CasePrepPlus

October 15, 2021

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

Editor: **Bruce Freeman**

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

COURT OF APPEALS

CIVIL PROCEDURE, CORPORATIONS.

A FOREIGN CORPORATION WHICH REGISTERS TO DO BUSINESS IN NEW YORK CONSENTS TO THE SERVICE OF PROCESS IN NEW YORK BUT DOES NOT CONSENT TO THE GENERAL JURISDICTION OF NEW YORK.

The Court of Appeals, in a full-fledged opinion by Judge Singas, over a two-judge dissent, determined that a corporation registered to do business in New York consents to the service of process in New York, but not to general jurisdiction in New York. The underlying lawsuit stemmed from a car accident in Virginia. Both Ford and Goodyear were sued. Neither the car or the tire were made or sold in New York: "Aybar [the New York resident who drove the car] purchased the vehicle in New York from a third party. Ford did not sell the vehicle in this state in the first instance, nor did Ford design or manufacture the vehicle here. Similarly, Goodyear designed, manufactured, and initially sold the tire in other states. It is undisputed that Ford was incorporated in Delaware and maintains its principal place of business in Michigan and that Goodyear was incorporated and has its principal place of business in Ohio. At all relevant times, Ford and Goodyear were registered with the New York Secretary of State as foreign corporations authorized to do business in this state and had appointed in-state agents for service of process in accordance with the Business Corporation Law. * * * We have never conflated statutory consent to service with consent to general jurisdiction, and the fact remains that, under existing New York law, a foreign corporation does not consent to general jurisdiction in this state merely by complying with the Business Corporation Law's registration provisions." ***Aybar v. Aybar*, 2021 N.Y. Slip Op. 05393, Ct App 10-7-21**

CRIMINAL LAW, EVIDENCE.

THE SUPPRESSION COURT SHOULD HAVE ORDERED A RODRIGUEZ HEARING; THE APPELLATE DIVISION SHOULD NOT HAVE RELIED ON TRIAL TESTIMONY TO OVERCOME THE SUPPRESSION COURT'S ERROR.

The Court of Appeals, reversing (modifying) the Appellate Division, determined defendant was entitled to a Rodriguez hearing on whether a witness's identification of the defendant was confirmatory. The Court of Appeals noted that the Appellate Division should not have relied on trial testimony to overcome the suppression court's error: "Supreme Court erred in denying defendant's pretrial request for a hearing pursuant to *People v Rodriguez* (79 NY2d 445 [1992]), as the prosecutor here offered only bare assurances that the witness was familiar with defendant. Further, the Appellate Division erroneously relied on testimony adduced at trial to overcome the suppression court's error. 'Thus, the case should be remitted to Supreme Court for a hearing to determine whether the [photographic] identification procedure was confirmatory. If, after that hearing, the court concludes that the People have not sustained their burden, a Wade hearing should be held and further proceedings, including a new trial, should be had as the circumstances may warrant. If the court concludes that a Wade hearing is not required, the judgment[] should be amended to reflect that result' ...". ***People v. Carmona*, 2021 N.Y. Slip Op. 05390, Ct App 10-7-21**

CRIMINAL LAW, EVIDENCE.

DEFENDANT WAS CHARGED WITH MANSLAUGHTER SECOND BASED ON THE DEATH OF A PERSON TO WHOM DEFENDANT SOLD HEROIN; THE GRAND JURY EVIDENCE DID NOT SUPPORT EITHER THE "RECKLESS" ELEMENT OF MANSLAUGHTER SECOND OR THE "CRIMINAL NEGLIGENCE" ELEMENT OF CRIMINALLY NEGLIGENT HOMICIDE.

The Court of Appeals, reversing the Appellate Division, in a full-fledged opinion by Judge Fahey, determined the grand jury evidence did not support the "reckless" element of manslaughter second degree or the "criminal negligence" element of criminally negligent homicide. The charges arose from defendant's sale of heroin to the decedent, who died of an overdose: "Both recklessness and criminal negligence 'require that there be a 'substantial and unjustifiable risk' that death or injury will occur; that the defendant engage in some blameworthy conduct contributing to that risk; and that the defendant's conduct amount to a 'gross deviation' from how a reasonable person would act' ... . 'The only distinction between the two mental states is that recklessness requires that the defendant be 'aware of' and 'consciously disregard' the risk while criminal negligence is met when the defendant negligently fails to perceive the risk' ... . [T]he underlying conduct for both offenses is the same and involves some degree of risk creation ... . [T]he ' 'nonperception' of a risk, even if death results,

is not enough'—rather, the defendant must have 'engaged in some blameworthy conduct creating or contributing to a substantial and unjustifiable risk of death' ... . * * * The evidence demonstrated that defendant knew that the heroin he sold the decedent was strong and required caution. That the heroin was potent, however, does not equate to a substantial and unjustifiable risk that death would result from the use of the heroin. The coroner, the decedent's ex-girlfriend, and the other individual who purchased heroin from defendant all testified that it was common knowledge among heroin users that different samples or preparations of heroin had different potencies and that the strength of heroin could vary a great deal among samples. The People's evidence demonstrated that the decedent, his ex-girlfriend, and the other individual all used the same sample of heroin purchased from defendant before July 22 and survived those encounters." ***People v. Gaworecki*, 2021 N.Y. Slip Op. 05392, Ct App 10-7-21**

FIRST DEPARTMENT

FREEDOM OF INFORMATION LAW (FOIL), ATTORNEYS.

THE EXECUTIVE ORDER TOLLING STATUTES OF LIMITATIONS BECAUSE OF THE COVID PANDEMIC DOES NOT APPLY TO THE TIME LIMITS FOR RESPONSES TO FOIL REQUESTS.

The First Department, reversing Supreme Court, determined the district attorney could not use the statutes-of-limitations tolls imposed by executive order because of the COVID pandemic to delay responses to FOIL requests: "By its terms, EO [Executive Order] 202.8 tolls legal 'process[es] or proceeding[s] as prescribed by the procedural laws of the state' … . The FOIL framework and deadlines for agency responses to requests are not 'prescribed by the procedural laws,' such as the CPLR and CPL. In the context of FOIL requests, legal 'proceedings' ensue only when parties are unable to agree on a response to a request, and resort to the courts via CPLR article 78 proceedings. The conduct of article 78 proceedings are 'prescribed by the procedural laws' of the CPLR. FOIL requests and responses are not so prescribed ... . Hence, respondents' position that EO 202.8 tolls their obligation to respond to FOIL requests, is erroneous." ***Matter of Oustatcher v. Clark*, 2021 N.Y. Slip Op. 05295, First Dept 10-5-21**

LABOR LAW- CONSTRUCTION LAW, PERSONAL INJURY.

PLAINTIFF'S LADDER SHIFTED AS HE USED IT TO THROW TRASH INTO A DUMPSTER; THE ALLEGATION HE WAS TOLD NOT TO USE THAT DUMPSTER DID NOT RAISE A SOLE-PROXIMATE-CAUSE OR RECALCITRANT-EMPLOYEE DEFENSE.

The First Department, reversing Supreme Court, determined plaintiff was entitled to summary judgment on his Labor Law § 240(1) cause of action in this ladder-fall case. Plaintiff was using a closed A-frame ladder propped up against a dumpster as threw debris into it when the ladder shifted and he fell. The defendants' argument that plaintiff was told not to use that dumpster did not raise a sole-proximate-cause or a recalcitrant-employee defense: " '[I]f a statutory violation is a proximate cause of an injury, the plaintiff cannot be solely to blame for it' ... . A worker's injury in an area of the work site where the worker was not supposed to be amounts to comparative negligence, which is not a defense to a Labor Law § 240(1) claim ... . To the extent that defendants argue that plaintiff was recalcitrant in ignoring defendants' alleged instructions not to use the dumpster, this is insufficient to raise an issue of fact. The recalcitrant worker defense 'requires a showing that the injured worker refused to use the safety devises that were provided by the owner or employer. It has no application where, as here, no adequate safety devices were provided' ... . An employer's instructions 'to avoid an unsafe practice is not a sufficient substitute for providing a worker with a safety device to allow him to complete his work safely' ...". ***Plaku v. 1622 Van Buren LLC*, 2021 N.Y. Slip Op. 05311, First Dept 10-5-21**

SECOND DEPARTMENT

ATTORNEYS, CIVIL PROCEDURE.

PLAINTIFF AND HIS ATTORNEY SENT 75 LETTERS TO HARASS DEFENDANTS; SANCTIONS FOR FRIVOLOUS CONDUCT SHOULD HAVE BEEN IMPOSED.

The Second Department, reversing Supreme Court, determined plaintiff should have been sanctioned for harassing defendants: "In 2015, the plaintiff commenced this shareholder's derivative action. After the action was commenced, the plaintiff and his attorney sent approximately 75 letters to various defendants, as well as those defendants' family members, clergy, and attorneys. Therein, the plaintiff made disturbing references, among other things, to plagues, repentance, imprisonment, and punishment by the Internal Revenue Service for tax fraud. ... Pursuant to 22 NYCRR 130-1.1, sanctions may be imposed against a party or the party's attorney for frivolous conduct. Conduct is 'frivolous if: (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) it asserts material factual statements that are false' (22 NYCRR 130-1.1[c]). 'A party seeking the imposition of a sanction or an award of an attorney's fee pursuant to 22 NYCRR 130-1.1(c) has the burden of proof' ... . [T]he defendants estab-

lished that the plaintiff's conduct in sending the subject letters was calculated to harass the defendants ...". ***Glaubach v. Slifkin*, 2021 N.Y. Slip Op. 05323, Second Dept 10-7-21**

CRIMINAL LAW, EVIDENCE.

THE DNA TEST RESULT GENERATED USING THE FORENSIC STATISTICAL TOOL (FST) SHOULD NOT HAVE BEEN ADMITTED IN EVIDENCE WITHOUT FIRST HOLDING A *FRYE* HEARING.

The Second Department, reversing defendant conviction, determined the DNA test results using the Forensic Statistical Tool (FST) should not have been admitted without first holding a *Frye* hearing: "The defendant was convicted, after a jury trial, of murder in the second degree, assault in the first degree, and criminal possession of a weapon in the second degree. Prior to trial, the defendant moved, inter alia, to preclude the People from introducing at trial DNA testing results derived from the use of the Forensic Statistical Tool (hereinafter FST), or alternatively, to conduct a hearing pursuant to *Frye v United States* (293 F 1013 [DC Cir]) to determine the admissibility of the evidence generated by the FST. The Supreme Court denied that branch of the defendant's motion, finding that FST was generally accepted in the scientific community. We reverse. The Supreme Court improvidently exercised its discretion in admitting FST evidence without first holding a *Frye* hearing ...". ***People v. Adeyeye*, 2021 N.Y. Slip Op. 05347, Second Dept 10-6-21**

CRIMINAL LAW, EVIDENCE.

BY ARGUING HE DID NOT KNOW THE WEAPON AND AMMUNITION WERE IN THE TRUCK HE WAS DRIVING, DEFENDANT PUT HIS STATE OF MIND IN ISSUE; THEREFORE, THE EVIDENCE HE HAD TWICE BEFORE BEEN IN THE POSSESSION OF FIREARMS, ONCE ON A PLANE AND ONCE IN A VEHICLE, WAS ADMISSIBLE UNDER *MOLINEUX*.

The Second Department determined evidence of two prior incidents (more than a decade before defendant's arrest) in which defendant had a firearm in his possession was admissible *Molineux* evidence in this prosecution for weapons and ammunition possession. Defendant argued at trial that he did not know the weapons and ammunition were in the truck he was driving. A strong dissent argued the *Molineux* evidence should not have been admitted because it was too remote, too prejudicial, and did not fit the state-of-mind exception to the *Molineux* rule: " 'When [the] defendant's criminal intent cannot be inferred from the commission of the act or when [the] defendant's intent or mental state in doing the act is placed in issue, . . . proof of other crimes may be admissible under the intent exception to the *Molineux* rule' ... . Here, the Supreme Court providently exercised its discretion in admitting the proferred *Molineux* evidence. The evidence was directly relevant and probative of a material element of the crimes charged, namely, the defendant's knowing possession of the guns ... . Our dissenting colleague's assertion that the defendant's criminal intent could be easily inferred from the circumstances of the incident, thus rendering the *Molineux* evidence unnecessary, ignores the fact that the defendant asserted a lack of criminal intent theory at trial. Contrary to our dissenting colleague's assertion, the defendant placed his state of mind squarely in issue in his opening statement and throughout the trial, by pursuing the defense that '[h]e didn't know' the guns were in the truck, and that the People would be unable to prove his intent to possess the guns beyond a reasonable doubt." ***People v. Telfair*, 2021 N.Y. Slip Op. 05355, Second Dept 10-6-21**

FAMILY LAW, EVIDENCE.

THE PARENTS' INCOME WAS NOT PROPERLY CALCULATED FOR CHILD-SUPPORT PURPOSES.

The Second Department, reversing Supreme Court, determined the parents' income was not properly calculated for child-support purposes: "The Child Support Standards Act (hereinafter CSSA) 'sets forth a formula for calculating child support by applying a designated statutory percentage, based upon the number of children to be supported, to combined parental income up to the statutory cap that is in effect at the time of the judgment ...'. ... A calculation of 'the basic child support obligation for the children, . . . is done by (1) determining the combined parental income and (2) multiplying the amount of combined parental income up to the statutory cap by the appropriate child support percentage' ... . '[A] court has broad discretion to impute income when determining the amount of child support, and is not bound by the parties' representations of their finances'... . The court may impute income to a party 'based on the [party's] employment history, future earning capacity, educational background' ... , 'resources available to the party, including 'money, goods, or services provided by relatives and friends' ... , or 'when it is shown that the marital lifestyle was such that, under the circumstances, there [is] a basis for the court to conclude that the [party's] actual income and financial resources were greater than what he or she reported on his or her tax return[ ]' ... . Here, the Supreme Court improperly determined the parties' income by averaging their reported earnings over the preceding four years ... . Furthermore, under the circumstances of this case, where the plaintiff is employed by his family and his tax returns show substantial downward fluctuations in income, the court should have conducted an analysis as to whether to impute income to the plaintiff." ***Koutsouras v. Mitsos-Koutsouras*, 2021 N.Y. Slip Op. 05328, Second Dept 10-7-21**

FORECLOSURE, CIVIL PROCEDURE, EVIDENCE.

PLAINTIFF DID NOT DEMONSTRATE STANDING TO BRING THE FORECLOSURE ACTION.

The Second Department, reversing (modifying) Supreme Court, determined the plaintiff in this foreclosure action did not demonstrate standing to bring the action. Therefore, the lack-of-standing affirmative defense should not have been struck: "[A] plaintiff may demonstrate its standing in a foreclosure action through evidence that it was in possession of the subject note endorsed in blank, or the subject note and a firmly affixed allonge endorsed in blank, at the time of the commencement of the action (see UCC 3-202[2] ...). ... The plaintiff attempted to demonstrate that it was the holder of the underlying note by attaching to the complaint a copy of the note with an allonge. The purported allonge contains an endorsement in blank, has no pagination, is undated, and contains no writing in any way to demonstrate its connection to the note or that it was firmly affixed thereto. An affirmation of the plaintiff's counsel and an affidavit of a representative of the plaintiff's loan servicer, submitted in support of the plaintiff's motion, also failed to indicate that the purported allonge is connected to the note or that it was firmly affixed thereto. Therefore, the plaintiff failed to establish that the purported allonge was so firmly attached to the note as to become a part thereof, and thus failed to establish, prima facie, its standing to commence this foreclosure action ...". ***Federal Natl. Mtge. Assn. v. Hollien*, 2021 N.Y. Slip Op. 05321, Second Dept 10-7-21**

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

THERE WAS A QUESTION OF FACT WHETHER THE PLAINTIFF'S FAILURE TO INCLUDE DEFENDANT IN THE ORIGINAL FORECLOSURE PROCEEDING WAS THE RESULT OF "WILFUL NEGLECT;" THEREFORE, PURSUANT TO RPAPL 1523, DEFENDANT'S "WILFUL-NEGLECT" AFFIRMATIVE DEFENSE IN THIS REFORECLOSURE ACTION SHOULD NOT HAVE BEEN DISMISSED.

The Second Department, reversing Supreme Court, determined defendant's affirmative defense to the reforeclosure should not have been dismissed. Plaintiff had not named defendant in its original foreclosure action, apparently because a quit-claim deed adding defendant to the title was not discovered in the title search. Defendant demonstrated there had been a prior foreclosure action in which defendant had been named as a party. Therefore, there was a question of fact whether the failure to name defendant in the original foreclosure action was the result of "wilful neglect:" "To prevail in a reforeclosure action, the plaintiff must demonstrate that the defect in the original foreclosure action 'was not due to fraud or wilful neglect of the plaintiff and that the defendant or the person under whom he claims was not actually prejudiced thereby' (RPAPL 1523[2] [emphasis added]). Pursuant to the language of RPAPL 1523 ... the plaintiff had the burden of demonstrating ... both that the defect in the underlying foreclosure action was not the result of fraud or the wilful neglect of the foreclosure plaintiff, and that the defect did not prejudice the defendant (see RPAPL 1523[1], [2]). * * * Contrary to the plaintiff's contention, the evidence of the prior foreclosure action in which the defendant was named as a party raised a triable issue of fact as to whether the plaintiff's failure to name her as a defendant in the underlying foreclosure action was the result of 'wilful neglect' (RPAPL 1523[2] ...)." ***U.S. Bank N.A. v. Lomuto*, 2021 N.Y. Slip Op. 05363, Second Dept 10-6-21**

FORECLOSURE, EVIDENCE, CONTRACT LAW.

THE PLAINTIFF DID NOT DEMONSTRATE COMPLIANCE WITH THE NOTICE PROVISION OF THE MORTGAGE IN THIS FORECLOSURE ACTION; PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined plaintiff's motion for summary judgment in this foreclosure action should not have been granted. Plaintiff did not demonstrate compliance with the notice requirements in the mortgage: "... Supreme Court improperly determined that the plaintiff established, prima facie, that it complied with the notice requirement of paragraph 22 of the mortgage. Statements in Johnson's [plaintiff's vice president's] affidavit, 'which asserted that the notice of default was sent in accordance with the terms of the mortgage, [were] unsubstantiated and conclusory and . . . , even when considered together with the copy of the notice of default, failed to show that the required notice was in fact mailed by first class mail or actually delivered to the designated address if sent by other means, as required by the subject mortgage' ... . Johnson did not purport to have personal knowledge of the mailing of the default notice or any familiarity with the plaintiff's mailing practices ...". ***Ditech Fin., LLC v. Naidu*, 2021 N.Y. Slip Op. 05320, Second Dept 10-7-21**

PERSONAL INJURY, EMPLOYMENT LAW, EVIDENCE.

ALTHOUGH THE DEFENDANTS MAY HAVE BEEN NEGLIGENT IN HIRING THE DEFENDANT WHO SEXUALLY ASSAULTED THE SEVEN-YEAR-OLD PLAINTIFF, THERE WAS NO CONNECTION BETWEEN DEFENDANT'S EMPLOYMENT AND THE PLAINTIFF OR THE OFFENSE, WHICH OCCURRED NEAR PLAINTIFF'S HOME; THEREFORE, THE NEGLIGENT HIRING AND RETENTION CAUSE OF ACTION SHOULD HAVE BEEN DISMISSED.

The Second Department, reversing (modifying) Supreme Court, determined the negligent hiring and retention cause of action against the church defendants should have been dismissed. The complaint alleged plaintiff, who was seven years

old, was abducted near her home, taken to a secluded area, and sexually assaulted by the defendant. The court noted that the church defendants may have been negligent in hiring the defendant, but there was no connection between the offense committed by the defendant and his employment: "With respect to a cause of action alleging negligent hiring and retention, '[t]he employer's negligence lies in having placed the employee in a position to cause foreseeable harm, harm which would most probably have been spared the injured party had the employer taken reasonable care in making decisions respecting the hiring and retention of the employee' ... . As such, a necessary element of a cause of action to recover damages for negligent hiring and retention is a nexus or connection between the defendant's negligence in hiring and retaining the offending employee and the plaintiff's injuries ... . Here, the plaintiff failed to allege any such nexus, since the sexual assault occurred far from the Church's premises, and there is no allegation in the complaint that the plaintiff had any prior contact with the alleged attacker, any prior relationship with any of the defendants, or even any knowledge, at the time of the sexual assault, that the alleged attacker was employed by the defendants." ***Roe v. Domestic & Foreign Missionary Socy. of the Prot. Episcopal Church*, 2021 N.Y. Slip Op. 05360, Second Dept 10-6-21**

PERSONAL INJURY, EVIDENCE, CIVIL PROCEDURE.

SUPREME COURT ERRONEOUSLY PRECLUDED PLAINTIFF'S TREATING PHYSICIAN'S TESTIMONY AND THE ADMISSION OF MEDICAL RECORDS IN THIS TRAFFIC ACCIDENT CASE; PLAINTIFF'S MOTION TO SET ASIDE THE DEFENSE VERDICT SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined plaintiff's motion to set aside the defense verdict in this traffic accident case should have been granted. The trial court had erroneously precluded some of the testimony of one of plaintiff's treating physicians and the admission of another treating physician's medical records. The defendant had waived any objection to the records by failing to object after service of plaintiff's notice of intention to enter the documents: "At the trial on the issue of damages, the plaintiff called one of her treating physicians, Irving Friedman, as a witness. The Supreme Court erred in granting the defendant's application to preclude Friedman's testimony concerning the cervical and thoracic regions of the plaintiff's spine based upon a conceded error Friedman made wherein he misidentified the MRI of the plaintiff's spine ... . Under the circumstances of this case, any defects in Friedman's opinions or the foundations on which those opinions are based 'should go to the weight to be accorded that evidence by the trier of fact, not to its admissibility in the first instance' ... . In addition, the Supreme Court erred in precluding Friedman's testimony regarding future treatment and possible need for future surgery, as Friedman had addressed these issues in his medical reports ... . [T]he Supreme Court erred in precluding the admission of the medical records of another of the plaintiff's treating physicians, Rubin Ingber, under the business records exception to the hearsay rule. The defendant waived his right to any objection to the admission of the records as business records, as he failed to timely object after having been served with the plaintiff's notice of her intention to enter the documents into evidence pursuant to CPLR 3122-a ...". ***Benguigui v. Racer*, 2021 N.Y. Slip Op. 05318, Second Dept 10-6-21**

REAL ESTATE, CONTRACT LAW.

THE PURCHASERS BREACHED THE CONTRACT OF SALE BY INFORMING THE SELLER THEY WOULD NOT ATTEND THE "TIME OF THE ESSENCE" CLOSING; THEREFORE, THE PURCHASERS ARE ENTITLED TO RETURN OF THEIR DEPOSIT.

The Second Department, reversing Supreme Court, determined the seller did not breach the contract for sale and the purchasers breached the contract by stating in a letter they would not attend the "time of the essence" closing. Therefore the purchasers were entitled to the return of their deposit: "The Supreme Court erred in determining that the purchasers were entitled to a return of their down payment because the seller breached the contract by failing to 'close on the property free of violations.' Instead, the purchasers never placed the seller in default. * * * ... [A]s the purchasers advised by letter prior to the 'time of the essence' closing that they would not appear at the closing, they breached the contract and forfeited their down payment, without the necessity of a tender on the part of the seller ...". ***Xelo v. Hamilton*, 2021 N.Y. Slip Op. 05364, Second Dept 10-6-21**

FOURTH DEPARTMENT

CIVIL PROCEDURE, EVIDENCE, PRIVILEGE, ANIMAL LAW, ATTORNEYS.

AN AFFIDAVIT WITH A PARTY STATEMENT AND A NON-PARTY AFFIDAVIT WHICH WERE NOT DISCLOSED SHOULD HAVE BEEN CONSIDERED IN OPPOSTION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT IN THIS DOG-BITE CASE.

The Fourth Department, reversing Supreme Court and reinstating the complaint in this dog-bite case, determined an affidavit which should have been disclosed because it contained the statement of a party was admissible in opposition to defendant's motion for summary judgment (the Davis affidavit). In addition, the affidavit of a non-party witness should

have been considered by the court (the Cheetham affidavit). Even if the discovery demands are read to include the non-party affidavit, the affidavit was privileged as material prepared for litigation and therefore not discoverable. Supreme Court had precluded both affidavits on the ground they had not been disclosed: "[W]e agree with the court that the affidavit of Davis, insofar as it contained a party statement of defendant, should have been disclosed. CPLR 3101 (e) 'enables a party to unconditionally obtain a copy of his or her own statement[,] creating an exception to the rule that material prepared for litigation is ordinarily not discoverable' ... . We nevertheless agree with plaintiff that the court abused its discretion in precluding Davis's affidavit from consideration in opposition to the motion ... . Defendant knew of Davis as a person of interest, which is why counsel sought to depose her approximately four months prior to making the motion, and defendant did not seek the assistance of the court to compel Davis's production ... . Inasmuch as plaintiff is not precluded from relying on Davis's affidavit to oppose summary judgment, Davis is not precluded from testifying at trial ... . We also conclude that the court abused its discretion in precluding the Cheetham affidavit from consideration. Cheetham was listed as a witness in discovery and was deposed. Cheetham is not a party to this action, and his affidavit did not include any statements of a party. Even assuming that Cheetham's statement was discoverable, we note that defendant's discovery demands did not include a demand for nonparty witness statements. Assuming further that defendant's discovery demands could be read to include a request for the statement of a nonparty witness, i.e., Cheetham, we conclude that Cheetham's statement was conditionally privileged as material prepared in anticipation of litigation (see CPLR 3101 [d] [2 ...). Defendant would be unable to show any substantial need for Cheetham's statement inasmuch as Cheetham was deposed and therefore provided the substantial equivalent of the material contained in the statement ...". ***Vikki-lynn A. v. Zewin*, 2021 N.Y. Slip Op. 05412, Fourth Dept 10-8-21**

CRIMINAL LAW, EVIDENCE.

THE PAT DOWN SEARCH OF DEFENDANT TRAFFIC OFFENDER WAS NOT SUPPORTED BY REASONABLE SUSPICION.

The Fourth Department, reversing County Court, determined the pat down search of defendant traffic offender was not supported by reasonable suspicion: "[A] pat down search of a traffic offender is not authorized unless, when the vehicle is stopped, there is reasonable suspicion that the defendant is armed or poses a threat to the officer's safety ... . The requisite reasonable suspicion is simply lacking here; defendant made no evasive moves, he was not aggressive with the officer, he did not reach into his clothing or into dark hiding spots in the car, there were no telltale bulges in his clothes, he made no statements about weapons or other dangerous items, and the officer had no prior knowledge of any defendant-specific concerns ... . Contrary to the motion court's view, 'non-compliant and erratic behavior' does not automatically give rise to reasonable suspicion of a threat to officer safety ... . Although defendant's flat affect and partial disrobement during the traffic stop was odd, nothing about his specific odd behavior during the episode gave rise to reasonable suspicion that he was armed or posed a threat to the officer's safety ... . If anything, the officer's ability to peer unobstructed into defendant's open pants should have assuaged, rather than heightened, any concerns that defendant was concealing a weapon. The crack cocaine should therefore have been suppressed as the fruit of the unlawful frisk ...". ***People v. Santy*, 2021 N.Y. Slip Op. 05439, Fourth Dept 10-8-21**

CRIMINAL LAW, JUDGES.

THE JUDGE SHOULD HAVE HELD A HEARING TO DETERMINE THE AMOUNT OF RESTITUTION, MATTER REMITTED.

The Fourth Department determined County Court should have held a hearing on the amount of restitution and remitted the matter: "Penal Law § 60.27 (2) provides in relevant part that, when a court requires restitution to be made, '[i]f the record does not contain sufficient evidence to support such finding or upon request by the defendant, the court must conduct a hearing' … . Here, contrary to the assertion of the People, defendant made a timely request for a restitution hearing inasmuch as he requested a hearing before the court made its determination on restitution. The court never ordered a specific amount of restitution at sentencing, and the People did not prepare the order of restitution setting forth the amount requested until the following week. Defendant raised issues with the amount and requested a hearing. Upon defendant's request, the court was required to conduct a hearing 'irrespective of the level of evidence in the record' to support the amount of restitution ...". ***People v. Osborn*, 2021 N.Y. Slip Op. 05426, Fourth Dept 10-8-21**

CRIMINAL LAW, JUDGES, APPEALS.

DEFENDANT'S GUILTY PLEA WAS COERCED BY THE JUDGE'S THREAT TO IMPOSE A HEAVIER SENTENCE IF CONVICTED AFTER TRIAL; ALTHOUGH THE ISSUE WAS NOT PRESERVED, IT WAS CONSIDERED ON APPEAL IN THE INTEREST OF JUSTICE.

The Fourth Department, vacating defendant's guilty plea, determined defendant was induced to enter the plea by a threat to impose a heavier sentence after trial. The defendant did not preserve the issue for appeal by a motion to withdraw the plea or vacate the judgment, but the appeal was heard in the interest of justice: "[D]efendant contends that his plea was rendered involuntary due to statements made by County Court during the plea colloquy indicating that the court would

impose the maximum sentence and direct that it run consecutively to a previously imposed sentence if he were convicted at trial. * * * ... [I]t is well settled that a defendant 'may not be induced to plead guilty by the threat of a heavier sentence' if he or she decides to proceed to trial ... . [T]he court's comments about sentencing were not merely a description of the range of the potential sentences; instead, they conveyed to defendant the court's intent to impose the maximum punishment at sentencing if he proceeded to trial and lost. That constitutes coercion, rendering the plea involuntary ...". ***People v. Thigpen-Williams*, 2021 N.Y. Slip Op. 05429, Fourth Dept 10-8-21**

REAL PROPERTY LAW.

UNAMBIGUOUS LANGUAGE IN A DEED MUST BE ENFORCED.

The Fourth Department, reversing (modifying) Supreme Court, determined unambiguous language in a deed is not subject to interpretation: "The construction of deeds generally 'presents a question of law for the court to decide' ... , and deeds must be 'construed according to the intent of the parties, so far as such intent can be gathered from the whole instrument, and is consistent with the rules of law' (Real Property Law § 240 [3]). 'The 'intent' to which [section 240 (3)] refers is the objective intent of the parties as manifested by the language of the deed' ... . '[A] court will only look outside the four corners of the deed to establish the intent of the parties when . . . that instrument is found to be ambiguous' ... . In this case, pursuant to the unambiguous language of the corrected deed and the contract of sale referenced therein, Flower [defendant] transferred 'all' of his oil, gas, and mineral rights in the premises ... .It is a fundamental principle of deed construction that '[w]hen words have a definite and precise meaning, it is not permissible to go elsewhere in search of conjecture in order to restrict or extend the meaning' ... . We conclude that, in determining that Flower intended to transfer ... only his right to receive royalties while retaining his right to receive free gas, the court improperly restricted the meaning of the plain language of the corrected deed, particularly the word 'all.' "***BPGS Land Holdings, LLC v. Flower*, 2021 N.Y. Slip Op. 05413, Fourth Dept 10-8-21**

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