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FIRST DEPARTMENT

CONTRACT LAW, CIVIL PROCEDURE, SECURITIES.

QUESTION WHETHER A CONTRACT WHICH IS SILENT ABOUT ITS DURATION WAS PROPERLY TERMINATED REQUIRED CONSIDERATION OF THE INTENT OF THE PARTIES AND COULD NOT BE RESOLVED BASED UPON THE PLEADINGS ALONE; DEFENDANT'S MOTION TO DISMISS THE COMPLAINT SHOULD NOT HAVE BEEN GRANTED.

The First Department, reversing Supreme Court, determined defendant's (Goldman Sachs') motion to dismiss the complaint in this breach of contract action should not have been granted. The issue is whether a contract with is silent about its duration was properly terminated by Goldman. The issue requires consideration of the intent of the parties and could not be resolved based upon the pleadings: "... Supreme Court failed to examine the surrounding circumstances as well as the intent of the parties in discerning the original intent of the parties ... . It improperly determined, as a matter of law, that a 'reasonable time' justifying termination of the contract had elapsed and plaintiffs had not made any persuasive arguments to the contrary. In doing so, it relied upon its conclusion that Goldman was no longer receiving a meaningful benefit from the agreement, thus rejecting out of hand plaintiff's allegations in the amended complaint to the contrary. As this is a motion to dismiss pursuant to CPLR 3211(a)(7), Supreme Court should have afforded the pleadings a liberal construction (see CPLR 3026), taken the allegations of the complaint as true, and afforded plaintiff[s] the benefit of every possible favorable inference. A motion court must only determine whether the facts as alleged fit within any cognizable legal theory ... . Whether a plaintiff can ultimately establish its allegations should not be considered in determining a motion to dismiss ... . 'Under CPLR 3211(a)(1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law' ...". ***Charles Schwab Corp. v. Goldman Sachs Group, Inc.*, 2020 N.Y. Slip Op. 04520, First Dept 8-13-20**

CRIMINAL LAW, APPEALS.

THE FAILURE TO MENTION THE JUSTIFICATION DEFENSE ON THE VERDICT SHEET WAS NOT PRESERVED FOR APPEAL BY AN OBJECTION AND THE INTEREST OF JUSTICE APPELLATE JURISDICTION WILL NOT BE INVOKED WHERE THERE WAS AMPLE OPPORTUNITY TO OBJECT.

The First Department determined defendant did not preserve the issue concerning the adequacy of the verdict sheet which did not mention the justification defense. Defendant was acquitted of the top counts (attempted murder and assault first) and convicted of assault second. The jury was instructed not to consider the lesser counts if the justification defense applied. But the verdict sheet was silent on the justification defense. The First Department refused to exercise its interest of justice jurisdiction because there was ample opportunity to interpose an objection to the jury instructions and verdict sheet: "... [D]efendant contends that his conviction on the lesser count of second-degree assault must be vacated since the verdict sheet made no mention of justification. Verdict sheets in criminal cases, however, may not include substantive instructions absent authorization by CPL 310.20(2) ... . Here, defense counsel made no objections when the verdict sheet was reviewed and discussed by the court with the parties. In prior cases, we reversed convictions in the interest of justice where defendants interposed no objections to jury instructions that failed to comply with Velez [131 AD3d 129], even though the claim was unpreserved ... . In *People v. Davis* (176 AD3d 634 [2019], lv denied 34 NY3d 1157 [2020]), we changed course. The jury in that case similarly found defendant not guilty of the top count, but guilty of the lesser count. Although defendant interposed no objections to the verdict sheet or the jury instructions that were given, defendant appealed on the basis that both the initial and supplemental charges and the verdict sheet did not comply with Velez. We 'decline[d] to exercise our interest of justice jurisdiction to review these unpreserved claims' ... . Davis is applicable here. The defendant, although afforded multiple opportunities during the two-and-a-half to three-day charge conference, during trial and prior to deliberations, interposed no objections, and thus, failed to preserve his claims." ***People v. Macon*, 2020 N.Y. Slip Op. 04519, First Dept 8-13-20**

CRIMINAL LAW, ATTORNEYS, APPEALS, EVIDENCE, IMMIGRATION.

THE RECORD WAS NOT SUFFICIENT FOR CONSIDERATION OF THE INEFFECTIVE ASSISTANCE ARGUMENT RE WHETHER DEFENDANT WAS ADEQUATELY INFORMED OF THE DEPORTATION CONSEQUENCES OF HIS GUILTY PLEA; THE PRECISE NATURE OF COUNSEL'S ADVICE WAS NOT IN THE RECORD; TWO-JUSTICE DISSENT.

The First Department, over a two-justice dissent, determined the record was insufficient to preserve the ineffective assistance of counsel argument. The defendant argued that he was sufficiently informed about the deportation-risk associated with his guilty plea. The majority held that the record did not reflect the precise advice given by counsel and therefore the appropriate mechanism for review is a CPL § 440.10 motion. The dissenters argued the record was sufficient to send the matter back for a motion to vacate the plea: "We do not agree with defendant's attempt to exempt himself from the necessity of making a CPL 440.10 motion based on his counsel's statements at the plea hearing concerning the off-the-record advice concerning immigration that had been rendered. To reiterate, counsel's statements to the court, on their face, are general in nature and do not purport to describe the contents of the immigration advice that defendant actually received. The statement that defendant had been advised of 'all possible consequences' was consistent both with accurate advice that the plea would subject him to mandatory deportation and with inaccurate advice that failed to warn him of that consequence. We cannot, on this record, tell whether the advice actually given was accurate or inaccurate. Certainly, it cannot be said that counsel's statement establishes 'irrefutably' ... that the advice given was inaccurate, as is required to render a CPL 440.10 motion unnecessary." ***People v. Gomez*, 2020 N.Y. Slip Op. 04518, First Dept 8-13-20**

ZONING, LAND USE, MUNICIPAL LAW.

LOCAL RESIDENTS OPPOSING THE USE OF A HOTEL AS A HOMELESS SHELTER RAISED A QUESTION OF FACT ABOUT WHETHER THE CONFIGURATION OF THE BUILDING WOULD ALLOW ADEQUATE ACCESS BY FIREFIGHTERS.

The First Department, in a full-fledged opinion by Justice Singh, over a concurring opinion by Justice Oing, determined that the old Park Savoy Hotel was properly classified as a nontransient apartment hotel for use as a shelter for 150 employed or job-seeking men. However local residents, who brought an Article 78 proceeding objecting to the shelter, raised a question of fact about whether the configuration of the building would allow adequate access by firefighters: "We are asked to decide whether respondents properly permitted the opening of an employment shelter for homeless men in midtown Manhattan. We find that respondents rationally determined that the subject building is a Class A multiple dwelling in the 'R-2' occupancy group which represents a continuation of a preexisting use group classification and is grandfathered from compliance with the current New York City Building Code (Administrative Code of City of N.Y. [Building Code] § 310.1). However, we conclude that petitioners have rebutted the presumption that the building as currently configured will not endanger the general safety and welfare of the public. Accordingly, we remand this matter to Supreme Court for further proceedings." ***Matter of West 58th St. Coalition, Inc. v. City of New York*, 2020 N.Y. Slip Op. 04521, First Dept 8-13-20**

SECOND DEPARTMENT

CIVIL PROCEDURE, ATTORNEYS, CONTRACT LAW.

DEFENDANT OFFERED MORE TO SETTLE THE ACTION THAN WAS AWARDED PLAINTIFF AFTER TRIAL; DEFENDANT WAS THEREFORE ENTITLED TO ATTORNEY'S FEES PURSUANT TO CPLR 3220

The Second Department, reversing (modifying) Supreme Court, determined defendant was entitled to attorney's fees pursuant to CPLR 3220 in this breach of contract action. The defendant offered $950,000 to settle the action before trial and the plaintiff was awarded about $525,000: "CPLR 3220 provides, in relevant part, that, in an action to recover damages for breach of contract, at any time at least 10 days prior to trial, a defendant may make 'a written offer to allow judgment to be taken against [it] for a sum therein specified, with costs then accrued, if the [defendant] fails in his defense.' If the plaintiff rejects the offer and thereafter 'fails to obtain a more favorable judgment, [the plaintiff] shall pay the expenses necessarily incurred by the [defendant], for trying the issue of damages from the time of the offer' (CPLR 3220 ...). Here, since the defendant's offer of $950,000 exceeded the plaintiff's award of $524,253.92 and the plaintiff rejected that offer, the court should have awarded the defendant its expenses, including attorneys' fees, incurred in trying the issue of damages from the date of its offer pursuant to CPLR 3220 ...". ***Kirchoff-Consigli Constr. Mgt., LLC v. Dharmakaya, Inc.*, 2020 N.Y. Slip Op. 04468, Second Dept 5-12-20**

CIVIL PROCEDURE, CONTRACT LAW.

THE 90-DAY CONTRACTUAL STATUTE OF LIMITATIONS WAS VALID AND ENFORCEABLE; THE BREACH OF CONTRACT CAUSE OF ACTION WAS TIME-BARRED.

The Second Department, reversing Supreme Court, determined that the 90-day statute of limitation in the contract applied and the breach of contract cause of action was therefore time-barred. The construction contract required an action to be brought within 90 days of the completion of construction: "... [An] 'agreement which modifies the Statute of Limitations by

specifying a shorter, but reasonable, period within which to commence an action is enforceable' ... . ' [T]he period of time within which an action must be brought . . . should be fair and reasonable, in view of the circumstances of each particular case. . . . The circumstances, not the time, must be the determining factor' ... . 'Absent proof that the contract is one of adhesion or the product of overreaching, or that [the] altered period is unreasonably short, the abbreviated period of limitation will be enforced' ... . Here, the [defendant] demonstrated, prima facie, that the time within which to commence this action had expired inasmuch as the plaintiff failed to commence this action within 90 days after May 31, 2011, when construction was indisputably complete ...". ***Stonewall Contr. Corp. v. Long Is. Rail Rd. Co.*, 2020 N.Y. Slip Op. 04505, Second Dept 8-12-20**

CIVIL PROCEDURE, EMPLOYMENT LAW, LABOR LAW.

IN LIGHT OF THE REVERSAL BY THE COURT OF APPEALS, PLAINTIFF HOME HEALTH CARE AIDES WERE NOT ENTITLED TO CLASS CERTIFICATION ON THE QUESTION WHETHER THEY SHOULD BE PAID FOR THE SLEEP AND BREAK HOURS DURING 24-HOUR SHIFTS.

The Second Department, on remittal after reversal by the Court of Appeals, determined plaintiffs, home health care aides, were not entitled to class certification on the question whether they were entitled to be paid for the sleep and break hours during 24-hour shifts. The Court of Appeals ruled that the NYS Department of Labor's (DOL's) finding that the flat-rate pay did not violate the Minimum Wage Order (Wage Order) was not irrational or unreasonable: "On March 26, 2019, the Court of Appeals reversed this Court's decision and order, concluding that the DOL's interpretation of the Wage Order did not conflict with the promulgated language and was not irrational or unreasonable ... . The Court of Appeals remitted the matter to this Court to determine whether the plaintiffs' class certification motion was properly denied, considering the DOL's interpretation of the Wage Order as well as alternative bases for class certification asserted by the plaintiffs. The proponent of a motion for class certification bears the burden of establishing the requirements of CPLR article 9 ... . CPLR 901 sets forth five prerequisites to class certification. 'These factors are commonly referred to as the requirements of numerosity, commonality, typicality, adequacy of representation and superiority' ... . 'A class action certification must be founded upon an evidentiary basis' ... . [I]n light of the DOL's interpretation of the Wage Order, the plaintiffs have failed to demonstrate entitlement to class certification on the question of whether the defendants violated the law by failing to pay them for all hours of a 24-hour shift. Although a worker must be paid minimum wage for the time he or she is 'required to be available for work at a place prescribed by the employer,' under the DOL interpretation of the Wage Order, a worker is not considered to be 'available for work at a place prescribed by the employer' during designated meal and sleep breaks, totaling 11 hours of a 24-hour shift ...". ***Moreno v. Future Health Care Servs., Inc.*, 2020 N.Y. Slip Op. 04473, Second Dept 8-12-20**

CIVIL PROCEDURE, EVIDENCE.

THE PROOF THE DEFENDANT WAS PROPERLY SERVED WAS NOT REBUTTED BY THE DEFENDANT'S UNSUBSTANTIATED ALLEGATIONS, SUPREME COURT REVERSED.

The Second Department, reversing Supreme Court, determined that the proof that defendant was properly served with the summons and complaint was not rebutted by the defendant's unsubstantiated allegations: " 'At a hearing to determine the validity of service of process, the burden of proving personal jurisdiction is upon the party asserting it, and that party must sustain that burden by a preponderance of the credible evidence' ... .'In reviewing a determination made after a hearing, this Court's authority is as broad as that of the hearing court, and this Court may render the determination it finds warranted by the facts, taking into account that in a close case, the hearing court had the advantage of seeing the witnesses' ... . Here, viewing the evidence in its totality, the plaintiff met her burden of proving by a preponderance of the evidence that jurisdiction over the defendant was obtained by proper service of process ... . At the hearing, the process server testified to his independent recollection of his personal delivery of the papers to a person of suitable age and discretion at the defendant's dwelling, explained why he recalled this particular delivery, and gave testimony about the mailing. Among the exhibits the plaintiff presented at the hearing was a photograph, with a date, time, and GPS coordinates, depicting where the process server delivered the papers. The defendant's testimony verified that the person of suitable age and discretion, as named and described in the process server's affidavit, was consistent with the name and description of one of his co-tenants, his father. Although the defendant testified that his father was out of the country at the time of delivery, the defendant's testimony, which was unsubstantiated and, in critical respects, without a basis of personal knowledge, was insufficient to support the determination that he was not properly served." ***Sturrup v. Scaria*, 2020 N.Y. Slip Op. 04506, Second Dept 8-12-20**

CIVIL PROCEDURE, EVIDENCE, ATTORNEYS.

THE EVIDENCE SUBMITTED IN SUPPORT OF DEFENDANT'S SUMMARY JUDGMENT MOTION, INCLUDING AN ATTORNEY AFFIDAVIT, WAS NOT IN ADMISSIBLE FORM, THE MOTION SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined defendant's (CCC's) motion for summary judgment should not have been granted because the supporting evidence, including an attorney affidavit, was not in admissible form: "The affirmation of CCC's attorney was not based upon personal knowledge and, thus, was of no probative or evidentiary significance ... . 'The affidavit or affirmation of an attorney, even if he [or she] has no personal knowledge of the facts, may, of

course, serve as the vehicle for the submission of acceptable attachments which do provide evidentiary proof in admissible form, e.g., documents, transcripts' ... . Here, however, the submissions by CCC on the motion were not in admissible form ... . The emails and letters were offered for the truth of their contents and, therefore, constituted hearsay ... . CCC failed to establish that any exception to the hearsay rule applied ... . Since CCC failed to submit admissible evidence or an affidavit by a person having knowledge of the facts, it failed to establish its prima facie entitlement to judgment as a matter of law (see CPLR 3212[b] ...)." ***United Specialty Ins. v. Columbia Cas. Co.*, 2020 N.Y. Slip Op. 04511, Second Dept 8-12-20**

CRIMINAL LAW.

DEFENDANT HAS THE RIGHT TO BE PERSONALLY PRESENT AT RESENTENCING ABSENT WAIVER, RESENTENCE REVERSED.

The Second Department, reversing defendant's resentence, determined the right to be personally present at sentencing extends to resentencing: "The defendant's fundamental right to be 'personally present at the time sentence is pronounced' (CPL 380.40[1]) extends to resentencing or to the ...amendment of a sentence ... . While a defendant convicted of a felony may waive the right to be present at resentencing, this waiver must be expressly made ... . A '[w]aiver results from a knowing, voluntary and intelligent decision' ... . Here, the defendant was not produced at resentencing and the record is devoid of any indication that he expressly waived his right to be present. Thus, the Supreme Court's failure to have the defendant produced at the resentencing proceeding violated the defendant's fundamental right to be present at the time of sentence." ***People v. Rodriguez*, 2020 N.Y. Slip Op. 04493, Second Dept 8-12-20**

CRIMINAL LAW, EVIDENCE.

DEFENDANT'S REQUEST FOR THE MISSING WITNESS JURY INSTRUCTION SHOULD HAVE BEEN GRANTED, CONVICTION REVERSED.

The Second Department, reversing Supreme Court, determined defendant's request for a missing witness jury instruction should have been granted. Defendant was charged with contempt stemming from the violation of a protective order. It was alleged defendant pushed his former girlfriend to the ground in the presence of her date. Her date was subpoenaed by the People and was ready to testify but was not called by the People: "The proponent of a missing witness charge 'initially must demonstrate only three things via a prompt request for the charge: (1) that there is an uncalled witness believed to be knowledgeable about a material issue pending in the case,' (2) that such witness can be expected to testify favorably to the opposing party,' and (3) that such party has failed to call' the witness to testify' ... . 'The party opposing the charge, in order to defeat the proponent's initial showing, must either account for the witness's absence or demonstrate that the charge would not be appropriate' ... . 'This burden can be met by demonstrating that the witness is not knowledgeable about the issue, that the issue is not material or relevant, that although the issue is material or relevant, the testimony would be cumulative to other evidence, that the witness is not available', or that the witness is not under the party's control' such that he [or she] would not be expected to testify in his or her favor' ... . If the party opposing the charge meets its burden to rebut the proponent's prima facie showing, 'the proponent retains the ultimate burden to show that the charge would be appropriate' ... . Here, the defendant met his prima facie burden to show that the complainant's date was believed to be knowledgeable about a material issue pending in the case and was expected to testify favorably to the People, who had failed to call him to testify. According to the complainant, her date was present during the incident ... and was a victim during that incident. The People failed to rebut this prima facie showing ... . Contrary to the People's contention, they failed to establish that the complainant's date was unavailable as a witness. He appeared in court pursuant to the People's so-ordered subpoena, and his counsel stated that although he did not wish to be a witness, he was outside the courtroom and was prepared to testify. Further, the People did not establish that the complainant's date was not under the People's 'control,' such that he would not be expected to testify in their favor, given that he allegedly was on a date with the complainant when the defendant lunged at them, threatened them, and pushed the complainant to the ground. Moreover, the People did not demonstrate that the testimony would have been cumulative." ***People v. Sanchez*, 2020 N.Y. Slip Op. 04494, Second Dept 8-12-20**

INMATES, CRIMINAL LAW, MENTAL HYGIENE LAW.

ALTHOUGH PETITIONER DEMONSTRATED THE INMATE LACKED THE CAPACITY TO MAKE A REASONED DECISION ABOUT THE PROPOSED TREATMENT FOR SCHIZOPHRENIA, PETITIONER DID NOT DEMONSTRATE THE PROPOSED TREATMENT WAS NARROWLY TAILORED TO THE INMATE'S NEEDS.

The Second Department, remitting the matter, determined that, although it was demonstrated the inmate (Tyrone) lacked the capacity to make a reasoned decision about his treatment for schizophrenia, the petitioner did not demonstrate the proposed treatment was narrowly tailored to the inmate's needs: "When seeking to administer a course of medication to a patient without that patient's consent, a petitioner bear the burden of demonstrating, by clear and convincing evidence, (1) the patient's incapacity to make treatment decisions ... , and (2) that 'the proposed treatment is narrowly tailored to give substantive effect to the patient's liberty interest, taking into consideration all relevant circumstances, including the patient's best interests, the benefits to be gained from the treatment, the adverse side effects associated with the treatment and

any less intrusive alternative treatments' ... . 'Whether a mentally ill patient has the capacity to make a reasoned decision with respect to treatment is a question of fact for the hearing court, the credibility findings of which are entitled to due deference' ... . [T]e petitioner demonstrated by clear and convincing evidence that Tyrone lacks the capacity to make a reasoned decision with respect to the proposed treatment. ... However, the petitioner failed to demonstrate by clear and convincing evidence that the proposed treatment is narrowly tailored to preserve Tyrone's liberty interest." ***Matter of Tyrone M.*, 2020 N.Y. Slip Op. 04478, Second Dept 8-12-20**

INSURANCE LAW.

NOTIFICATION OF AN INTENTION TO CANCEL AN AUTOMOBILE INSURANCE POLICY IF A QUESTIONNAIRE IS NOT SUBMITTED IS NOT A VALID CANCELLATION, THE POLICY REMAINED IN EFFECT DESPITE THE INSURED'S FAILURE TO SUBMIT THE QUESTIONNAIRE.

The Second Department, reversing Supreme Court, determined the insurer's (GEICO's) purported cancellation of the automobile insurance policy was invalid for two reasons: (1) the notice of cancellation was insufficient; and (2) the reason for the cancellation was not among those allowed by the Insurance Law. GEICO notified the insured (Islam) the policy would be cancelled unless Islam submitted a completed questionnaire by a certain date. Islam did not submit the questionnaire: " '[A] mere expression of a purpose or intention to cancel in the future is not sufficient; that is, it must be one of actual cancellation, not of future conditional cancellation, or of doubtful meaning as to time or purpose' ... . The purported cancellation notice reflected a mere intention to cancel in the future if Islam did not provide a completed business use questionnaire. In any event, cancellation is permitted only upon specified grounds once a covered policy has been in effect for at least 60 days (see Insurance Law § 3425[c][1][A-C]). Insurance Law § 3425(c)(1)(C) requires the 'discovery of fraud or material misrepresentation in obtaining the policy or in the presentation of a claim thereunder' to cancel an automobile insurance policy during the required policy period of one year (Insurance Law § 3425[c][1][C]). Here, there is no dispute that the GEICO policy had been in effect for at least 60 days at the time of the purported cancellation. GEICO did not establish that it had discovered any fraud or material misrepresentation committed by Islam; thus, GEICO did not sustain its burden of demonstrating that its notice of cancellation complied with the statutory requirements of Insurance Law § 3425(c)(1) ...". ***Matter of Unitrin Direct Ins. Co. v. Barrow*, 2020 N.Y. Slip Op. 04481, Second Dept 8-12-20**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

APPELLANT WAS NOT AN AGENT OF THE GENERAL CONTRACTOR OR OWNER, DID NOT SUPERVISE AND CONTROL PLAINTIFF'S WORK AND DID NOT HAVE CONTROL OVER THE WORK SITE; THEREFORE THE LABOR LAW §§ 240(1), 241(6) AND 200 CAUSES OF ACTION SHOULD HAVE BEEN DISMISSED IN THIS CONSTRUCTION-DEBRIS-SLIP-AND-FALL CASE.

The Second Department, reversing Supreme Court, determined the appellant, which was hired by the construction manager to put in concrete steps, was bit an agent of the general contractor or the owner and did not exercise supervisory control plaintiff's work in this Labor Law §§ 200, 240(1) and 241(6) action. Plaintiff worked for an HVAC contractor and fell over construction debris on a temporary ramp leading to the entrance of the premises: "To hold a defendant liable as an agent of the general contractor or the owner for violations of Labor Law §§ 240(1) and 241(6), there must be a showing that it had the authority to supervise and control the work that brought about the injury ... 'The determinative factor is whether the party had the right to exercise control over the work, not whether it actually exercised that right' ... . 'Where the owner or general contractor does in fact delegate the duty to conform to the requirements of the Labor Law to a third-party subcontractor, the subcontractor becomes the statutory agent of the owner or general contractor' ... . Here, the appellant established its prima facie entitlement to judgment as a matter of law dismissing the Labor Law §§ 240(1) and 241(6) causes of action insofar as asserted against it by demonstrating that it was not an agent of the general contractor or the owner with regard to the plaintiff's work ... . There was no evidence that the appellant had any authority to supervise or control the work of the plaintiff ... . [T]he appellant established its prima facie entitlement to judgment as a matter of law dismissing the Labor Law § 200 and common-law negligence causes of action insofar as asserted against it by demonstrating that it did not have control over the work site ...". ***Fiore v. Westerman Constr. Co., Inc.*, 2020 N.Y. Slip Op. 04460, Second Dept 12-12-20**

MENTAL HYGIENE LAW, CRIMINAL LAW.

RESPONDENT IS A DANGEROUS SEX OFFENDER REQUIRING CONFINEMENT, NOT STRICT AND INTENSIVE SUPERVISION AND TREATMENT (SIST), SUPREME COURT REVERSED.

The Second Department, reversing Supreme Court, determined respondent was a dangerous sex offender requiring confinement under the Mental Hygiene Law. Supreme Court had found respondent was entitled to release under strict and intensive supervision and treatment (SIST). "Throughout the entirety of the respondent's confinement and incarceration, he has never successfully completed any sex offender treatment program. The respondent was violent and 'destructive' in group therapy, and repeatedly threatened and assaulted his treatment providers and other staff members. During interviews with treatment providers and evaluators, the respondent threatened to kill the judge who sentenced him; indicated

that he derived excitement out of humiliating, tormenting, hunting, and hurting other people; and indicated that he kept a 'revenge' list in his mind of people he intended to retaliate against. The respondent also repeatedly feigned psychiatric illnesses that he did not have in an attempt to manipulate the evaluators. Up until the time of the subject dispositional hearing, the respondent continued to make threats and express a desire to kill facility staff members. ... The State presented the testimony of two experts, each of whom opined to a reasonable or high degree of psychological certainty that the respondent is a dangerous sex offender requiring confinement. Both experts diagnosed the respondent with several disorders that affect his emotional, cognitive, or volitional capacity in a manner making it likely that the respondent would engage in recidivist violent sexual offense behavior again. Both experts' testimony also established that the respondent is presently unable to control his behavior because he has steadfastly refused to meaningfully engage in any treatment program. Each of the experts believed that the respondent's disorders were treatable, but because the respondent had not successfully completed treatment to resolve his disorders, deviance, offense cycle, or triggers, the disorders remained untreated, and the respondent lacked the ability to control his behavior." ***Matter of State of New York v. Raul L.*, 2020 N.Y. Slip Op. 04479, Second Dept 8-12-20**

PERSONAL INJURY, VEHICLE AND TRAFFIC LAW.

PLAINTIFF BICYCLIST RAN INTO THE BACK OF DEFENDANT'S STOPPED OR STOPPING CAR; DEFENDANT DRIVER'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined the action by plaintiff-bicyclist against defendant-driver should have been dismissed. Plaintiff ran into the back of defendant's car as defendant was stopped or was stopping to park: "Vehicle and Traffic Law section 1231 provides that every bicyclist is 'subject to all of the duties applicable to the driver of a vehicle' ... . A bicyclist 'approaching another vehicle from the rear is required to maintain a reasonably safe distance and rate of speed under the prevailing conditions to avoid colliding with the other vehicle' (... see Vehicle and Traffic Law § 1129[a]). A rear-end collision with a stopped or stopping vehicle establishes a prima facie case of negligence on the part of the operator of the rear vehicle, requiring that operator to come forward with evidence of a nonnegligent explanation for the collision to rebut the inference of negligence ... . The evidence ... established that the plaintiff was negligent in failing to see what was there to be seen because he was not paying attention to the road conditions ahead, while he was riding his bicycle at a fast rate of speed, and that he failed to maintain a reasonably safe distance from the defendant's vehicle which, according to the plaintiff, was stopped at the time of the impact ... . The plaintiff's contention in opposition that the defendant made a sudden stop before attempting to park his vehicle was insufficient to raise a triable issue of fact as to whether the defendant was negligent in the operation of his vehicle ...". ***Greene v. Raskin*, 2020 N.Y. Slip Op. 04463, Second Dept 8-12-20**

THIRD DEPARTMENT

CRIMINAL LAW, APPEALS.

THE MAJORITY DID NOT CONSIDER THE ARGUMENT DEFENDANT WAS NOT ADEQUATELY INFORMED OF THE RIGHTS HE WAS GIVING UP BY PLEADING GUILTY BECAUSE THE ISSUE WAS NOT PRESERVED; THE TWO-JUSTICE DISSENT ARGUED THE APPEAL SHOULD BE CONSIDERED IN THE INTEREST OF JUSTICE AND THE CONVICTION REVERSED.

The Third Department, over a two-justice dissent, determined defendant's assertion that he was not adequately informed of the rights he was giving up by pleading guilty was not preserved for appeal. The dissent argued the court should consider the appeal under its interest of justice jurisdiction and reverse the conviction: "Defendant also asserts that his guilty plea was not knowing, voluntary and intelligent because County Court did not fully advise him of the rights that he was giving up by pleading guilty. This claim was not preserved for our review as the record does not disclose that defendant made an appropriate postallocution motion ... , and we decline to exercise our interest of justice jurisdiction to take corrective action. **From the dissent:** "... County Court engaged in a limited and brief exchange with defendant in which it explained that, by pleading guilty, defendant was giving up the 'right to remain silent and not to incriminate yourself,' the 'right to a jury trial' and 'any other rights you have on a trial.' County Court failed to advise defendant of his right to be confronted by witnesses. Additionally, and significantly, when asked if he had discussed the plea and its consequences with counsel, defendant merely stated, 'She told me about violating, would be like 90 days. I understand.' The record does not establish that defendant understood and affirmatively waived the trial-related rights that he was automatically forfeiting by pleading guilty and, thus, defendant's plea is invalid ...". ***People v. Cruz*, 2020 N.Y. Slip Op. 04514, Third Dept 8-13-20**

CRIMINAL LAW, EVIDENCE.

THE STRIP SEARCH OF DEFENDANT WAS JUSTIFIED AND CONDUCTED PROPERLY.

The Third Department determined the strip search of defendant, which resulted in the seizure of cocaine, was proper: " '[I]t is clear that a strip search must be founded on a reasonable suspicion that the arrestee is concealing evidence underneath clothing and the search must be conducted in a reasonable manner' ... . The trooper testified at the suppression

hearing that the search of the vehicle led to the discovery of 1.1 grams of marihuana in the center console. A K-9 search of the vehicle revealed 'hits' at both the center console and the driver's seat. According to the trooper, during the transport of defendant to the State Police barracks, the smell of marihuana was 'overwhelming.' At the barracks, defendant was handcuffed to a bench and the trooper continued to smell marihuana. Each time the trooper asked defendant if he had marihuana on him, he denied it. After defendant was advised that he was to be strip-searched, he was taken to a private interview room and the search was conducted by two male officers. Defendant was asked to remove one article of clothing at a time; when he was down to his underwear, defendant handed over the marihuana, and the cocaine was revealed shortly thereafter. Given this evidence, a reasonable suspicion existed that defendant was concealing evidence and we find that the search was conducted in a reasonable manner ...". ***People v. Hightower*, 2020 N.Y. Slip Op. 04513, Third Dept 8-13-20**

FAMILY LAW, EVIDENCE, JUDGES.

FAMILY COURT RESOLVED CONFLICTING EVIDENCE AND CREDIBILITY ISSUES WITHOUT A HEARING, FAILED TO ACCEPT ALLEGATIONS IN A PRO SE MODIFICATION OF CUSTODY PETITION AS TRUE, IMPOSED A SANCTION FOR A VIOLATION OF A CUSTODY ORDER WHICH IS NOT ALLOWED BY THE CONTROLLING STATUTES, AND FAILED TO TAKE THE BEST INTERESTS OF THE CHILDREN INTO ACCOUNT.

The Third Department, reversing Family Court, noted several errors in these proceedings which began with father's violation of custody petitioner followed by two modification of custody petitions by mother. All the petitions were brought pro se. Family Court erred: (1) in dismissing mother's modification petitions without a hearing; (2) in failing to accept as true and liberally construe mother's pro se allegations; (3) in making factual findings and credibility determinations in the absence of a hearing on the modification petitions; (4) and in imposing an impermissible sanction on mother for an alleged violation of a custody order: "Family Court did not liberally construe the mother's pro se petitions, accept her allegations as true, afford her the benefit of every possible inference or resolve credibility issues in her favor when determining the motions to dismiss. ... [R]ather than accept the mother's allegations as true, Family Court improperly made factual findings and credibility determinations, inappropriately resolving the conflicting versions of events, as set forth in the mother's petitions and the father's supporting affidavits, against the mother and in favor of the father ... . [T]he only available penalty that Family Court may impose for a willful violation of a custodial order without a concurrent modification petition pending is a monetary fine and/or a period of imprisonment (see Judiciary Law § 753 [A]; Family Ct Act § 156 ...). However, Family Court sanctioned the mother by modifying the joint legal order of custody and granting the father sole legal custody of the children without determining whether there had been a change in circumstances. In addition, Family Court failed to engage in any discernible analysis of whether a modification was in the best interests of the children." ***Matter of Gerard P. v. Paula P.*, 2020 N.Y. Slip Op. 04515, Third Dept 8-13-20**

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