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COURT OF APPEALS

CRIMINAL LAW, APPEALS, JUDGES.

A NUMBER OF GUILTY-PLEA CONVICTIONS REVERSED BECAUSE THE DEFENDANTS WERE TOLD THE WAIVER OF APPEAL WAS AN ABSOLUTE BAR TO APPEAL.

The Court of Appeals, over an extensive dissent with respect to one case, reversed a number of guilty-plea convictions because the judges told the defendants the waiver was an absolute bar to appeal: "The waivers of the right to appeal were invalid and unenforceable pursuant to our analysis in People v. Thomas (34 NY3d 545 [2019]). It is well-settled that 'a waiver of the right to appeal is not an absolute bar to the taking of a first-tier direct appeal' ... . Nonetheless, in each case, among other infirmities, the rights encompassed by an appeal waiver were mischaracterized during the oral colloquy and in written forms executed by defendants, which indicated the waiver was an absolute bar to direct appeal, failed to signal that any issues survived the waiver and, in the Queens and Orleans Counties cases, advised that the waiver encompassed 'collateral relief on certain nonwaivable issues in both state and federal courts' ... . Viewing these deficiencies in the context of the record in each case and considering the totality of the circumstances, including in several cases defendants' significant mental health issues ... , we cannot say that defendants comprehended the nature [and consequences] of the waiver of appellate rights' ...". ***People v. Bisono*, 2020 N.Y. Slip Op. 07484, CtApp 12-15-20**

CRIMINAL LAW, EVIDENCE.

EVEN THOUGH THE DEFENDANT ARGUED HE NEVER HAD ACTUAL OR CONSTRUCTIVE POSSESSION OF THE WEAPON FOUND IN ANOTHER'S HOUSE, DEFENDANT WAS ENTITLED TO THE "INVOLUNTARY POSSESSION" JURY INSTRUCTION; POSSESSION, EITHER ACTUAL OR CONSTRUCTIVE, IS NOT VOLUNTARY IF IT IS FOR SO BRIEF A PERIOD OF TIME THAT THE DEFENDANT COULD NOT HAVE TERMINATED POSSESSION.

The Court of Appeals, in a full-fledged opinion by Judge Rivera, over a three-judge dissent, reversing defendant's conviction, determined there was a reasonable view of the evidence which supported a jury instruction on voluntary (involuntary) possession of a weapon. In addition to actual and constructive possession, there is the concept of involuntary possession. Both actual and constructive possession can be involuntary if it is so fleeting that the defendant was not able to terminate possession. Defendant argued he was a guest for the night in the house where the weapon was found and did not possess it all, either actually or constructively. The Court of Appeals noted that "involuntary possession" conflicted with "no possession at all," but the jury still should have been instructed on involuntary possession because there was evidence to support the instruction: "The distinction among constructive, knowing, and voluntary possession that defendant emphasizes is reflected in the Criminal Jury Instructions' model charge on voluntary possession, which provides that '[p]ossession . . . is voluntary when the possessor was aware of [their] physical possession or control . . . for a sufficient period to have been able to terminate the possession' (CJI2d [NY] Voluntary Possession § 15.00 [2] ... . * * * ... [T]he trial court denied the charge here, not because the requested charge lacked evidentiary support, but because the court considered the proposed language more confusing than helpful. ... . This determination was in error because the requested charge did not inject confusion into the instructions. Rather, it addressed an entirely different aspect of the charged possessory crime: the temporal requirement of voluntary possession. Indeed, the requested charge would have clarified the law because the charge, as erroneously given, allowed the jury to conclude that if defendant had control over the area where the gun was found—i.e., the bedroom—then he had constructive possession of the gun, regardless of how long he was actually aware of its presence. This is not an accurate statement of the relevant law where, as here, there is a reasonable view of the evidence that the possession may not have been voluntary." ***People v. J.L.*, 2020 N.Y. Slip Op. 07663, CtApp 12-17-20**

CRIMINAL LAW, EVIDENCE.

DEFENDANT, WHO ACCEPTED POSSESSION OF THE WEAPON FROM HIS FRIEND, DID SO IN ANTICIPATION OF A POSSIBLE CONFRONTATION; DURING THE CONFRONTATION DEFENDANT SHOT TWO PEOPLE; THE ARGUMENT THAT DEFENDANT ACTED IN SELF-DEFENSE DID NOT RENDER DEFENDANT'S POSSESSION OF THE WEAPON TEMPORARY AND LAWFUL.

The Court of Appeals, in a full-fledged opinion by Judge Stein, over two concurring opinions, determined defendant was not entitled to a jury instruction on temporary and lawful possession of a firearm. Defendant was leaving a friend's apartment building when he saw a man, Carson, pull a gun out of his pocket. Defendant and Carson had a history of violent confrontations, including shootings. Defendant went back to his friend's (Foe's) apartment. Foe picked up a loaded gun and offered to walk defendant out of the building. When they got to the lobby Foe handed defendant the gun. When defendant saw Carson he believed Carson was about to shoot him and defendant shot Carson and a bystander: "... '[A] defendant may not be guilty of unlawful possession if the jury finds that [the defendant] found the weapon shortly before [the defendant's] possession of it was discovered and [the defendant] intended to turn it over to the authorities' ... . We have also indicated that temporary and lawful possession may result where a defendant 'took [the firearm] from an assailant in the course of a fight' ... and the circumstances do not otherwise evince an intent to maintain unlawful possession of the weapon . In such scenarios, '[t]he innocent nature of the possession negates . . . the criminal act of possession' ... . Ultimately, whether the weapon is found fortuitously or obtained by disarming an attacker, 'the underlying purpose of the charge is to foster a civic duty on the part of citizens to surrender dangerous weapons to the police' ... . [D]efendant's possession did not 'result temporarily and incidentally from the performance of some lawful act, [such] as disarming a wrongful possessor' or unexpected discovery ... . Rather, under the circumstances presented here, defendant's contention that his possession should be legally excused on the grounds of self-defense amounts to a claim that he was entitled to possess the weapon for his protection. Even crediting defendant's testimony that he had been confronted by Carson at the building's exit earlier and that Carson had displayed a firearm at that time, defendant testified that he then safely retreated to Foe's apartment. There was no evidence suggesting that Carson chased after defendant when he re-entered the building, or that Carson had any awareness of defendant's location in the building. Further, defendant admitted that he accepted possession of the firearm from Foe in the stairwell, at a time when he was unaware of Carson's whereabouts and was not facing any imminent threat to his safety. Defendant then chose to retain possession of the firearm and to enter the lobby with the weapon in his hand. Under these circumstances, the only reasonable conclusion to be drawn from the evidence is that defendant armed himself in anticipation of a potential confrontation; however, the law is clear that defendant 'may not avoid the criminal [possession] charge by claiming that he possessed the weapon for his protection' ...". ***People v. Williams*, 2020 N.Y. Slip Op. 07664, CtApp 12-17-20**

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

ALTHOUGH RPAPL 1320-a, ENACTED WHILE THIS APPEAL WAS PENDING, HAS CHANGED THINGS, THE DEFENDANTS' LACK-OF-STANDING DEFENSE WAS WAIVED BECAUSE IT WAS NOT RAISED IN THEIR ANSWERS OR PRE-ANSWER MOTIONS; THE BANK'S MOTION FOR SUMMARY JUDGMENT WAS PROPERLY GRANTED.

The Court of Appeals, in a brief memorandum with an extensive concurring opinion, determined the defendants in the foreclosure action had waived the lack-of-standing defense by not raising it in their answers or pre-answer motions. The court noted that Real Property Actions and Proceedings Law (RPAPL) 1320-a, which was enacted when this appeal was pending, may allow standing to be raised "at this stage of the litigation:" "... Supreme Court did not err in granting plaintiff's motions for summary judgment and for a judgment of foreclosure and sale. Defendants failed to raise standing in their answers or in pre-answer motions as required by CPLR 3211 (e) and accordingly, under the law in effect at the time of the orders appealed from, the defense was waived ... . Defendants' argument that ownership is an essential element of a foreclosure action, raised for the first time in support of their motion for reargument at the Appellate Division, is unpreserved for our review. We do not reach the issue of whether RPAPL 1302-a, enacted while this appeal was pending, affords defendants an opportunity to raise standing at this stage of the litigation. Defendants are free to apply to the trial court for any relief that may be available to them under that statute." ***JPMorgan Chase Bank, N.A. v. Caliguri*, 2020 N.Y. Slip Op. 07660, CtApp 12-17-20**

ZONING, ENVIRONMENTAL LAW.

NYC'S "OPEN SPACE" ZONING REQUIREMENT IS MET BY ROOFTOP GARDENS ON A SINGLE BUILDING IN A MULTI-BUILDING ZONING LOT.

The Court of Appeals, in a full-fledged opinion by Judge Feinman, reversing the Appellate Division and upholding the NYC Board of Standards and Appeals (BSA), over an extensive three-judge dissent, determined the "open space" requirement of the NYC Zoning Resolution in a zoning lot with multiple buildings was met by rooftop gardens accessible to a single building's residents: "The question before us is whether an area must be accessible to the residents of every building on a zoning lot containing multiple, separately owned buildings in order to constitute 'open space' within the meaning of

the New York City Zoning Resolution ... . The Board of Standards and Appeals of the City of New York (BSA), which is responsible for administering the Zoning Resolution, has interpreted the definition of open space to encompass rooftop gardens accessible to a single building's residents as long as the residents of each building on the zoning lot receive at least a proportionate share of open space. ... 'Open space' is that part of a zoning lot, including courts or yards, which is open and unobstructed from its lowest level to the sky and is accessible to and usable by all persons occupying a dwelling unit or a rooming unit on the zoning lot' ... . The minimum amount of open space required on a zoning lot is determined by the 'open space ratio,' which is 'the number of square feet of open space on the zoning lot, expressed as a percentage of the floor area on that zoning lot' ... . [T]he minimum amount of open space required on a zoning lot is calculated by multiplying the given open space ratio by the total residential floor area on the zoning lot. * * * The Appellate Division ... opined that the definition of open space in ZR [Zoning Resolution] § 12-10 unambiguously requires that open space be accessible to the residents of every building on a zoning lot. By contrast, the dissent concluded that the statute was ambiguous and would have deferred to the BSA's practical reading of the open-space definition as applied to multi-owner zoning lots. * * * The BSA's interpretation is rational as applied to multi-owner zoning lots". ***Matter of Peyton v. New York City Bd. of Stds. & Appeals*, 2020 N.Y. Slip Op. 07662, CtApp 12-17-20**

FIRST DEPARTMENT

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA).

THE SEXUAL INTERCOURSE WAS DEEMED NONCONSENSUAL SOLELY BECAUSE THE VICTIM WAS 14; THE DEFENDANT WAS 27; DEFENDANT WAS NOT ENTITLED TO A DOWNWARD DEPARTURE TO RISK LEVEL ONE; THERE WAS A SUBSTANTIVE DISSENT.

The First Department, over a dissent, determined defendant was not entitled to a downward risk level departure from level two to level one. The defendant was 27 when he had sexual intercourse with the fourteen-year-old victim. The majority argued the age difference precluded a departure: "The record shows that this 27 year-old defendant engaged in nonconsensual sexual intercourse with the victim, who was 14 years old, the only relevant crime considered by the SORA court regarding his risk level designation. * * * While courts have recognized that sexual conduct that was nonconsensual solely by virtue of age may result in an over-assessment in risk level designation, those cases did not involve a defendant who was nearly twice as old as the victim, as in this case ...". ***People v. Romulus*, 2020 N.Y. Slip Op. 07512, First Dept 12-15-20**

HUMAN RIGHTS LAW, EMPLOYMENT LAW.

PLAINTIFF RAISED QUESTIONS OF FACT ABOUT HIS SEXUAL HARASSMENT AND RETALIATION CAUSES OF ACTION AGAINST HIS EMPLOYER.

The First Department, reversing Supreme Court, determined plaintiff had raised questions of fact on his sexual harassment and retaliation causes of action against his employer: "[Re: sexual harassment] Plaintiff testified that his supervisor, defendant Hall, made repeated sexual advances towards him, including reaching out to touch his face and holding his hand in an elevator while they were alone. She also initiated conversations that made him uncomfortable, telling him she had a 'crush' on him, telling him she was single and twice inviting him to her home to repair 'a hole' in her apartment. In one conversation, plaintiff claimed Hall said she had a tattoo, adding that 'You have to undress me to see it.' Plaintiff further testified that after he rebuffed Hall's sexual advances, she repeatedly brought him to the Human Resources manager's office to complain about his work product and that she solicited complaints about him from other coworkers. Plaintiff claims that he complained to HR about Hall's behavior in December. In January he was told that either he could resign or he would be fired. * * * [Re: retaliation] Defendants submitted evidence of complaints about plaintiff's brash demeanor, insensitive comments to coworkers, and poor work ethic, which demonstrate his difficulties following orders and getting along with his peers. By doing so, defendants satisfied their prima facie burden. In opposition, plaintiff relies on Hall's offensive conduct, including her telling him, in sum and substance, that if they could not be together then plaintiff could not work around Hall, and defendants' failure to adequately investigate his claims prior to his termination. Plaintiff's assertions raise disputed issues of fact about whether there was a mixed motive to terminate his employment ...". ***Franco v. Hyatt Corp.*, 2020 N.Y. Slip Op. 07522, First Dept 12-15-20**

LABOR LAW-CONSTRUCTION LAW, CIVIL PROCEDURE.

PLAINTIFF WAS INJURED WHEN A WHEEL ON THE CONTAINER HE WAS PUSHING GOT STUCK IN A GAP IN THE FLOOR AFTER THE PLYWOOD COVERING THE GAP BROKE; PLAINTIFF'S MOTION TO AMEND THE COMPLAINT TO ADD THE RELEVANT INDUSTRIAL CODE PROVISION SHOULD HAVE BEEN GRANTED; THE LABOR LAW § 241(6), LABOR LAW § 200 AND NEGLIGENCE CAUSES OF ACTION SHOULD NOT HAVE BEEN DISMISSED.

The First Department, reversing Supreme Court, determined plaintiff's Labor Law § 241(6), Labor Law § 200 and Negligence causes of action should not have been dismissed. Plaintiff was pushing a container of cinderblocks when plywood covering a gap in the floor broke and a wheel got stuck, causing plaintiff to be propelled head over heels and land on his

back. The Second Department further held plaintiff should have been allowed to amend the complaint by adding the relevant Industrial Code provision, despite the 3–1/2 year delay in bringing the motion to amend. Defendant was not prejudiced by the amendment: "As Industrial Code (12 NYCRR) § 23-1.7(e)(1) is applicable to these facts and defendant failed to show that it would be prejudiced by an amendment of the bill of particulars to assert a violation of this provision as a predicate to the Labor Law § 241(6) claim, plaintiff's motion to amend should be granted (see CPLR 3025[b] ...). In view of the absence of prejudice to defendant, plaintiff was not required to explain his 3½-year delay in bringing this motion ... . [A]n inadequately protected gap in the floor of a passageway at a construction site that causes a container, dumpster, or the like to become stuck or otherwise lose its balance and trip, slip, or fall violates Industrial Code (12 NYCRR) § 23-1.7(e)(1) and can serve as a predicate for a Labor Law § 241(6) claim. ... Defendant failed to establish prima facie that it neither created nor had notice of the dangerous condition of the hallway floor ...". ***Trinidad v. Turner Constr. Co.*, 2020 N.Y. Slip Op. 07519, First Dept 12-15-20**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

THE HOMEOWNERS EXERCISED NO SUPERVISORY CONTROL OVER THE INJURY-CAUSING WORK IN THIS LABOR LAW § 200 AND NEGLIGENCE CASE; THE CASE SHOULD HAVE BEEN ANALYZED AS A "MEANS AND METHODS OF WORK" ACTION, NOT A "CREATE OR HAVE NOTICE OF A DANGEROUS CONDITION" ACTION; THE HOMEOWNERS' MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED.

The First Department, reversing Supreme Court, determined the Labor Law § 200 and negligence causes of action against the homeowners should have been dismissed because the homeowners did not exercise any supervisory control over plaintiff's work. The hole into which plaintiff fell was dug as part of the construction project. Supreme Court should not have analyzed the case using a "create or have notice of a dangerous condition" theory: "Plaintiff was injured when he fell into a hole dug by employees of codefendant Apex Construction/Masonry Corp. (Apex) in the backyard of Homeowner Defendants' home during renovation of the premises. The hole was created for the purpose of building the foundation for a deck. Homeowner Defendants hired nonparty IA Construction Management Inc. as the general contractor, which subcontracted out part of the work to Apex; plaintiff was an employee of IA Construction. Here, plaintiff's accident arose from the means and methods of Apex's work, not a defective premises condition. Thus, the dispositive issue is whether the Homeowner Defendants had authority to exercise supervisory control over the injury-producing work, not whether they created or had notice of the hazardous condition ... . The record establishes, as a matter of law, that they had no such authority. It is undisputed that Homeowner Defendants lived offsite during the renovation project and had no involvement with the work, and Apex's owner testified that the homeowners did not direct or control Apex's work ...". ***Tsongas v. Apex Constr./Masonry Corp.*, 2020 N.Y. Slip Op. 07520, First Dept 12-15-20**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

QUESTIONS OF FACT ABOUT WHETHER PLAINTIFF'S INJURY WAS DUE TO DEFENDANTS' FAILURE TO PROVIDE HIM WITH THE PROPER PROTECTIVE DEVICES PRECLUDED SUMMARY JUDGMENT IN THIS LABOR LAW § 240(1) ACTION; THE DISSENT DISAGREED; A STACK OF CONCRETE BOARDS FELL OFF A TRUCK ONTO PLAINTIFF WHEN THE SKIDS UNDER THE BOARDS BROKE.

The First Department, reversing Supreme Court, over a dissent, determined plaintiff was not entitled to summary judgment on his Labor Law § 240(1) cause of action. Plaintiff was injured when a stack of cement boards fell off a truck onto him after the skids under the concrete boards broke: "Plaintiff failed to demonstrate conclusively that the accident was proximately caused by [defendants'] failure to provide him with proper protective devices for the performance of his work. The load of cement boards atop the pallet jack did not fall because of an inadequacy or deficiency in the pallet jack but, rather, because the wooden skids underneath the load of cement boards broke, causing the load to fall from the pallet jack. Coupled with the dispute as to whether plaintiff was permitted to use the street level hoist for the delivery of cement boards, this evidence renders it impossible to determine as a matter of law that [defendants] failed to supply plaintiff with adequate safety devices for the performance of his work and that this failure was a proximate cause of plaintiff's accident ...". ***Valle v. Port Auth. of N.Y. & N.J.*, 2020 N.Y. Slip Op. 07685, First Dept 12-17-20**

MUNICIPAL LAW, PERSONAL INJURY.

PLAINTIFF RAISED A QUESTION OF FACT WHETHER THE CITY CREATED THE ROAD CONDITION WHICH CAUSED HIS SLIP AND FALL; THE CITY'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The First Department, in a full-fledged opinion by Justice Renwick, reversing Supreme Court, determined plaintiff's slip and fall action should not have been dismissed. Although the city demonstrated it did not have written notice of the condition, plaintiff raised a question of fact whether the city created the dangerous condition when it attempted road repair: "... [P]laintiff Nicholas Martin testified consistently — both at a hearing held pursuant to General Municipal Law § 50-H and a deposition — that on January 17, 2017, he slipped and fell on Seward Avenue, between Pugster Avenue and Olmtead Avenue. At the time, plaintiff lived on the same block where his accident occurred. He specified that he fell on the roadway

in front of 2007 Seward Avenue. When shown photographs where his accident occurred, he stated that he fell on a square blacktop that contained loose gravel and was raised about one and one-half inches. He had noticed the condition about a month before his accident, when pavement work had been done. Although he did not see who did the road work, his girlfriend told him that the City had performed the work." ***Martin v. City of New York*, 2020 N.Y. Slip Op. 07503, First Dept 12-15-20**

PERSONAL INJURY.

PROPERTY OWNERS WERE AWARE THE SIDEWALK IN FRONT OF THE RESTAURANT HAD BEEN HOSED DOWN BY RESTAURANT EMPLOYEES ON A COLD DAY; PLAINTIFF WAS ENTITLED TO SUMMARY JUDGMENT IN THIS ICY-SIDEWALK SLIP AND FALL CASE.

The First Department, reversing Supreme Court, determined plaintiff was entitled to summary judgment in this icy-sidewalk slip and fall case. Defendants' employees hosed down the sidewalk in front of the restaurant on a cold day. The argument that plaintiff saw the ice and should have taken another route (comparative negligence) did not preclude summary judgment in plaintiff's favor: "To obtain partial summary judgment, a plaintiff does not have to demonstrate the absence of his own comparative fault ... . Moreover, plaintiff is not required to show that 'defendants' negligence was the sole proximate cause of the accident to be entitled to summary judgment' ... . The evidence plaintiff submitted in support of his motion shows that defendants-tenants ... created the dangerous condition when their employees hosed the sidewalk on a cold winter day ... . Defendants-owners ... had a non delegable duty to maintain the sidewalk and had notice that the restaurant employees had created a dangerous condition, because [the] property manager and ... superintendent had observed the restaurants' employees hosing the sidewalk." ***Benny v. Concord Partners 46th St. LLC*, 2020 N.Y. Slip Op. 07665, First Dept 12-17-20**

SECOND DEPARTMENT

ATTORNEYS.

DEFENDANTS MOVED TO DISQUALIFY PLAINTIFF, AN ATTORNEY AND PHYSICIAN REPRESENTING HIMSELF IN THIS FRAUD AND BREACH OF CONTRACT ACTION, ARGUING PLAINTIFF MAY BE CALLED AS A WITNESS; THE DEFENDANTS DID NOT SPECIFY HOW PLAINTIFF'S TESTIMONY WOULD BE NECESSARY TO THE DEFENSE; THE MOTION TO DISQUALIFY SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined defendants' motion to disqualify plaintiff Colantonio, an attorney and physician representing himself, should not have been granted. Plaintiffs brought a fraud and breach of contract action arising from the lease/purchase of a liposuction laser unit. Defendants moved to disqualify arguing Colantonio may be called as a witness: " 'In order to disqualify counsel on the ground that he or she may be called as a witness, the party moving for disqualification has the burden of demonstrating that '(1) the testimony of the opposing party's counsel is necessary to his or her case, and (2) such testimony would be prejudicial to the opposing party' ... . In turn, '[a] finding of necessity takes into account such factors as the significance of the matters, weight of the testimony, and availability of other evidence' ... . [T]he defendants each failed to make the requisite showing that Colantonio should be disqualified as counsel for Empire Medical and Cestari. The defendants failed to specify the facts about which they expect Colantonio to testify or to establish how such testimony would be necessary to their defense ... . They also failed to allege that Colantonio's testimony would be prejudicial to plaintiffs Cestari or Empire Medical ... . Indeed, Colantonio and Cestari both attested to the opposite. At this early stage in the litigation, discovery has not established the substance and necessity of Colantonio's testimony in the action ... . Moreover, in opposition to the motions, plaintiff Cestari averred that disqualification of Colantonio would cause a substantial hardship on him, which constitutes an exception to the rule 3.7 of the Rules of Professional Conduct (22 NYCRR 1200.0) advocate-witness disqualification ...". ***Empire Med. Servs. of Long Is., P.C. v. Sharma*, 2020 N.Y. Slip Op. 07545, Second Dept 12-16-20**

CIVIL PROCEDURE, CORPORATION LAW.

SERVICE ON AN UNAUTHORIZED FOREIGN CORPORATION DID NOT COMPLY WITH BUSINESS CORPORATION LAW § 307, A JURISDICTIONAL DEFECT.

The Second Department determined service on an unauthorized foreign (Paraguayan) corporation (Dahava) did not comply with Business Corporation Law § 307 which is a jurisdictional defect: "Business Corporation Law § 307 provides for service of process on unauthorized foreign corporations. Process against a foreign corporation not authorized to do business in New York may be served upon the Secretary of State as its agent (see Business Corporation Law § 307[a]). 'Such service shall be sufficient if notice therefor and a copy of the process are' delivered personally to the foreign corporation in the manner by which service of process is authorized by the law of the jurisdiction where the service is made, or '[s]ent by . . . registered mail with return receipt requested, at the post office address specified for the purpose of mailing process, on file

in the department of state, or with any official . . . in the jurisdiction of its incorporation, or if no such address is there specified, to its registered or other office there specified, or if no such office is there specified, to the last address . . . known to the plaintiff' ... . Here, the plaintiff failed to establish that he properly served Dahava, a foreign corporation not authorized to do business in New York, pursuant to Business Corporation Law § 307 ... . An affidavit of service indicated that Dahava was served on June 5, 2015, by delivery of the summons and complaint on the Secretary of State. A separate affidavit of service stated that on June 11, 2015, a copy of the summons and complaint was sent by registered mail, return receipt requested, to Dahava at the address listed at the top of the [investment] agreement [between the parties]. The plaintiff, however, did not establish that he attempted to ascertain whether an address was on file with the Paraguayan equivalent of the Secretary of State before resorting to mailing the summons and complaint to Dahava's last known address set forth in the October 2012 agreement ...". ***Friedman v. Goldstein*, 2020 N.Y. Slip Op. 07548, Second Dept 12-16-20**

DENTAL MALPRACTICE, MEDICAL MALPRACTICE, NEGLIGENCE.

PLAINTIFF'S EXPERT'S AFFIDAVIT IN THIS DENTAL MALPRACTICE ACTION WAS CONCLUSORY AND SPECULATIVE AND THEREFORE DID NOT RAISE A QUESTION OF FACT; DEFENDANT DEMONSTRATED THE PERFORMED PROCEDURE WAS NOT THE PROXIMATE CAUSE OF PLAINTIFF'S INJURY, THEREBY NEGATING THE "LACK OF INFORMED CONSENT" CAUSE OF ACTION; DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined defendant established he did not depart from good and accepted practice and the procedure he performed was not the proximate cause of plaintiff's injury. Plaintiff's expert's affidavit was speculative and conclusory. Plaintiff did not raise a question of fact in support of the "lack of informed consent" cause of action: "... [M]ere conclusory allegations of malpractice, unsupported by competent evidence tending to establish the elements of the cause of action at issue, are insufficient to defeat summary judgment ... . '[L]ack of informed consent is a distinct cause of action [which] requir[es] proof of facts not contemplated by an action based merely on allegations of negligence' ... . 'To establish a cause of action [to recover damages] for malpractice based on lack of informed consent, [a] plaintiff must prove (1) that the person providing the professional treatment failed to disclose alternatives thereto and failed to inform the patient of reasonably foreseeable risks associated with the treatment, and the alternatives, that a reasonable medical practitioner would have disclosed in the same circumstances, (2) that a reasonably prudent patient in the same position would not have undergone the treatment if he or she had been fully informed, and (3) that the lack of informed consent is a proximate cause of the injury' ... . 'The third element is construed to mean that the actual procedure performed for which there was no informed consent must have been a proximate cause of the injury' ... . The defendant established, prima facie, that his care and treatment did not proximately cause the plaintiff's alleged injuries. In opposition, the plaintiff failed to raise a triable issue of fact as to whether a lack of informed consent proximately caused his injuries ...". ***Kelapire v. Kale*, 2020 N.Y. Slip Op. 07553, Second Dept 12-16-20**

FORECLOSURE, EVIDENCE, CIVIL PROCEDURE.

THE BANK FAILED TO DEMONSTRATE STANDING TO BRING THE FORECLOSURE ACTION WITH ADMISSIBLE EVIDENCE; THE BANK'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined plaintiff bank did not demonstrate standing to bring the foreclosure action. The bank's motion for summary judgment should not have been granted: "The plaintiff failed to present admissible evidence establishing that the plaintiff or its counsel was in possession of the note at the time of commencement of the action. In support of its motion, the plaintiff submitted the affidavit of Howard R. Handville, a senior loan analyst at Ocwen Financial Corporation whose indirect subsidiary is Ocwen Loan Servicing, LLC (hereinafter Ocwen), the plaintiff's loan servicer. Handville attested that he reviewed the servicing records maintained by Ocwen in its ordinary course of business, that prior servicers' records were integrated into Ocwen's records and relied upon by Ocwen and that '[b]ased on [his] review of the Servicing Records, the original Note and Mortgage for the Loan were physically delivered to Plaintiff's custodian on April 25, 2007, prior to the commencement of this foreclosure action.' Handville further averred that '[s]ince that date, the original Note and Mortgage have remained in the physical possession of Plaintiff or its counsel.' Even if Handville's affidavit was sufficient to lay a proper foundation for the admission of the 'Servicing Records,' the affidavit was insufficient to establish standing because the records themselves were not submitted by the plaintiff. '[I]t is the business record itself, not the foundational affidavit, that serves as proof of the matter asserted' ... , and 'a witness's description of a document not admitted into evidence is hearsay' ...". ***Deutsche Bank Natl. Trust Co. v. Schmelzinger*, 2020 N.Y. Slip Op. 07543, Second Dept 12-16-20**

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

PLAINTIFF BANK DID NOT PROVE COMPLIANCE WITH THE NOTICE REQUIREMENTS OF RPAPL 1304; JUDGMENT AFTER TRIAL REVERSED.

The Second Department, reversing Supreme Court, determined the plaintiff bank in this foreclosure action did not demonstrate strict compliance with the notice requirements of RPAPL 1304. The judgment after trial was reversed: "... [T]he plain-

tiff relied upon the testimony of DeCaro [loan verification officer], who, when shown a copy of the 90-day notice, testified that the notice was printed on October 13, 2011, the same date that appears on the notice, that it was sent to the defendants at the subject property, and that such notice was maintained by Wells Fargo in the regular course of business as the plaintiff's loan servicer. Contrary to the plaintiff's contention, DeCaro's testimony was insufficient to demonstrate that it complied with RPAPL 1304. DeCaro did not testify that she had personal knowledge of the purported mailing or of Wells Fargo's mailing practices, and did not describe the procedure by which the RPAPL 1304 notice was mailed to the defendants by both certified mail and first-class mail ... . Although the notice itself stated in bold print, 'FIRST CLASS MAIL and CERTIFIED MAIL,' no receipt or corresponding document issued by the United States Postal Service was submitted proving that the notice was actually sent by certified mail more than 90 days prior to commencement of the action. Moreover, the mailing manifest submitted by the plaintiff failed to establish that the notice was actually mailed to the defendants by both certified mail and first-class mail ... . Since the plaintiff failed to provide evidence of the actual mailing, 'or proof of a standard office mailing procedure designed to ensure that items are properly addressed and mailed, sworn to by someone with personal knowledge of the procedure,' the plaintiff failed to establish its strict compliance with RPAPL 1304 ...". ***US Bank N.A. v. Pierre*, 2020 N.Y. Slip Op. 07622, Second Dept 12-16-20**

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

THE PROPERTY TRANSFERRED TO THE DEFENDANT BY WILL UPON THE DEATH OF THE PROPERTY OWNER; THEREFORE THE ESTATE WAS NOT A NECESSARY PARTY IN THIS FORECLOSURE ACTION.

The Second Department, reversing Supreme Court, determined the estate was not a necessary party in this foreclosure action because the property transferred upon the property owner's death by operation of the will: "Pursuant to a deed dated March 27, 1991, Marjorie Colwell became the owner of certain real property located in Brooklyn (hereinafter the subject property). Colwell died on November 8, 2004. Colwell's will bequeathed the subject property to the defendant Sonia Gaines, and also named Gaines as the executrix of the estate. ... We disagree with the Supreme Court's determination that the estate was a necessary party to this action, and that the failure to join the estate warranted vacatur of the order of reference and the judgment of foreclosure and sale and dismissal of the complaint insofar as asserted against Gaines ... . Pursuant to RPAPL 1311(1), 'necessary defendants' in a mortgage foreclosure action include, among others, '[e]very person having an estate or interest in possession, or otherwise, in the property as tenant in fee, for life, by the curtesy, or for years, and every person entitled to the reversion, remainder, or inheritance of the real property, or of any interest therein or undivided share thereof, after the determination of a particular estate therein.' Under the circumstances of this case, the estate was not a necessary party to this mortgage foreclosure action. 'Generally, title to real property devised under the will of a decedent vests in the beneficiary at the moment of the testator's death and not at the time of probate' ...". ***US Bank Trust, N.A. v. Gaines*, 2020 N.Y. Slip Op. 07623, Second Dept 12-16-20**

INSURANCE LAW, CONTRACT LAW.

THE INSURER'S ACCEPTANCE OF PREMIUM PAYMENTS AFTER IT LEARNED OF THE MISREPRESENTATION ABOUT THE SPRINKLER SYSTEM WAIVED THE INSURER'S RIGHT TO RESCIND THE POLICY.

The Second Department determined that the insurer's (Hamilton's) acceptance of premiums after disclaiming coverage for fire damage when it learned the building did not have a sprinkler system waived the insurer's right to rescind the policy. The insured had indicated the building had a sprinkler system it its application for the policy: "The continued acceptance of premiums by an insurance carrier after learning of sufficient facts which allow for the rescission of the policy, constitutes a waiver of the right to rescind ... . Here, ... the record demonstrated, as a matter of law, that Hamilton waived its right to assert the plaintiff's misrepresentation as a basis for rescinding the policy and disclaiming coverage by renewing the policy and accepting further premiums after it discovered the misrepresentation ...". ***5512 OEAAJB Corp. v. Hamilton Ins. Co.*, 2020 N.Y. Slip Op. 07525, Second Dept 12-16-20**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

PLAINTIFF ALLEGED HE WAS STANDING ON AN A-FRAME LADDER WHEN IT SHIFTED CAUSING A CONCRETE SLAB TO FALL ON HIS HAND; DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON THE LABOR LAW § 240(1) CAUSE OF ACTION SHOULD NOT HAVE BEEN GRANTED; IN ADDITION A DEFENDANT FAILED TO SHOW IT WAS NOT AN "OWNER" WITHIN THE MEANING OF LABOR LAW 240(1).

The Second Department, reversing Supreme Court, determined defendants' motion for summary judgment on plaintiff's Labor Law § 240(1) cause of action should not have been granted. Plaintiff alleged the A-frame ladder he was standing when positioning a concrete slab shifted causing the slab to fall on his hand. In addition the Second Department determined defendant (Cappy's) did not demonstrate it was not an "owner" within the meaning of Labor Law § 240(1): "The defendants failed to show, prima facie, that this incident did not involve an injury caused by the failure to provide a safety device to protect against an elevation-related risk, within the meaning of the statute. In particular, the plaintiff's work entailed attempting to move or lift a heavy slab of cement at ceiling or roof level, while standing on a ladder. The plaintiff testified

that the ladder 'moved' while he was reaching for the slab, causing the slab to fall or drop. The plaintiff alleges, inter alia, that a sling or other device should have been provided to secure the slab. Under these circumstances, the defendants failed to show, prima facie, that this incident did not result from the failure to provide such safety device to protect against an elevation-related risk, and the evidence also raised issues of fact as to that matter ... . Further, [defendant] Cappy's failed to show, prima facie, that it cannot be deemed an 'owner' within the meaning of Labor Law § 240(1). Under Labor Law §§ 240(1) and 241(6), 'those parties with a property interest who hire the general contractor' are deemed 'owners' ... . 'Lessees who hire a contractor and have the right to control the work being done are considered 'owners' within the meaning of the statutes' ...". ***Gomez v. 670 Merrick Rd. Realty Corp.*, 2020 N.Y. Slip Op. 07549, Second Dept 12-16-20**

MUNICIPAL LAW, NEGLIGENCE.

PLAINTIFF IN THIS SLIP AND FALL CASE ALLEGED HE WAS INJURED WHEN HE STEPPED ON A LOOSE MANHOLE COVER OWNED BY DEFENDANT-TOWN; THE TOWN DEMONSTRATED IT DID NOT HAVE NOTICE OF THE CONDITION BUT DID NOT DEMONSTRATE IT DID NOT CREATE THE CONDITION; THE TOWN'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined defendant-town's motion for summary judgment in this slip and fall case should not have been granted. Plaintiff alleged he stepped on a loose manhole cover which swung out from under him crushing his leg. The town demonstrated it did not have written notice of the condition, but did not demonstrate it did not create the condition: "Where, as here, the plaintiff alleged that the affirmative negligence exception applies, the defendant must show, prima facie, that the exception does not apply ... . Here, the plaintiff alleged that the defendant created the alleged dangerous condition, inter alia, through its initial placement of the manhole and by the use of an ill-fitting manhole cover, and the defendant's submissions in support of its motion for summary judgment do not address these allegations. Accordingly, the defendant failed to establish, prima facie, that it did not create the alleged defect ...". ***Dejesus v. Town of Mamaroneck*, 2020 N.Y. Slip Op. 07542, Second Dept 12-16-20**

PERSONAL INJURY.

IN THIS SLIP AND FALL CASE, DEFENDANTS DID NOT DEMONSTRATE THE WHEEL STOP, WHICH HAD BEEN MOVED FROM ITS POSITION AT THE TOP OF THE PARKING SPACE, WAS OPEN AND OBVIOUS AND NOT INHERENTLY DANGEROUS; DEFENDANTS' MOTION FOR SUMMARY JUDGMENT PROPERLY DENIED.

The Second Department determined the defendants in this slip and fall case did not demonstrate the wheel stop which was an open and obvious condition that was not inherently dangerous. The wheel stop had been move from its normal position at the top of a parking space. Plaintiff tripped over it after getting out of her car and taking a few steps while looking toward the store: "A landowner has a duty to maintain its premises in a reasonably safe condition ... . There is, however, no duty to protect or warn against conditions that are open and obvious and not inherently dangerous ... . 'Proof that a dangerous condition is open and obvious does not preclude a finding of liability against an owner for failure to maintain property in a safe condition' ... . 'The determination of whether an asserted hazard is open and obvious cannot be divorced from the surrounding circumstances, and whether a condition is not inherently dangerous, or constitutes a reasonably safe environment, depends on the totality of the specific facts of each case' ...". ***Brett v. AJ 1086 Assoc., LLC*, 2020 N.Y. Slip Op. 07532, Second Dept 12-16-20**

REAL PROPERTY LAW, TRESPASS.

PLAINTIFFS' MOTIONS FOR SUMMARY JUDGMENT ON THEIR ADVERSE POSSESSION AND TRESPASS CAUSES OF ACTION SHOULD HAVE BEEN GRANTED; A DEFENDANT'S MISTAKEN BELIEF HE OR SHE HAD A RIGHT TO ENTER DOES NOT DEFEAT LIABILITY FOR TRESPASS.

The Second Department, reversing Supreme Court in this adverse possession and trespass action, determined plaintiffs were entitled to summary judgment on their adverse possession and trespass actions. With regard to trespass, the court noted that liability is not defeated by a defendant's belief he or she has a right to enter the property: "The Supreme Court also should have granted that branch of the plaintiffs' cross motion which was, in effect, for summary judgment on the issue of liability on the trespass cause of action. To meet their prima facie burden, the plaintiffs were required to demonstrate that the defendant intentionally entered onto the land belonging to the plaintiffs without justification or permission ... . 'Liability may attach regardless of defendant's mistaken belief that he or she had a right to enter' ... . Here, the plaintiffs established their prima facie entitlement to judgment as a matter of law on the trespass cause of action by submitting the affidavit of the plaintiff Jamie Montanaro, who averred that, in December 2016, the defendant removed a portion of the retaining wall on the disputed property and built a garage which encroaches upon the disputed property ... . The plaintiffs also submitted the affidavit of a land surveyor who averred that the new garage encroached upon the disputed property ...". ***Montanaro v. Rudchyk*, 2020 N.Y. Slip Op. 07560, Second Dept 12-16-20**

THIRD DEPARTMENT

UNEMPLOYMENT INSURANCE.

UBER DRIVERS ARE EMPLOYEES ENTITLED TO UNEMPLOYMENT INSURANCE BENEFITS.
The Third Department determined that Uber drivers are employees entitled to unemployment insurance benefits: "Uber controls the drivers' access to their customers, calculates and collects the fares and sets the drivers' rate of compensation. Drivers may choose the route to take in transporting customers, but Uber provides a navigation system, tracks the drivers' location on the app throughout the trip and reserves the right to adjust the fare if the drivers take an inefficient route. Uber also controls the vehicle used, precludes certain driver behavior and uses its rating system to encourage and promote drivers to conduct themselves in a way that maintains 'a positive environment' and 'a fun atmosphere in the car.' Considering the foregoing, we find no reason to disturb the Board's finding of an employment relationship ...". ***Matter of Lowry (Uber Tech., Inc--Commissioner of Labor)*, 2020 N.Y. Slip Op. 07645, Third Dept 12-17-20**

UNEMPLOYMENT INSURANCE.

CLAIMANT WAS AN EMPLOYEE OF A LOGISTICS COMPANY WHICH FACILITATES DELIVERIES.
The Third Department determined claimant was an employee of a logistics company (US Pack) which facilitates deliveries and was therefore entitled to unemployment insurance benefits: "The record reflects that claimant was assigned specific workdays and hours by US Pack's operations manager and was issued an identification badge bearing US Pack's name. Claimant was required to sit in the client's parking lot during set hours — for which he was paid a set fee — and wait for US Pack to contact him with assignments. The client would notify US Pack about assignments, which, in turn, would call claimant to retrieve the assignments. Claimant was required to call dispatch at US Pack once the assignments were loaded into his car. Once a delivery was completed, claimant was required to call dispatch again, providing the name of the person who accepted the delivery and the time delivery was complete, before moving onto the next delivery. Although claimant could refuse an assignment, he testified that when he did, he was told he could be fired, and the following day was punished by being passed over for assignments. Some compensation was negotiated, although claimant testified that US Pack set the compensation of some of the deliveries. Although the record establishes that claimant used his own vehicle and was not reimbursed any expenses, the record nevertheless supports the Board's conclusion that US Pack exercised sufficient supervision, direction and control over significant aspects of claimant's work to establish an employer-employee relationship ...". ***Matter of Thomas (US Pack Logistics, LLC--Commissioner of Labor)*, 2020 N.Y. Slip Op. 07642, Third Dept 12-17-20**

WORKERS' COMPENSATION, PERSONAL INJURY.

DAMAGE TO A LEG MUSCLE, HERE THE HAMSTRING, SUPPORTED A SCHEDULE LOSS OF USE (SLU) AWARD, WORKERS' COMPENSATION BOARD REVERSED.
The Third Department, reversing the Workers' Compensation Board, determined damage to a muscle, here the hamstring, qualified for a schedule loss of use (SLU): "The Board's conclusion that no SLU award can be made because 'no special consideration applies to a hamstring tear' fails to take into consideration that the 2018 guidelines specifically permit an SLU award to be based upon a permanent residual deficit caused by physical damage to a muscle, such as a hamstring. We recognize that the 2018 guidelines provide 'useful criteria' and the Board makes the ultimate determination of a claimant's degree of disability, but that determination must be supported by substantial evidence ... . In finding that claimant was not entitled to an SLU award, the Board did not discredit or find unpersuasive the medical opinion of either of the orthopedists, reject Rashid's [the orthopedist's] opinion that this hamstring tear injury most closely correlated to a quadricep rupture or find that the orthopedists' SLU calculations were inadequately supported; rather, the Board found that, even if credited, the medical opinions could not support an SLU award here ... . [W]e find, contrary to the Board's interpretation, that, in the absence of specific instructions regarding hamstring tears in the 2018 guidelines, a medical expert could rationally rely upon the special consideration for quadricep ruptures as the closest corollary to claimant's injury and impairment. The absence a special consideration addressing a hamstring impairment did not preclude an SLU award for a leg impairment ...". ***Matter of Semrau v. Coca-Cola Refreshments USA Inc.*, 2020 N.Y. Slip Op. 07650, Third Dept 12-17-20**

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