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FIRST DEPARTMENT

CIVIL PROCEDURE, APPEALS, JUDGES. LIMITED LIABILITY COMPANY LAW.

SUPREME COURT DID NOT HAVE THE DISCRETION TO GRANT PLAINTIFF LEAVE TO AMEND A COMPLAINT AFTER THE COMPLAINT HAD BEEN DISMISSED FOR LACK OF STANDING BY THE APPELLATE DIVISION.

The First Department, in a full-fledged opinion by Justice Renwick, reversing Supreme Court, over a two-justice dissent, determined Supreme Court did not have the discretion to grant leave to amend a complaint which had been dismissed by the First Department for lack of standing. After the appeal, plaintiff had cured the standing defect and Supreme Court allowed the amendment after the time-period to commence a new action (CPLR 205(a)) had expired: "This appeal raises the interesting question of whether a trial court has the discretion to grant a plaintiff leave to amend a complaint, pursuant to CPLR 3025 (b) ... , after the Appellate Division has already ordered the complaint dismissed, with direction to enter judgment. We dismissed the complaint because plaintiffs, as non-managing members of a manager-managed Delaware limited liability company, lacked capacity ... or standing to act on behalf of the Company when they obtained a Certificate of Revival of the Company before filing a second amended complaint. After plaintiffs purportedly remedied this deficiency of proper standing, they sought to revive the dismissed action by seeking leave to file a third amended complaint. As aforementioned, after we had already ordered the complaint dismissed, the motion court granted plaintiffs leave to file the third amended complaint. At the time plaintiffs sought leave to amend, the time to commence a new action had expired, including the six-month grace period provided by CPLR 205(a). ... Under these circumstances, we find that the trial court lacked discretion to grant plaintiffs leave to amend a complaint that had already been dismissed by this Court. * * * Given this Court's outright dismissal of the claims based on a finding of lack of standing, there was no action pending when plaintiffs moved for leave to file the third amended complaint. Thus, the trial court lacked any discretion or authority to grant plaintiffs such leave, where we had properly dismissed the second amended complaint before plaintiffs filed the motion to amend ... ". ***Favourite Ltd. v. Cico*, 2022 N.Y. Slip Op. 03987, First Dept 6-21-22**

CIVIL PROCEDURE, ATTORNEYS.

PLAINTIFF'S ATTORNEY WAS NOT AWARE OF COVID-RELATED PROCEDURAL CHANGES FOR CONDUCTING COMPLIANCE CONFERENCES; PLAINTIFF'S MOTION TO VACATE DISMISSAL OF THE ACTION SHOULD HAVE BEEN GRANTED.

The First Department, reversing Supreme Court, determined the COVID-related law office failure was an adequate excuse and plaintiff's motion to vacate the dismissal of the action should have been granted: "Supreme Court improvidently exercised its discretion in denying plaintiffs' motion to vacate the dismissal, as plaintiffs showed both a reasonable excuse for their default and a meritorious cause of action (see CPLR 2005 ...). Under the circumstances, law office failure constitutes a reasonable excuse for the default, since plaintiffs' counsel was unaware that procedures for conducting compliance conferences had changed during the COVID-19 pandemic and, as a result, inadvertently failed to submit stipulations before a scheduled conference ... . Furthermore, plaintiffs demonstrated a meritorious cause of action by submitting the complaint, a bill of particulars, and the injured plaintiff's deposition testimony ... . Defendants also were not prejudiced by plaintiffs' failure to appear, and indeed, did not oppose the motion to vacate ...". ***Willner v. S Norsel Realties LLC*, 2022 N.Y. Slip Op. 04111, First Dept 6-23-22**

CIVIL PROCEDURE, PERSONAL INJURY.

DEFENDANT'S MOTION TO COMPEL PLAINTIFF TO APPEAR FOR A PSYCHIATRIC EXAMINATION (INDEPENDENT MEDICAL EXAMINATION [IME]) SHOULD HAVE BEEN GRANTED BECAUSE PLAINTIFF HAD PLACED HER MENTAL CONDITION IN CONTROVERSY; DEFENDANT'S MOTION TO VACATE THE NOTE OF ISSUE SHOULD HAVE BEEN GRANTED BECAUSE DISCOVERY WAS NOT COMPLETE.

The First Department, reversing (modifying) Supreme Court, determined defendant's motions to compel plaintiff to appear for an independent medical examination (IME) and to vacate the note of issue should have been granted: "We find that plaintiff's mental condition is, in fact, in controversy. Plaintiff requests compensatory damages only for her alleged emotional distress, and she has testified that she experienced depression, anxiety, and dizziness, as well as headaches brought on by severe mental anguish (CPLR 3121[a]). As a result, a mental examination by a psychiatrist is warranted to enable defendants to rebut plaintiff's causes of action for emotional distress ... . [W]e grant defendants' motion to vacate the note of issue. Contrary to the certificate of readiness, discovery had not been completed, as plaintiff had not yet complied

with the court's directive to submit a Jackson affidavit detailing the process she had undertaken to search her social media post ...". ***Lopez v. Bendell*, 2022 N.Y. Slip Op. 03990, First Dept 6-21-22**

CONTRACT LAW,

HERE THE DEFENDANTS RAISED PLAINTIFF'S SIGNING A RELEASE AS AN AFFIRMATIVE DEFENSE; THE COMPLAINT ALONG WITH PLAINTIFF'S AFFIRMATION ADEQUATELY ALLEGED THE RELEASE WAS THE PRODUCT OF OVERREACHING OR UNFAIR CIRCUMSTANCES AND THEREFORE WAS NOT A BAR TO CERTAIN CAUSES OF ACTION.

The First Department, reversing (modifying) Supreme Court, determined plaintiff adequately alleged a release (raised by defendants as an affirmative defense) was the product of overreaching and therefore did not bar certain causes of action: "[T]he amended complaint, along with the affirmation plaintiff submitted in opposition to defendants' motion, sufficiently alleges that the release was the result of overreaching or unfair circumstances. A court must accept as true the facts as alleged in the complaint and submissions in opposition to the motion, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory ... . Under the alleged facts, the affirmative defense of the release does not entirely bar plaintiff's action at this stage of the litigation. '[I]t is inequitable to allow a release to bar a claim where. . .it is alleged. . .that it was the result of overreaching or unfair circumstances' ...". ***Chadha v. Wahedna*, 2022 N.Y. Slip Op. 04089, First Dept 6-23-22**

CORPORATION LAW, COOPERATIVES, FIDUCIARY DUTY, CONTRACT LAW, LANDLORD-TENANT.

A LEASE BETWEEN PLAINTIFF CORPORATION AND DEFENDANTS (ONE OF WHOM WAS A MEMBER OF PLAINTIFF'S BOARD) WAS NOT VOTED ON BY A MAJORITY OF DISINTERESTED DIRECTORS AND WAS THEREFORE VOIDABLE UNDER BUSINESS CORPORATION LAW 713(B); DEFENDANTS BREACHED THEIR FIDUCIARY DUTY TO THE CORPORATION BY SUBLETTING THE LEASED PREMISES FOR A MUCH HIGHER RENT WITHOUT PLAINTIFF'S KNOWLEDGE.

The First Department, reversing Supreme Court, determined plaintiff cooperative apartment corporation (HDFC) demonstrated defendants (one of whom was a member of plaintiff's board) had entered a lease with plaintiff which was not voted upon by a majority of disinterested directors and was therefore voidable under Business Corporation Law § 713(b). In addition, plaintiff demonstrated defendants had breached their fiduciary duty to the corporation: "Plaintiff, a low-income cooperative apartment corporation (HDFC), established prima facie that the lease between plaintiff and defendants Thomas Green and A Cup of Harlem was not voted on by a majority of disinterested directors and is therefore voidable under Business Corporation Law § 713(b). A Cup of Harlem is a partnership between Thomas Green and Siwana Green, who are married. Siwana Green is a shareholder in the HDFC and a former officer and member of plaintiff's board of directors. By lease dated April 1, 2004, while Siwana Green was one of three members of the board, plaintiff leased one of the two commercial spaces in the building to Thomas Green and A Cup of Harlem for a 99-year term, with a monthly rent of $700 for the entirety of the term and an option to extend the lease for a 10-year term at a rate of $800 per month. In support of its motion, plaintiff submitted a former board member's affidavit that he was elected to a one-year term in February 2004, that he only learned of the lease in 2018, when Siwana Green was removed from the board, and that he never would have approved a lease with such 'outlandish' terms. ... The record demonstrates that Siwana Green breached her fiduciary duty to plaintiff by diverting a corporate opportunity without plaintiff's knowledge or consent and admittedly receiving more than $200,000 profit from the sublessee to whom, in March 11, 2009, Thomas Green sublet the leased premises at a monthly rent of $2,500 for a ten-year term, which was then renewed for a monthly rent of $2,800." ***67-69 St. Nicholas Ave. Hous. Dev. Fund Corp. v. Green*, 2022 N.Y. Slip Op. 04087, First Dept 6-23-22**

MEDICAL MALPRACTICE, PERSONAL INJURY.

IN NEW YORK THERE ARE NO CAUSES OF ACTION FOR "PRECONCEPTION NEGLIGENCE" OR "WRONGFUL LIFE;" HERE MOTHER ALLEGED THE DRUG SHE HAD BEEN TAKING FOR EPILEPSY BEFORE SHE LEARNED SHE WAS PREGNANT CAUSED THE BABY TO BE BORN WITH SPINA BIFIDA.

The First Department, reversing Supreme Court, determined plaintiffs' actions for "preconception negligence" and "wrongful life" should have been dismissed. Plaintiff mother had been treated for epilepsy for years with a drug (VPA). She became pregnant while taking the drug and stopped taking it as soon as she learned she was pregnant. The baby was born with spina bifida: "Defendants treated the infant plaintiff's mother for epilepsy. To control her seizures, they prescribed valproic acid (VPA), which the mother had been taking for years while under the care of other physicians. Unbeknownst to all, while she was on VPA, the mother conceived the infant plaintiff. Although the VPA was discontinued when the mother learned that she was pregnant, the infant was born with spina bifida, for which she seeks to hold defendants responsible. It is well established that an infant has no cause of action for preconception negligence ... . The infant's claims that defendants failed to ensure that her mother was on birth control and monitored regularly for pregnancy while on VPA sound in 'wrongful life,' for which there is also no cause of action ...". ***Z.L. v. Mount Sinai Hosp.*, 2022 N.Y. Slip Op. 04112, First Dept 6-23-22**

NEGLIGENCE, MUNICIPAL LAW, VEHICLE AND TRAFFIC LAW.

PLAINTIFFS RAISED QUESTIONS OF FACT (1) WHETHER THE POLICE ACTED IN RECKLESS DISREGARD OF THE SAFETY OF OTHERS DURING A HIGH-SPEED CHASE AND IN FAILING TO NOTIFY THE DISPATCHER OF THE CHASE, AND (2) WHETHER THE CHASE WAS A PROXIMATE OR CONCURRENT CAUSE OF PLAINTIFFS' ACCIDENT (THERE WAS NO CONTACT WITH EITHER VEHICLE INVOLVED IN THE CHASE).

The First Department, reversing (modifying) Supreme Court, in a full-fledged opinion by Justice Kapnick, determined plaintiffs raised questions of fact about whether the police acted in reckless disregard of the safety of others during a high-speed chase, and whether the chase of the BMW driven by Llewellyn was a proximate or concurrent cause of the accident (neither vehicle involved in the chase struck plaintiffs' vehicle): "[T]he motion court properly held that the reckless disregard standard applied in evaluating the City defendants' conduct in pursuing Llewellyn (see Vehicle and Traffic Law §§ 1104[b], 1104[e]). However, the motion court erred in determining that 'there is no evidence that the NYPD officers acted recklessly as a matter of law, and that the pursuit was not the proximate cause or a concurrent cause of this incident' ... . Plaintiffs ... submitted evidence that the City defendants initiated a high-speed chase of Llewellyn's BMW at close proximity after observing it run a single red light, and continued the high-speed chase, which included crossing over a double yellow line and running two red lights, in a known congested and heavily populated residential area which at the time of the pursuit had moderate to heavy traffic and numerous pedestrians.... . ... Plaintiffs also raised an issue of fact concerning whether the NYPD officers acted recklessly in failing to notify the radio dispatcher at the start of the pursuit and inform headquarters with relevant information, including the nature of the offense." ***Handelsman v. Llewellyn*, 2022 N.Y. Slip Op. 04093, First Dept 6-23-22**

SECOND DEPARTMENT

CONTRACT LAW, MENTAL HYGIENE LAW, TRUSTS AND ESTATES. MEDICAID, CIVIL PROCEDURE.

IN ACCORDANCE WITH THE NURSING HOME REFORM ACT (NHRA), THE ADMISSION AGREEMENT SIGNED BY THE NURSING-HOME RESIDENT'S GRANDDAUGHTER DID NOT IMPOSE PERSONAL LIABILITY UPON THE GRANDDAUGHTER FOR PAYMENT OF THE COSTS OF THE RESIDENT'S CARE; THE GRANDDAUGHTER'S MOTION TO VACATE THE DEFAULT JUDGMENT SHOULD HAVE BEEN GRANTED AND THE BREACH-OF-CONTRACT COMPLAINT SHOULD HAVE BEEN DISMISSED.

The Second Department, reversing Supreme Court, determined the admission agreement signed by the nursing-home resident's granddaughter (who was appointed guardian of her grandfather's property) did not impose personal liability upon the granddaughter for payment of the cost of her resident's care (provided by the plaintiff facility). Therefore, plaintiff should not have seized the granddaughter's personal funds. The default judgment in favor of plaintiff should have been vacated, and the breach-of-contract complaint should have been dismissed: "[T]he admission agreement in this case is subject to the Nursing Home Reform Act (hereinafter the NHRA). As relevant here, the NHRA provides that '[w]ith respect to admissions practices, a nursing facility must . . . not require a third party guarantee of payment to the facility as a condition of admission (or expedited admission) to, or continued stay in, the facility' ... . However, that prohibition 'shall not be construed as preventing a facility from requiring an individual, who has legal access to a resident's income or resources available to pay for care in the facility, to sign a contract (without incurring personal financial liability) to provide payment from the resident's income or resources for such care' ... . The admissions agreement set forth the relevant contractual obligations of the granddaughter, and the admissions agreement demonstrates as a matter of law that it did not render the granddaughter a 'third party guarantee of payment' ... .'The admission[s] agreement merely required the [granddaughter] to facilitate payment from the . . . resident's available income and resources, and only to the extent that the [granddaughter] had access to such income and resources and only if [the granddaughter] could do so without incurring any personal financial liability' ... . [t]he plaintiff failed to adequately allege a breach of the granddaughter's contractual obligation to facilitate payment to the plaintiff from the resident's 'income or resources' ...". ***Nassau Operating Co., LLC v. DeSimone*, 2022 N.Y. Slip Op. 04029, Second Dept 6-22-22**

EMPLOYMENT LAW, CONTRACT LAW, CIVIL PROCEDURE.

THERE ARE SUBSTANTIVE QUESTIONS OF FACT ABOUT THE NATURE OF THE AGREEMENTS BETWEEN PLAINTIFF EMPLOYER AND DEFENDANT EMPLOYEE RE: THE SALE OF DEFENDANT'S TAX PREPARATION BUSINESS TO PLAINTIFF AND WHETHER DEFENDANT SOLD HER CLIENT LIST TO PLAINTIFF; PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION ENFORCING THE RESTRICTIVE COVENANT SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined plaintiff-employer's motion for a preliminary injunction in this violation-of-a-restrictive-covenant case should not have been granted. There were too many issues of fact about the nature of the parties' agreement re: plaintiff's purchase of defendant's tax preparation business, including whether defendant turned over her client list to the plaintiff: "[T]he plaintiff commenced this action against the defendant, its former employee, to recover damages for breach of contract. The plaintiff alleged ... the parties entered into three agreements: a purchase agreement whereby the plaintiff purchased the defendant's tax preparation business, including her client list; an agreement whereby the plaintiff employed the defendant as a tax preparer; and a confidentiality, nonsolicit, and noncompete agreement which, inter alia, contained restrictive covenants that, among other things, prohibited the defendant from soliciting the plaintiff's clients. ... [T]he plaintiff failed to demonstrate a clear right to relief and, thus, did not demonstrate a likelihood of success on the merits. "[A] restrictive covenant will only be subject to specific enforcement to the extent that it is reasonable in time and area, necessary to protect the employer's legitimate interests, not harmful to the general public and not unreasonably burdensome to the employee' ... .

An employer's interests justifying a restrictive covenant are limited 'to the protection against misappropriation of the employer's trade secrets or of confidential customer lists, or protection from competition by a former employee whose services are unique or extraordinary' ... . Here, there are issues of fact as to what the parties agreed to, including whether the plaintiff purchased the rights to the defendant's clients pursuant to the parties' agreements and whether the plaintiff breached its own obligations pursuant to those agreements. Since these issues of fact exist, the plaintiff did not show a likelihood of success on the merits and, thus, failed to establish a clear right to preliminary injunctive relief ...". ***R&G Brenner Income Tax Consultants v. Fonts*, 2022 N.Y. Slip Op. 04039, Second Dept 6-22-22**

FAMILY LAW, APPEALS, JUDGES, EVIDENCE.

FAMILY COURT HELD A HEARING IN THE MODIFICATION OF CUSTODY PROCEEDING BUT DID NOT STATE IN ITS DECISION THE FACTS RELIED UPON TO DENY THE PETITION; THE APPELLATE DIVISION REVIEWED THE EVIDENCE, REVERSED FAMILY COURT, AND GRANTED MOTHER'S PETITION.

The Second Department, reversing Family Court, determined mother's petition to modify custody should have been granted. Family Court held a hearing but did not, in its decision, state the facts relied upon to deny the petition. Because the record was sufficient, the Second Department exercised its authority to review the evidence and make its own determination: "[T]o facilitate effective appellate review, the hearing court 'must state in its decision 'the facts it deems essential' to its determination' ... . [W]hile the Family Court stated in its decision that the allegations in the mother's petition 'largely stem from the difficulties that the parties have in co-parenting which predate her petition,' and that 'both parties contribute to continuing the conflict between one another,' the court did not identify the facts adduced at the hearing that supported its denial of the mother's petition. ... . The evidence at the hearing showed that, on numerous occasions after the issuance of the 2018 custody order, the father, in the child's presence, denigrated the mother and behaved inappropriately toward her ... . The father consistently failed to make the child available for telephone and video calls with the mother as required by the original custody order, routinely ignored the mother's attempted communications with the child, and repeatedly failed to adhere to the court-ordered parental access schedule ... . The hearing testimony established that the father not only refused to foster a good relationship between the mother and the child—he expressly testified that he did not believe he had an obligation to do so—but actively sought to thwart such a relationship. 'Parental alienation of a child from the other parent is an act so inconsistent with the best interests of the child[ ] as to, per se, raise a strong probability that the offending party is unfit to act as custodial parent' ... ... [T]he father demonstrated a lack of interest in the child's education and development by, among other things, refusing to have the child evaluated for learning disabilities or treated for his speech impediment ... . [T]he father failed to respond to the mother's inquiries about the child's health, education, and safety". ***Matter of Smith v. Francis*, 2022 N.Y. Slip Op. 04026, Second Dept 6-22-22**

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

IN THIS FORECLOSURE ACTION, A PARTY WHO DID NOT SIGN THE NOTE BUT DID SIGN THE MORTGAGE IS A "BORROWER" ENTITLED TO RPAPL 1304 NOTICE; PLAINTIFF BANK'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined that a borrower, Ellen Weininger, who signed the mortgage but not the note, was entitled to notice of foreclosure pursuant to RPAPL 1304: "[I]t is undisputed that the plaintiff failed to serve Ellen Weininger with timely notice pursuant to RPAPL 1304, and, contrary to the plaintiff's contention, Ellen Weininger was entitled to such notice as a 'borrower' within the meaning of that statute. Although Ellen Weininger did not sign the underlying note, both of the defendants executed the mortgage as a 'borrower.' Where, as here, a homeowner defendant is referred to as a 'borrower' in the mortgage instrument and, in that capacity, agrees to pay amounts due under the note, that defendant is a 'borrower' for the purposes of RPAPL 1304, notwithstanding the absence of a consolidation, extension, and modification agreement signed by that defendant or any ambiguity created by a provision in the mortgage instrument to the effect that parties who did not sign the underlying note are not personally obligated to pay the sums secured ... . Since Ellen Weininger signed the mortgage as a 'borrower' and, in that capacity, agreed to pay the amounts due under the note, she was entitled to timely notice pursuant to RPAPL 1304 ... As the plaintiff conceded that it did not send the requisite notice pursuant to RPAPL 1304 to Ellen Weininger until 17 days before commencement of this action, it failed to meet its prima facie burden of establishing compliance with RPAPL 1304, and those branches of the plaintiff's motion which were for summary judgment on the complaint insofar as asserted against the defendants, to strike their answer, and for an order of reference should have been denied." ***Deutsche Bank Natl. Trust Co. v. Weininger*, 2022 N.Y. Slip Op. 04008, Second Dept 6-22-22**

INSURANCE LAW, CONTRACT LAW, ARBITRATION, ATTORNEYS.

IN THIS VEHICLE ACCIDENT CASE, PLAINTIFF ENTERED AN ARBITRATION AGREEMENT WHICH INDICATED THE AWARD WOULD BE BETWEEN $0 AND $50,000, BUT THE POLICY LIMITS WERE $100,000/300,000; THE UNILATERAL MISTAKE BY PLAINTIFF'S ATTORNEY RE: THE POLICY LIMITS WAS NOT INDUCED BY DEFENDANT OR DEFENDANT'S CARRIER, THEREFORE RESCISSION OF THE AGREEMENT WAS NOT AN AVAILABLE REMEDY.

The Second Department, reversing Supreme Court, determined defendant's motion to compel arbitration in this vehicle-accident case should have been granted. Plaintiff wanted the agreement to arbitrate rescinded because it did not reflect the actual policy limits. But the unilateral mistake by plaintiff's attorney was not induced by the defendant because defendant's insurance carrier had twice notified plaintiff's attorney of the policy limits. The agreement to arbitrate set the award at between $0 and $50,000, but the policy limits were $100,000/300,000: "

'Generally, a party's unilateral mistake is a ground for rescission of a contract only where it was induced by fraud or other wrongful conduct by the other party' ... . Moreover, 'the equitable remedy of rescission is not available to relieve an allegedly mistaken party of the consequences of their failure to exercise ordinary care' ... . Contrary to the plaintiff's contention, he failed to establish that the arbitration agreement was subject to the equitable remedy of rescission on the ground of unilateral mistake by his attorney regarding the policy limits ... . The purported mistake in the high-low agreement at issue arose not from any fraudulent inducement by the defendant, but from the failure of the plaintiff's attorney to exercise ordinary care under the circumstances ...". ***Maynard v. Smith*, 2022 N.Y. Slip Op. 04017, Second Dept 6-22-22**

THIRD DEPARTMENT

CRIMINAL LAW, APPEALS.

THE MAJORITY REFUSED TO CONSIDER WHETHER COUNTY COURT PROPERLY DISCHARGED A JUROR WHO FAILED TO APPEAR BECAUSE THE ISSUE WAS NOT PRESERVED BY OBJECTION; TWO DISSENTERS WOULD HAVE CONSIDERED THE ISSUE IN THE INTEREST OF JUSTICE AND ORDERED A NEW TRIAL.

The Third Department refused to consider whether the court properly discharged a juror because the issue was not preserved by objection. The two dissenting justices would have ordered a new trial in the interest of justice: **From the dissent:** "If a juror is unable to continue serving due to an illness, 'the court shall make a reasonably thorough inquiry concerning such illness . . . and shall attempt to ascertain when such juror will be appearing in court' (CPL 270.35 [2] [a]). * * * ... [O]n the day at issue and approximately 30 minutes after the scheduled start of the trial, County Court noted that juror No. 1 was not present. The court remarked, 'She did leave sick yesterday,' and, after such remark, stated that it was necessary to replace juror No. 1 with an alternate juror. ... ... [T]here was no reasonably thorough inquiry — let alone, any inquiry — as to juror No. 1's absence. Although juror No. 1 was apparently ill on the day when she was selected for service, the court did not bother to learn if she continued to be ill. It seems that the court merely speculated that, because juror No. 1 was ill the day before, she continued to be ill and that was the reason why she did not show up at the scheduled time for the start of the trial. Such speculation, however, does not meet the standard of conducting a reasonably thorough inquiry. ... [E]ven if it could be said that the court did make a reasonably thorough inquiry, the court still failed to ascertain when juror No. 1 would return to court. The record discloses that, prior to discharging juror No. 1, the court neither heard from nor reached out to her to see if she would not be making it for the trial or if she was en route to the courthouse ...". ***People v. Colter*, 2022 N.Y. Slip Op. 04055, Third Dept 6-23-22**

CRIMINAL LAW, APPEALS.

BECAUSE THE ISSUE WAS NOT PRESERVED BY OBJECTION, THE MAJORITY DID NOT CONSIDER WHETHER COUNTY COURT MADE A PROPER INQUIRY OF A JUROR WHO, DURING DELIBERATIONS, FOR THE FIRST TIME, REVEALED SHE WAS A RAPE VICTIM; DEFENDANT WAS CHARGED WITH RAPE; THE DISSENTING JUDGE WOULD HAVE CONSIDERED THE ISSUE IN THE INTEREST OF JUSTICE AND ORDERED A NEW TRIAL.

The Third Department refused to consider whether County Court properly handled an "outburst by a juror during deliberations" because the issue was not preserved by objection. The dissenting justice would have considered the issue in the interest of justice and ordered a new trial: **From the dissent:** "The foreperson said it best — 'how did you get this far if that's the case? . . . you shouldn't be here.' The foreperson said this to one of the jurors, who was in seat No. 6, after this juror revealed during deliberations that she was a victim of rape — one of the crimes for which defendant was being tried. Juror No. 6 had not disclosed this fact during voir dire or on the juror questionnaire. In any event, County Court proceeded to question each juror, including juror No. 6, to determine if any of them was grossly unqualified. Such inquiry, however, was not 'probing and tactful' ... and, consequently, the court failed to ensure that the finding of guilt was the product of a fair and impartial jury. * * * In my view, County Court's inquiry did not meet the probing and tactful standard. Based on the allegations of rape made against defendant, juror No. 6's revelation of being a rape victim and the doubt expressed by the foreperson about juror No. 6's impartiality, it was incumbent upon the court, at the very least, to ask juror No. 6 about being a rape victim. Indeed, the court intended on asking juror No. 6 about being a sexual assault victim but, for some reason that is not apparent in the record, it never did. Merely asking whether juror No. 6 was a crime victim did not address the emotionally charged situation that the foreperson brought to the court's attention. The court's inquiry was therefore flawed from the outset ...". ***People v. Rivera*, 2022 N.Y. Slip Op. 04050, Third Dept 6-23-22**

CRIMINAL LAW, EVIDENCE.

AFTER TRIGGERING A SECURITY ALARM AT A SPORTING GOODS STORE, DEFENDANT WAS DETAINED IN THE STORE FOR HALF AN HOUR IN THE PRESENCE OF POLICE OFFICERS WHOSE QUESTIONS WERE NOT CONFINED TO THE PETIT LARCENY INVESTIGATION RE: AMMUNITION, BUT RATHER RELATED TO DEFENDANT'S POSSESSION OF FIREARMS; DEFENDANT'S UNWARNED STATEMENTS SHOULD HAVE BEEN SUPPRESSED; CONVICTION REVERSED.

The Third Department, reversing defendant's conviction, determined the questioning by the police when defendant was still in a sporting goods store where he allegedly attempted to steal ammunition constituted custodial interrogation in the absence of the Miranda warnings. The statements made by the defendant at the sporting goods store should have been suppressed: "The entire interaction at the sporting goods store was captured by the various body cameras worn by the police involved. Viewing same, it is evident that, throughout most of the interaction, four police officers were present at the sporting goods store, with at least one officer positioned between defendant and the exit. More

importantly, shortly after the police arrived, defendant had been told to empty his pockets and place all of his personal property on the counter. Defendant did so. While being detained by the police, defendant asked the police multiple times if he could retrieve his possessions. The police denied each of these requests. ... Additionally, the questions posed by the police to defendant exceeded that necessary for investigation. Many of their inquiries were not limited to the petit larceny, the allegation in question, but instead focused on firearms that defendant may have possessed, their location, caliber and defendant's intent as to his usage of same. With the benefit of viewing the interaction between the police and defendant, and considering all the circumstances involved, we cannot say that a reasonable person would have felt free to leave ...". ***People v. Abdullah*, 2022 N.Y. Slip Op. 04045, Third Dept 6-23-22**

FREEDOM OF INFORMATION LAW (FOIL), ATTORNEYS.

HERE, IN THIS FOIL PROCEEDING, THE REQUESTED DOCUMENTS WERE ULTIMATELY PROVIDED AFTER AN INITIAL REFUSAL RENDERING THE ACTION MOOT; THE PETITIONER'S REQUEST FOR AN AWARD OF ATTORNEY'S FEES, HOWEVER, WAS NOT PRECLUDED.

The Third Department determined the award of attorney's for a FOIL request is not precluded when the underlying action is rendered moot because the requested documents were ultimately provided (after an initial refusal): "The fact that the proceeding has been rendered moot by the disclosure of the documents does not ... preclude petitioner's request for an award of fees ... .The Public Officers Law permits an award of 'reasonable [counsel] fees and other litigation costs' where the petitioner 'has substantially prevailed' in a FOIL proceeding and 'when the agency failed to respond to a request . . . within the statutory time frame' ... . Under the circumstances, as petitioner included in his petition a request for fees associated with the FOIL application, the matter must be remitted to Supreme Court for a determination of an award of costs and fees pursuant to Public Officers Law § 89 (4) (c) (i)." ***Matter of Lewis v. James*, 2022 N.Y. Slip Op. 04066, Third Dept 6-23-22**

MUNICIPAL LAW.

ITHACA'S FEE SCHEDULE FOR PERMITS ALLOWING THE CLOSURE OF STREETS AND SIDEWALKS FOR CONSTRUCTION ON PRIVATE PROPERTY IS VALID, SUPREME COURT REVERSED.

The Third Department, reversing Supreme Court, over a dissent, determined the respondent city demonstrated its fee schedule for permits allowing the closure of streets, sidewalks and parking spaces during construction on private property was valid. The decision is too detailed and comprehensive to be fairly summarized here: "... City officials had a rational basis for calculating the public costs arising from permitted street and sidewalk closures and ... the new street permit fee structure imposed a reasonable approximation of those costs upon permit applicants. ... [P]etitioner [owner of the property on which the construction was done] failed to raise a question of fact as to the reasonableness of the new street fee structure, respondents were entitled to summary judgment dismissing the challenge to that structure and a declaration that it is valid ...". ***Matter of 201 C-Town LLC v. City of Ithaca, N.Y.*, 2022 N.Y. Slip Op. 04069, Third Dept 6-23-22**

WORKERS' COMPENSATION.

THE BOARD SHOULD HAVE CONSIDERED WHETHER A PRIOR ELBOW INJURY ADDED TO THE SCHEDULE LOSS OF USE (SLU) ASSOCIATED WITH THE SUBSEQUENT SHOULDER INJURY; THE BOARD DEPARTED FROM PRECEDENT WITHOUT EXPLANATION.

The Third Department, reversing the Workers' Compensation Board, determined the schedule loss of use (SLU) award for a shoulder injury should not have been offset by a prior award for an elbow injury. Rather, whether the second injury resulted in an increased loss of use should have been considered: "[T]he Board credited Coniglio's [the employer's expert's] opinion of a 20% SLU as being consistent with the guidelines and expressly declined to add any additional loss of use. ... [W]e note that the Board has previously determined that adding value for posterior extension to an overall SLU award that also includes a documentation of deficits of flexion or abduction is consistent with the guidelines ... . The Board did not address Coniglio's failure to add any value for his finding of a posterior extension defect to his overall SLU calculation and, as such, has not provided a rational basis for departing from its precedent. Accordingly, its finding of a 20% SLU of the left arm must also be reversed and the matter remitted for further consideration by the Board ... " ***Matter of Kromer v. UPS Supply Chain Solutions*, 2022 N.Y. Slip Op. 04072, Third Dept 6-23-22**

WORKERS' COMPENSATION, APPEALS.

THE BOARD FAILED TO ADEQUATELY EXPLAIN ITS DECISION TO DENY COVERAGE OF MEDICAL BILLS ON THE GROUND THEY WERE NOT CAUSALLY RELATED TO CLAIMANT'S MEDICAL CONDITION, MAKING APPELLATE REVIEW IMPOSSIBLE; MATTER REMITTED.

The Third Department, reversing the Workers' Compensation Board, determined the Board did not explain its decision to deny coverage of 25 medical bills based on the conclusion the bills did not relate to claimant's medical condition: "Although, 'the Board has the exclusive province to resolve conflicting medical opinions' and to evaluate medical evidence before it, and its factual determinations on causal relationship will not be disturbed if supported by substantial evidence in the record, its decision here fails to indicate what medical opinions or reports formed the basis for the conclusions reached regarding causal relationship ... . It is further noted that many of the bills or supporting records include multiple diagnoses and charges, with some of the diagnoses appearing to match the established conditions, such as treatment for a urinary tract infection. No basis is provided for denying compensability for portions of the bills related to established conditions, i.e., for denying payment for the entire medical bill based upon the inclusion of non-compensable treatment in the bill or records. By failing to provide the

reasons for its rulings or the basis upon which the determination was made, the WCLJ [Workers' Compensation Law Judge] and the Board 'failed to satisfy [their] obligation to provide some basis for appellate review' ...". ***Matter of Sequino v. Sears Holdings*, 2022 N.Y. Slip Op. 04070, Third Dept 6-23-22**

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