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Editor: **Bruce Freeman**

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FIRST DEPARTMENT

REAL ESTATE, CONTRACT LAW, CIVIL PROCEDURE.

THE SELLER WAS NOT OBLIGATED TO EXERCISE AN OPTION IN THE RESTRICTED REMEDIES CLAUSE OF THE REAL ESTATE PURCHASE CONTRACT BECAUSE THE BUYER NEVER DEMANDED SPECIFIC PERFORMANCE OF THE CONTRACT.

The First Department, in a full-fledged opinion by Justice Oing, affirming Supreme Court and noting that a motion to dismiss for failure to state a cause of action may be brought at any time, determined the motion to dismiss this action for specific performance of a real estate purchase agreement was properly granted. The buyer argued it was entitled to specific performance because the seller was required to exercise one of the remedies described in the restricted remedies clause of the purchase agreement. The court disagreed and held the buyer never in fact demanded specific performance. Rather, the buyer indicated it would not close unless the seller remedied a tax misclassification and lowered the purchase price: "Supreme Court properly considered the seller's post note of issue CPLR 3211(a)(7) motion to dismiss for failure to state a cause of action because it can be made at any time (CPLR 3211[e]). Thus, CPLR 3212(a)'s requirement of demonstrating good cause for the delay does not apply ... . * * * .. .[T]he buyer maintains that Supreme Court erred in dismissing that claim by misreading *Mehlman v. 592-600 Union Ave. Corp.* (46 AD3d 338 [1st Dept 2007]) in applying the contract's restricted remedy clause against it. That clause expressly and strictly limited the buyer to two remedies in the event the seller was unable to convey title to the premises pursuant to the terms of the contract: (i) terminate the contract and receive its down payment or (ii) consummate the transaction with a $25,000 credit to remedy any title issue. The buyer argues that our holdings in Mehlman and *101123 LLC v. Solis Realty LLC* (23 AD3d 107 [1st Dept 2005]) obligate the seller to concede the title defect and demand that the buyer exercise one of the options set forth in the restricted remedies clause at the closing, and that the seller's failure to satisfy this obligation enables the buyer to maintain its specific performance claim. * * * ... [A] seller unable to convey clear title for reasons contemplated in the parties' contract is entitled to invoke the restricted remedies clause in response to a buyer's demand for specific performance of the parties' contractual terms. Here, the buyer's allegations unmistakably demonstrate that it did not demand specific performance from the seller to convey title as alleged in the complaint, namely, by conveying title in accordance with the seller's contractual representation that there were no negative tax issues associated with the premises. Instead, the buyer alleged in its complaint that it was ready, willing and able to close provided that the seller, inter alia, corrected the tax misclassification and reduced the purchase price to address the tax liabilities arising from the misclassification. In fact, the allegations underlying the claim demonstrate the complete absence of a demand for specific performance of the parties' contract. Rather, according to those allegations, the buyer's demand would result only if the seller did not comply with the buyer's condition to close. These allegations, as a matter of law, demonstrate that the seller was not obligated to invoke the restricted remedies clause. Thus, under these circumstances, the buyer is precluded from seeking from the seller specific performance of their contract". ***M&E 73-75, LLC v. 57 Fusion LLC*, 2020 N.Y. Slip Op. 04372, First Dept 7-30-20**

SECOND DEPARTMENT

ADMINISTRATIVE LAW, VEHICLE AND TRAFFIC LAW, EVIDENCE.

THE FINDING THAT PETITIONER VIOLATED VEHICLE AND TRAFFIC LAW § 1180 (d) (SPEEDING) WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE; THE POLICE OFFICER DESCRIBED AN INCIDENT ON A DIFFERENT DATE AT THE HEARING.

The Second Department, reversing Supreme Court, determined the administrative finding that petitioner violated Vehicle and Traffic Law section 1180 (d) (speeding) was not supported by substantial evidence because the police officer described an incident on a different date at the hearing: "At the hearing, the police officer, who issued the summons to the petitioner, testified about events which occurred on March 18, 2016, which was not the date that the alleged offense occurred according to the summons issued to the petitioner. While the substantial evidence standard 'demands only that a given inference is reasonable and plausible, not necessarily the most probable' ... , here, there was no testimony or evidence provided to demonstrate that the petitioner operated his vehicle in violation of Vehicle and Traffic Law § 1180(d) on March 8, 2016. Giv-

en the discrepancy between the date of the offense as set forth in the summons and the testimony of the officer, relying on his notes which also referred to March 18, 2016, the record does not demonstrate that the ALJ was presented with substantial evidence that the petitioner violated Vehicle and Traffic Law § 1180(d) on March 8, 2016 ...". ***Matter of Batra v. Egan*, 2020 N.Y. Slip Op. 04300, Second Dept 7-29-20**

CIVIL PROCEDURE.

THE CERTIFICATION ORDER DIRECTING PLAINTIFF TO FILE A NOTE OF ISSUE WITHIN 90 DAYS WAS NOT A VALID 90-DAY NOTICE PURSUANT TO CPLR 3216; THE ACTION SHOULD NOT HAVE BEEN DISMISSED AND THE CROSS-MOTION TO EXTEND THE TIME FOR FILING A NOTE OF ISSUE SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined the action should not have been dismissed for failure to file a note of issue because a valid 90-day notice had not been issued or served. The certification order issued by Supreme Court directing plaintiff to file a note of issue within 90 days did not meet the criteria for a 90-day notice required by CPLR 3216: "... [T]he record shows that neither the Supreme Court nor any of the defendants served, pursuant to CPLR 3216, a 90-day demand to file a note of issue on the plaintiff. ... [A]lthough the court issued a certification order ... directing the plaintiff to file the note of issue within 90 days of the order, it did not constitute a valid 90-day demand because it did not contain any language warning that the plaintiff's failure to file the note of issue within 90 days would result in dismissal pursuant to CPLR 3216 ... . Additionally, the ... certification order did not set forth specific conduct by the plaintiff constituting neglect ... . Since the plaintiff was never served with a 90-day demand, the court should not have dismissed the complaint due to the plaintiff's failure to file the note of issue ... . [T]he Supreme Court could not rely upon CPLR 3126 as a basis upon which to dismiss the complaint as the plaintiff's failure to timely file the note of issue or to move to extend the time to file the note of issue did not constitute disobedience of an 'order for disclosure' (CPLR 3126 ...). We also disagree with the Supreme Court's determination denying the plaintiff's cross motion, pursuant to CPLR 2004, to extend her time to file the note of issue. Discovery is complete and the defendants failed to establish that they were prejudiced by the plaintiff's failure to timely file the note of issue and her delay in moving for an extension of time to do so ...". ***Tolkoff v. Goldstein*, 2020 N.Y. Slip Op. 04341, Second Dept 7-29-20**

CIVIL RIGHTS LAW.

A VIOLATION OF THE RIGHT OF PRIVACY CAUSE OF ACTION ALLEGING USE OF A PERSON'S IMAGE IN ADVERTISING IS PURELY STATUTORY (CIVIL RIGHTS LAW 50 AND 51); THERE IS NO COMMON-LAW RIGHT OF PUBLICITY IN NEW YORK.

The Second Department determined the complaint stated causes of action for violation of the right of privacy by the alleged use of plaintiff's likeness in an advertising campaign. The Second Department, disagreeing with Supreme Court, held the cause of action alleging a purported common-law fight of publicity should have been dismissed because the right of privacy is exclusively statutory in New York: "We agree with the Supreme Court's determination denying those branches of the defendant's motion which were to dismiss the first and second causes of action, alleging violations of the plaintiff's right of privacy and the related right of publicity, respectively, under Civil Rights Law §§ 50 and 51. Civil Rights Law § 50 prohibits '[a] person, firm or corporation' from using 'for advertising purposes . . . the name, portrait or picture of any living person without having first obtained the written consent of such person.' 'A name, portrait or picture is used for advertising purposes' if it appears in a publication which, taken in its entirety, was distributed for use in, or as part of, an advertisement or solicitation for patronage of a particular product or service' ... . Here, accepting the plaintiff's allegations as true, which we must ... , whether or not the subject image constituted a work of art, the first and second causes of action state cognizable causes of action under Civil Rights Law §§ 50 and 51 as they allege, inter alia, that the defendant used the plaintiff's portrait, image, and likeness as Phantom Knoet in an advertising campaign, which included promotional merchandise to promote the defendant's financial services and products ... . However, the Supreme Court should have granted that branch of the defendant's motion which was to dismiss the third cause of action, alleging a violation of a purported common-law right of publicity based on the defendant's misappropriation of the plaintiff's property right in her image and that of her persona Phantom Knoet. As the right of publicity is encompassed under the Civil Rights Law as an aspect of the right of privacy, which is exclusively statutory, there is no common-law right of publicity ...". ***Darden v. OneUnited Bank*, 2020 N.Y. Slip Op. 04291, Second Dept 6-29-20**

CORPORATION LAW, CONTRACT LAW, FRAUD.

QUESTION OF FACT WHETHER THE CORPORATE VEIL SHOULD BE PIERCED IN THIS BREACH OF CONTRACT ACTION.

The Second Department, reversing Supreme Court, determined plaintiff had raised questions of fact about whether the corporate veil should be pierced in this breach of contract action: "The plaintiff alleged that it contracted with the defendant China Perfect Construction Corp. (hereinafter China Perfect) to perform certain construction work, and that China Perfect breached that contract by performing the work in a substandard manner. The plaintiff alleged that the defendants Rushang Zhao and May Lu ... exercised complete dominion and control over the operations of China Perfect and used such domin-

ion and control to commit a fraud or wrong against the plaintiff. In this regard, the plaintiff alleged that the individual defendants created the defendant New Empire Builder Corp. ... solely to avoid the debts and liabilities of China Perfect, and that they transferred the assets of China Perfect to New Empire in order to render China Perfect 'judgment-proof.' * * * ... [T]he defendants failed to affirmatively establish, prima facie, that the individual defendants did not exercise dominion and control over China Perfect to commit a wrong or injustice against the plaintiff, such that the doctrine of piercing the corporate veil is inapplicable ...". ***Sterling Park Developers, LLC v. China Perfect Constr. Corp.*, 2020 N.Y. Slip Op. 04340, Second Dept 7-29-20**

EMPLOYMENT LAW, TRADE SECRETS, CONTRACT LAW, CIVIL PROCEDURE.

MOTION TO VACATE THE NOTE OF ISSUE AND COMPEL DISCOVERY PROPERLY DENIED; MISAPPROPRIATION OF TRADE SECRETS AND BREACH OF A NON-COMPETITION CLAUSE CAUSES OF ACTION SHOULD NOT HAVE BEEN DISMISSED.

The Second Department, reversing (modifying) Supreme Court, determined: (1) plaintiff's motion to vacate the note of issue and compel additional discovery was properly denied because the criteria of 22 N.Y.C.R.R. § 202.21 were not met; (2) the misappropriation of trade secrets cause of action re: customer lists was properly dismissed; (3) the misappropriation of trade secrets cause of action re: development of a laser should not have been dismissed; and (4), the breach of the non-competition clause cause of action should not have been dismissed: "The elements of a cause of action to recover damages for misappropriation of trade secrets are: (1) possession of a trade secret; and (2) use of that trade secret in breach of an agreement, confidential relationship or duty, or as a result of discovery by improper means (*see Tri-Star Light. Corp. v. Goldstein*, 151 AD3d 1102, 1106). A trade secret includes any compilation of information which provides the company with an opportunity to obtain an advantage over competitors who do not know or use it ... . [T]he plaintiff raised triable issues of fact as to whether the defendant used its trade secrets in the manufacture of particular lasers ... . A restrictive covenant will not be enforced if it is unreasonable in time, space, or scope ... . Thus, 'a restrictive covenant will only be subject to specific enforcement to the extent that it is reasonable in time and area, necessary to protect the employer's legitimate interests, not harmful to the general public and not unreasonably burdensome to the employee' ... . [T]he plaintiff raised a triable issue of fact regarding whether the noncompetition clause should be partially enforced. A restrictive covenant may be partially enforced to the extent necessary to protect a company's legitimate interests ... . In particular, 'restrictive covenants will be enforceable to the extent necessary to prevent the disclosure or use of trade secrets or confidential customer information' ...". ***Photonics Indus. Intl., Inc. v. Xiaojie Zhao*, 2020 N.Y. Slip Op. 04330, Second Dept 7-29-20**

FAMILY LAW.

MOTHER, WHO OPPOSES VACCINATING THE CHILD, SHOULD NOT HAVE BEEN AWARDED MEDICAL DECISION-MAKING AUTHORITY.

The Second Department, reversing (modifying) Family Court, determined mother, who opposes vaccination of the child, should not have been awarded medical decision-making authority: "Here, the child, by his attorney ... , asserts that the mother should not have medical decision-making authority over him. The mother opposes vaccinating the child. However, at the hearing, the father testified that he would innoculate the child for diphtheria, tetanus, and pertussis, and measles, mumps, and rubella, expressed concern that the child could become infected and young and elderly members of his family were at risk due to the child's lack of immunization against 'highly contagious preventable diseases,' and further noted that his younger child had received a 'full set' of vaccinations. The forensic evaluator recommended that the father should be awarded medical decision-making authority due to his position on vaccinations which was safer for the child, a position which was entitled to some weight ... . Under the circumstances, the determination of the Family Court to award the mother medical decision-making authority did not have a sound an substantial basis in the record, and the father should have been awarded medical decision-making authority ...". ***Matter of Ednie v. Haniquet*, 2020 N.Y. Slip Op. 04305, Second Dept 7-29-20**

FAMILY LAW, ATTORNEYS.

THE ATTORNEY FOR THE CHILD (AFC) TOOK AND ADVOCATED POSITIONS WHICH WERE CONTRARY TO THE WISHES OF THE CHILDREN; NEW CUSTODY HEARING ORDERED WITH A NEW AFC.

The Second Department, in a full-fledged opinion by Justice Christopher, determined the attorney for the children (AFC) took a position contrary to the children's wishes in this custody action, requiring a new hearing and the appointment of a new AFC: "An AFC is required to 'zealously advocate the child's position" (22 NYCRR 7.2[d] ...). In order to determine the child's wishes, the AFC must 'consult with and advise the child to the extent of and in a manner consistent with the child's capacities, and have a thorough knowledge of the child's circumstances' (22 NYCRR 7.2[d][1]). The rules further state that 'the [AFC] should be directed by the wishes of the child, even if the [AFC] believes that what the child wants is not in the child's best interests' and that the [AFC] should explain fully the options available to the child, and may recommend to the child a course of action that in the [AFC]'s view would best promote the child's interests' ... . * * * ... [T]he AFC's representation was in direct contravention of her clients' stated parameters. Throughout the course of the proceedings, she failed to

advocate on behalf of her clients, who were 13 and 11 years old at the time of the hearing, and who were both on the high honor roll and involved in extracurricular activities. The AFC actively pursued a course of litigation aimed at opposing their stated positions. She joined the plaintiff in opposing the introduction of evidence and witnesses in support of the defendant's case. When the defendant sought to introduce evidence in defense of the plaintiff's allegations that the defendant provided the children with unnecessary medical care, the AFC joined the plaintiff in opposing the introduction of the defendant's evidence. The AFC also opposed the introduction of evidence that may have supported one child's claim that the plaintiff attempted to strangle her. The AFC objected to the testimony of school personnel for the purpose of explaining the children's seemingly excessive school absences. The AFC's questions of the plaintiff during cross-examination were designed to elicit testimony in support of the plaintiff's case, in opposition to her clients' wishes." ***Silverman v. Silverman*, 2020 N.Y. Slip Op. 04338, Second Dept 7-29-20**

FAMILY LAW, CIVIL PROCEDURE, ATTORNEYS.

ABSENT PROOF OF SERVICE OF THE SUPPORT MAGISTRATE'S ORDER ON FATHER OR FATHER'S COUNSEL, THE TIME FOR FILING OBJECTIONS TO THE ORDER NEVER BEGAN RUNNING.

The Second Department, reversing Family Court, determined the time for filing objections to the order of the Support Magistrate never started to run because there was no evidence the order was served or mailed, notwithstanding father's possession of the order: "Pursuant to Family Court Act § 439(e), objections to an order of a Support Magistrate must be filed within 30 days after the date on which the order is provided to the objecting party in court or by personal service, or within 35 days after the date in which the order is mailed to the objecting party ... . When a party is represented by counsel, the 35-day time requirement does not begin to run until the final order is mailed to counsel ... . Here, the father and the father's prior counsel indicated that neither of them received the Support Magistrate's order by either personal service or mail. In addition, there is no evidence in the record demonstrating that the Support Magistrate's order was mailed or personally served on the father's counsel. Since there is no evidence in the record indicating that the Support Magistrate's order was personally served or mailed to the father's counsel ... , the time in which the father was required to file his objections never began to run ... . Contrary to the Family Court's determination, the father's actual possession of the Support Magistrate's order, which prior counsel indicated was obtained from the Family Court record room, is not dispositive, as the time limitations of Family Court Act § 439(e) do not begin to run until service is effectuated in accordance therewith ...". ***Hughes v. Lugo*, 2020 N.Y. Slip Op. 04308, Second Dept 7-29-20**

FORECLOSURE, CIVIL PROCEDURE.

ALTHOUGH IT IS POSSIBLE TO ENTER AN 'INFORMAL APPEARANCE' IN AN ACTION WHICH WILL AVOID A DEFAULT, THE APPEARANCE MUST BE MADE WITHIN THE STATUTORY TIME LIMITS; THE PLAINTIFF BANK'S MOTION FOR A DEFAULT JUDGMENT IN THIS FORECLOSURE ACTION WAS PROPERLY GRANTED.

The Second Department affirmed the default judgment granted to plaintiff bank in this foreclosure action. The court rejected the argument that defendant (Hall) had entered a valid "Informal appearance:" "It is true that '[i]n addition to the formal appearances listed in CPLR 320(a), the law continues to recognize the so-called informal' appearance' ... . 'It comes about when the defendant, although not having taken any of the steps that would officially constitute an appearance under CPLR 320(a), nevertheless participates in the case in some way relating to the merits' ... . Although 'an informal appearance can prevent a finding that the defendant is in default, thereby precluding entry of a default judgment' ... , this is only true when the participation constituting the informal appearance occurred within the time limitations imposed for making a formal appearance ... . Indeed, even service of a formal 'notice of appearance will not protect the defendant from entry of a default judgment if, after service of the complaint, the defendant does not timely make a CPLR 3211 motion or serve an answer' ... . Accordingly, an informal appearance, without more, does not somehow absolve a defendant from complying with the time restrictions imposed by CPLR 320(a) which govern the service of an answer or the making of a motion pursuant to CPLR 3211 ...". ***Deutsche Bank Natl. Trust Co. v. Hall*, 2020 N.Y. Slip Op. 04292, Second Dept 7-29-20**

FORECLOSURE, CIVIL PROCEDURE, EVIDENCE.

DEFENDANTS' CONCLUSORY AND UNSUBSTANTIATED CLAIMS DID NOT REBUT THE SWORN ALLEGATIONS OF PROPER SERVICE AND MAILING OF THE SUMMONS, COMPLAINT AND REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL) 1303 NOTICE IN THIS FORECLOSURE ACTION; THE DEFENDANTS' MOTION TO DISMISS THE COMPLAINT SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined defendants' motion to dismiss the complaint in the foreclosure action on the ground defendants were never served should not have been granted: "... [T]he affidavit of service contained sworn allegations reciting that service was made upon Simone Cohen at 4:48 p.m. on March 3, 2009, by delivering to her the summons, complaint, and notice required by RPAPL 1303 at the subject property. The affidavit of service included a description of Simone Cohen. Another affidavit of service of the same process server contained sworn allegations reciting that service was made upon Avi Cohen by delivering a copy of the relevant papers to 'SIMONE COHEN (WIFE),' a person

of suitable age and discretion, at 4:48 p.m. on March 3, 2009, at the subject property, '[s]aid premises being the Defendant's dwelling place within the State of New York,' and described Simone Cohen as above. The process server further averred that on March 4, 2009, he mailed those documents to Avi Cohen at the address of the subject property 'by depositing a true copy of the same in a postpaid, properly addressed envelope in a[n] official depository under the exclusive care and custody of the United States post office.' Two additional affidavits of service recited that on March 4, 2009, copies of the summons were mailed to each defendant at the subject property. Contrary to the determination of the Supreme Court, the defendants' submissions failed to rebut the affidavit of service, since they stated only that Simone Cohen could not have been present at the time of the alleged service since she picked up her children from school every Tuesday and that she could not have understood or answered the process server's questions or understood the import of the legal papers since she was not proficient in English. The defendants' conclusory and unsubstantiated submissions did not rebut the sworn allegation that a person fitting the physical description of Simone Cohen was present at the residence at the time and accepted service ... . Moreover, Avi Cohen did not deny that he received the papers in the mail and thus did not overcome the inference of proper mailing that arose from the affidavit of service ...". ***Nationstar Mtge., LLC v. Cohen*, 2020 N.Y. Slip Op. 04312, Second Dept 7-29-20**

FORECLOSURE, EVIDENCE, CIVIL PROCEDURE.

HEARSAY DID NOT PROVE BANK HAD STANDING IN THIS FORECLOSURE ACTION.

The Second Department, reversing Supreme Court, determined the evidence submitted by plaintiff bank to establish standing in this foreclosure action was inadmissible hearsay: "... [T]he plaintiff submitted the affidavit of a foreclosure specialist for Seterus, Inc. (hereinafter Seterus), which purports to be a subservicer for the Federal National Mortgage Association as assignee of the plaintiff as assignee of OneWest. The affidavit constitutes inadmissible hearsay, as the foreclosure specialist did not attest that he had personal knowledge of OneWest's business practices and procedures ... , or that any records provided by OneWest were incorporated into Seterus's own records ... , and also did not submit any documents to show that OneWest possessed the note at the time of the commencement of this action (see CPLR 4518[a] ...). Since the foreclosure specialist also failed to establish a foundation to show that he had personal knowledge as to whether OneWest possessed the note prior to commencement of the action (see CPLR 3212[b] ...), the plaintiff failed to establish its standing. The documents attached to the affirmation of counsel for the plaintiff are inadmissible hearsay as counsel failed to establish a foundation for admission of such documents as business records and the foreclosure specialist's affidavit does not reference the records attached to counsel's affirmation ... . Moreover, even if a proper foundation for the admissibility of the business records had been established, the submitted documents do not show that OneWest had ownership of and the right to enforce the note at the time of the commencement of the action … . The plaintiff also failed to show OneWest's standing based upon a purported written assignment of the mortgage from MERS [Mortgage Electronic Registration system] to OneWest, as the plaintiff did not demonstrate that MERS had the authority to assign the note ...". ***Ocwen Loan Servicing, LLC v. Schacker*, 2020 N.Y. Slip Op. 04313, Second Dept 7-29-20**

PERSONAL INJURY, EVIDENCE.

ALTHOUGH THERE WAS A STORM IN PROGRESS AT THE TIME OF THE SLIP AND FALL, THERE WERE QUESTIONS OF FACT WHETHER THE ICE FORMED AFTER A PRIOR STORM AND WHETHER THE DEFENDANTS HAD CONSTRUCTIVE KNOWLEDGE OF THE CONDITION OF THE SIDEWALK; DEFENDANTS' SUMMARY JUDGMENT MOTION SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined defendants' motion for summary judgment in this sidewalk slip and fall case should not have been granted. Although there was a storm in progress at the time of the slip and fall, there were questions of fact whether ice had formed from a storm two days before and whether the defendants had constructive notice of the condition: "Under the storm in progress rule, '[a] property owner will not be held liable in negligence for a plaintiff's injuries sustained as the result of an icy condition occurring during an ongoing storm or for a reasonable time thereafter' ... . Here, in support of their summary judgment motion, the defendants submitted climatological data which showed that on January 26, 2015, trace amounts of snow fell in the morning, and that the snow began to increase in intensity at about the time of the accident and continued into the next day. That same data, however, also showed that 3.6 inches of snow fell on January 24, 2015, and that 2 inches of snow depth remained on January 26, 2015. Although the defendants established that a snowstorm was in progress at the time of the plaintiff's fall, the defendants failed to establish that the plaintiff's fall was a result of an icy condition which developed as a result of the snowfall on January 26, and not that of January 24 ... . Notably, while the defendants provided evidence of their general snow removal practices, they provided no evidence regarding any specific removal efforts following the January 24 storm, including on January 26 prior to the plaintiff's fall. Thus, the defendants failed to establish that the plaintiff slipped and fell on an icy condition that was a product of the storm in progress, or that they lacked constructive notice of a preexisting condition ...". ***Kearse v. 40 Wall St. Holdings Corp.*, 2020 N.Y. Slip Op. 04296, Second Dept 7-29-20**

PERSONAL INJURY, EVIDENCE, CIVIL PROCEDURE.

PLAINTIFF-PEDESTRIAN'S MOTION FOR SUMMARY JUDGMENT IN THIS TRAFFIC ACCIDENT CASE SHOULD HAVE BEEN GRANTED; ALTHOUGH A PLAINTIFF NEED NOT DEMONSTRATE THE ABSENCE OF COMPARATIVE NEGLIGENCE IN SUPPORT OF SUMMARY JUDGMENT, THE COURT CAN CONSIDER COMPARATIVE NEGLIGENCE WHERE, AS HERE, THE PLAINTIFF MOVES TO DISMISS THE COMPARATIVE-NEGLIGENCE AFFIRMATIVE DEFENSE.

The Second Department, reversing Supreme Court, determined plaintiff-pedestrian's motion for summary judgment in this traffic accident case should have been granted. The court noted that evidence of a plaintiff's comparative negligence, although no longer an impediment to summary judgment, can be considered by the court where the plaintiff moves to dismiss a comparative-negligence affirmative defense: " 'A plaintiff in a negligence action moving for summary judgment on the issue of liability must establish, prima facie, that the defendant breached a duty owed to the plaintiff and that the defendant's negligence was a proximate cause of the alleged injuries' ... . 'To be entitled to partial summary judgment a plaintiff does not bear the . . . burden of establishing . . . the absence of his or her own comparative fault' ... . Even though a plaintiff is no longer required to establish his or her freedom from comparative negligence to be entitled to summary judgment on the issue of liability, the issue of a plaintiff's comparative negligence may be decided in the context of a summary judgment motion where, as here, the plaintiff moved for summary judgment dismissing a defendant's affirmative defense of comparative negligence ... . Here, the plaintiff established her prima facie entitlement to judgment as a matter of law on the issue of liability by submitting, inter alia, her own affidavit, which demonstrated that she was walking within a crosswalk with the pedestrian signal in her favor when Martinez, who was attempting to make a left turn, failed to yield the right-of-way and struck her ... . The plaintiff's affidavit was also sufficient to establish, prima facie, that she was not at fault in the happening of the accident, as it demonstrated that she exercised due to care by confirming that she had the pedestrian signal in her favor and by looking for oncoming traffic in all directions before entering the crosswalk and that the collision occurred so suddenly that she could not avoid it ...". ***Hai Ying Xiao v. Martinez*, 2020 N.Y. Slip Op. 04295, Second Dept 7-29-20**

Similar issues and result in ***Maliakel v. Morio*, 2020 N.Y. Slip Op. 04298, Second Dept 7-29-20**

PERSONAL INJURY, EVIDENCE, VEHICLE AND TRAFFIC LAW, CIVIL PROCEDURE.

WHETHER THE DEFENDANT FIRST STOPPED AT THE STOP SIGN OR DROVE THROUGH THE STOP SIGN DOESN'T MATTER BECAUSE EITHER WAY THE VEHICLE AND TRAFFIC LAW WAS VIOLATED; PLAINTIFF'S MOTION TO SET ASIDE THE DEFENSE VERDICT IN THIS INTERSECTION TRAFFIC ACCIDENT CASE SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined the motion for a judgment as a matter of law (CPLR 4401) was properly denied, but the motion to set aside the defense verdict in this intersection traffic accident case (CPLR 4404 (a)) should have been granted. Defendant violated the Vehicle and Traffic Law by proceeding into the intersection on a road controlled by a stop sign. Whether defendant first stopped at the stop sign or went through the stop sign doesn't matter: "... [T]he Supreme Court should have granted the plaintiff's motion pursuant to CPLR 4404(a) to set aside the jury verdict as contrary to the weight of the evidence and for a new trial. The evidence established that the defendant violated Vehicle and Traffic Law §§ 1142(a) and 1172(a) ... . The defendant's statutory duty to yield to the plaintiff continued even after the defendant entered the intersection. Such statutory violations constitute negligence as a matter of law and could not properly be disregarded by the jury ... . Accordingly, the jury could not have returned a verdict that the defendant was not negligent on any fair interpretation of the evidence ...". ***Ramirez v. Cruse*, 2020 N.Y. Slip Op. 04334, Second Dept 7-29-20**

PERSONAL INJURY, MEDICAL MALPRACTICE, TRUSTS AND ESTATES, CIVIL PROCEDURE.

PLAINTIFF'S DECEDENT'S MEDICAL MALPRACTICE AND WRONGFUL DEATH ACTIONS WERE NOT TIME-BARRED, SUPREME COURT REVERSED.

The Second Department, reversing Supreme Court, determined the medical malpractice and wrongful death causes of action on behalf of decedent should not have been dismissed as time-barred: "The plaintiff's decedent died due to complications related to cancer on August 29, 2015. On May 26, 2016, the plaintiff commenced this action to recover damages for wrongful death and medical malpractice against, among others, the defendants Forest Hills Hospital (hereinafter FHH) and Sergio Martinez, a physician (hereinafter together the defendants). As is relevant to these appeals, the complaint alleged negligent acts and omissions by the defendants related to the decedent's hospitalization at FHH from July 30, 2013, to August 1, 2013. After joinder of issue, Martinez and FHH separately moved pursuant to CPLR 3211(a)(5) to dismiss, as time-barred, so much of the complaint as was based upon alleged acts of malpractice committed before November 26, 2013, insofar as asserted against each of them. ... Supreme Court granted the defendants' separate motions. ... We disagree with the Supreme Court's determination that the statute of limitations barred causes of action to recover damages for medical malpractice that accrued prior to November 26, 2013 (i.e., 2½ years before the date the action was commenced), rather than February 28, 2013 (i.e., 2½ years before the date of the decedent's death) (see EPTL 5-4.1 ...). Since, at the time of his death, the decedent had a valid cause of action to recover damages for medical malpractice based upon acts or omissions occurring

on or after February 28, 2013, and since the wrongful death cause of action was commenced within two years of the date of his death, the wrongful death cause of action was timely commenced ... . Accordingly, any causes of action to recover damages for medical malpractice that accrued on or after February 28, 2013 (i.e., within 2½ years of the decedent's death), including the decedent's July 2013 hospitalization, were timely. Further, the plaintiff then had one year from the decedent's death to assert a cause of action alleging conscious pain and suffering (see CPLR 210[a]; ...)." ***Perez v. Baez*, 2020 N.Y. Slip Op. 04329, Second Dept 7-29-20**

PERSONAL INJURY, MUNICIPAL LAW.

INFANT PLAINTIFF WAS APPARENTLY INJURED BY HOT COALS LEFT AFTER A FIRE IN A COUNTY PARK; THE NEGLIGENT SUPERVISION CAUSE OF ACTION AGAINST THE COUNTY SHOULD NOT HAVE BEEN DISMISSED.

The Second Department, reversing Supreme Court, determined the negligent supervision cause of action against the county should not have been dismissed. Apparently infant plaintiff was injured in a county park by hot coals left after a fire: " 'While a municipality is not an insurer of the safety of those who use its parks, it does have a duty to maintain its parks in a reasonably safe condition,' which includes exercising ordinary care in providing an adequate degree of general supervision' ... . Here, the defendants, in moving for summary judgment dismissing the complaint, failed to demonstrate their prima facie entitlement to judgment as a matter of law. Under the circumstances presented here, the evidence submitted by the defendants in support of their summary judgment motion failed to eliminate all triable issues of fact as to whether they exercised adequate supervision of park visitors' use of fires and disposal of hot coals ...". ***S.A.P. v. County of Westchester*, 2020 N.Y. Slip Op. 04337, Second Dept 7-29-20**

THIRD DEPARTMENT

CRIMINAL LAW, CONTRACT LAW, APPEALS.

RESTITUTION ORDERED WAS GREATER THAN THAT AGREED TO IN THE PLEA AGREEMENT; ALTHOUGH THE ISSUE WAS NOT PRESERVED, THE APPEAL WAS CONSIDERED IN THE INTEREST OF JUSTICE; RESTITUTION VACATED AND MATTER REMITTED.

The Third Department, vacating the restitution award in the interest of justice, determine the restitution ordered was not that agreed to in the plea agreement: "Defendant contends that Supreme Court improperly enhanced the sentence by ordering him to pay restitution in an amount greater than what was agreed to under the plea agreement. The record supports his claim, and the People concede that the restitution award should be reduced. Although defendant failed to preserve his claim by requesting a hearing or objecting to the amount of restitution at sentencing, we deem it appropriate to take corrective action in the interest of justice ... . As defendant was not sentenced in accordance with the plea agreement, the matter must be remitted to Supreme Court to provide defendant with the opportunity to either accept the sentence with the enhanced restitution award or withdraw his guilty plea ... . In addition, as Supreme Court failed to set forth the time and manner of payment of the amount of restitution in the restitution order, this omission must also be addressed upon remittal ...". ***People v. Gravell*, 2020 N.Y. Slip Op. 04344, Third Dept 7-30-20**

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