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FIRST DEPARTMENT

APPEALS, EVIDENCE.

THE DENIAL OF A MOTION TO PRECLUDE EVIDENCE WAS NOT AN APPEALABLE ORDER.

The First Department held the denial of a motion to preclude evidence was not an appealable order: "[Supreme Court] denied defendants-appellants' motion to preclude evidence of any alleged misrepresentations and/or breaches of contract not previously pled in the second amended complaint in support of the respective fraud and breach of contract causes of action, and held that plaintiffs could rely upon such evidence by amending their interrogatory answers in the future, unanimously dismissed, without costs, as taken from a nonappealable order. 'An evidentiary ruling made before trial is generally reviewable only in connection with an appeal from a judgment rendered after trial' ... . Here, defendants' motion to preclude, which was made to limit plaintiffs' allegations to those asserted in a second amended complaint, notwithstanding that outstanding discovery remained, including critical depositions, did not involve an evidentiary issue pertaining to the merits of the controversy or a substantial right to justify appellate review (see CPLR 5701[a][2][iv], [v] ...)." ***National Union Fire Ins. Co. of Pittsburgh, PA v. Razzouk*, 2020 N.Y. Slip Op. 08004, First Dept 12-29-20**

CONTRACT LAW, CIVIL PROCEDURE.

THERE WAS A QUESTION OF FACT WHETHER THE ONE-YEAR STATUTE OF LIMITATIONS IN THE CONTRACT WITH DEFENDANT SUBCONTRACTOR WAS REASONABLE BECAUSE THE RUNNING OF THE STATUTE COULD BE TRIGGERED BY A PARTY OVER WHICH DEFENDANT HAD NO CONTROL.

The First Department, in a full-fledged opinion by Justice Singh, reversing Supreme Court, determined the counterclaims by defendant subcontractor, Nastasi, in this breach of a construction contract action, should not have been dismissed. The central issue was whether the one-year contractual statute of limitations was enforceable. Because the statute could be triggered by the failure of the owner to pay the plaintiff general contractor, Turner, a circumstance over which the defendant subcontractor, Nastasi, had no control, there was a question of fact whether the one-year limitations period was reasonable: "The relevant question when deciding whether a limitations period is enforceable is whether and when the damages were objectively ascertainable ... . A contractual limitations period is unenforceable without a concrete determination of damages accrual ... . Here, the provisions setting a one-year limitation period for claims arising out of the contracts between Turner and Nastasi are reasonable on their face. However, the contracts also provide that payments by the owner are conditions precedent to any sums owed by Turner to Nastasi. As observed in D&S Restoration, it was neither fair nor reasonable to impose such a condition precedent, which was not within Nastasi's control, but had the capability of nullifying its claim (D&S Restoration, 160 AD3d at 926). ... [T]he intent of the owner should not govern the interplay of the two provisions. Such a holding will unreasonably permit a party to choose to stay silent on the issue of owner payment unless it suited them, and unilaterally set the accrual date for the claim." ***Turner Constr. Co. v. Nastasi & Assoc., Inc.*, 2020 N.Y. Slip Op. 08024, First Dept 12-29-20**

CORPORATION LAW, CIVIL PROCEDURE.

THE PROOF WAS NOT SUFFICIENT TO SUPPORT PIERCING THE CORPORATE VEIL AND SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED ON THAT ISSUE.

The First Department, reversing Supreme Court, determined the proof was not sufficient to support piercing the corporate veil and summary judgment should have been granted on that issue: " 'Generally, a plaintiff seeking to pierce the corporate veil must show that (1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury' ... . 'Since, by definition, a corporation acts through its officers and directors, to hold a shareholder/officer ... personally liable, a plaintiff must do more than merely allege that the individual engaged in improper acts or acted in 'bad faith' while representing the corporation.' ... Instead, '[t]he party seeking to pierce the corporate veil must establish that the owners [of the corporation], through their domination, abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice against that party such that a court in equity will intervene' ... . Here, ... the complaint ... does not sufficiently allege injury to plaintiff. ... [Plaintiff] 'failed to produce evidence that the individual defendants took steps to render

the corporate defendant insolvent in order to avoid plaintiffs' claim for damages or otherwise defraud plaintiffs' ...". ***Sutton 58 Assocs. LLC v. Pilevsky*, 2020 N.Y. Slip Op. 08020, First Dept 12-29-20**

CRIMINAL LAW.

AFTER THE DISCHARGE OF A JUROR FOR MISCONDUCT, THE TRIAL COURT PROPERLY REPLACED THE JUROR WITH AN ALTERNATE WHO HAD BEEN EXCUSED AND SENT HOME; THERE WAS A DISSENT.

The First Department, over a dissent, determined the trial court properly replaced a juror for misconduct with an alternate jury who had been excused and sent home: "The plain language of CPL 270.35 (1) states, in relevant part, that 'If at any time after the trial jury has been sworn and before the rendition of its verdict, a juror is unable to continue serving . . . the court must discharge such juror. If an alternate juror or jurors are available for service, the court must order that the discharged juror be replaced by the alternate juror whose name was first drawn and called, provided, however, that if the trial jury has begun its deliberations, the defendant must consent to such replacement.' Thus, according to the plain language of CPL 270.35 (1), the trial court was required to decide if the alternate was 'available for service,' and did not require the consent of defendant given that the jury had not begun its deliberations." ***People v. Murray*, 2020 N.Y. Slip Op. 08007, First Dept 12-29-30**

CRIMINAL LAW, CIVIL PROCEDURE, MEDICAID, FRAUD.

ALTHOUGH THE TWO INDICTMENTS ALLEGED THE SAME MODUS OPERANDI FOR MEDICAID FRAUD, THE CHARGES INVOLVED DIFFERENT PARTIES AND TIME PERIODS; THE WRIT OF PROHIBITION SEEKING TO PRECLUDE PROSECUTION ON DOUBLE JEOPARDY GROUNDS DENIED OVER A DISSENT.

The First Department, over a dissent, denied the writ of prohibition seeking to preclude a second prosecution for Medicaid fraud on double jeopardy grounds. Although the alleged scheme to defraud was the same, the two indictments involved different parties and different time periods: "In essence, the wrongdoing charged in each indictment is the filing of fraudulent Medicaid reimbursement claims and related misconduct, such as payment of kickbacks. However, the indictments charge different specific criminal acts, which were perpetrated on different dates and over different time periods. Moreover, the indictments do not allege fraudulent billing of any of the same managed care organizations. While it appears that the different fraudulent acts charged in the two indictments had a similar modus operandi and were part of a common plan, this alone does not suffice to render them part of the same 'criminal transaction' under CPL 40.10(2)(b) ...". ***Matter of Diefenbacher v. Jackson*, 2020 N.Y. Slip Op. 08015, First Dept 12-29-20**

CRIMINAL LAW, CONTEMPT.

DEFENDANT'S CONTEMPT CONVICTION FOR VIOLATING AN ORDER OF PROTECTION STANDS, DESPITE THE FACT THAT THE ORDER OF PROTECTION WAS BASED ON AN OFFENSE SINCE FOUND UNCONSTITUTIONAL.

The First Department determined the order of protection based on a conviction for an offense which has been found unconstitutional was voidable, not void, and therefore remained in effect: "Defendant was properly convicted of first-degree criminal contempt under Penal Law § 215.51(b)(v) for violating an order of protection that had been issued upon his conviction of second-degree aggravated harassment under former Penal Law § 240.30(1)(a). The contempt conviction was valid even though the Court of Appeals declared that the aggravated harassment provision underlying the order of protection was unconstitutional in *People v. Golb* (23 NY3d 455 [2014] ... . *Golb* was decided after the order of protection was issued against defendant, but before he violated it. ... The *Golb* decision did not render defendant's order of protection void on its face, but merely voidable. Defendant's underlying conviction was final before *Golb* was decided. The order of protection was indisputably valid at the time of its issuance. After *Golb*, there are no reported cases holding that convictions under former Penal Law § 240.30 (1)(a) are automatically vacated. Instead, where there was vacatur of a conviction or order of protection, it was in response to a request for relief either on appeal or in a posttrial motion ... . Defendant did not challenge the order of protection by appealing the aggravated harassment conviction against him ... . His subsequent CPL 440.10 motion to vacate the conviction and order of protection based on Golb was denied ... . Defendant was therefore required to comply with the extant order and his violation constituted criminal contempt ...". ***People v. Brown*, 2020 N.Y. Slip Op. 08011, First Dept 12-29-20**

FALSE CLAIMS ACT, SECURITIES.

THE MOTIONS TO DISMISS THE QUI TAM ACTION ALLEGING THE VIOLATION OF THE NEW YORK FALSE CLAIMS ACT BY SETTING INTEREST RATES ON BONDS PROPERLY DENIED.

The First Department affirmed Supreme Court's denial of the motions to dismiss this qui tam action alleging defendants violated the New York False Claims Act (NYFCA) in setting interest rates for certain variable rate demand obligations (VRDO) (bonds): "False claims are actionable if the State provides any portion of the funds used to pay the false claims ... . The complaint sufficiently alleges that a portion of the funds the conduit borrower received came from the state. That the state's money passed to defendant M&T Bank Corporation through private VRDO borrower entities does not make the government any less its source. By issuing conduit bonds, the state 'made the funds available,' thereby 'providing' money

within the meaning of the New York False Claims Act ...". ***State of New York ex rel. Edelweiss Fund, LLC v. JP Morgan Chase & Co.*, 2020 N.Y. Slip Op. 08019, First Dept 12-29-20**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

PLAINTIFF SLIPPED ON ICE AND SNOW IN AN AREA OF THE WORK SITE USED AS A WALKWAY; PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT IN THIS LABOR LAW § 241(6) ACTION SHOULD HAVE BEEN GRANTED; THERE WAS A DISSENT.

The First Department, reversing Supreme Court, over a dissent, determined plaintiff was entitled to summary judgment on his Labor Law § 241(6) cause of action. Plaintiff slipped and fell on ice and snow on a walkway used on the work site: "[12 NYCRR] Section 23-1.7(d) provides, in pertinent part, that no employee shall be permitted 'to use a floor, passageway, walkway, scaffold, platform or other elevated working surface which is in a slippery condition' and requires the removal of any '[i]ce, snow, water, grease and any other foreign substance which may cause slippery footing.' Here, plaintiff's accident occurred while he was walking on a path in the fenced-in area between the security guard booth and the worksite entrance at Staircase B. The general superintendent ... swore in his deposition that there was an unpaved path between the booth and the worksite entrance, that it was one of two entrances to the worksite, that it was a 'walked path that workers generally took' and that it was 'an area that should be kept clear of snow and ice and any other slippery conditions so that workers don't injure themselves[.]' " ***Potenzo v. City of New York*, 2020 N.Y. Slip Op. 08013, First Dept 12-29-30**

LANDLORD-TENANT, NEGLIGENCE.

A NON-DEFECTIVE CELLAR DOOR CLOSED AND STRUCK PLAINTIFF'S HEAD; THE LEASE DID NOT REQUIRE THE DEFENDANT OUT-OF-POSSESSION LANDLORD TO MAINTAIN THE PREMISES; AND THERE WAS NO STRUCTURAL DEFECT; THE LANDLORD'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED.

The First Department, reversing Supreme Court, determined the defendant out-of-possession landlord (West 16th) was not liable for an injury from a non-defective cellar door which closed and struck plaintiff's head: "It is well established that an out-of-possession landlord like West 16th 'is generally not liable for negligence with respect to the condition of the demised premises unless it (1) is contractually obligated to make repairs or maintain the premises, or (2) has a contractual right to reenter, inspect and make needed repairs and liability is based on a significant structural or design defect that is contrary to a specific statutory safety provision' ... . The lease did not obligate West 16th to maintain or repair the cellar doors or to install an auxiliary safety device on the cellar doors, which were fully functional and not broken in any way. ... Further, the alleged defect is not a structural defect contrary to a specific statutory safety provision. ... [W]e have previously held that the failure to install a safety device to hold such doors open—the precise negligence alleged against West 16th herein—was 'not a structural defect contrary to a specific statutory safety provision' ...". ***Matias v. West 16th Realty LLC*, 2020 N.Y. Slip Op. 08000, First Dept 12-29-20**

PERSONAL INJURY, EMPLOYMENT LAW.

NEGLIGENT HIRING, SUPERVISION, RETENTION AND TRAINING CAUSES OF ACTION PROPERLY SURVIVED SUMMARY JUDGMENT; THE VICARIOUS LIABILITY CAUSE OF ACTION, HOWEVER, SHOULD HAVE BEEN DISMISSED; IT WAS ALLEGED EMPLOYEES OF A RESIDENTIAL FACILITY BURNED A NONVERBAL, AUTISTIC RESIDENT.

The First Department, in a full-fledged opinion by Justice Moulton, determined the vicarious liability cause of action against L & W, the employer of defendants Chavies and Edwards, should have been dismissed, but the negligent hiring, retention, supervision and training causes of action, as well as claims for punitive damages, properly survived summary judgment. The complaint alleged plaintiff, Sandoval, a nonverbal autistic adult who lived in a residential facility operated by defendant L & W, was deliberate burned by a heated utensil (potato masher) used by either Chavies or Edwards to control plaintiff. The vicarious liability cause of action dismissed because the alleged burning of plaintiff was outside the scope of Chavies' and Edwards' employment: "... L&W conditions all employment offers on at least one satisfactory professional reference. Despite this policy, L&W did not check the professional references submitted by Chavies or Edwards. Most notably, Chavies indicated on his job application that he had been 'let go' from his most recent job working with intellectually disabled children. It is for the jury to determine whether L&W's lapse in obtaining satisfactory references for both employees constitutes negligent hiring under the circumstances ... . L&W's claim that the incident was not foreseeable is belied by its own training materials. The SCIP training materials reflect that residential staff face difficult emotional challenges in their positions, and that as a result, the potential for abuse is reasonably foreseeable. The training materials note the 'Common Emotional Reactions' that staff may have including 'Anger.' The training materials reference the 'incidents of abuse' and seek to decrease those incidents 'through increasing awareness of the definition and the causative factors of abuse.' The materials also reference the potential that staff might 'lose control and strike or verbally abuse a person.' ... [A]s the movant, it is L&W's burden to establish the lack of proximate cause ... . L&W's causation arguments are undercut by its own hiring policy, which makes an offer of employment contingent on at least one satisfactory professional reference and by the

... training materials, which highlight the critical importance of 'ongoing staff training' in decreasing abuse." ***Sandoval v. Leake & Watts Servs., Inc.*, 2020 N.Y. Slip Op. 08017, First Dept 12-29-20**

WORKERS' COMPENSATION LAW, CORPORATION LAW, LABOR LAW-CONSTRUCTION LAW.

THE DEFENDANT LIMITED LIABILITY COMPANIES FUNCTIONED AS A SINGLE INTEGRATED UNIT WITH PLAINTIFF'S EMPLOYER; PLAINTIFF'S ONLY REMEDY IN THIS SLIP AND FALL CASE IS THE WORKERS' COMPENSATION LAW BENEFITS HE APPLIED FOR AND RECEIVED BEFORE BRINGING THIS LABOR LAW § 240(1) ACTION.

The First Department, reversing Supreme Court, over an extensive dissent, determined the corporate entities plaintiff sued in this slip and fall case function as a single integrated entity with plaintiff's employer, the nursing home where he was injured. Plaintiff had applied for and received Workers' Compensation benefits and then brought this Labor Law § 240(1) action. The First Department held that plaintiff's exclusive remedy was Workers' Compensation: "... [W]e find that Hopkins Ventures has shown ownership of 100% of both KFG Land and KFG Operating and that it exercised complete managerial and financial control over both companies, operating them as if they were a single integrated entity. Since the evidentiary proof submitted by KFG Land was sufficient to make out its prima facie case, that the LLCs functioned as a single integrated entity in connection with the joint venture of acquiring and operating the property and nursing home, the exclusivity provisions of the WCL apply. Plaintiff failed to raise a material issue of fact to defeat defendant's motion for summary judgment. ... Although the dissent reaches the underlying merits of plaintiff's cross appeal concerning the dismissal of his Labor Law §240(1) on the basis that he was not engaged in a 'repair' or 'alteration' within the meaning of Labor Law § 240(1) at the time of his accident, we affirm on the ground that even if plaintiff was engaged in alteration or repair, the exclusivity provisions of the WCL would be his sole remedy since he applied for and received those benefits." ***Fuller v. KFG L & I, LLC*, 2020 N.Y. Slip Op. 07998, First Dept 12-29-20**

SECOND DEPARTMENT

ARBITRATION, CONTRACT LAW.

THE CONTRACT PROPERLY ACCORDED THE ARBITRATOR THE AUTHORITY TO DETERMINE "GATEWAY" QUESTIONS OF ARBITRABILITY; NONSIGNATORIES ARE COMPELLED TO ARBITRATE.

The Second Department, in a full-fledged opinion by Justice Miller, over a two-justice dissent, determined: (1) the contract properly accorded the arbitrator the power to decide whether the issues raised in the complaint were arbitrable (so-called "gateway" questions); and (2) the non-signatories, here plaintiff's LLC and defendant's law partner and law firm, are subject to the arbitration provision in the contract. Plaintiff is a professional football player and defendant is an attorney who represented plaintiff in contract negotiation and marketing and endorsements. The opinion is detailed and comprehensive and cannot be fully summarized here: "... Revis [plaintiff athlete] entered into an agreement with Schwartz [defendant attorney] pursuant to which they agreed to arbitrate 'gateway' questions of arbitrability ... . [N]either the Supreme Court, nor this Court, nor any court, has the authority to decide whether and to what extent these parties' disputes are arbitrable ... . Indeed, just as a court may not 'rule on the potential merits of the underlying' claim that is assigned by contract to an arbitrator, 'even if it appears to the court to be frivolous'... , 'a court may not decide an arbitrability question that the parties have delegated to an arbitrator' ... , even if the court determines that 'the argument that the arbitration agreement applies to the particular dispute is 'wholly groundless' ... . * * * 'Under the direct benefits theory of estoppel, a nonsignatory may be compelled to arbitrate where the nonsignatory 'knowingly exploits' the benefits of an agreement containing an arbitration clause, and receives benefits flowing directly from the agreement' ... . 'The benefits must be direct, and the party seeking to compel arbitration must demonstrate that the party seeking to avoid arbitration relies on the terms of the agreement containing the arbitration provision in pursuing its claim' ...". ***Revis v. Schwartz*, 2020 N.Y. Slip Op. 08094, Second Dept 12-30-20**

CIVIL PROCEDURE, FORECLOSURE.

THE ACTION SHOULD NOT HAVE BEEN DISMISSED PURSUANT TO CPLR 3216 FOR FAILURE TO PROSECUTE; ISSUE HAD NOT BEEN JOINED AND OTHER CONDITIONS PRECEDENT TO DISMISSAL WERE NOT MET.

The Second Department, reversing Supreme Court, determined plaintiff's motion to vacate the conditional order dismissing the action for failure to prosecute pursuant to CPLR 3216: "The conditional order constituted a defective 90-day notice pursuant to CPLR 3216. The court was without authority to issue a 90-day notice since issue was not joined in the action (see CPLR 3216[b][1] ...). Moreover, the conditional order failed to state that the plaintiff's failure to comply 'will serve as a basis for a motion' by the court to dismiss the action for failure to prosecute ... . The purported dismissal was not properly effectuated since the court never directed the parties to show cause why the action should not be dismissed, and failed to issue a formal order of dismissal on notice to the parties as required by CPLR 3216 ... . Moreover, the conditional order was

erroneous since it directed the plaintiff to move for an order of reference, even though the plaintiff had already moved for an order of reference. Accordingly, we grant the plaintiff's motion to vacate the conditional order and restore the action to the active calendar." ***U.S. Bank N.A. v. Thompson*, 2020 N.Y. Slip Op. 08098, Second Dept 12-30-20**

CONSUMER LAW, MUNICIPAL LAW, CIVIL PROCEDURE.

A GENERAL BUSINESS LAW § 349 DECEPTIVE BUSINESS PRACTICE ACTION AGAINST THE CITY SOUNDS IN TORT TRIGGERING THE NOTICE OF CLAIM REQUIREMENT.

The Second Department noted that a deceptive business practice cause of action pursuant to General Business Law § 349 sounds in tort. The GBL § 349 cause of action against the city not state a cause of action because no notice of claim was filed: "Administrative Code of the City of New York § 7-201 and General Municipal Law § 50-e together require a plaintiff, in order to bring an action sounding in tort against the City of New York, to serve a notice of claim within ninety days after the date the claim arises ... . Failure to comply with a statutory notice of claim requirement is a ground for dismissal pursuant to CPLR 3211(a)(7) for failure to state a cause of action ... . General Business Law § 349(a) prohibits '[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state' ... . We agree with the Supreme Court's determination that the plaintiffs' first cause of action, which sought to recover damages for violations of General Business Law § 349, was a claim sounding in tort, and therefore was subject to the requirements of General Municipal Law § 50-e, as a cause of action sounding in fraud ... . Accordingly, we agree with the court's determination granting that branch of the defendants' motion which was to dismiss the first cause of action due to the plaintiffs' failure to serve a notice of claim within 90 days after the claim arose ...". ***Singh v. City of New York*, 2020 N.Y. Slip Op. 08123, Second Dept 12-30-20**

CRIMINAL LAW.

DEFENDANT, AT THE PLEA PROCEEDINGS, WAS NOT INFORMED OF THE PERIOD OF POSTRELEASE SUPERVISION TO BE IMPOSED OR THE MAXIMUM WHICH COULD BE IMPOSED; GUILTY PLEA VACATED.

The Second Department, vacating defendant's guilty plea, noted County Court did not specify the period of postrelease supervision which would be imposed, or the maximum which could be imposed at the plea proceedings: " '[A] trial court has the constitutional duty to ensure that a defendant, before pleading guilty, has a full understanding of what the plea connotes and its consequences' ... . 'To meet due process requirements, a defendant 'must be aware of the postrelease supervision component of that sentence in order to knowingly, voluntarily and intelligently choose among alternative courses of action' ... , and '[w]ithout such procedures, vacatur of the plea is required' ... . It is not enough for a court to generally inform a defendant that a term of postrelease supervision will be imposed as a part of the sentence ... . Rather, for a plea of guilty to be knowing, intelligent, and voluntary, the court must inform the defendant of either the specific period of postrelease supervision that will be imposed or, at the least, the maximum potential duration of postrelease supervision that may be imposed ... . Here, at the plea proceeding, the County Court did not specify the period of postrelease supervision to be imposed or, alternatively, the maximum potential duration of postrelease supervision that could be imposed. The court's failure to so advise the defendant prevented his plea from being knowing, voluntary, and intelligent." ***People v. Cabrera*, 2020 N.Y. Slip Op. 08074, Second Dept 12-30-20**

CRIMINAL LAW.

A DEFENDANT CAN NOT BE CONVICTED OF BOTH FORGERY AND POSSESSION OF A FORGED INSTRUMENT WITH RESPECT TO THE SAME FORGED INSTRUMENT.

The Second Department noted: " '[A]n individual may be charged with both forgery and criminal possession of a forged instrument, [but] [s]he cannot be convicted of both crimes with respect to the same forged instrument' " ... . ***People v. Filan*, 2020 N.Y. Slip Op. 08078, Second Dept 12-30-20**

CRIMINAL LAW, CONSTITUTIONAL LAW, ATTORNEYS.

ALTHOUGH IT APPEARS THE POLICE HAD PROBABLE CAUSE TO ARREST THE DEFENDANT BEFORE THEY ENTERED THE HOME AND THEREFORE COULD HAVE GOTTEN AN ARREST WARRANT, THERE WAS NO CONSTITUTIONAL VIOLATION BECAUSE THE POLICE ENTERED THE HOME WITH CONSENT; DEFENSE COUNSEL ARGUED THE POLICE DID NOT GET A WARRANT TO DELAY THE ATTACHMENT OF THE RIGHT TO COUNSEL AND PROCURE STATEMENTS.

The Second Department, in a full-fledged opinion by Justice Chambers raising a question of first impression, determined the police did not violate the New York Constitution when they entered the home looking for defendant and made a warrantless arrest. The police had probable cause when they went to the home and defense counsel argued they did not get a warrant in order to delay the attachment of the right to counsel and obtain statements. The Second Department determined there was no *Payton* violation because the motion court credited the police testimony claiming they entered the home with the consent of the person who answered the door: "... [T]he defendant's appellate counsel specifically contends that where the police, armed with probable cause and ample time to obtain an arrest warrant, nevertheless choose to make a warrant-

less arrest in the absence of exigent circumstances, their conduct must be deemed to violate the defendant's indelible right to counsel under the New York State Constitution (see *People v. Harris*, 77 NY2d at 440). While this issue presents what appears to be an important constitutional question of first impression, we see no viable path to resolving this question in the defendant's favor within the current framework of New York law. Although the hearing evidence fully supports the defendant's view that the police went to the subject residence with the intent of making a warrantless arrest—indeed, the People did not present any evidence to suggest any alternative motive for the early morning visit—New York law does not presently recognize a 'new category of *Payton* violations based on subjective police intent' (... *People v. Harris*, 77 NY2d 434). Therefore, we decline to find that the police conduct in this case amounted to a violation of the defendant's constitutional rights under *Payton* and/or *Harris*. Moreover, since the hearing court's supportable finding of voluntary consent negates the defendant's Payton claim, we need not consider the defendant's further contention regarding the causal link between the warrantless arrest and his subsequent statements to the police." ***People v. Cuencas*, 2020 N.Y. Slip Op. 08118, Second Dept 12-30-20**

CRIMINAL LAW, EVIDENCE.

DEFENDANT WAS ENTITLED TO NOTICE THE PEOPLE WERE GOING TO PRESENT EVIDENCE SHE TYPED IN THE COMBINATION TO A SAFE IN RESPONSE TO A REQUEST FROM A DETECTIVE, NEW TRIAL ORDERED.

The Second Department, reversing defendant's conviction, in a full-fledged opinion by Justice Chambers, determined defendant was entitled to notice that the People were going to introduce evidence that she typed in the combination of a safe in response to a request from a detective: "Here, the Supreme Court erred in determining that the defendant's act of typing in the combination to the safe, which was made in direct response to Detective Theodore's request that the safe 'needed to be opened,' did not amount to a statement made to a law enforcement officer which, 'if involuntarily made would render the evidence thereof suppressible upon motion pursuant to [CPL 710.20(3)]' … . It is well settled that 'any pertinent communication, whether made by statement or conduct,' may be suppressed if made in violation of the defendant's right against self-incrimination ... . Our view is that the defendant physically entering the combination to open the safe, rather than verbally communicating that combination to the police ... , does not make her response any less communicative or testimonial in nature, since the act unquestionably expressed the contents of the defendant's mind ... . To the extent our decision in *People v. Morales* (248 AD2d 731) suggests a different conclusion, it should no longer be followed. Moreover, since the defendant's knowledge of the safe's combination was the only evidence establishing her dominion and control over its contents, the act of unlocking the safe was undoubtedly incriminating ... . In addition, the fact that the defendant was still in handcuffs and had not yet been advised of her Miranda rights when Detective Theodore made his request raises questions as to whether her act of unlocking the safe was voluntary ... . Thus, this is not a situation where the requirement of a CPL 710.30 notice was obviated because there was no question of the voluntariness of the challenged statement." ***People v. Porter*, 2020 N.Y. Slip Op. 08122, Second Dept 12-30-20**

CRIMINAL LAW, EVIDENCE, APPEALS.

THE POLICE WITNESSES AT THE SUPPRESSION HEARING WERE NOT CREDIBLE; THEREFORE DEFENDANT'S SUPPRESSION MOTION SHOULD HAVE BEEN GRANTED AND THE INDICTMENT DISMISSED.

The Second Department, reversing Supreme Court, in a full-fledged opinion by Justice Miller, determined defendant's motion to suppress should have been granted because the People's witnesses at the suppression hearing were not credible. Therefore the People did not meet their burden to show the legality of the police conduct. The indictment was dismissed. The police witnesses offered conflicting versions of the stop of the car in which defendant was a passenger and the ability to determine, from outside the car, that a credit card on the console was forged: " 'Given the severely undermined credibility of the arresting officer[s], it is unclear exactly what happened during the encounter between the officer[s] and the defendant, and the hearing court was confronted with choices of possible scenarios' ... . Under similar circumstances, this Court has stated that, 'where credibility is in issue, multiple choice questions are neither desirable nor acceptable,' and the fact-finder should refuse to 'select a credible version based upon guesswork'... . ... [W]e decline to credit any of the testimony of the People's witnesses ... . Accordingly, '[u]pon scrutiny of the People's evidence at the suppression hearing, we can only conclude that they failed to carry their burden of going forward and demonstrating the legality of the police conduct in the first instance[,]' including the legality of the stop ... . In view of this failure, 'all further actions by the police as a direct result of the stop were illegal . . . [and] the evidence recovered as a result of the unlawful stop must be suppressed' ... . Accordingly, 'exercising our independent power of factual review, we conclude that the defendant's motion to suppress . . . should have been granted'... . Without the suppressed evidence, there would not be legally sufficient evidence to prove the defendant's guilt. Accordingly, the indictment must be dismissed ...". ***People v. Harris*, 2020 N.Y. Slip Op. 08079, Second Dept 12-30-20**

EMPLOYMENT LAW, MUNICIPAL LAW, CIVIL PROCEDURE.

THE PETITIONER, A PROBATIONARY POLICE OFFICER CHALLENGING HIS TERMINATION, RAISED QUESTIONS OF FACT IN THIS ARTICLE 78 PROCEEDING; THEREFORE THE SUMMARY DETERMINATION PURSUANT TO CPLR 409 WAS NOT AVAILABLE.

The Second Department, reversing Supreme Court, determined this Article 78 proceeding reviewing the termination of a probationary police officer (Lake) involved questions of fact rendering a summary determination pursuant to CPLR 409(b) improper: "Since Lake submitted sufficient evidence to raise a triable issue of fact as to whether the reasons put forth by the Town were pretextual, the Town was not entitled to a summary determination on the petition (see CPLR 409[b] ...). To the contrary, the record presented triable issues of fact as to whether Lake's employment was terminated in bad faith for reasons unrelated to his job performance ... . Under … these circumstances, the matter should be remitted to the Supreme Court, Suffolk County, for an immediate trial ...". ***Matter of Lake v. Town of Southold*, 2020 N.Y. Slip Op. 08064, Second Dept 12-30-20**

FAMILY LAW, ATTORNEYS, JUDGES.

MOTHER SHOULD HAVE BEEN ADVISED OF HER RIGHT TO COUNSEL IN THIS CUSTODY PROCEEDING.

The Second Department, reversing Family Court, determined mother should have been advised of her right to counsel in this custody proceeding: " 'Family Court Act § 262 provides certain parties to particular Family Court proceedings with a statutory right to counsel. If the party in question falls within one of the enumerated subdivisions thereto, he or she must be advised by the court, before proceeding, that he or she has the right to representation, the right to seek an adjournment to confer with counsel and the right to assigned counsel if he or she cannot afford to retain counsel' ... . The deprivation of a party's fundamental right to counsel in a custody or visitation proceeding requires reversal, without regard to the merits of the unrepresented party's position ... . Here, the mother clearly fell within one of the enumerated subdivisions of Family Court Act § 262 because she was the respondent in a custody modification proceeding. Therefore, the Family Court should have advised the mother of her right to counsel." ***Matter of Follini v. Currie*, 2020 N.Y. Slip Op. 08062, Second Dept 12-30-20**

FAMILY LAW, CONTRACT LAW.

CAUSE OF ACTION ALLEGING THE STIPULATION OF SETTLEMENT IN THIS DIVORCE ACTION WAS UNCONSCIONABLE SHOULD HAVE BEEN DISMISSED, CRITERIA EXPLAINED.

The Second Department, reversing (modifying) Supreme Court, determined the cause of action alleging the stipulation of settlement in this divorce action was unconscionable should have been dismissed: "... [W]e agree with the defendant that the Supreme Court should have granted that branch of her cross motion which was pursuant to CPLR 3211(a) to dismiss the second cause of action, seeking to set aside the stipulation on the ground of unconscionability. 'An unconscionable bargain is one which no person in his or her senses and not under delusion would make on the one hand, and no honest and fair person would accept on the other, the inequality being so strong and manifest as to shock the conscience and confound the judgment of any person of common sense' ... . 'An agreement, however, is not unconscionable 'merely because, in retrospect, some of its provisions were improvident or one-sided' ... . Here, the terms of the stipulation, while perhaps improvident or one-sided in favor of the defendant, were not so unfair as to shock the conscience and confound the judgment of any person of common sense." ***Heinemann v. Heinemann*, 2020 N.Y. Slip Op. 08044, Second Dept 12-30-20**

FAMILY LAW, JUDGES.

MOTHER'S PETITION TO MODIFY THE PARENTAL ACCESS SCHEDULE SHOULD NOT HAVE RULED ON WITHOUT HOLDING A HEARING, CRITERIA EXPLAINED.

The Second Department, reversing Family Court, determined the judge should not have ruled in this custody proceeding without holding a hearing. Mother had filed a petition seeking modification of the parental access schedule: " 'Custody determinations . . . require a careful and comprehensive evaluation of the material facts and circumstances in order to permit the court to ascertain the optimal result for the child' ... . Accordingly, 'custody determinations should '[g]enerally' be made 'only after a full and plenary hearing and inquiry' ... . This rule 'furthers the substantial interest, shared by the State, the children, and the parents, in ensuring that custody proceedings generate a just and enduring result that, above all else, serves the best interest of a child' ... . Although the Court of Appeals has 'decline[d] . . . to fashion a 'one size fits all' rule mandating a hearing in every custody case statewide,' it has cautioned that a court 'opting to forgo a plenary hearing must take care to clearly articulate which factors were—or were not—material to its determination, and the evidence supporting its decision' ... . The Court of Appeals has, therefore, criticized the 'undefined and imprecise 'adequate relevant information' standard' as entailing 'an unacceptably-high risk' of resulting in custody determinations that neither 'conform to the best interest of a child' nor 'adequately protect' a parent's 'fundamental right . . . 'to control the upbringing of a child'... . Accordingly, '[w]here . . . facts material to the best interest analysis, and the circumstances surrounding such facts, remain in dispute, a custody hearing is required' ... . Here, the record demonstrates disputed factual issues so as to require a hearing on the issue of the father's parental access ... . Moreover, the Family Court, in making its determinations without a hearing,

relied upon the hearsay statements and conclusions of the forensic evaluator, whose opinions and credibility were untested by the parties. Contrary to the contention of the mother and the attorneys for the children, 'the court's mere reliance upon 'adequate relevant information,' as opposed to admissible evidence, was erroneous' ...". ***Matter of Corcoran v. Liebowitz*, 2020 N.Y. Slip Op. 08058, Second Dept 12-30-20**

FORECLOSURE, CIVIL PROCEDURE.

THE FORECLOSURE ACTION WAS TIME-BARRED; THE DISCONTINUANCE DID NOT DE-ACCELERATE THE DEBT.
The Second Department, reversing Supreme Court, determined defendant's motion for summary judgment in this foreclosure action should have been granted. The action was time-barred. The debt was accelerated when the foreclosure action was started and the discontinuance did not de-accelerate the debt: "Plaintiff's ... contention—that the stipulation of discontinuance in the 2007 action revoked the acceleration of the debt—is likewise without merit. ... Here, the stipulation of discontinuance in the 2007 action is silent on the issue of the revocation of the election to accelerate and does not otherwise indicate that the plaintiff would accept installment payments from the defendant and thus did not constitute an affirmative act revoking acceleration ...". ***Deutsche Bank Natl. Trust Co. v. Ebanks*, 2020 N.Y. Slip Op. 08035, Second Dept 12-30-20**

FORECLOSURE, CIVIL PROCEDURE, EVIDENCE.

PLAINTIFF'S MOTION TO RESTORE THE FORECLOSURE ACTION TO THE CALENDAR SHOULD HAVE BEEN GRANTED; ABSENT SPECIFIC AFFIRMATIVE DEFENSES PLAINTIFF BANK NEED NOT PROVE COMPLIANCE WITH STATUTORY AND CONTRACTUAL NOTICE REQUIREMENTS.
The Second Department, reversing Supreme Court in this foreclosure action, determined plaintiff's motion to restore the matter to the calendar should have been granted and plaintiff's motion for summary judgment should have been granted. The court noted that defendant had not waived the defense of standing but plaintiff submitted sufficient proof of standing and held plaintiff, in the absence of specific affirmative defenses, need not present proof of compliance with statutory and contractual notice requirements: "The defendant's contention that the plaintiff was required to demonstrate its compliance with statutory and/or contractual notice requirements in order to establish its entitlement to judgment as a matter of law is without merit ... . Specifically, the defendant's sixth affirmative defense generally and conclusorily alleged that the 'plaintiff has failed to comply with all conditions precedent to commencement of this action.' This Court has held such language to be insufficient to raise the issue of the plaintiff's compliance with either statutory or contractual notice requirements (... CPLR 3013). Absent there being a cognizable affirmative defense alleging non-compliance with statutory or contractual notice requirements, the plaintiff was not required to address those issues as part of its prima facie burden in moving for summary judgment ... . In opposition, the defendant failed to raise a question of fact that the plaintiff failed to comply with statutory or contractual notice requirements." ***One W. Bank, FSB v. Rosenberg*, 2020 N.Y. Slip Op. 08070, Second Dept 12-30-20**

FORECLOSURE, EVIDENCE.

THE REFEREE REPORT IN THIS FORECLOSURE ACTION RELIED ON HEARSAY AND THEREFORE SHOULD NOT HAVE BEEN CONFIRMED.
The Second Department, reversing Supreme Court, determined the calculations made by the referee were based on hearsay and therefore the referee's report in this foreclosure action should not have been confirmed: "The calculations of the referee were based upon the affidavit of Veronika Steen, Assistant Vice President of the plaintiff's successor-by-merger. Steen averred that she had personal knowledge of the matter through her review of the relevant documents, and that she had '[a]nnexed . . . a breakdown of the amounts due.' However, the documents produced include the agreements between the parties, not the payment history. Thus the computation was improperly premised upon unproduced business records ... . Accordingly, the plaintiff's motion to confirm the referee's report and for a judgment of foreclosure and sale should have been denied. We therefore remit the matter to the Supreme Court … for a new report computing the amount due to the plaintiff in accordance herewith." ***Hudson City Sav. Bank v. DePasquale*, 2020 N.Y. Slip Op. 08047, Second Dept 12-30-12**

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

THE BANK'S COMPLIANCE WITH THE NOTICE REQUIREMENTS OF RPAPL 1304 WAS NOT DEMONSTRATED WITH ADMISSIBLE EVIDENCE.
The Second Department, reversing Supreme Court, determined compliance with the notice requirements of RPAPL 1304 was not demonstrated with admissible evidence. Therefore the bank's motion for summary judgment in this foreclosure action should not have been granted: "... [T]he affidavit of an employee of its loan servicer was insufficient to establish that the notice was sent to the defendant in the manner required by RPAPL 1304. The affiant did not aver that he had personal knowledge of the purported mailings, or that he was familiar with the mailing practices and procedures of the plaintiff, which allegedly sent the notice ... . In addition, the plaintiff's submission of an affidavit of its own employee was similarly insufficient to establish the plaintiff's strict compliance with RPAPL 1304, since the employee had no personal knowledge of the purported mailings and he did not attest to a standard office mailing procedure designed to ensure that items are

properly addressed and mailed ... . Further, the plaintiff failed to submit sufficient proof of the actual mailings of the notices by first-class mail ...". ***Ridgewood Sav. Bank v. Van Amerongen*, 2020 N.Y. Slip Op. 08095, Second Dept 12-30-20**

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

THE REFEREE'S REPORT IN THIS FORECLOSURE ACTION WAS BASED ON HEARSAY; THE SECOND MORTGAGE WAS NOT DEMONSTRATED TO MEET THE REQUIRMENTS OF RPAPL 1351.

The Second Department, reversing Supreme Court, determined the referee's report was based upon hearsay and should not have been confirmed. In addition, the proof a second mortgage met the requirements of RPAPL 1351 and 1354 was insufficient: " 'The report of a referee should be confirmed whenever the findings are substantially supported by the record, and the referee has clearly defined the issues and resolved matters of credibility' ... . Here, the affidavit executed by an employee of the plaintiff's loan servicer, which was submitted by the plaintiff for the purpose of establishing the amount due and owing under the mortgage loan, constituted inadmissible hearsay and lacked probative value because the affiant failed to produce any of the business records upon which she purportedly relied in making her calculations ... . Consequently, the referee's findings with respect to the total amount due upon the mortgage were not substantially supported by the record ..... In an action to foreclose a mortgage commenced by a first mortgagee, a second mortgagee may move for a provision in the judgment of foreclosure and sale that any surplus moneys from the foreclosure sale be applied to satisfy the debt owed by the defendant to the second mortgagee (see RPAPL 1351[3]). Such a motion may be granted if 'it appears to the satisfaction of the court' that there exists no more than one other mortgage on the subject premises which is 'then due' and subordinate only to the plaintiff's mortgage but is entitled to priority over all other liens and encumbrances other than those described RPAPL 1354(2), and if the motion of the second mortgagee is 'made without valid objection of any other party' (RPAPL 1351[3]). Here, [the] motion papers insufficient, prima facie, to meet the requisite standard (see RPAPL 1351[3]) ...". ***U.S. Rof III Legal Tit. Trust 2015-1 v. John*, 2020 N.Y. Slip Op. 08099, Second Dept 12-30-20**

INSURANCE LAW, CONTRACT LAW.

AN INSURER WHO HAS NO DUTY TO DEFEND THE INSUREDS BECAUSE OF LATE NOTIFICATION, IN THE ABSENCE OF A PROVISION IN THE POLICY, MAY NOT RECOVER THE COSTS OF DEFENDING THE ACTION FROM THE INSUREDS AND THE SUCCESSFUL PLAINTIFF IN THE UNDERLYING ACTION.

The Second Department, reversing (modifying) Supreme Court, in a full-fledged opinion by Justice Duffy addressing a matter of first impression, determined the plaintiff insurer, which was not obligated to indemnify the insureds for a $900,000 default judgment because plaintiff insurer was not timely notified of the claim, could not recover the costs of defending the action from the insureds and the successful plaintiff in the underlying action. The policy was silent on the question. At issue was the effect of a reservation of rights in a letter to the insureds: "There is little doubt that the insurance company could have included in the policy a provision wherein it could recover its defense costs (upon a reservation of rights and a judicial determination that it is not required to indemnify) had it wanted to, but it did not do so here. The insurance company points to its May 2017 letter wherein it reserved its rights to seek to recover the costs of defending the underlying litigation and argues that other New York courts ... . * * * Typically, a reservation of rights letter asserts defenses and exclusions that are set forth in the policy between the parties. Indeed, awarding an insurer its defense costs when the insurer issues a reservation of rights letter for the same despite the lack of any language in the policy at issue permitting the insurer to recover the costs of defending claims that are later determined not covered by the policy flies in the face of basic contract principles and allows an insurer to impose a condition on its defense that was not bargained for ... . Moreover, 'strong policy considerations militate against allowing an insurer to unilaterally declare that it can recoup the costs of defending an insured where it is later determined [that the policy at issue did not cover the asserted claims]' as doing so would allow an insurer to define its duty to defend based upon the outcome of a declaratory judgment action and significantly curtail New York's long held view that the duty to defend is broader than the duty to indemnify ... . Thus, we hold that the insurance company may not recover its defense costs based on the May 2017 letter wherein it reserved its rights to recoup its defense costs in the underlying litigation absent an express provision to that effect in the policy." ***American W. Home Ins. Co. v. Gjonaj Realty & Mgt. Co.*, 2020 N.Y. Slip Op. 08027, Second Dept 12-30-20**

INSURANCE LAW, CONTRACT LAW.

DEFENDANT INSURER DID NOT ELIMINATE ALL QUESTIONS OF FACT ABOUT WHETHER PLAINTIFFS (INSUREDS) VIOLATED THE COOPERATION CLAUSE IN THE POLICY.

The Second Department, reversing Supreme Court, determined defendant insurer did not eliminate all questions of fact whether the plaintiffs (insureds) violated the cooperation clause in the policy: " 'An unexcused and willful refusal to comply with disclosure requirements in an insurance policy is a material breach of the cooperation clause and precludes recovery on a claim. Compliance with such a clause is a condition precedent to coverage, properly addressed by the court' ... . 'In order to establish breach of a cooperation clause, the insurer must show that the insured engaged in an unreasonable and willful pattern of refusing to answer material and relevant questions or to supply material and relevant documents' ...

. Here, the defendant failed to eliminate all triable issues of fact as to whether the plaintiffs breached the cooperation clause of the policy." ***Jahangir v. Tri-State Consumer Ins. Co.*, 2020 N.Y. Slip Op. 08049, Second Dept 12-30-20**

PERSONAL INJURY.

DEFENDANT PROPERTY OWNER DEMONSTRATED THERE HAD BEEN NO CRIMINAL ACTIVITY ON THE PROPERTY IN THE PAST AND PLAINTIFF FAILED TO RAISE A QUESTION OF FACT WHETHER THE FAILURE TO SECURE THE ALLEYWAY WAS A PROXIMATE CAUSE OF THE THIRD-PARTY ASSAULT; DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined defendant property owner's motion for summary judgment in this third-party assault case should have been granted. The defendant demonstrated there had been no prior criminal activity on the property and did not raise a question of fact whether the failure to secure the alleyway was a proximate cause of the attack: "... [T]he infant plaintiff testified that while he was in the building's vestibule, he was accosted by an unknown assailant and assaulted in the alleyway on the side of the building. The infant plaintiff, by his father and natural guardian, and his father suing derivatively, commenced this action against the defendant, alleging that the defendant failed to secure the alleyway. To recover damages from an owner of real property for injuries caused by criminal acts on the premises, a plaintiff must produce evidence indicating that the owner knew or should have known of the probability of conduct on the part of third persons which was likely to endanger the safety of those lawfully on the premises ... . Here, the defendant established, prima facie, its entitlement to summary judgment by showing that it had no notice of prior criminal activity so as to make the instant occurrence foreseeable. The plaintiffs submitted no evidence in response, and thus failed to raise a triable issue of fact ... . Moreover, in opposition to the defendant's prima facie showing with respect to causation, the plaintiffs failed to raise a triable issue of fact as to whether the defendant's alleged failure to secure the alleyway was a proximate cause of the occurrence ...". ***Calle v. Elmhurst Woodside, LLC*, 2020 N.Y. Slip Op. 08033, Second Dept 12-30-20**

PERSONAL INJURY.

QUESTION OF FACT WHETHER DEFENDANT DRIVER ATTEMPTED TO MAKE A LEFT TURN WHEN PLAINTIFF'S DECEDENT WAS TOO CLOSE IN THE ON-COMING LANE.

The Second Department, reversing (modifying) Supreme Court, determined there was a question of fact whether defendant driver executed a left turn when plaintiff's decedent, who apparently was being chased by police, was too close: " 'Vehicle and Traffic Law § 1141 provides that the 'driver of a vehicle intending to turn to the left within an intersection . . . shall yield the right of way to any vehicle approaching from the opposite direction which is within the intersection or so close as to constitute an immediate hazard' ... . The operator of an oncoming vehicle with the right-of-way is entitled to assume that the opposing operator will yield in compliance with the Vehicle and Traffic Law ... . A driver is negligent where he or she failed to see that which, through proper use of his or her senses, the driver should have seen ... . 'At the same time, a driver traveling with the right-of-way may nevertheless be found to have contributed to the happening of the accident if he or she did not use reasonable care to avoid the accident' ... . Here, the evidence submitted by [defendants] in support of their motion ... failed to eliminate triable issues of fact as to whether [defendant driver] was free from fault in the happening of the accident and, if not, whether [plaintiff's decedent's] negligence was the sole proximate cause of the accident ... . Specifically, a triable issue of fact exists, inter alia, as to whether, at the time [defendant driver] initiated her turn, [plaintiff's decedent's] vehicle was 'so close as to constitute an immediate hazard' ...". ***Gaudio v. City of New York*, 2020 N.Y. Slip Op. 08041, Second Dept 12-30-20**

PERSONAL INJURY, EVIDENCE.

DEFENDANT'S FEIGNED ISSUE OF FACT DID NOT RAISE A QUESTION OF FACT IN THE PEDESTRIAN TRAFFIC ACCIDENT CASE.

The Second Department, reversing Supreme Court, determined defendant had raised a feigned issue which did not raise a question of fact in this pedestrian traffic accident case: "The plaintiff established her prima facie entitlement to judgment as a matter of law on the issue of liability through her own affidavit, which demonstrated that she was walking within a crosswalk, with the pedestrian signal in her favor, when the defendants' vehicle failed to yield the right-of-way and struck her ... . In opposition, the defendants failed to raise a triable issue of fact. Edelstein's affidavit contradicted his admission immediately following the accident, as reflected in a police accident report. This affidavit was a belated attempt to avoid the consequences of his earlier admission by raising a feigned issue and was insufficient to raise a triable issue of fact ...". ***Gooden v. EAN Holdings, LLC*, 2020 N.Y. Slip Op. 08043, Second Dept 12-30-20**

PERSONAL INJURY, MUNICIPAL LAW.

A CONTRACTOR ALLEGED TO HAVE WORKED ON THE AREA OF THE ROADWAY WHERE PLAINTIFF SLIPPED AND FELL AND THE MUNICIPALITY DID NOT ELIMINATE QUESTIONS OF FACT ABOUT THEIR LIABILITY; DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined the municipality's (Port Washington North's) motion for summary judgment should not have been granted in this slip and fall case. The code provision requiring written notice of the dangerous condition applied to the village, not to Port Washington North, and Port Washington North did not demonstrate it did not create the condition. In addition, defendant contractor did not demonstrate it did not do any work on the roadway in the area of the slip and fall: "A contractor [J. Anthony] may be liable for an affirmative act of negligence which results in the creation of a dangerous condition upon a public street or sidewalk ... . Thus, in moving for summary judgment, J. Anthony had the burden of establishing, prima facie, that it did not perform any work on the portion of the roadway where the accident occurred or that it did not create the allegedly defective condition that caused the plaintiff's injuries ... . However, J. Anthony failed to satisfy its burden ... .The failure to do so requires the denial of that branch of J. Anthony's motion which was for summary judgment dismissing the complaint insofar as asserted against it, regardless of the sufficiency of the opposing papers ... . Port Washington North moved for summary judgment on the ground, inter alia, that it had not received prior written notice of the alleged defect which caused the plaintiff's injuries. ... Since the prior written notice provision specifically limits the notice requirement to 'street[s]' located 'within the Village' (Village Code §§ 143-23, 143-22), this provision is not applicable to the facts here, as the location of the accident was not within Port Washington North. Moreover, Port Washington North failed to meet its prima facie burden of eliminating all triable issues of fact regarding its role in creating the allegedly defective condition ...". ***Downing v. J. Anthony Enters., Inc.*, 2020 N.Y. Slip Op. 08038, Second Dept 12-30-20**

PERSONAL INJURY, MUNICIPAL LAW.

THE WRONGFUL DEATH COMPLAINT ALLEGED PORT AUTHORITY WAS NEGLIGENT IN FAILING TO INSTALL SUICIDE-PREVENTION BARRIERS ON THE GEORGE WASHINGTON BRIDGE; THE COMPLAINT STATED A CAUSE OF ACTION AND SHOULD NOT HAVE BEEN DISMISSED.

The Second Department, reversing Supreme Court, over a two-justice dissent, determined the complaint alleging the Port Authority was negligent for failure to install suicide-prevention barriers on the George Washington Bridge should not have been dismissed. Plaintiff's decedent had jumped off the bridge. Supreme Court held the maintenance of the bridge was a governmental function and there was no special relationship between Port Authority and plaintiff's decedent. The Second Department held the complaint alleged Port Authority was acting in a proprietary capacity and therefore was subject to ordinary principles of negligence: "... [T]he complaint did not need to allege that the Port Authority owed a special duty to the decedent, as opposed to the public generally, as the Port Authority did not establish that it was acting in a governmental capacity in maintaining the bridge ... . Since the complaint has alleged facts that support a determination that the Port Authority was acting in a proprietary capacity, the Port Authority would be subject to the same principles of tort law as a private landowner, and as such, the complaint states a cause of action ... . Here, accepting all facts alleged in the complaint as true for the purposes of this motion, the Port Authority's remaining contentions likewise do not establish that the complaint fails to state a cause of action." ***Perlov v. Port Auth. of N.Y. & N.J.*, 2020 N.Y. Slip Op. 08092, Second Dept 12-30-20**

TRUSTS AND ESTATES, CIVIL PROCEDURE.

SURROGATE'S COURT HAD THE AUTHORITY TO APPROVE, NUNC PRO TUNC, A METHOD OF SERVICE ON AN OUT-OF-STATE PARTY ACCOMPLISHED WITHOUT PRIOR COURT APPROVAL.

The Second Department, in a full-fledged opinion by Justice Duffy, in a matter of first impression, determined Surrogate's Court had the authority to approve, nunc pro tunc, service upon an out-of-state party by a method which was not in compliance with the Surrogate's Court Procedure Act (SCPA). Here the attempts at service which complied with the SCPA were unsuccessful. Without procuring permission from court, the executor served the party by first class mail and the letter was not returned. Surrogate's court approved the service by mail nunc pro tunc: "... [S]ince we find that the Surrogate's Court had the authority to deem service on the appellant complete, nunc pro tunc, pursuant to SCPA 307(3)(b), which allows for substituted service such as regular first-class mail, the remaining issue to address is whether the court properly determined that such substituted service was valid; to wit, whether service on the appellant by regular first-class mail met the requirements of due process such that personal jurisdiction over the appellant was established ... . * * * ... [T]he Executor undertook diligent but unsuccessful attempts to serve the appellant pursuant to SCPA 307(2) before regular first-class mail service was undertaken. Moreover, this is not a circumstance where the appellant had no knowledge of the proceeding that was taking place. Here, the appellant acknowledged that she (1) received a copy of the notice of probate at the time of the commencement of the probate proceeding, (2) immediately retained an attorney to represent her interests in the probate proceeding, and (3) subsequently received a copy of the will. The appellant was also aware of the scheduled hearing on July 12, 2017, in advance of that date, and neither she nor her attorney at that time chose to attend the proceeding. Thus, we find that the

substituted service on the appellant by regular first-class mail satisfied the requirements of due process ...". ***Matter of Polina*, 2020 N.Y. Slip Op. 08068, Second Dept 12-30-20**

TRUSTS AND ESTATES, PERSONAL INJURY, BANKRUPTCY.

THE ADMINISTRATOR OF THE ESTATE COULD SUE FOR DECEDENT'S CONSCIOUS PAIN AND SUFFERING BUT, BECAUSE THE WRONGFUL DEATH ACTION HAD NOT BEEN LISTED AS AN ASSET IN THE BANKRUPTCY PROCEEDING, THE ADMINISTRATOR DID NOT HAVE THE CAPACITY TO SUE ON BEHALF OF THE DISTRIUBUTEES FOR WRONGFUL DEATH.

The Second Department, reversing (modifying) Supreme Court, determined that the administrator of the estate could bring an action for conscious pain and suffering but, because the wrongful death action was not listed as an asset in the bankruptcy proceedings, the distributees did not have the capacity to sue: "... [T]he plaintiff, as the administrator of the decedent's estate, had the capacity to prosecute the cause of action to recover damages for conscious pain and suffering. A cause of action brought on behalf of a deceased to recover damages for conscious pain and suffering is 'personal to the deceased and belongs to the estate, not the distributees' ... . The decedent was not a party to the bankruptcy proceeding. Accordingly, the bankruptcy did not affect the plaintiff's capacity to prosecute the cause of action to recover damages for conscious pain and suffering on behalf of the decedent's estate ... . The Supreme Court, however, should have granted those branches of the defendants' separate motions which were to dismiss the cause of action to recover damages for wrongful death insofar as asserted against each of them. 'A cause of action to recover damages for wrongful death is a property right belonging solely to the distributees of the decedent and vests in them at the decedent's death' (... EPTL 5-4.4 [a]). It is undisputed that the cause of action to recover damages for wrongful death vested in the plaintiff as the sole distributee of the estate prior to the filing of the bankruptcy petition. Accordingly, as the plaintiff failed to schedule the wrongful death claim in the bankruptcy proceeding, it is subject to dismissal in this action on the ground that the plaintiff lacks the capacity to pursue the claim ...". ***Vinogradov v. Bay Plaza Apts Co., LLC*, 2020 N.Y. Slip Op. 08104, Second Dept 12-30-20**

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