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FIRST DEPARTMENT

APPEALS, FAMILY LAW, CIVIL PROCEDURE.

ALTHOUGH THE APPELLANT WAS IN JAPAN, THE FIRST DEPARTMENT REFUSED TO DISMISS THE APPEAL PURSUANT TO THE FUGITIVE DISENTITLEMENT DOCTRINE IN THIS FAMILY COURT CIVIL-CONTEMPT MATTER; FATHER HAD APPEARED VIRTUALLY IN COURT PROCEEDINGS AND STATED HE WOULD RETURN TO NEW YORK TO COMPLY WITH ANY COURT ORDER.

The First Department refused to dismiss the appeal of this Family Court civil contempt matter pursuant to the fugitive disentitlement doctrine (which authorizes the dismissal of an appeal if the appellant has left the jurisdiction). Here, father was in Japan: "Although the father is in Japan, we decline to dismiss the appeal pursuant to the fugitive disentitlement doctrine. There is no 'nexus' connecting the father's fugitive status and these proceedings ... . The father has continued to appear virtually in court, communicate with his counsel, and consent to relief sought by the mother. He has complied with the terms of his probation and submitted an affidavit stating that he will return to New York to comply with any court order. Under these circumstances, we find that the father has not 'flout[ed] the judicial process,' frustrated the operation of the courts, or prejudiced the mother's rights by leaving the jurisdiction to warrant dismissal of the appeal ...". ***Matter of Hilary C. v. Michael K.*, 2022 N.Y. Slip Op. 01512, First Dept 3-10-22**

CIVIL PROCEDURE, CIVIL RIGHTS LAW.

THE 2020 AMENDMENTS TO CIVIL RIGHTS LAW § 70, THE ANTI-SLAPP LAW, DO NOT APPLY RETROACTIVELY TO THE PLAINTIFF'S PENDING DEFAMATION ACTION AGAINST DEFENDANT.

The First Department, reversing Supreme Court, determined the 2020 amendments to the anti-strategic lawsuit against public participation (anti-SLAPP) law (Civil Rights Law § 70) should not be applied retroactively to cover plaintiff's defamation claims against defendant. Therefore defendant's motion for a ruling that the anti-SLAPP law applied retroactively should not have been granted: "[T]here is insufficient evidence supporting the conclusion that the legislature intended its 2020 amendments to the anti-strategic lawsuit against public participation (anti-SLAPP) law (see Civil Rights Law § 70 et seq.) to apply retroactively to pending claims such as the defamation claims asserted by plaintiffs in this action. The Court of Appeals has stated, in general terms, that 'ameliorative or remedial legislation' should be given 'retroactive effect in order to effectuate its beneficial purpose' ... . * * * ... '[C]lassifying a statute as remedial does not automatically overcome the strong presumption of prospectivity since the term may broadly encompass any attempt to supply some defect or abridge some superfluity in the former law' ... . In light of .... the factual evidence that the amendments to New York's anti-SLAPP law were intended to better advance the purposes of the legislation by correcting the narrow scope of the prior anti-SLAPP law, we find that the presumption of prospective application of the amendments has not been defeated. The legislature acted to broaden the scope of the law almost 30 years after the law was originally enacted, purportedly to advance an underlying remedial purpose that was not adequately addressed in the original legislative language. The legislature did not specify that the new legislation was to be applied retroactively. The fact that the amended statute is remedial, and that the legislature provided that the amendments shall take effect immediately, does not support the conclusion that the legislature intended retroactive application of the amendments." ***Gottwald v. Sebert*, 2022 N.Y. Slip Op. 01515, First Dept 3-10-22**

CIVIL PROCEDURE, CORPORATION LAW.

ALTHOUGH THIS SHAREHOLDERS' DERIVATIVE ACTION AGAINST A SWISS CORPORATION REQUIRES THE APPLICATION OF SWISS LAW, NEW YORK IS THE PROPER FORUM; MOST ON THE BOARD OF DIRECTORS ARE RESIDENTS OF NEW YORK AND THE ALLEGATIONS IN THE COMPLAINT REFLECT A SUBSTANTIAL NEXUS TO NEW YORK.

The First Department, reversing Supreme Court, determined New York, not Switzerland, was the proper forum for this shareholders' derivative action against a Swiss corporation, despite the need to apply Swiss law: "Defendants did not establish that in the interest of substantial justice, this action should be heard in another forum, namely, Switzerland (see generally CPLR 327[a] ...). Adjudication of plaintiffs' claims, which are undisputedly governed by Swiss law, will not place an undue burden on New York courts ... . New York courts are frequently called on to apply the laws of foreign jurisdictions

and in this case, there is no indication that the relevant law, which is from only one foreign jurisdiction, is in dispute or is distinctly abstruse ... . That plaintiffs seek certain nonmonetary relief that may not be available or enforceable in Switzerland does not cut in favor of dismissal because defendants can seek to limit the damages sought and plaintiffs are now willing to withdraw their requests for nonmonetary relief as against [defendant corporation]. Defendants do not claim that litigation in New York will cause them any hardship and although this matter could be litigated in Switzerland, Swiss courts do not permit trial by jury, which could pose some hardship to plaintiffs ... . Moreover, most of defendant-board members are residents of New York and none are residents of Switzerland ... . The allegations in the complaint make clear that this action has a substantial nexus to New York and at this point, it appears that the majority of the witnesses and evidence will be located in the United States, principally New York ...". ***Wormwood Capital LLC v. Mulleady*, 2022 N.Y. Slip Op. 01526, First Dept 3-10-22**

CIVIL PROCEDURE, DEBTOR-CREDITOR.

IN AN ACTION SEEKING TO ENFORCE A JUDGMENT AGAINST NON-DEBTORS PURSUANT TO CPLR ARTICLE 52, THE PETITIONERS ARE NOT ENTITLED TO A JURY TRIAL; THE ACTION IS EQUITABLE IN NATURE, DESPITE THE DEMAND FOR MONETARY DAMAGES.

The First Department determined petitioner's request for a jury trial in this action seeking to compel non-debtors to make assets accessible for execution should have been stricken. Even though money damages were demanded, the essence of the action is equitable: "Petitioners commenced a 'turnover' special proceeding under CPLR article 52 and sought a judgment among other things, 'seeking . . 'turnover' of [defendant] NYGFI assets to satisfy [p]etitioners' judgment . . . compelling the non-debtor [r]espondents to disclose, bring within the jurisdiction, and make accessible for execution . . . all cash, income, distributions and funds . . . including all membership interests in limited lability companies . . . and shares in corporations and interests in partnerships . . . and granting the appointment of a CPLR [a]rticle 52 receiver.' ... '[A] [p]laintiff is not entitled to a jury trial . . . [when] he seeks to enforce a judgment against a party other than the judgment debtor, which is an equitable claim' ... . '[T]he rule is fundamental that where a plaintiff seeks legal and equitable relief in respect of the same wrong, his right to trial by jury is lost' ... . Moreover, '[i]nclusion of a demand for money damages in the [pleading] does not, in and of itself, guarantee entitlement to a jury trial. Rather, it must be determined whether the main thrust of the action is for legal damages or for equitable relief' ...". ***Matter of Uni-Rty Corp. v. New York Guangdong Fin.*, 2022 N.Y. Slip Op. 01525, First Dept 3-10-22**

CIVIL PROCEDURE, DEBTOR-CREDITOR, CONSTITUTIONAL LAW.

SUPREME COURT SHOULD NOT HAVE DISMISSED AN ACTION TO ENFORCE A MONEY JUDGMENT OBTAINED IN THE PEOPLE'S REPUBLIC OF CHINA (PRC) ON THE IMPLICIT GROUND THE DEFENDANTS WERE NOT AFFORDED DUE PROCESS IN THE PRC; THE US STATE DEPARTMENT DOCUMENTS UPON WHICH SUPREME COURT'S RULING WAS BASED DO NOT CONSTITUTE DOCUMENTARY EVIDENCE; THE COMPLAINT SUFFICIENTLY ALLEGED DEFENDANTS HAD AN OPPORTUNITY TO BE HEARD, WERE REPRESENTED BY COUNSEL AND HAD THE OPPORTUNITY TO APPEAL IN THE PRC ACTION.

The First Department, reversing Supreme Court, determined the complaint sufficiently alleged that the money judgment obtained by plaintiff in the People's Republic of China (PRC) comported with the principles of due process. The complaint alleged the defendants had an opportunity to be heard, were represented by counsel, and had a right to appeal the underlying proceeding in the PRC. Plaintiff's action to enforce the foreign judgment should not have been dismissed based upon US State Department reports alleging a lack of judicial independence in the PRC: "The court should not have dismissed the action on the ground that the U.S. State Department's 2018 and 2019 Country Reports on Human Rights Practices (Country Reports) conclusively refuted plaintiff's allegation that the PRC judgment was rendered under a system that comported with the requirements of due process. The Country Reports do not constitute 'documentary evidence' under CPLR 3211(a)(1) ... . In any event, the reports, which primarily discuss the lack of judicial independence in proceedings involving politically sensitive matters, do not utterly refute plaintiff's allegation that the civil law system governing this breach of contract business dispute was fair." ***Shanghai Yongrun Inv. Mgt. Co., Ltd v. Maodong Xu*, 2022 N.Y. Slip Op. 01523, First Dept 3-10-22**

CIVIL PROCEDURE, MEDICAL MALPRACTICE, NEGLIGENCE.

DEFENDANTS' MOTIONS TO AMEND THEIR ANSWERS IN THIS MED MAL CASE TO ALLEGE PLAINTIFF'S CULPABLE CONDUCT AND COMPARATIVE NEGLIGENCE (RE: HER WEIGHT AND SMOKING) SHOULD HAVE BEEN GRANTED; THE DELAY IN MAKING THE MOTION CAUSED NO PREJUDICE; GOOD CAUSE FOR THE DELAY NEED NOT BE SHOWN; FAILURE TO INCLUDE THE AMENDED PLEADINGS WITH THE MOTION PAPERS AND DEFECTS IN VERIFICATIONS SHOULD HAVE BEEN OVERLOOKED.

The First Department, reversing (modifying) Supreme Court, determined: (1) the defendants in this medical malpractice actions should have been allowed to amend their answers to allege culpable conduct and comparative negligence on the part of plaintiff, citing her weight and smoking habit: (2) the defendants failure to attach the proposed amended pleading to the motion papers was a technical defect which should have been overlooked; (3) the defendants did not need to submit

a certificate of merit for the proposed amendments; and (4), the defects in the defendants' verifications should have been overlooked: " 'While [defendants were] or should have been aware of the facts and theories asserted in the amended [answers] long before amendment was actually sought, delay alone is not a sufficient ground for denying leave to amend' ... . Under the circumstances in this case, there was no unreasonable delay by defendants in seeking leave to amend, as plaintiff has not filed her note of issue nor has the case has been certified as trial-ready ... . Further, because there was no extended delay by defendants in moving to amend, they did not need to proffer a reasonable excuse for the delay ... '[O]n a motion for leave to amend, [the movant] need not establish the merit of its proposed new allegations, but simply show that the proffered amendment is not palpably insufficient or clearly devoid of merit' ... Contrary also to plaintiff's argument, *Golson v Addei* [216 AD2d 268] does not stand for the proposition that a comparative negligence defense in a medical malpractice case based on a plaintiff's smoking history is per se meritless ...". ***Johnson v. Montefiore Med. Ctr.*, 2022 N.Y. Slip Op. 01418, First Dept 3-8-22**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

A STACK OF SHEETROCK BOARDS WHICH WERE LEANING AGAINST A WALL FELL ON PLAINTIFF; THERE WERE QUESTIONS OF FACT ABOUT WHETHER IT WAS A GRAVITY-RELATED EVENT AND WHETHER THE ELEVATION DIFFERENTIAL WAS DE MINIMIS.

The First Department, reversing (modifying) Supreme Court, determined there was a question of fact whether plaintiff could recover for injuries under Labor Law § 240(1). A stack of 25 to 30 sheetrock boards which had been leaning against a wall fell on him. The court noted that the Labor Law § 241(6) cause of action was properly dismissed because the incident happened in an apartment, not a "passageway:" "[T]he record presents issues of fact as to whether plaintiff's injuries flowed directly from the application of the force of gravity to the sheetrock, whether the elevation differential was de minimis, and whether the combined weight of the sheetrock panels could generate a significant amount of force as it fell ...". ***Kuylen v. KPP 107th St., LLC*, 2022 N.Y. Slip Op. 01419, First Dept 3-8-22**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY, EVIDENCE.

DEFENDANT'S EXPERT'S AFFIDAVIT ITSELF RAISED QUESTIONS OF FACT AND WAS OTHERWISE DEFICIENT IN THIS LABOR LAW § 240(1) LADDER FALL CASE; DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The First Department, reversing Supreme Court, determined plaintiff's Labor Law § 240(1) cause of action should not have been dismissed. Plaintiff alleged he fell off a ladder while cleaning glass with an extension pole. The court noted that the defendant's expert affidavit was deficient and itself raised questions of fact precluding summary judgment in favor of the defendant: "Summary dismissal of the Labor Law § 240(1) claim is precluded by issues of fact as to whether plaintiff was exposed to an elevation-related risk 'attendant to his work [of washing windows] as it was intended to be performed' ... . Plaintiff testified that he performed the work using an extension pole with a squeegee attached to one end, while both of his feet were on the rung one or two steps below the top of a 12-foot ladder. Plaintiff was unable to estimate the height of the glass except that it was more than 15 feet above the floor, but he stated that he could not have cleaned the glass while standing on the floor because he would not have been able to apply sufficient force to the glass. * * * The [defendant's] expert's statements raised issues of fact as to his own credibility in opining that plaintiff could have cleaned all of the glass while standing on the floor and plaintiff's description of the supplies he needed to use and did use in performing the work." ***Durasno v. 680 Fifth Ave. Assoc., L.P.*, 2022 N.Y. Slip Op. 01413, First Dept 3-8-22**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY, EVIDENCE.

THERE WAS NO DIRECT OR CIRCUMSTANTIAL EVIDENCE OF THE CAUSE OF PLAINTIFF'S-DECEDENT'S FALL FROM A LADDER; ONLY A DEFECTIVE OR UNSAFE LADDER GIVES RISE TO LABOR LAW § 240(1) LIABILITY; THE TRIER OF FACT WOULD HAVE TO RESORT TO SPECULATION; THE ACTION SHOULD HAVE BEEN DISMISSED.

The First Department, reversing Supreme Court, determined plaintiff-decedent's Labor Law §§ 240(1) and 241(6) causes of action should have been dismissed. Plaintiff's decedent fell from a ladder, but there were no witnesses and no evidence of the cause of the fall. The trier of fact would have been forced to speculate about whether the ladder was defective in some way: "[Defendants] Casur and 124 Ridge established their prima facie entitlement to judgment as a matter of law by demonstrating that no one was in a position to establish the cause of the accident, as there was no direct or circumstantial evidence as to how the accident happened ... . In opposition, plaintiff failed to raise a triable issue of fact. Since the accident may well have been caused by a misstep or loss of balance, rather than by a defective or improperly secured ladder, any determination by the trier of fact as to the cause of the accident would be based upon speculation ... . The Noseworthy doctrine (*see Noseworthy v City of New York*, 298 NY 76, 80-81 [1948])is not applicable to this case, since Casur and 124 Ridge's knowledge as to the cause of the accident is no greater than plaintiff's ...". ***Public Adm'r of Queens County v. 124 Ridge LLC*, 2022 N.Y. Slip Op. 01522, First Dept 3-10-22**

LANDLORD-TENANT, MUNICIPAL LAW, TENANT HARASSMENT.

TENANTS' CAUSES OF ACTION FOR TENANT (STATUTORY) HARASSMENT, PRIVATE NUISANCE, ASSAULT, BREACH OF THE WARRANTY OF HABITABILITY, AS WELL AS THE CLAIM FOR PUNITIVE DAMAGES, REINSTATED.

The First Department, reversing Supreme Court, reinstated plaintiffs-tenants' causes of action for statutory harassment, private nuisance, assault, breach of the warranty of habitability, as well as the demand for punitive damages, in this action by tenants against the landlord alleging both habitability-issues and the landlord's imminent threat to use force. With respect to the tenant (statutory) harassment cause of action, the court wrote: "Plaintiffs alleged ... there were repeated interruptions of essential services such as heat, hot water, gas, and electricity, as well as disruptions in elevator service, phone, television, and internet service; large amounts of construction dust, including lead dust, in the public hallways; flooding and mold on the tenth floor; rat and vermin infestations; a lack of building security in the lobby and a lack of a fire safety system. * * * The complaint states a cause of action for harassment under Administrative Code of City of NY §§ 27—2005(d) and 27—2115(m), as Supreme Court is 'a court of competent jurisdiction' for the purposes of Administrative Code § 27—2115(m)(2) ... . Contrary to the motion court's determination, the statute expressly provides that only claims arising [from conditions in the building, that is, under subparagraphs b, c, and g of Administrative Code § 27-2004(a)(48)(ii), require the existence of a predicate violation to state a claim for harassment. Here, plaintiffs assert their first cause of action under Administrative Code § 27-2004(a)(48)(ii)(a), based on allegations that defendant Chelsea Hotel Owner, LLC's principal, defendant Ira Drukier, was "making express or implied threats that force will be used" against plaintiffs, and therefore no predicate violation was required for this cause of action. ... On the third cause of action, for harassment arising from deprivation of services, plaintiffs state a claim under the statute by asserting that the alleged conditions were the subject of violations that, if established, would support a claim for harassment (*see Robinson v Day*, 103 AD3d 584, 587 [1st Dept 2013] [A complaint need only 'allege the misconduct complained of in sufficient detail to inform the defendants of the substance of the claims']). Evidence of the specific violations issued in connection with the alleged conditions may be obtained in discovery as contemplated by the statute (see Administrative Code § 27-2115[h][2][ii])." ***Berg v. Chelsea Hotel Owner, LLC*, 2022 N.Y. Slip Op. 01511. First Dept 3-10-22**

MEDICAL MALPRACTICE, NEGLIGENCE, CIVIL PROCEDURE.

PLAINTIFF ALLEGED FAILURE TO DIAGNOSE CANCER IN 2014 IN THIS MEDICAL MALPRACTICE ACTION; DESPITE THE ENACTMENT OF LAVERN'S LAW (CPLR 214-A) IN 2018, WHICH EXTENDED THE STATUTE OF LIMITATIONS FOR FAILURE TO DIAGNOSE CANCER BY VIRTUE OF ITS RETROACTIVE-APPLICATION AND REVIVAL PROVISIONS, THE ACTION WAS TIME-BARRED.

The First Department, reversing Supreme Court, determined plaintiff's med mal action alleging failure to diagnose lung cancer based upon a CT scan in 2014 was time barred pursuant to the retroactive-application and revival limitations in CPLR 214-a, enacted on January 31, 2018 (called Lavern's Law): "[Lavern's Law] 'appl[ies] to acts, omissions, or failures occurring within 2 years and 6 months prior to the effective date of this act, and not before' ... . Thus, by its terms, the discovery toll in Lavern's Law's applies retroactively to causes of action that were not time-barred as of Lavern's Law's effective date, i.e., causes of action accruing on or after July 31, 2015. Plaintiff's causes of action, which accrued on May 16, 2014, predate the earliest date to which Lavern's Law's retroactive discovery toll applies. Lavern's Law also provides for the revival of certain time-barred medical malpractice causes of action. Where a claim based on the negligent failure to diagnose cancer or a malignant tumor occurred and, 'within ten months prior to the effective date of the act . . . became time-barred under any applicable limitations period then in effect, such action or claim may be commenced within six months of the effective date of the act . . . .' ... . Therefore, a failure to diagnose cancer or malignant tumor cause of action that became time-barred between March 31, 2017 and January 31, 2018 may be revived if it is commenced no later than July 31, 2018 ... . Because plaintiff's claims became time-barred on November 16, 2016, the limited revival provision of the new law (for certain claims that became time-barred after March 31, 2017) does not avail her ...". ***Ford v. Lee*, 2022 N.Y. Slip Op. 01414, First Dept 3-8-22**

REAL ESTATE, REAL PROPERTY LAW, FIDUCIARY DUTY. CONTRACT LAW, CIVIL PROCEDURE.

THE COMPLAINT SUFFICIENTLY STATED FACTS AMOUNTING TO A BREACH-OF-FIDUCIARY-DUTY CAUSE OF ACTION AGAINST DEFENDANT REAL ESTATE BROKER, DESPITE PLAINTIFF-SELLER'S CONSENT TO THE BROKER'S "DUAL AGENCY;" IT WAS ALLEGED THE BROKER WAS AWARE THE PROPERTY WAS TO BE SUBDIVIDED AND SOLD BY THE BUYERS FOR THREE TIMES THE PRICE AND SHE WOULD BE THE BUYERS' BROKER FOR THE SUBSEQUENT SALES.

The First Department, reversing Supreme Court, determined the complaint sufficiently stated a cause of action for breach of fiduciary duty by the defendant real estate broker, despite the plaintiff's consent to the broker's "dual agency:" "Although the complaint does not explicitly articulate a cause of action for breach of fiduciary duty, such a cause of action is manifest in its factual allegations, and the documentary evidence fails to utterly refute those allegations ... . In connection with his sale of certain real property, plaintiff signed a disclosure form pursuant to Real Property Law § 443, giving his informed consent

to a 'dual agency with designated sales agent' relationship with defendants. The form states that a dual agent cannot give the seller or buyer 'undivided loyalty.' Nevertheless, it does not relieve defendants from all fiduciary duty. The form states that defendant Nikki Carchedi, of defendant Stone House Properties, 'is appointed to represent the seller in this transaction.' The complaint establishes a cause of action for breach of a fiduciary duty beyond the acknowledged 'divided' duty by alleging that [defendant] Carchedi failed to disclose that she had a personal stake in the sale to the buyers, who planned to subdivide the property immediately after purchase and retain her as the broker for the sale of the subdivided parcels, and that they did so, listing the subdivided parcels for almost three times the price plaintiff received in his sale ... . We also note plaintiff's assertion that the agent representing the buyer was the son of Carchedi's longtime client about whom plaintiff had expressed concern." ***Hahn v. Stone House Props. LLC*, 2022 N.Y. Slip Op. 01416, First Dept 3-8-22**

SECOND DEPARTMENT

CIVIL PROCEDURE, FAMILY LAW.

THE COUNTY WHERE PLAINTIFF AND DEFENDANT OWNED A SEASONAL SECOND HOME (WHERE DEFENDANT LIVED AFTER COVID REACHED NEW YORK CITY) WAS NOT THE PROPER VENUE FOR THE DIVORCE ACTION.

The Second Department, in a full-fledged opinion by Justice Lasalle, reversing Supreme Court, determined the county where plaintiff and defendant owned a seasonal second home, and where defendant moved when COVID reached New York City, was not the proper venue for the divorce action: "The parties to this divorce action primarily resided in New York County, while maintaining a seasonal second home in Suffolk County. In March 2020, when the COVID-19 pandemic first reached New York City, the defendant retreated to the Suffolk County residence along with her pregnant and immunocompromised daughter and began spending more time there in order to assist the daughter during the pregnancy and after the child's birth. In August 2020, the plaintiff commenced this action for a divorce and ancillary relief in Suffolk County, on the ground that the parties were residents of Suffolk County. The defendant moved pursuant to CPLR 510 and 511 for a change of venue, and the Supreme Court denied the motion. This case presents the issue of whether sheltering in place in a seasonal home creates a sufficient degree of permanence to establish residency at that location. We hold that it does not under the circumstances of this case. Because the parties' stays in Suffolk County were only seasonal and temporary, we hold that neither of them were residents of Suffolk County at the time of the commencement of the action. Accordingly, the Supreme Court should have granted the defendant's motion pursuant to CPLR 510 and 511 to change the venue of the action from Suffolk County to New York County." ***Fisch v. Davidson*, 2022 N.Y. Slip Op. 01442, Second Dept 3-9-22**

CIVIL PROCEDURE, FRAUD, FIDUCIARY DUTY, CONVERSION, EMPLOYMENT LAW.

CAUSES OF ACTION ALLEGING BREACH OF FIDUCIARY DUTY DO NOT ACCRUE UNTIL THE FIDUCIARY DUTY IS OPENLY REPUDIATED; CAUSES OF ACTION FOR CONVERSION BASED UPON FRAUD ARE TIMELY SIX YEARS FROM THE CONVERSION OR TWO YEARS FROM DISCOVERY OF THE CONVERSION; THE RELEVANT CAUSES OF ACTION HERE, THEREFORE, SHOULD NOT HAVE BEEN DISMISSED.

The Second Department, reversing Supreme Court, determined causes of action alleging defendant Filardo, plaintiff car dealership's employee, used fraudulent schemes to steal funds from plaintiff over a period of years, should not have been dismissed on statute of limitations grounds, and/or on the ground the causes of action were not adequately pled. "The plaintiff asserted causes of action against Filardo for breach of fiduciary duty (first cause of action), breach of the duty of loyalty (second cause of action), faithless servant doctrine (third cause of action), conversion (fifth cause of action), fraudulent concealment by fiduciary (sixth cause of action), and promissory estoppel (ninth cause of action), and causes of action against both defendants for aiding and abetting fraud (fourth cause of action), civil conspiracy (seventh cause of action), fraud and deceit (eighth cause of action), unjust enrichment (tenth cause of action), money had and received (eleventh cause of action), and fraud by non-disclosure (twelfth cause of action). ... 'The statute of limitations for a cause of action alleging a breach of fiduciary duty does not begin to run until the fiduciary has openly repudiated his or her obligation or the relationship has been otherwise terminated' ... Here, the plaintiff alleged that its relationship with Filardo was not terminated until November 2017, and there is no allegation that Filardo openly repudiated his employment obligations prior to that time ... . [W]hen the allegations of fraud are essential to a cause of action alleging conversion based upon actual fraud, the cause of action is governed by the limitations period for fraud set forth in CPLR 213(8). That statute provides that, in an action based upon fraud, 'the time within which the action must be commenced shall be the greater of six years from the date the cause of action accrued or two years from the time the plaintiff or the person under whom the plaintiff claims discovered the fraud, or could with reasonable diligence have discovered it' ...". ***Star Auto Sales of Queens, LLC v. Filardo*, 2022 N.Y. Slip Op. 01476, Second Dept 3-9-22**

CIVIL PROCEDURE, JUDGES.

EVEN THOUGH PLAINTIFF DID NOT TIMELY FILE A NOTE OF ISSUE AND DID NOT COMPLY WITH A PRIOR DISCOVERY ORDER, THE JUDGE WAS WITHOUT AUTHORITY TO, SUA SPONTE, DISMISS THE COMPLAINT BECAUSE PLAINTIFF HAD NOT BEEN SERVED WITH A VALID 90-DAY DEMAND TO FILE A NOTE OF ISSUE.

The Second Department, reversing Supreme Court, determined the judge should not have, sua sponte, dismissed the complaint on the ground plaintiff failed to timely file a note of issue and failed to comply with a prior discovery order because plaintiff had not been served with a valid 90-day notice: "The Supreme Court improperly, sua sponte, directed dismissal of the complaint on the ground that the plaintiff failed to timely file a note of issue and failed to comply with a prior discovery order of the court. Because the plaintiff was not served with a valid 90-day demand to file a note of issue pursuant to CPLR 3216(b)(3), the court had no authority to dismiss the complaint based on the failure to timely file a note of issue ... . Further, the plaintiff's alleged failure to comply with the discovery order did not constitute extraordinary circumstances warranting the sua sponte dismissal of the complaint ...". ***Moreau v. Cayton*, 2022 N.Y. Slip Op. 01450, Second Dept 3-9-22**

CIVIL PROCEDURE, TRUSTS AND ESTATES.

THE PETITION BROUGHT BY THE EXECUTOR PURSUANT TO SCPA 2103 SOUGHT DISCOVERY AND THE TURNOVER OF ANNUITY FUNDS WHICH HAD BEEN TRANSFERRED TO APPELLANT; THE SCPA 2103 ACTION IS LIKE AN ACTION FOR CONVERSION OR REPLEVIN AND HAS A THREE-YEAR STATUTE OF LIMITATIONS; HERE THE MOTIONS TO AMEND THE ANSWERS TO ASSERT THE STATUTE OF LIMITATIONS DEFENSE AND FOR SUMMARY JUDGMENT ON THAT GROUND SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Surrogate's Court, determined the appellant's motion to amend their answers to assert the statute of limitations defense, and the summary judgment dismissing the petition on that ground should have been granted. The petition, brought by the executor pursuant to SCPA 2103, sought discovery and the turnover of funds from an annuity which had been distributed: "[T]he Surrogate's Court should have granted that branch of the appellants' motion which was for leave to amend their answers to add the affirmative defense of the statute of limitations. The petitioner failed to demonstrate that she would be prejudiced or surprised by the proposed amendment. The petitioner also failed to demonstrate that the proposed amendment was palpably insufficient or patently devoid of merit. 'A discovery proceeding pursuant to SCPA article 21 has been likened to an action for conversion or replevin and a three-year statute of limitations has been applied' ... . 'A conversion cause of action accrues and the limitations period begins to run on the date the conversion allegedly occurred'... . Here, the appellants produced evidence ... that the annuity funds at issue were withdrawn and deposited into a joint bank account ... [and] then transferred into a personal account ... on December 31, 2012, and January 3, 2013. Since the petition was not filed until June 23, 2016, the appellants demonstrated, prima facie, that the petitioner's claim was time-barred. ... [T]he petition did not allege a cause of action sounding in fraud or breach of fiduciary duty. Moreover, even if the petition had alleged breach of fiduciary duty, the applicable statute of limitations would still be three years because the petition sought money damages only and fraud was not essential to the claim ...". ***Matter of Chustckie*, 2022 N.Y. Slip Op. 01452, Second Dept 3-9-22**

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA), EVIDENCE.

THE PEOPLE'S APPLICATION FOR AN UPWARD DEPARTURE IN THIS SORA RISK ASSESSMENT PROCEEDING WAS NOT SUPPORTED BY CLEAR AND CONVINCING EVIDENCE.

The Second Department, reversing (modifying) County Court determine the proof submitted by the People did not support the application for an upward departure in this SORA risk assessment proceeding: "... County Court erred in granting the People's application for an upward departure. The People failed to prove the facts in support of their proffered aggravating factor, including that the defendant engaged in unprotected sexual conduct with the victim, by clear and convincing evidence ...". ***People v. Paterno*, 2022 N.Y. Slip Op. 01470, Second Dept 3-9-22**

EMPLOYMENT LAW, MUNICIPAL LAW, ARBITRATION.

THE UNION'S CLAIM THAT THE COUNTY EMPLOYEE, A SEASONAL EMPLOYEE, SHOULD BE CLASSIFIED AS FULL-TIME BECAUSE HE WORKED 40 HOURS-A-WEEK WAS NOT ARBITRABLE BECAUSE CIVIL SERVICE LAW § 22 PROVIDES THAT RECLASSIFICATION OF A CIVIL SERVICE POSITION CAN ONLY BE DONE BY THE MUNICIPAL CIVIL SERVICE COMMISSION.

The Second Department, reversing Supreme Court, determined the grievance filed on behalf of a county employee was not arbitrable because the relief required reclassification of a civil service position: "The respondent Joseph W. Grzymalski began to work for the petitioner, the County of Nassau, on June 28, 2013. He was classified as a seasonal worker and allegedly worked 40 hours per week until his employment was terminated on July 3, 2018 ... [T]he respondent Civil Service Employees Association, AFSCME, Local 1000, AFL-CIO, by its Local 830 (hereinafter CSEA), on behalf of Grzymalski, filed a grievance claiming that because Grzymalski worked 40 hours per week, he was entitled to 'full time benefits and status.' ... In determining whether a dispute between a public sector employer and employee is arbitrable, a court must first determine

whether 'there is any statutory, constitutional or public policy prohibition against arbitration of the grievance' ... . [T]he respondents are essentially seeking a reclassification of Grzymalski's position from seasonal to full time. Since the reclassification of a civil service position can only be accomplished by the municipal civil service commission (see Civil Service Law § 22), the subject grievance is nonarbitrable ...". ***Matter of County of Nassau v. Civil Serv. Empls. Assn., Civ. Serv. Empls. Assn., AFSCME*, Local 1000, AFL-CIO, 2022 N.Y. Slip Op. 01453, Second Dept 3-9-22**

FORECLOSURE, CIVIL PROCEDURE.

DEFENDANTS WERE NOT SERVED WITH NOTICE OF THE FORECLOSURE SALE; THEIR MOTION TO VACATE THE FORECLOSURE SALE SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined defendants in this foreclosure action were entitled to service of the notice of the foreclosure sale. Because the defendants were not served with the notice, their motion to vacate the foreclosure sale should have been granted: " 'Parties to an action involving the sale of real property pursuant to a judgment, who have appeared in the action and have not waived service, are entitled to have served upon them, pursuant to CPLR 2103, all papers in the action, including a notice of sale' ... , a court is authorized to set aside a judicial sale within one year thereafter, for failure to comply with the requirement as to notice, but only if a substantial right of a party was prejudiced by the defect. Here, the defendants established that they were prejudiced by the lack of notice of the sale inasmuch as they were deprived of the opportunity to protect their interest in the subject property ...". ***38-12 Astoria Blvd., LLC v. Ramos*, 2022 N.Y. Slip Op. 01433, Second Dept 3-9-22**

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

THE LOST NOTE AFFIDAVIT SUBMITTED BY THE BANK WAS INSUFFICIENT; THEREFORE THE BANK DID NOT DEMONSTRATE STANDING TO BRING THE FORECLOSURE ACTION; DEFENDANTS' MOTION TO AMEND THE ANSWER TO ASSERT THE LACK OF STANDING DEFENSE SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined the bank in this foreclosure action did not demonstrate standing to bring the action and Supreme Court should have granted defendant's motion to amend the answer to assert lack of standing as a defense: "[I]n support of its motion for summary judgment, the plaintiff submitted ... a lost note affidavit of a representative of the plaintiff's loan servicer, to which was annexed a copy of the consolidated note. However, the affidavit was insufficient to establish the facts preventing the production of the note ... . Supreme Court should have granted that branch of the defendant's cross motion which was pursuant to CPLR 3025(b) for leave to amend her answer to assert the affirmative defense of lack of standing ... . Leave to amend a pleading should be freely granted (see CPLR 3025[b]). In the absence of prejudice or surprise to the opposing party, a motion to amend should be granted unless the proposed amendment is palpably insufficient or patently devoid of merit ... . 'Mere lateness is not a barrier to the amendment. It must be lateness coupled with significant prejudice to the other side, the very elements of the laches doctrine' ... . [T]he defendant did not waive the affirmative defense of lack of standing (see RPAPL 1302-a)." ***Deutsche Bank Natl. Trust Co. v. Kreitzer*. 2022 N.Y. Slip Op. 01441, Second Dept 3-9-22**

FORECLOSURE, CIVIL PROCEDURE, EVIDENCE, UNIFORM COMMERCIAL CODE (UCC).

THE BANK FAILED TO DEMONSTRATE STANDING TO BRING THE FORECLOSURE ACTION; THERE WERE QUESTIONS OF FACT WHETHER THE "HOLDER (OF THE NOTE)" REQUIREMENTS OF THE UCC WERE MET.

The Second Department, reversing Supreme Court, determined plaintiff bank did not demonstrate standing to bring the foreclosure action: "[T]here was no evidence that the plaintiff is the assignee of note, and triable issues of fact exist as to whether the plaintiff was the holder of the note at the time the action was commenced. A promissory note is a negotiable instrument within the meaning of the Uniform Commercial Code (see UCC 3-104[2][d] ...). A 'holder' is 'the person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession' (UCC 1-201[b][21][A] ...). Where an instrument is endorsed in blank, it may be negotiated by delivery (see UCC 3-202[1]; 3-204[2] ...). In the present case, there is a triable issue of fact as to whether the note was properly endorsed in blank by an allonge 'so firmly affixed thereto as to become a part thereof' when it came into the possession of the plaintiff (UCC 3-202[2] ...). ... The plaintiff's reliance on the assignments of the mortgage is misplaced 'because the mortgage is not the dispositive document of title as to the mortgage loan' ...". ***HSBC Bank USA, N.A. v. Herod*, 2022 N.Y. Slip Op. 01444, Second Dept 3-9-22**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

PLAINTIFF ROOFER WAS ENTITLED TO SUMMARY JUDGMENT ON HIS LABOR LAW § 240(1) CAUSE OF ACTION BECAUSE HE FELL THROUGH AN UNPROTECTED HOLE IN THE ROOF WHICH WAS COVERED ONLY BY A SHEET OF BLACK PLASTIC; THE FACT THAT PLAINTIFF HAD UNTIED HIS SAFETY HARNESS SO HE COULD ASSIST A CO-WORKER DID NOT PRECLUDE SUMMARY JUDGMENT BECAUSE COMPARATIVE NEGLIGENCE IS NOT RELEVANT UNDER LABOR LAW § 240(1).

The Second Department, reversing (modifying) Supreme Court, determined the fact that plaintiff untied his harness so he could assist a fellow roofer in another area of the roof did not preclude summary judgment in plaintiff's favor on the Labor Law § 240(1) cause of action. Plaintiff, when walking toward the co-worker he was going to assist, fell through a hole in the roof that was concealed by a sheet of black plastic: "[T]he plaintiff established, prima facie, that Labor Law § 240(1) was violated and that the violation was a proximate cause of his injuries. The undisputed evidence established that the plaintiff was exposed to the elevation-related risk of the hole that was cut into the roof, that the hole through which the plaintiff fell was uncovered and unguarded, and that the location of the hole was concealed by an ice and water shield. The plaintiff established that the absence of protective equipment covering or guarding the hole was a proximate cause of his injuries. Indeed, in granting summary judgment on the issue of liability on the Labor Law § 241(6) cause of action, the Supreme Court found that the defendants failed to cover or guard the hole as required by the Industrial Code, and that such failure was a proximate cause of the plaintiff's injuries. '[W]hen the evidence establishes the absence of any safety devices . . . the statutes' [Labor Law § 240(1)] clear dictates have not been met. . . If proximate cause is established, the responsible parties have failed, as a matter of law, to 'give proper protection' ' ... . [T]he defendants failed to raise a triable issue of fact as to whether there was a statutory violation and whether the plaintiff's own conduct was the sole proximate cause of the accident ... . Since the plaintiff established a violation of the statute and that the violation was a proximate cause of his fall, the plaintiff's comparative negligence, if any, is not a defense to the Labor Law § 240(1) cause of action ...". ***Mejia v. 69 Mamaroneck Rd. Corp*, 2022 N.Y. Slip Op. 01449, Second Dept 3-9-22**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

THE PROPERTY OWNER AND GENERAL CONTRACTOR FAILED TO DEMONSTRATE THAT THE INDUSTRIAL CODE PROVISION REQUIRING EMPLOYERS TO ENSURE THE FLOOR AT THE WORK SITE IS NOT SLIPPERY DID NOT APPLY TO THE FLOOR OF A TRUCK OWNED AND OPERATED BY A THIRD PARTY WHICH DELIVERED MATERIALS TO THE WORK SITE; HERE PLAINTIFF ALLEGED HE SLIPPED AND FELL ON OIL ON THE FLOOR OF THE TRUCK AS HE WAS ATTEMPTING TO UNLOAD IT.

The Second Department, reversing (modifying) Supreme Court, determined defendant property owner and general contractor were not entitled to summary judgment on the Labor Law § 241(6) cause of action, even though plaintiff's slip and fall was allegedly caused by oil on the floor of a truck used to deliver elevator components to the work site: "Habberstad [the property owner] and T.G. Nickel [the general manager] failed to demonstrate their prima facie entitlement to judgment as a matter of law dismissing so much of the cause of action alleging a violation of Labor Law § 241(6) as was predicated on 12 NYCRR 23-1.7(d) insofar as asserted against each of them. Section 23-1.7(d) of the Industrial Code provides that '[e]mployers shall not suffer or permit any employee to use a floor, passageway, walkway, scaffold, platform or other elevated working surface which is in a slippery condition.' Here, contrary to the Supreme Court's conclusion, Habberstad and T.G. Nickel failed to make a prima facie showing that the floor of the truck on which the injured plaintiff was performing work was not the type of surface contemplated under section 23-1.7(d) ...". ***Schutt v. Dynasty Transp. of Ohio, Inc.*, 2022 N.Y. Slip Op. 01473, Second Dept 3-9-22**

LANDLORD-TENANT, MUNICIPAL LAW, TENANT HARASSMENT, CIVIL PROCEDURE.

THE TENANT HARASSMENT CAUSE OF ACTION SHOULD NOT HAVE BEEN DISMISSED; SUPREME COURT HAD SUBJECT MATTER JURISDICTION FOR THAT CAUSE OF ACTION.

The Second Department, reversing (modifying Supreme Court, determined the tenant harassment cause of action should not have been dismissed, noting that Supreme Court had subject matter jurisdiction for that cause of action: "... Supreme Court erred in granting that branch of the defendants' motion which was pursuant to CPLR 3211(a)(7) to dismiss the third cause of action, which alleged harassment in violation of Local Law No. 7 (2008) of City of New York (Administrative Code of City of NY § 27-2005[d]). Contrary to the court's determination, the plaintiffs sufficiently pleaded that cause of action. Furthermore, the court was vested with subject matter jurisdiction to make a determination on that cause of action ...". ***Akter v. Zara Realty Holding Corp.*, 2022 N.Y. Slip Op. 01434, Second Dept 3-9-22**

PERSONAL INJURY, MUNICIPAL LAW, VEHICLE AND TRAFFIC LAW.

IN THIS POLICE-CAR TRAFFIC ACCIDENT CASE, THE MUNICIPALITY DID NOT DEMONSTRATE THE POLICE OFFICER'S SPECIFIC CONDUCT WAS EXEMPT FROM THE ORDINARY RULES OF THE ROAD PURSUANT TO VEHICLE AND TRAFFIC LAW § 1104, AND DID NOT DEMONSTRATE THE OFFICER WAS NOT LIABLE UNDER THE ORDINARY RULES OF NEGLIGENCE; THE MUNICIPALITY'S SUMMARY JUDGMENT MOTION SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined the defendant municipality did not demonstrate that the reckless disregard standard applied or that the police officer was not negligent in this police-car traffic accident case: " '[T]he reckless disregard standard of care in Vehicle and Traffic Law § 1104(e) only applies when a driver of an authorized emergency vehicle involved in an emergency operation engages in the specific conduct exempted from the rules of the road by Vehicle and Traffic Law § 1104(b)' ... . Even where there is no dispute that the driver was involved in an emergency operation of an authorized vehicle, where the injury-causing conduct did not fall within any of the categories of privileged conduct set forth in Vehicle and Traffic Law § 1104(b), the plaintiff's claim is governed by principles of ordinary negligence ... . Here, the defendants failed to eliminate triable issues of fact as to whether [officer] Giandurco engaged in specific conduct exempted from the rules of the road by Vehicle and Traffic Law § 1104(b) and whether the reckless disregard standard of care was therefore applicable ... . The defendants also failed to establish, prima facie, that under principles of ordinary negligence, Giandurco was not at fault in the happening of the accident ...". ***Cooney v. Port Chester Police Dept.*, 2022 N.Y. Slip Op. 01440, Second Dept 3-9-22**

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

WHEN THE PROPERTY OWNER DIED INTESTATE, THE DECEDENT'S INTEREST IN THE PROPERTY PASSED OUTSIDE THE ESTATE TO THE DISTRIBUTEES AS TENANTS IN COMMON; THEREFORE, THE PARTITION ACTION BY ONE OF THE TENANTS IN COMMON SHOULD NOT HAVE BEEN DISMISSED ON THE GROUND AN ADMINISTRATOR OF THE ESTATE HAD BEEN APPOINTED.

The Second Department, reversing Supreme Court, determined the partition action by a party holding 50% ownership of real property formerly owned by decedent should not have been dismissed based on the appointment of an administrator for decedent's estate. Decedent died intestate. His interest in the real property passed to the distributees upon his death and is therefore not part of the estate: "[T]he decedent died intestate, possessed of the subject property, and leaving six distributees who became owners of the subject property as tenants in common at the time of the decedent's death. In its complaint, LCD Holdings alleged that it had acquired a 50% interest in the subject property from deeds given by and through certain of those distributees, with the defendants—the decedent's remaining distributees—holding the other 50% interest. Consequently, the subject property is not part of the administrable estate ... . Under such circumstances, LCD Holding, as the alleged holder of a 50% interest in the subject property as a tenant in common with the defendants, had the right to maintain this action for the partition and sale of the subject property in the Supreme Court, Kings County (see RPAPL 901[1] ...). Accordingly, the court erred in, sua sponte, directing dismissal of the action without prejudice to the commencement of a proceeding for the same relief in the in Surrogate's Court ...". ***LCD Holding Corp. v. Powell-Allen*, 2022 N.Y. Slip Op. 01447, Second Dept 3-9-22**

THIRD DEPARTMENT

WORKERS' COMPENSATION, ADMINISTRATIVE LAW.

ALTHOUGH THE EMPLOYER WAIVED ITS OWN INDEPENDENT MEDICAL EXAMINATION, THE EMPLOYER RAISED SPECIFIC, SUBSTANTIVE OBJECTIONS TO CLAIMANT'S ORTHOPEDIST'S PERMANENCY FINDINGS, INCLUDING THE ALLEGATIONS THE ORTHOPEDIST DID NOT COMPLETELY REVIEW THE MEDICAL RECORDS AND DID NOT FOLLOW THE RELEVANT GUIDELINES; THE BOARD'S FAILURE TO ADDRESS THE EMPLOYER'S OBJECTIONS REQUIRED REVERSAL AND REMITTAL.

The Third Department, reversing the Workers' Compensation Board and remitting the matter, determined the board should have addressed the employer's specific objections to the permanency findings of claimant's orthopedist (Capiola), even though the employer did not produce its own independent medical report: "Upon administrative review, the employer renewed its objections that the credibility of the medical opinion was not based on a complete review of claimant's medical records, that claimant had not reached MMI [maximum medical improvement], that the guidelines were not followed in rendering the medical opinion and that there was inconsistency between claimant's medical condition and his physical restrictions. ... In its decision, the Board sets forth in detail the parties' opposing positions and then adopted the findings and decision of the WCLJ [Workers' Compensation Law Judge]. Neither the decision of the Board nor that of the WCLJ sets forth any reasoning or analysis of the substantive issues raised by the employer. Although there was no opposing medical opinion and the Board 'may not reject an uncontradicted opinion that is properly rendered' ... , the issues raised by the em-

ployer in its application for review challenged the propriety and reliability of Capiola's permanency findings. The Board's failure to specifically address the claims raised by the employer 'depriv[ed] the employer . . . of the opportunity to have the Board consider the merits of . . . issue[s] that [were] properly preserved' and precludes any meaningful review by this Court ...". ***Matter of Ippolito v. NYC Tr. Auth.*, 2022 N.Y. Slip Op. 01493, Third Dept 3-10-22**

WORKERS' COMPENSATION, ADMINISTRATIVE LAW.

THE WORKERS' COMPENSATION BOARD HAD PREVIOUSLY HELD THAT, IN A HEARING-LOSS CASE, THE FAILURE TO INCLUDE THE AUDIOGRAM (HEARING TEST) WITH THE INDEPENDENT MEDICAL EXAMINATION RECORD PRECLUDES CONSIDERATION OF THE EXPERT EVIDENCE; THE AUDIOGRAM WAS NOT INCLUDED HERE AND THE BOARD DID NOT EXPLAIN ITS DEPARTURE FROM PRECEDENT (BY CREDITING THE EXPERT EVIDENCE); DETERMINATION REVERSED.

The Third Department, reversing the Workers' Compensation Board in this hearing-loss case, determined the carrier's expert's (Arick's) failure to include the audiogram (hearing test) with the independent medical examination (IME) record required that the expert's evidence be precluded. There was precedent to that effect and the board did not explain its departure from precedent: "Arick could not explain during his testimony, however, why a copy of his audiogram was neither provided with his IME report nor present in the Board's file, and claimant's counsel continued to raise this point during the hearing, on administrative appeal to the Board and now again before this Court. As claimant argues, the Board has previously determined that where an audiogram test providing the basis for a physician's SLU [schedule loss of use] finding does not accompany the IME report and is not submitted to the Board file, that physician's IME report and findings must be precluded ... . The Board failed to address claimant's contention regarding the omission of Arick's audiogram from his IME and the record and, as such, has not provided a rational explanation for departing from its prior decision requiring that an audiogram be submitted to the Board with the IME report (see Workers' Compensation Law § 137 [1] [a]; 12 NYCRR 300.2 [d] [4] [iii], [iv]; [12]). Inasmuch as the Board has not provided a rational basis for departing from its own precedent, its decision must be reversed ...". ***Matter of Cala v. PAL Envtl. Safety Corp.*, 2022 N.Y. Slip Op. 01498, Third Dept 3-10-22**

FOURTH DEPARTMENT

CIVIL PROCEDURE, LABOR LAW-CONSTRUCTION LAW, WORKERS' COMPENSATION, PERSONAL INJURY.

THE WORKERS' COMPENSATION BOARD RULED THE PLAINTIFF DID NOT HAVE "POST-CONCUSSION SYNDROME" OR A "CONCUSSION CONDITION;" PLAINTIFF WAS THEREFORE ESTOPPED FROM CLAIMING THOSE INJURIES IN THIS LABOR LAW ACTION.

The Fourth Department, reversing (modifying) Supreme Court, determined the ruling by the Workers' Compensation Board that plaintiff did not have "post-concussion syndrome" or a "concussion condition" collaterally estopped plaintiff from claiming those injuries in this Labor Law action: "We agree with defendant that the court erred in denying its motion insofar as it effectively sought summary judgment dismissing plaintiff's claims for damages related to PCS or a concussion condition as barred by the doctrine of collateral estoppel, but we conclude that plaintiff's claims for damages related to headaches and the alleged concussion itself are not so barred. The quasi-judicial determinations of administrative agencies, such as the Workers' Compensation Board (Board), 'are entitled to collateral estoppel effect where the issue a party seeks to preclude in a subsequent civil action is identical to a material issue that was necessarily decided by the administrative tribunal and where there was a full and fair opportunity to litigate before that tribunal' ... and a determination whether a plaintiff actually sustained a physical injury causally related to an accident ... , the Board in this case specifically found that plaintiff did not have 'post-concussion syndrome' or a 'concussion condition' that were causally related to the second work accident." ***Szymkowiak v. New York Power Auth.*, 2022 N.Y. Slip Op. 01702, Fourth Dept 3-11-22**

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

PLAINTIFF'S MOTION TO AMEND THE COMPLAINT SHOULD NOT HAVE BEEN GRANTED; THE WAS NO ALLEGATION THE PARTY TO BE ADDED AS A DEFENDANT HAD ANY INTEREST IN THE PROPERTY IN DISPUTE; AND THE CIVIL CONSPIRACY CAUSE OF ACTION PLAINTIFF SOUGHT TO ADD IS NOT RECOGNIZED IN NEW YORK; THEREFORE THE PROPOSED AMENDMENTS WERE PATENTLY DEVOID OF MERIT.

The Fourth Department, reversing (modifying) Supreme Court, determined the motion to amend the complaint to add a defendant (Fu) and a cause of action for civil conspiracy should not have been granted. Plaintiff did not allege that Fu had any interest in the property in dispute. And New York does not recognize civil conspiracy as a tort: " 'It is well settled that leave to amend a pleading shall be freely given, provided the amendment is not palpably insufficient, does not prejudice or surprise the opposing party, and is not patently devoid of merit . . . , and the decision to permit an amendment is within the sound discretion of the court' ... . Initially, plaintiff clarified in the amended complaint that the first cause of action, which is

asserted against all defendants and seeks to set aside the deed and mortgage, was brought under RPAPL article 15. Pursuant to RPAPL article 15, an action may be maintained against any 'person [who] . . . may have an . . . interest in the real property which may in any manner be affected by the judgment' (RPAPL 1511 [2]). Here, plaintiff failed to allege in the amended complaint any interest that Fu may have in the property and, thus, she is not a proper party to that cause of action ... . Furthermore, New York does not recognize civil conspiracy to commit a tort, such as fraud or conversion, as an independent cause of action ... . Therefore, the proposed amendments with respect to Fu are patently devoid of merit." ***Landco H & L, Inc. v. 377 Main Realty, Inc.*, 2022 N.Y. Slip Op. 01695, Fourth Dept 3-11-22**

CRIMINAL LAW.

RESTITUTION IN EXCESS OF THE STATUTORY CAP FOR LOST WAGES WAS IMPROPERLY AWARDED BECAUSE "LOST WAGES" DOES NOT FIT ANY OF THE EXCEPTIONS TO THE CAP RESTRICTION.

The Fourth Department, modifying County Court, determined the restitution amount which exceeded the statutory cap did not fit into any of the statutory exceptions to the cap restriction. The victim was improperly awarded an amount for lost wages: "[T]he court erred in imposing restitution and reparation in excess of the statutory cap for the second victim's past lost earnings because, under the plain meaning of the statute, that form of loss does not fall within the exception to the statutory cap pursuant to Penal Law § 60.27 (5) (b) ... . In particular, contrary to the court's determination, inasmuch as past lost earnings are wages, salary, or other income that the second victim could have, but did not, earn (see Black's Law Dictionary [11th ed 2019], lost earnings), the excess amount ordered as restitution and reparation for that loss does not constitute reimbursement for 'the return of the [second] victim's property' or equivalent thereof (§ 60.27 [5] [b] ...)." ***People v. Witherow*, 2022 N.Y. Slip Op. 01691, Fourth Dept 3-11-22**

CRIMINAL LAW, EVIDENCE.

PURSUANT TO A US SUPREME COURT DECISION WHICH CAME DOWN AFTER DEFENDANT'S CONVICTION, DEFENDANT HAS STANDING TO CHALLENGE THE CELL SITE LOCATION INFORMATION (CSLI) WARRANT, MATTER REMITTED.

The Fourth Department, reserving decision and remitting the matter, determined that, based upon a US Supreme Court decision which came down after defendant's conviction, defendant has standing to challenge the cell site location information (CSLI) warrant: "We agree with defendant ... that he has standing to challenge the CSLI search warrant. At the time of the court's decision, controlling caselaw in this Department held that the acquisition of CSLI was not a search under the State or Federal Constitution because a defendant's use of a phone 'constituted a voluntary disclosure of his [or her] general location to [the] service provider, and a person does not have a reasonable expectation of privacy in information voluntarily disclosed to third parties' ... . Following defendant's conviction, the United States Supreme Court decided Carpenter v United States, 138 S Ct 2206, 2217 [2018]), which held that 'an individual maintains a legitimate expectation of privacy in the record of his [or her] physical movements as captured through CSLI' ... . As a result of the Carpenter decision, defendant is entitled to a determination on the merits regarding his challenges to the CSLI search warrant." ***People v. Ozkaynak*, 2022 N.Y. Slip Op. 01700, Fourth Dept 3-11-22**

CRIMINAL LAW, EVIDENCE.

THE PEOPLE DID NOT DEMONSTRATE THE ANONYMOUS TIP PROVIDED PROBABLE CAUSE TO BELIEVE DEFENDANT WAS IN THE VEHICLE PURSUED AND STOPPED BY THE POLICE.

The Fourth Department, reversing Supreme Court, determined the Peopled failed to demonstrate the arresting officers had probable cause to pursue and stop the vehicle form which defendant attempted to flee. The officers were observing the vehicle because of an anonymous tip: "The United States Supreme Court has 'recognized . . . [that] there are situations in which an anonymous tip, sufficiently corroborated, exhibits 'sufficient indicia of reliability to provide reasonable suspicion to make [an] investigatory stop' ... . However, '[s]ince an anonymous tip 'seldom demonstrates the informant's basis of knowledge or veracity,' it can only give rise to reasonable suspicion if accompanied by sufficient indicia of reliability' ... . The anonymous tip must be reliable, not only 'in its assertion of illegality,' but also 'in its tendency to identify a determinate person' ... . The evidence at the suppression hearing established that police officers were dispatched based on an anonymous tip that defendant was in a specific vehicle at a specific location. However, when police responded to the area, neither defendant nor the vehicle was present. Over 3½ hours later, officers observed the vehicle and two individuals inside. The only officer to testify at the suppression hearing admitted that he could not determine whether the occupants of the vehicle were male or female, let alone whether one of them was defendant. Further, the vehicle was not registered to defendant. Nevertheless, the officers activated their emergency lights and attempted to stop the vehicle." ***People v. Ponce*, 2022 N.Y. Slip Op. 01706, Fourth Dept 3-11-22**

CRIMINAL LAW, EVIDENCE.

AT THE FRYE HEARING, THE PEOPLE DEMONSTRATED THE ADMISSIBILITY OF THE RESULTS OF DNA ANALYSIS USING THE STRMIX DNA ANALYSIS PROGRAM.

The Fourth Department, affirming defendant's conviction, determined the Frye hearing sufficiently demonstrated the admissibility of the results of DNA analysis using the STRmix DNA analysis program (STRmix program): "[T]he People introduced evidence that biological samples were recovered from several locations at the scene of the incident and that those samples were analyzed using the STRmix program, which indicated that defendant's DNA was contained in those samples. Before trial, the People provided defendant with notice of the results of the tests and the program used to conduct them and, at defendant's request, the court ordered a Frye hearing concerning that program .... The People introduced evidence at the hearing that the STRmix program had been the subject of numerous peer-reviewed journal articles and had been evaluated and approved by the National Institute of Standards and Technology and by the Erie County Central Police Services Forensic Laboratory before it began using the STRmix program. In addition, the People established that the STRmix program was being used by numerous forensic testing agencies and laboratories in New York, California, the United States Army, Australia, and New Zealand, and that it had been approved by the DNA Subcommittee of the New York State Forensic Science Committee." ***People v. Bullard-Daniel*, 2022 N.Y. Slip Op. 01707, Fourth Dept 3-11-22**

CRIMINAL LAW, EVIDENCE, JUDGES.

A DETECTIVE WAS PROPERLY ALLOWED TO IDENTIFY DEFENDANT IN A SURVEILLANCE VIDEO; TESTIMONY ABOUT THE "BLINDED" PHOTO ARRAY IDENTIFICATION PROCEDURE WAS PROPERLY ALLOWED; THE DEFENSE CROSS-EXAMINATION ABOUT A WITNESS'S CRIMINAL HISTORY SHOULD NOT HAVE BEEN CURTAILED; ANY ERRORS DEEMED HARMLESS.

The Fourth Department, finding any evidentiary errors harmless, determined: (1) a detective was properly allowed to identify the defendant in a surveillance video because the People demonstrated the detective had prior contacts with the defendant; (2) testimony about the "blinded" photo identification procedure was properly allowed; and (3) the defense cross-examination about a witness's criminal history should not have been curtailed by the judge: "We conclude that the court did not abuse its discretion in permitting the challenged testimony because the People presented evidence establishing that the police detective was familiar with defendant based on several prior contacts with defendant over the course of several years. Thus, there 'was some basis for concluding that the [police detective] was more likely to identify defendant correctly than was the jury' ... . Testimony about a photo array procedure, and the array itself, may be admitted where, inter alia, the procedure is 'blinded,' that is, where the person administering the array procedure does not know the suspect's position in the array (CPL 60.25 [1] [c] [ii]; see CPL 60.30). Here, although the array viewed by the witness was created by the police detective who administered the procedure, the specific procedure conducted was nevertheless blind because the police detective placed three different arrays in envelopes, which he shuffled before having the witness pick one. This procedure is sufficient, in our view, to ensure that, at the time the witness was viewing the array, the police detective did not know the position of defendant in that array ... . '[C]urtailment [of cross-examination] will be judged improper when it keeps from the jury relevant and important facts bearing on the trustworthiness of crucial testimony' ... . [W]e conclude that the court erred in limiting defense counsel's cross-examination regarding the underlying facts of a witness's prior drug conviction that occurred two months before the shooting at issue here, inasmuch as those facts bore on the witness's credibility and were not remote or cumulative ...". ***People v. Griffin*, 2022 N.Y. Slip Op. 01698, Fourth Dept 3-11-22**

CRIMINAL LAW, EVIDENCE, JUDGES.

THE CROSS-EXAMINATION OF A DETECTIVE ABOUT STATEMENTS ATTRIBUTED TO THE VICTIM IN THIS SEXUAL-OFFENSE PROSECUTION SHOULD NOT HAVE BEEN CURTAILED BY THE JUDGE; THE ERROR WAS NOT HARMLESS WITH RESPECT TO SEVERAL COUNTS, BUT WAS DEEMED HARMLESS WITH RESPECT TO OTHER COUNTS.

The Fourth Department, reversing defendant's conviction on several counts, determined the judge's curtailing of the cross-examination of a detective concerning statements attributed to the victim in this sexual-offense prosecution was not harmless error as to those (reversed) counts: " 'Once a proper foundation is laid, a party may show that an adversary's witness has, on another occasion, made oral or written statements which are inconsistent with some material part of the trial testimony, for the purpose of impeaching the credibility and thereby discrediting the testimony of the witness' ... . 'To lay the foundation for contradiction, it is necessary to ask the witness specifically whether he [or she] has made such statements; and the usual and most accurate mode of examining the contradicting witness, is to ask the precise question put to the principal witness' ... . Here, defendant laid a proper foundation by eliciting testimony from the victim that was inconsistent with the detective's written report purporting to record the victim's statement, and the court therefore should have permitted cross-examination of the detective regarding that inconsistency ... . The testimony of the victim was the only direct

evidence supporting count one of the indictment, charging criminal sexual act in the third degree, counts three and four of the indictment, charging sexual abuse in the third degree, and counts six and eight of the indictment, charging endangering the welfare of a child. We conclude that the admissible evidence of guilt with respect to those counts is not overwhelming, and that there is a reasonable possibility that the error in curtailing defense counsel's cross-examination of the detective may have contributed to defendant's conviction." ***People v. Kilgore*, 2022 N.Y. Slip Op. 01709, Fourth Dept 3-11-22**

CRIMINAL LAW, EVIDENCE, JUDGES, CONSTITUTIONAL LAW.

THE JUDGE SHOULD NOT HAVE RELIED ON EVIDENCE GIVEN AT A MATERIAL WITNESS HEARING, FROM WHICH DEFENDANT WAS PROPERLY EXCLUDED, AT A SUBSEQUENT SIROIS HEARING AT WHICH THE WITNESS DID NOT TESTIFY.

The Fourth Department, reversing defendant's conviction, determined the judge should not have relied upon evidence given at a material witness hearing, from which the defendant was properly excluded, at a subsequent Sirois hearing at which the material witness did not testify: "At [the material witness] hearing, the witness ... testified that she had been threatened by defendant, the codefendant, and others in an attempt to prevent her from testifying at trial. Although the court granted the People's application for a material witness order and set bail to ensure the witness's availability, the next day the People requested a Sirois hearing and sought a determination that the witness had been made constructively unavailable to testify at trial by threats attributable to defendant ... . A defendant generally has no constitutional right to be present at a material witness hearing ... ; however, a '[d]efendant's absence from [a Sirois] hearing[] could have a substantial effect on his [or her] ability to defend' ... . Here, although there is no dispute that the initial material witness hearing was not intended to address any Sirois or other evidentiary issues ... , the court erred in relying on the unchallenged testimony taken therein in making its Sirois determination ... . Indeed, the court effectively, and erroneously, incorporated the material witness hearing into the subsequent Sirois hearing by expressly relying on that testimony and on its own observations of the witness's demeanor in making its determination." ***People v. Phillips*, 2022 N.Y. Slip Op. 01710, Fourth Dept 3-11-22**

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA), JUDGES.

THE JUDGE SHOULD NOT HAVE, SUA SPONTE, WITHOUT NOTICE TO THE DEFENDANT, ASSESSED 12 POINTS FOR FAILURE TO ACCEPT RESPONSIBILITY; DEFENDANT ACCEPTED RESPONSIBILITY BY PLEADING GUILTY.

The Fourth Department, reversing County Court, determined the judge should not have, sua sponte, without prior notice to the defendant, assessed 12 points for failure to accept responsibility in this SORA risk level proceeding. The Fourth Department noted defendant pled guilty to statutory rape. Although defendant stated he thought the 16-year-old victim was 18, the guilty plea was an adequate acceptance of responsibility: "[I]t is well established that '[a] defendant has both a statutory and constitutional right to notice of points sought to be assigned to him or her so as to be afforded a meaningful opportunity to respond to that assessment' ... . As a result, 'a court's sua sponte departure from the Board's recommendation at the hearing, without prior notice, deprives the defendant of a meaningful opportunity to respond' ... . [T]he court erred in assessing him 10 points under risk factor 12, for failure to accept responsibility, given that he pleaded guilty and admitted his guilt ... . [D]efendant was not afforded a meaningful opportunity to argue against the override [recommended by the board] or in favor of a downward departure ... " ***People v. Ritchie*, 2022 N.Y. Slip Op. 01635, Fourth Dept 3-11-22**

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

DEFENDANT NEVER PHYSICALLY POSSESSED THE NOTE UNDERLYING THE MORTGAGE AND WAS NEVER ASSIGNED THE NOTE; THEREFORE DEFENDANT DOES NOT HAVE STANDING TO FORECLOSE ON THE MORTGAGE; AN ATTORNEY'S FAILURE TO APPEAR AT A FULLY BRIEFED MOTION ARGUMENT IS NOT A DEFAULT.

The Fourth Department, reversing Supreme Court, determined defendant does not own the note underlying the mortgage and therefore has no right to foreclose. The Fourth Department noted that an attorney's failure to appear at a full briefed motion argument does not constitute a default: "[D]efendant lacks noteholder standing because the promissory note upon which defendant relies is neither endorsed in blank nor specially endorsed to defendant ... . [E]ven had the note been endorsed in blank or specially endorsed to defendant, defendant's admitted failure to physically possess the original note would independently preclude it from foreclosing as a noteholder ... . Nor does defendant have assignee standing. The affidavits submitted on defendant's behalf do not aver that the subject note was ever assigned to defendant ... . [A]n action to quiet title pursuant to RPAPL article 15 is a proper procedural vehicle for determining defendant's standing to foreclose (see RPAPL 1501 [1], [5] ...)." ***Hummel v. Cilici, LLC*, 2022 N.Y. Slip Op. 01690, Fourth Dept 3-11-22**

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