the rezoning ordinance. The court found that one section of the Local Law usurped powers reserved under SEQRA requiting annulment of that section. The court found that another paragraph of the Local Law prohibiting the transport of minerals on town roads did not carve out exceptions for deliveries as required by the Vehicle and Traffic Law. With respect to the standing issue, the court wrote: "For purposes of standing, when a property owner challenges the SEQRA review process undertaken in conjunction with a zoning enactment to which its property is subject, 'ownership of the subject property confers a legally cognizable interest in being assured that the Town satisfied SEQRA before taking action to rezone its land' ... . '[S]tanding should be liberally constructed so that land use disputes are settled on their own merits rather than by preclusive, restrictive standing rules. To that end, the allegations contained in a petition are deemed to be true and are construed in the light most favorable to the petitioner' ... . Holser and Hastings have demonstrated that they reside in the Town and own property therein. It is not necessary to assert 'proof of special damage or in-fact injury' ... , nor do they have to state a noneconomic environmental harm. All that is necessary for standing is to demonstrate ownership of property subject to the rezoning ordinance ...". ***Matter of Troy Sand & Gravel Co., Inc. v. Town of Sand Lake*, 2020 N.Y. Slip Op. 04212, Thrid Dept 7-23-20**

FOURTH DEPARTMENT

ARBITRATION, MUNICIPAL LAW, EMPLOYMENT LAW, CONTRACT LAW.

UNDER THE CIRCUMSTANCES OF THIS CASE, WHETHER THE CONDITIONS PRECEDENT TO ARBITRATION OF A GRIEVANCE REQUIRED BY THE COLLECTIVE BARGAINING AGREEMENT WERE COMPLIED WITH IS A QUESTION FOR THE COURT, NOT THE ARBITRATOR.

The Fourth Department, reversing Supreme Court, determined it was for the court, not the arbitrator, to determine whether the conditions precedent for arbitration were met in this action seeking General Municipal Law Section 207-a benefits for an injured firefighter: "... [T]he CBA [collective bargaining agreement] contains conditions precedent to arbitration within the provisions addressing the grievance procedure and ... the court should have decided whether the conditions precedent had been met. 'Questions concerning compliance with a contractual step-by-step grievance process have been recognized as matters of procedural arbitrability to be resolved by the arbitrators,' except in cases involving 'a very narrow arbitration clause or a provision expressly making compliance with the time limitations a condition precedent to arbitration' ... . Here, compliance with the requirements of steps one and two of the grievance procedure and the time limitations for serving a grievance were conditions precedent to arbitration. Under these circumstances, we conclude that 'it was for the court, and not the arbitrator, to decide whether the grievance[] had been timely [served] and completed by the . . . employee at steps one and two of the grievance procedure' ... . Therefore, we ... remit the matter to Supreme Court for a hearing on the issue whether the conditions precedent to arbitration were met and thereafter for a new determination on the petition to stay

arbitration ...". ***Matter of Village of Manlius (Town of Manlius Professional Firefighters Assn., Iaff Local #3316)*, 2020 N.Y. Slip Op. 04251, Fourth Dept 7-24-20**

CRIMINAL LAW.

DEFENDANT'S SENTENCE REDUCED IN THIS MANSLAUGHTER, BURGLARY, MURDER CASE DUE TO DEFENDANT'S AGE AND MENTAL ILLNESS.

The Fourth Department found defendant's sentence of 25 years to life in this manslaughter, burglary, murder case unduly harsh and severe due to his age and his mental illness. Sentence reduced to 15 years to life: "This Court 'has broad, plenary power to modify a sentence that is unduly harsh or severe under the circumstances, even though the sentence may be within the permissible statutory range,' and may exercise that power, 'if the interest of justice warrants, without deference to the sentencing court' … . Defendant was 20 years old at the time of the offense. His criminal history consisted of only three incidents within the year leading up to the killing, all of which stemmed from the onset of defendant's documented schizophrenia and all charges were dismissed as a result of defendant's incapacity due to mental disease or defect. Here, at trial, both experts testified that, at the time of the killing, defendant was experiencing delusions. Indeed, the People's own expert expressly recognized that defendant had a diminished capacity to understand the wrongfulness of his actions at the time and that 'the action was a product of his symptoms of mental illness.' ... [W]e modify the judgment by reducing the sentences of imprisonment imposed for manslaughter in the first degree under count one of the indictment and for burglary in the first degree under counts three and four of the indictment to determinate terms of 15 years, to be followed by the five years of postrelease supervision imposed by the court, and by reducing the sentence imposed for murder in the second degree under count two of the indictment to an indeterminate term of incarceration of 15 years to life." ***People v. Gillie*, 2020 N.Y. Slip Op. 04275, Third Dept 7-24-20**

CRIMINAL LAW.

THE PERSISTENT FELONY OFFENDER STATEMENT WAS INADEQUATE BECAUSE IT DID NOT CLEARLY INDICATE THE PERIODS OF DEFENDANT'S PRIOR INCARCERATION; THEREFORE, BECAUSE THE TEN-YEAR CUT-OFF PERIOD IS TOLLED DURING INCARCERATION, IT COULD NOT BE DETERMINED WHETHER DEFENDANT'S PRIOR FELONIES FELL WITHIN THE TEN-YEAR CUT-OFF PERIOD FOR A VALID PERSISTENT FELONY OFFENDER SENTENCE.

The Fourth Department, reversing County Court, determined the persistent felony offender statement was inadequate because it did not clearly describe the periods of defendant's incarceration, which tolls the ten-year cut off for consideration of prior felonies. The matter was remitted for the submission of a valid statement and resentencing: "The sentences upon the predicate violent felony convictions 'must have been imposed not more than ten years before commission of the felony of which the defendant presently stands convicted' (§ 70.04 [1] [b] [iv]). However, '[i]n calculating the ten year period . . . , any period of time during which the person was incarcerated for any reason between the time of commission of the previous felony and the time of commission of the present felony shall be excluded and such ten year period shall be extended by a period or periods equal to the time served under such incarceration' (§ 70.04 [1] [b] [v]). It is undisputed that, here, the sentences for defendant's two prior violent felony convictions were imposed more than 10 years before defendant committed the subject violent felony offense (see §§ 70.04 [1] [b]; 70.08 [1] [a], [b]). Thus, the prior violent felony convictions may be considered predicate violent felony convictions only in accordance with the tolling provision of section 70.04 (1) (b) (v) based upon defendant's subsequent periods of incarceration. Because the tolling provision of Penal Law § 70.04 (1) (b) (v) is implicated, the persistent violent felony offender statement filed by the People was required to 'set forth the date of commencement and the date of termination as well as the place of imprisonment for each period of incarceration to be used for tolling of the ten year limitation' (CPL 400.15 [2]; see CPL 400.16 [1], [2]). Here, however, the statement filed by the People did not comply with that requirement ... . Moreover, contrary to the position taken by the People that the statement substantially complies with CPL 400.15, the absence of the required information deprived defendant of the requisite 'reasonable notice and an opportunity to be heard' with respect to the tolling period ...". ***People v. Watkins*, 2020 N.Y. Slip Op. 04265, Fourth Dept 7-24-20**

CRIMINAL LAW.

DEFENDANT WAS PROPERLY SENTENCED TO INCARCERATION UPON A VIOLATION OF PROBATION IN THIS FELONY DWI CASE, DESPITE DEFENDANT'S COMPLETION OF THE SIX-MONTH PERIOD OF INCARCERATION ORIGINALLY IMPOSED.

The Fourth Department determined defendant was properly sentenced to imprisonment after a violation of probation in this felony DWI case, despite his completion of the original six-month sentence: "County Court sentenced defendant to six months of imprisonment and five years of probation on each count. Several years later, after serving the imprisonment portion of his sentence, defendant admitted that he had violated the conditions of his probation. He now appeals from a judgment that revoked his sentence of probation and sentenced him to concurrent indeterminate terms of imprisonment. * * *

Courts have held that, where a defendant is originally sentenced pursuant to section 60.21 and then later violates the terms of his or her probation or conditional discharge after fully serving his or her term of incarceration, the defendant cannot be sentenced to an additional term of incarceration without violating the rule against multiple punishments for the same offense ... . Defendant thus contends that, inasmuch as he completed the imprisonment portion of his original sentence, the court was not authorized to impose an additional sentence of imprisonment upon his admission that he violated the conditions of his probation. We reject that contention. Contrary to defendant's contention, he was not originally sentenced to a term of imprisonment under Penal Law § 60.21 with respect to any of the three counts. That section provides, in pertinent part, that '[n]otwithstanding [section 60.01 (2) (d)], when a person is to be sentenced upon a conviction for a violation of [Vehicle and Traffic Law § 1192 (2), (2-a) or (3)], the court may sentence such person to a period of imprisonment authorized by article seventy of this title and shall sentence such person to a period of probation or conditional discharge' (§ 60.21 ...). The probation or conditional discharge imposed pursuant to section 60.21 is to run consecutively to any period of imprisonment imposed pursuant to article 70. Here, however, defendant was not sentenced to a period of imprisonment pursuant to Penal Law article 70. Rather, he was sentenced on each count to a traditional split sentence pursuant to Penal Law § 60.01 (2) (d), with the period of probation running concurrently with the period of imprisonment. Thus, Penal Law § 60.21 is inapplicable to this case and does not preclude the imposition of a sentence of imprisonment upon the revocation of probation ...". ***People v. Boldt*, 2020 N.Y. Slip Op. 04284, Fourth Dept 7-24-20**

CRIMINAL LAW, EVIDENCE.

THE DUPLICITY IN THE INDICTMENT WAS REMEDIED BY DETAILS PROVIDED TO THE DEFENSE PRIOR TO TRIAL AND BY DETAILED TRIAL EVIDENCE.

The Fourth Department held the prosecutor had remedied the duplicity in the indictment by providing information in a supplemental bill of particulars and a "trial indictment" after the motion to dismiss for duplicity was made, information corroborated by detailed trial evidence: "With respect to the counts of criminal sexual act in the first degree, after defendant made his motion, the prosecutor provided him with a supplemental bill of particulars that identified a precise date for each of the first 10 counts of criminal sexual act in the first degree. We conclude that dismissal of those counts is not required because the duplicity was 'cured by reference to a bill of particulars supplementing the indictment' ... . ,,, With respect to the counts of rape in the first degree, although the duplicity of those counts was left unaddressed by the supplemental bill of particulars, before trial, the prosecutor provided defendant with a document styled as a 'trial indictment,' which indicated that the People intended to prove a specific instance with respect to each of the counts on which defendant was ultimately convicted ... . In addition, the People provided evidence of those specific instances of forced sexual intercourse at trial by offering the testimony of the victim ... . The victim's testimony was detailed, graphic, and corroborated by receipts, photographs, and emails that allowed the victim to pinpoint the precise dates on which each of those incidents of forced sexual intercourse occurred. "Because defendant was convicted only of those counts of [rape in the first degree] where pretrial notice of specific instances was given and where those specific instances were proved at trial" ... , we conclude that dismissal of those counts as duplicitous was not required. ***People v. Quiros*, 2020 N.Y. Slip Op. 04279, Fourth Dept 7-24-20**

CRIMINAL LAW, EVIDENCE.

DEFENDANT TOLD THE POLICE HE DIDN'T WANT TO TALK, HIS STATEMENT SHOULD HAVE BEEN SUPPRESSED BUT THE ERROR WAS HARMLESS; CONSECUTIVE SENTENCES FOR POSSESSION OF THE KNIFE AND MURDER BY STABBING FOUND PROPER.

The Fourth Department determined defendant's statement should have been suppressed but found the error harmless. The Fourth Department further held that defendant was properly sentenced to consecutive sentences for possession of the knife and murder by stabbing: "... [D]efendant unequivocally informed the police immediately after being advised of his Miranda rights that 'he didn't want to talk.' No reasonable police officer could have interpreted that statement as anything other than a desire not to talk to the police ... . Regardless, the police continued the interrogation, thereby failing to 'scrupulously honor[ ]' defendant's right to remain silent' ... . Nevertheless, the error is harmless because the evidence of defendant's guilt is overwhelming and there is no reasonable possibility that any error in admitting defendant's statements to the police contributed to his conviction ... . * * * In cases concerning consecutive sentencing in the CPW [criminal possession of a weapon] context, we employ a framework that 'appropriately reflects the heightened level of integration between the possession and the ensuing substantive crime for which the weapon was used' ... . To determine whether a single act constituted both offenses under section 70.25 (2), we look to when the crime of possession was completed, i.e., both the actus reus and mens rea ... .'Only where the act of possession is accomplished before the commission of the ensuing crime and with a mental state that both satisfies the statutory mens rea element and is discrete from that of the underlying crime may consecutive sentences be imposed' ... . Consecutive sentencing is permissible here because defendant's act of possessing the knife was accomplished before he used it to kill the victim and "defendant's possession [thereof] was marked by an unlawful intent separate and distinct from" his intent with respect to the homicide ... . Indeed, the mental state associated with the CPW count, i.e., intent to use the knife unlawfully, is discrete from the mental state associated with the homicide count, i.e., negligence ...". ***People v. Colon*, 2020 N.Y. Slip Op. 04257, Fourth Dept 7-24-20**

CRIMINAL LAW, EVIDENCE, APPEALS.

THE DEFENDANT'S DNA ON THE WEAPON AND DEFENDANT'S PRESENCE AS A PASSENGER IN THE CAR WHERE THE WEAPON WAS FOUND WERE NOT SUFFICIENT TO PROVE DEFENDANT POSSESSED THE WEAPON AT THE TIME ALLEGED IN THE INDICTMENT; DEFENDANT'S CONVICTION REVERSED BASED ON A WEIGHT OF THE EVIDENCE ANALYSIS.

The Fourth Department, reversing defendant's possession of a weapon conviction, applying a weight of the evidence analysis, determined the defendant's DNA on the weapon and his presence as a passenger in the car where the weapon was found was not enough: "It is undisputed that the driver owned the vehicle and that the duffle bag belonged to him as well. The People relied on evidence that defendant's DNA profile matched that of the major contributor to DNA found on the handgun and that the driver was excluded as a contributor thereto. Although 'an inference could be made [from that evidence] that defendant had physically possessed the gun at some point in time' ... , that evidence alone ... does not establish that defendant actually possessed the handgun on the date and at the time alleged in the indictment … . Defendant was not the owner or operator of the vehicle, nor did the duffle bag in the locked trunk belong to him, and there was no evidence that defendant possessed or had access to the keys for the vehicle or that he had any access to or control over the trunk and duffle bag ... . Contrary to the People's contention, defendant's statement to the police did not constitute an admission that he had possessed the handgun ... or that he knew about its presence in the duffle bag and, in any event, mere knowledge of the presence of the handgun would not establish constructive possession ...". ***People v. Hunt*, 2020 N.Y. Slip Op. 04270, Fourth Dept 7-24-20**

EMPLOYMENT LAW, MUNICIPAL LAW, HUMAN RIGHTS LAW.

ALTHOUGH NO GENERAL MUNICIPAL LAW NOTICE OF CLAIM NEED BE FILED FOR THE FEDERAL EMPLOYMENT DISCRIMINATION OR THE STATE HUMAN RIGHTS LAW CAUSES OF ACTION, A NOTICE OF CLAIM PURSUANT TO THE SYRACUSE CITY CHARTER WAS REQUIRED FOR THE HUMAN RIGHTS LAW CAUSES OF ACTION.

The Fourth Department, reversing (modifying) Supreme Court, determined the federal employment discrimination causes of action and the state Human Rights Law causes of action did not trigger the need to file a notice of claim under General Municipal Law §§ 50-e and 50-i, but the notice of claim requirement pursuant to the Syracuse City Charter did apply to the Human Rights Law causes of action: "... [T]he issue here is whether plaintiffs were required to file a notice of claim pursuant to the Syracuse City Charter. We agree with plaintiffs that they did not need to file a notice of claim with respect to their Federal discrimination claims ... . [T]he notice of claim provisions of General Municipal Law §§ 50-e and 50-i are inapplicable to State claims under the Human Rights Law ... . But that is because Human Rights claims 'are not tort actions under section 50-e and are not personal injury, wrongful death, or damage to personal property claims under section 50-I' ... . In contrast, Syracuse City Charter § 8-115 (3) is not limited to tort claims or claims for personal injury. It provides in relevant part that '[n]o action or special proceeding, for any cause whatever, . . . involving the rights or interests of the [C]ity shall be prosecuted or maintained against the [C]ity' unless a notice of claim was served on the City within three months after the accrual of such claim … . The broad language of that notice of claim requirement encompasses plaintiffs' causes of action under the Human Rights Law ...". ***Blackmon v. City of Syracuse*, 2020 N.Y. Slip Op. 04254, Fourth Dept 7-24-20**

FAMILY LAW, EVIDENCE.

SEVERE ABUSE FINDING SUPPORTED BY FATHER'S FAILURE TO SEEK IMMEDIATE MEDICAL CARE FOR THE SERIOUSLY INJURED CHILD.

The Fourth Department, over a dissent, determined the evidence supported the severe abuse finding against father on the ground father delayed in seeking medical attention for the child's severe injuries: "Family Court's finding of severe abuse was based on two incidents in which the father found the older child at the bottom of the basement stairs in the morning. After the first incident, the older child sustained back and leg injuries, torso abrasions and facial bruising that was so severe that she could not open her eyes all the way. After the second incident, the child had two lacerations across the front of her neck that required significant medical attention. * * * A finding of severe abuse requires clear and convincing evidence that a child was found to be abused 'as a result of reckless or intentional acts of the parent committed under circumstances evincing a depraved indifference to human life, which result in serious physical injury to the child as defined in [Penal Law § 10.00 (10)]' (Social Services Law § 384-b [8] [a] [i]; see Family Ct Act §§ 1046 [b] [ii]; 1051 [e]). Here, the older child suffered severe injuries, including cuts to her throat that required a significant amount of medical attention and serious bruising. The act of cutting the older child's throat twice demonstrates that the actor did so because he or she simply did not care whether grievous harm would result to the older child. Even assuming, arguendo, that the evidence did not establish that the father was the one who inflicted those injuries, we conclude that the evidence demonstrates that he was in the home when the older child sustained her serious physical injuries and that he offered no compelling explanation for what caused them or

why he failed to seek immediate medical help for her after discovering those injuries ... . We disagree with the dissent's view that petitioner was required to present evidence that the father's delay in seeking medical treatment exacerbated the older child's injuries or complicated the older child's medical treatment." ***Matter of Mya N. (Reginald N.--Sadie H.)*, 2020 N.Y. Slip Op. 04266, Fourth Dept 7-24-20**

FREEDOM OF INFORMATION LAW (FOIL).

THE CITY MAY NOT CHARGE A FEE FOR REVIEW AND REDACTION OF POLICE BODY-WORN CAMERA FOOTAGE PURSUANT TO A FREEDOM OF INFORMATION LAW (FOIL) REQUEST.

The Fourth Department, reversing (modifying) Supreme Court, determined the city was not entitled to charge a fee for the review or redaction of police body-worn camera (BWC) footage under the Freedom of Information Law (FOIL): "... [R]espondents may not charge petitioner a fee for the costs associated with their review or redaction of the BWC footage requested by petitioner ... . We note that the Committee on Open Government has specifically opined that 'if the document exists in electronic format and the agency has the authority and the ability to redact electronically, we believe it would be reasonable for the agency to provide the requested redacted copy at no charge' (Comm on Open Govt FOIL—AO—18904 [2012]). While 'the advisory opinions issued by the Committee on Open Government are not binding on the courts . . . , an agency's interpretation of the statutes it administers generally should be upheld if not unreasonable or irrational' ... . We therefore modify the judgment by vacating that part of the judgment permitting respondents to charge petitioner a fee for the cost of reviewing and redacting the requested video footage." ***Matter of Forsyth v. City of Rochester*, 2020 N.Y. Slip Op. 04250, Fourth Dept 7-24-20**

INSURANCE LAW, PERSONAL INJURY.

PLAINTIFF'S SUPPLEMENTAL UNINSURED/UNDERINSURED MOTORIST (SUM) COVERAGE WAS GREATER THAN THE BODILY INJURY COVERAGE IN THE TORTFEASOR'S POLICY; SO THE SUM PROVISION OF PLAINTIFF'S POLICY WAS TRIGGERED.

The Fourth Department, reversing Supreme Court, determined defendant-insurer's supplemental uninsured/underinsured motorist (SUM) benefits were triggered in the traffic accident case. The (SUM) coverage under plaintiff's policy was greater than the bodily injury coverage in the tortfeasor's policy. Plaintiff had settled for the tortfeasor's policy limit and then sought to collect SUM benefits under his policy. Plaintiff's insurer had determined the policy was not triggered and Supreme Court agreed: "Insurance Law § 3420 (f) (2) was enacted to allow an insured to obtain the same level of protection for himself [or herself] and his [or her] passengers which he [or she] purchased to protect himself [or herself] against liability to others' ... . It is well settled that, '[u]nder Insurance Law § 3420 (f) (2), an insured's [SUM] coverage is triggered when the limit of the insured's bodily injury liability coverage is greater than the same coverage in the tortfeasor's policy'... . More particularly, when determining whether SUM coverage is triggered, '[t]he necessary analytical step . . . is to place the insured in the shoes of the tortfeasor and ask whether the insured would have greater bodily injury coverage under the circumstances than the tortfeasor actually has' ... , which 'requires a comparison of each policy's bodily injury liability coverage as it in fact operates under the policy terms applicable to that particular coverage' ... . Here, a comparison of the two policies at issue, in light of the circumstances of this case, demonstrates that plaintiff would be afforded greater coverage under his policy than under the tortfeasor's policy. The tortfeasor's policy would have provided plaintiff with only $100,000 of coverage for bodily injury, whereas plaintiff's policy would have provided him with up to $300,000 of coverage for bodily injury. Although plaintiff's SUM benefits would be reduced by the amount paid to his wife under the policy's $300,000 per accident maximum, he is still afforded more coverage under his policy than under the tortfeasor's policy because the bodily injury limit for an accident in which two people are injured would be $200,000 under the tortfeasor's policy, which is less than the coverage afforded by plaintiff's policy. Consequently, the SUM provision of plaintiff's policy was triggered ...". ***Gross v. Travelers Ins.*, 2020 N.Y. Slip Op. 04253, Fourth Dept 7-24-20**

MUNICIPAL LAW, CIVIL RIGHTS LAW.

42 U.S.C. § 1983 CAUSES OF ACTION AGAINST THE SHERIFF AND UNDERSHERIFF IN THEIR OFFICIAL CAPACITIES STEMMING FROM THE SUICIDE OF PLAINTIFFS' DECEDENT IN THE ERIE COUNTY JAIL SHOULD NOT HAVE BEEN DISMISSED.

The Fourth Department, reversing Supreme Court, determined the 42 U.S.C. § 1983 causes of action against the sheriff and undersheriff in their official capacities, stemming from plaintiffs' decedent's suicide in the Erie County Jail, should not have been dismissed: "We agree with plaintiffs that in state court they can assert a section 1983 cause of action against a sheriff or undersheriff in his or her official capacity. Until 1989, New York Constitution, article XIII, section 13 (a) stated that counties could not be made responsible for acts of sheriffs. Although that provision was removed via amendment in 1989, that amendment merely granted counties the ability to assume liability if the they chose to do so ... . Erie County has not passed

any legislation assuming such responsibility and, as a result, cannot be responsible for the acts of the Sheriff or Undersheriff ... . We thus conclude that the Sheriff and the Undersheriff are the proper defendants for the section 1983 cause of action. 'The gravamen of the cause of action pursuant to 42 USC § 1983 is deprivation of property without due process of law. The essential elements of the cause of action are conduct committed by a person acting under color of state law, which deprived the plaintiff of rights, privileges, or immunities secured . . . by the Constitution or laws of the United States' ... . The Sheriff has a duty to 'ensure that inmates receive adequate food, clothing, shelter, and medical care, and [to] take reasonable measures to guarantee the safety of the inmates' ... . Here, plaintiffs' allegations that the Sheriff and Undersheriff failed to take measures to ensure the safety of the inmates from suicide are sufficient to state a viable cause of action under section 1983 ...". ***Freeland v. Erie County*, 2020 N.Y. Slip Op. 04244 Fourth Dept 7-24-20**

MUNICIPAL LAW, NEGLIGENCE, TOXIC TORTS, ENVIRONMENTAL LAW, CIVIL PROCEDURE.

MOTIONS FOR LEAVE TO FILE LATE NOTICES OF CLAIM IN THIS "POLLUTION ESCAPING FROM A LANDFILL" CASE SHOULD HAVE BEEN GRANTED; THE STATUTE OF LIMITATIONS HAD BEEN TOLLED BY THE FILING OF A FEDERAL CLASS ACTION SUIT; ALTHOUGH THERE WAS NO ADEQUATE EXCUSE, THE RESPONDENT WAS AWARE OF THE CLAIMS AND COULD NOT DEMONSTRATE PREJUDICE FROM THE DELAY.

The Fourth Department, reversing Supreme Court, determined the motions for leave to file late notices of claim in these actions stemming from pollution escaping from a landfill should have been granted. Although leave to file a late notice of claim cannot be granted after the statute of limitations has run, here the statute of limitations was tolled by the filing of a federal class action suit: "Although more than one year and ninety days had elapsed between the November 2016 accrual date alleged in claimants' proposed notices of claim and their application for leave to serve late notices of claim, we agree with claimants that the filing of the federal class action in March 2017, in which claimants are putative class members, tolled the statute of limitations ... . [T]he court abused its discretion in denying their application insofar as it sought leave to serve late notices of claim on respondent ... . 'In determining whether to grant such [relief], the court must consider, inter alia, whether the claimant[s have] shown a reasonable excuse for the delay, whether the [respondent] had actual knowledge of the facts surrounding the claim within 90 days of its accrual, and whether the delay would cause substantial prejudice to the [respondent]' ... . Although claimants failed to establish a reasonable excuse for the delay, '[t]he failure to offer an excuse for the delay is not fatal where . . . actual notice was had and there is no compelling showing of prejudice to [respondent]' ... . [B]ecause respondent knew that its Site was upgraded to a Class 2 site in 2015 and because similarly situated individuals served timely notices of claim on respondent alleging 'substantively identical' exposure to the Site's pollutants and resulting damages ... , we conclude that claimants established that respondent received the requisite actual timely knowledge of the claims claimants now assert. We further conclude that claimants met their initial burden of establishing that respondent would not be substantially prejudiced by the delay inasmuch as respondent has been investigating similar claims since early 2017 ... and that, in opposition, respondent failed to make a "particularized showing" of substantial prejudice caused by the late notice ...". ***Matter of Bingham v. Town of Wheatfield*, 2020 N.Y. Slip Op. 04241, Fourth Dept 7-24-20**

ZONING, LAND USE.

THE PROPERTY OWNERS DID NOT DEMONSTRATE THEY COULD NOT REALIZE A REASONABLE RETURN ON THE PROPERTY ABSENT THE USE VARIANCE ALLOWING CONSTRUCTION OF A "DOLLAR STORE"; THE USE VARIANCE SHOULD NOT HAVE BEEN GRANTED.

The Fourth Department, reversing Supreme Court, determined the property owners seeking a use v ariance to build a "Dollar Store" did not demonstrate the existing zoning regulations imposed unnecessary hardship on them. The proof presented to the Zoning Board of Appeals (ZBA) did not demonstrate the owners' inability to realize a reasonable return for the property absent a use variance: "... [T]here is no evidence in the record establishing whether respondents could realize a reasonable return on the parcel if it were used for any other conforming use. Indeed, respondents' expert did not discuss any possible use of the property other than as vacant land. Thus, inasmuch as respondents' expert failed to discuss the possible return with respect to all uses permitted within the zoning district, respondents failed to meet their burden of demonstrating that they cannot realize a reasonable return on the property without the requested use variance ... . The fact that respondents' application for a use variance was limited to the two-acre parcel is 'of no moment; the inquiry as to an inability to realize a reasonable return may not be segmented to examine less than all of an owner's property rights subject to a regulatory regime' ... . The expert's failure to address respondents' ability to obtain a reasonable return on the remaining parts of the parcel, or on other permissible uses within the zoning district, is fatal to the application. Thus, the determination is not supported by substantial evidence ... ". ***Matter of Dean v. Town of Poland Zoning Bd. of Appeals*, 2020 N.Y. Slip Op. 04242, Fourth Dept 7-24-20**

To view archived issues of CasePrepPlus,
visit www.nysba.org/caseprepplus.