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COURT OF APPEALS

CRIMINAL LAW, EVIDENCE.

THE DEFENDANT'S ACTIONS OBSERVED BY THE POLICE OFFICERS IN THIS STREET STOP DID NOT MEET THE "REASONABLE SUSPICION DEFENDANT HAD COMMITTED A CRIME OR WAS IN POSSESSION OF A WEAPON" STANDARD; THE FRISK WAS THEREFORE ILLEGAL AND THE SEIZED DRUGS SHOULD HAVE BEEN SUPPRESSED.

The Court of Appeals, reversing the Appellate Division and dismissing the indictment, in a full-fledged opinion by Judge Wilson, and an extensive concurring opinion by Judge Rivera, determined the police did not have reasonable suspicion defendant had committed a crime or was in possession of a weapon at the time defendant was frisked. The drugs found on defendant's person should have been suppressed: "Mr. Johnson's [defendant's] actions, as observed by Officer Pike, do not meet the minimum standard required to justify a stop and frisk under De Bour. Prior to the frisk, Officer Pike observed Mr. Johnson: (1) move from the driver's seat to the passenger seat of his parked car; (2) move his upper torso back toward the driver's seat; (3) pull up his pants and attempt to buckle his belt; and (4) appear nervous while being questioned. These circumstances do not support a reasonable view that Mr. Johnson was armed or that he had committed or was about to commit a crime. These actions 'constituted [nothing] other than 'innocuous behavior,' sole reliance on which would impermissibly reduce the foundation for [this] intrusion to nothing but 'whim or caprice' ...". ***People v. Johnson*, 2023 N.Y. Slip Op. 02734, CtApp 5-18-23**

CRIMINAL LAW, EVIDENCE.

THE EVIDENCE OF PHYSICAL INJURY WAS SUFFICIENT TO SUPPORT THE ASSAULT SECOND CONVICTION.

The Court of Appeals, reversing the appellate division, determined the evidence was sufficient to support the conviction of assault second: "The victim testified that defendant delivered a very hard blow to his face, that he felt pain, and that he experienced bleeding and swelling. Hospital records describe the victim's pain as 'aching' and indicate he was directed to take over-the-counter painkillers. Viewing the evidence in the light most favorable to the People, it was sufficient to establish physical injury for the purposes of Penal Law § 120.05 (3) ...". ***People v. Wheeler*, 2023 N.Y. Slip Op. 02736. CtApp 5-18-23**

CRIMINAL LAW, FAMILY LAW.

THE INDICTMENT COUNT CHARGING AGGRAVATED FAMILY OFFENSE DID NOT SPECIFY WHICH OF THE LISTED OFFENSES WAS THE BASIS OF THE CHARGE, RENDERING THE COUNT JURISDICTIONALLY DEFECTIVE.

The Court of Appeals, in a full-fledged opinion by Judge Troutman, determined the count of the indictment charging aggravated family offense (Penal Law § 240.75) was jurisdictionally defective because it did not specify which of the offenses listed in the statute was the basis of the charge: "A defendant commits the crime of aggravated family offense pursuant to Penal Law § 240.75 when the defendant 'commits a misdemeanor defined in subdivision two of this section as a specified offense and [the defendant] has been convicted of one or more specified offenses within the immediately preceding five years' (Penal Law § 240.75 [1]). Subdivision two of the statute contains 54 'specified offense[s],' 36 felonies and 18 misdemeanors ... . To qualify as a specified offense, the defendant and the person against whom the offense was committed must be members of the same family or household as defined in CPL 530.11 (1) (see id. § 240.75 [2]) ... . Thus, to commit the crime of aggravated family offense, a defendant must have been convicted of one or more of the specified offenses in subdivision two of the statute within the previous five years, the defendant must have currently committed one of the misdemeanor offenses listed in subdivision two, and both offenses must be committed against a member of the same family or household as the defendant. Defendant contends that the failure to specify the current misdemeanor offense in the count of the indictment charging him with aggravated family offense rendered that count jurisdictionally defective ... . We agree." ***People v. Saenger*, 2023 N.Y. Slip Op. 02735, CtApp 5-18-23**

ELECTION LAW, MUNICIPAL LAW.

A LOCAL LAW WHICH CURTAILS THE POWER OF AN ELECTED OFFICER TO ACT WAS DEEMED INVALID BECAUSE IT WAS NOT SUBJECT TO A PUBLIC REFERENDUM.

The Second Department, over an extensive dissent, determined a Local Law which curtailed the power of an elected officer to act was invalid because it was not subject to a public referendum. The decision and the dissent are too detailed to fairly summarize here: "Chapter 263 is substantively invalid on its face because the supermajority requirement continually curtails the power of a local officer to act ... . This goes to the wisdom and merit of the local law. 'Unless specifically provided by statute or charter provisions, one [local] legislature may not bind the hands of its successors in areas relating to governmental matters' ... . 'A local law . . . which . . . has the effect of curtailing the power of

such elective officers . . . becomes operative only after approval by the majority of the qualified' voters ... , since it 'curtail[s] each legislator's relative ability to cast the deciding vote' ... . To rule otherwise in the instant case would bind the hands of the Town Board and the public indefinitely, merely because years in the past, no one saw fit to challenge a law which would only have practical effect years in the future.... . * * * The power of the Town Board cannot be limited indefinitely merely because there was a procedure which would have allowed for the passage of such a provision, and although that procedure was not followed, the four-month statute of limitations for challenging procedural defects had passed. This was not a mere procedural defect. Rather, the Town Board imposed a continuing illegal infringement on the rights of future members of the Town Board, and a continuing infringement upon the rights of the voters." ***Hoehmann v. Town of Clarkstown*, 2023 N.Y. Slip Op. 02606, Second Dept 5-15-23**

Affirmed by the Court of Appeals: ***Hoehmann v. Town of Clarkstown*, 2023 N.Y. Slip Op. 02750, CtApp 5-19-23**

FIRST DEPARTMENT

CONTRACT LAW, ARBITRATION.

PLAINTIFF WAS DEEMED TO HAVE READ THE INFORMATION WHICH WAS HYPERLINKED; THEREFORE, PLAINTIFF WAS DEEMED TO HAVE AGREED TO ARBITRATION.

The First Department, reversing Supreme Court, determined plaintiff agreed to arbitrate based upon the hyperlinks in the document plaintiff reviewed: "Uber [defendant] sustained its burden of demonstrating that the parties had an explicit and unequivocal agreement to arbitrate. ... [P]laintiff had agreed to be bound by the arbitration agreement when he affirmatively indicated and confirmed, by taking two separate actions, that he had reviewed and agreed to Uber's updated terms of use, which were overtly hyperlinked as part of the pop-up screen and sufficient to form a binding contract ... . [P]laintiff was on inquiry notice of the updated Terms of Use that required any disputes between the parties to be resolved by arbitration. Although a clickwrap agreement's terms and conditions must be clear and conspicuous, they need not all be simultaneously and immediately visible; the terms may be binding and enforceable even if they are only accessible through a hyperlink ... . The keys to enforceability are a reasonable indication of the existence of the additional terms and the user's being required to manifest assent to them ...". ***Brooks v. Lang Yang*, 2023 N.Y. Slip Op. 02610, First Dept 5-15-23**

CRIMINAL LAW.

DEFENDANT WAS SENTENCED VIRTUALLY AND DID NOT WAIVE HIS RIGHT TO BE PRESENT; RESENTENCING ORDERED.

The First Department determined defendant was entitled to be resentenced because the sentencing was virtual and defendant did not waive his right to be present: "[D]efendant is entitled to be resentenced because he had a right to be personally present at his sentencing, and he did not expressly waive that right during the virtual proceeding (see CPL 380.40[1] ...)." ***People v. Barksdale*, 2023 N.Y. Slip Op. 02744, First Dept 5-18-23**

CRIMINAL LAW, APPEALS, CONSTITUTIONAL LAW.

THE DEFENDANT ARGUED A 2022 U.S. SUPREME COURT RULING FINDING NEW YORK'S FIREARM LICENSING REQUIREMENT UNCONSTITUTIONAL RENDERED THE POSSESSION-OF-A-WEAPON STATUTE TO WHICH HE PLED GUILTY IN 2016 UNCONSTITUTIONAL; THE ISSUE WAS NOT PRESERVED BECAUSE IT WAS NOT RAISED IN THE TRIAL COURT IN 2016.

The First Department refused to consider a constitutional issue on appeal because the issue was not preserved. Defendant pled guilty in 2016. The defendant argued on appeal that a 2022 U.S. Supreme Court ruling rendered the offense to which he pled guilty, Penal Law § 265.03(3), unconstitutional. In order to preserve that issue for appeal, it must have been raised before the trial court in 2016. The U.S. Supreme Court case, *New York State Rifle & Pistol Assn., Inc. v. Bruen*, 142 S. Ct. 2111 (2022), declared New York's license requirement for carrying a loaded firearm in public unconstitutional. Defendant pled guilty to possessing a loaded weapon outside his home or business: "Defendant did not preserve his claim that Penal Law § 265.03(3) is unconstitutional in light of the United States Supreme Court's decision in *New York State Rifle & Pistol Assn., Inc. v Bruen* ...), or his related claim that the ineligibility of persons under 21 (such as himself at the time of the crime) to apply for licenses to carry firearms violates the Second Amendment. 'This [preservation] requirement is no mere formalism, but ensures that the drastic step of striking duly enacted legislation will be taken not in a vacuum but only after the lower courts have had an opportunity to address the issue and the unconstitutionality of the challenged provision has been established' ... . '[D]efendant should not be permitted to avoid the consequences of the lack of preservation' on the ground that a constitutional challenge to Penal Law § 265.03(3) would have been futile ... . Here, '[a]lthough [Bruen] had not yet been decided, and trial counsel may have reasonably declined to challenge the [constitutionality of Penal Law § 265.03 (3)], defendant had the same opportunity to advocate for a change in the law as [any other] litigant' ... . Defendant is essentially making the argument that an 'appellant should not be penalized for his failure to anticipate the shape of things to come,' but the Court of Appeals has expressly rejected that argument ... . This preservation principle applies to constitutional claims ... . As an alternative holding, we find that on the present record, defendant has failed to establish that Penal Law § 265.03(3) is unconstitutional." ***People v. Adames*, 2023 N.Y. Slip Op. 02623, Fist Dept 5-16-23**

DEFAMATION.

PLAINTIFF, AN EDITORIAL DIRECTOR AT GAWKER, DID NOT SUFFICIENTLY ALLEGE THE DAILY BEAST REPORTERS WHO WROTE AN ARTICLE ABOUT GAWKER VIOLATED THE "GROSS IRRESPONSIBILITY STANDARD" IN MAKING STATEMENTS ABOUT PLAINTIFF; THE DEFAMATION COMPLAINT WAS DISMISSED.

The First Department, reversing Supreme Court, determined plaintiff, an editor, did not sufficiently allege the reporters who wrote a story about the company where plaintiff worked acted in a "grossly irresponsible manner," the standard for defamation in this context: "Plaintiff, who at the time of the article was employed by BDG Media as the editorial director of the digital media website Gawker, alleges that the article contained misleading excerpts of her communications with her colleagues at Gawker, omitting relevant context in order to inaccurately portray her as racist, homophobic, xenophobic, and transphobic. Plaintiff further alleges that the statements published in the article were false, misleading, or, to the extent they contained literal truth, taken out of context to place her in a defamatory light. Plaintiff maintains that ... BDG Media terminated her employment as a result of the article. ... [P]laintiff's defamation cause of action withstands dismissal only if she adequately alleges that defendants, all of whom are members of the media, 'acted in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties' in writing and publishing the article ... The 'gross irresponsibility standard demands no more than that a publisher utilize methods of verification that are reasonably calculated to produce accurate copy' and does not require 'exhaustive research [or] painstaking judgments' ... . Furthermore, the alleged falsity or defamatory meaning of certain statements is not probative of whether defendants acted with gross irresponsibility ...". ***Griffith v. Daily Beast*, 2023 N.Y. Slip Op. 02614, First Dept 5-16-23**

HUMAN RIGHTS LAW, EMPLOYMENT LAW, MUNICIPAL LAW, CIVIL PROCEDURE.

THE HOSTILE WORK ENVIRONMENT AND SEX DISCRIMINATION CLAIMS WERE NOT UNTIMELY BECAUSE A CONTINUING COURSE OF CONDUCT LEADING UP TO THE FILING OF THE COMPLAINT WAS ALLEGED.

The First Department, reversing (modifying) Supreme Court, determined plaintiff's hostile work environment and sex discrimination claims should not have been dismissed as untimely because a continuing pattern was sufficiently alleged: "The allegations supporting plaintiff's hostile work environment and sex discrimination claims are timely, as she has sufficiently alleged facts comprising 'a single continuing pattern of unlawful conduct extending into the [limitations] period immediately preceding the filing of the complaint' ... . The complaint alleges that, following Corn's sexual assault on plaintiff in February 2015, he continued to stare at her, lurked by her desk, made inappropriate, flirtatious comments toward her, disclosed intimate details about his marriage, and frequently pressured her to go out drinking, within the limitations period. It cannot be said that, as a matter of law, these acts were not part of a single continuing pattern of unlawful conduct supporting her hostile work environment and discrimination claims ... . Moreover, under the New York City Human Rights Law (Administrative Code of City of NY § 8-107) and amended New York State Human Rights Law (Executive Law § 296[h]), the allegations that Corn sexually assaulted plaintiff in 2015 and engaged in a pattern of gender-based misconduct in the workplace, demonstrate that she was subjected to inferior terms, conditions, or privileges of employment on the basis of her gender ...". ***Crawford v. American Broadcasting Co., Inc.*, 2023 N.Y. Slip Op. 02611, First Dept 5-16-23**

PERSONAL INJURY, LANDLORD-TENANT, CONTRACT LAW, MUNICIPAL LAW.

ALTHOUGH THE NYC ADMINISTRATIVE CODE MAKES TENANTS RESPONSIBLE FOR REMOVING ICE AND SNOW FROM SIDEWALKS, IT DOES NOT IMPOSE TORT LIABILITY FOR FAILURE TO DO SO; THE ADMINISTRATIVE CODE ALSO MAKES PROPERTY OWNERS RESPONSIBLE FOR SNOW AND ICE REMOVAL; THE LEASE SPECIFICALLY STATED DEFENDANT WAS NOT RESPONSIBLE FOR CLEARING SNOW AND ICE FROM THE SIDEWALK; DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED.

The First Department, reversing Supreme Court, determined the tenant, 185th Operating, was not liable for a sidewalk ice and snow slip-and-fall. Although the NYC Administrative Code makes tenants responsible for removing ice and snow from sidewalks, it does not impose tort liability for a failure to do so. Here the lease explicitly stated the tenant is not responsible for clearing ice and snow: "Although the applicable statute requires tenants to clear snow and ice from the sidewalks around their premises, the statute does not impose tort liability for noncompliance (Administrative Code of the City of New York § 16-123[a] ...). Furthermore, Administrative Code § 7-210(a), which requires property owners to maintain the sidewalk abutting their property, does not impose liability on 185 Operating, as 185 Operating is a tenant of the premises, not the owner. Not only did 185th Operating's lease with defendant owner ... specifically state that 185th Operating was not responsible for maintaining the sidewalks adjacent to the premises, but [the owner's] lease with defendant Staples ..., a tenant occupying the same building as 185th Operating, expressly made Staples responsible for clearing snow and ice from the sidewalk where the icy condition had occurred. The record does not present any evidence that 185th Operating's earlier voluntary snow removal created or exacerbated a hazardous condition that then caused plaintiff's injury ...". ***Cruz v. Heights Broadway, LLC*, 2023 N.Y. Slip Op. 02612, First Dept 5-16-23**

SECOND DEPARTMENT

BATTERY, WORKERS' COMPENSATION LAW, EMPLOYMENT LAW.

THE PERSON WHO ASSAULTED PLAINTIFF WAS THE OWNER OF THE LAW FIRM PLAINTIFF WORKED FOR; PLAINTIFF COULD RECOVER WORKERS' COMPENSATION BENEFITS FROM THE LAW FIRM AND DAMAGES FOR ASSAULT AND BATTERY FROM THE OWNER, WHO WAS A COEMPLOYEE.

The Second Department, reversing (modifying) Supreme Court, determined plaintiff could recover for assault and battery against a coemployee (Levoritz) even though plaintiff had been awarded Workers' Compensation benefits from his employer for the same assault and battery. Plaintiff was employed by defendant law firm at the time of the alleged assault and battery and the law firm was owned by Levortiz: "The Supreme Court, however, erred in granting Levoritz's motion for summary judgment dismissing the complaint insofar as asserted against him. Contrary to Levoritz's contention, Workers' Compensation Law § 29 does not bar an employee who has accepted workers' compensation benefits from suing a coemployee who has committed an intentional assault against him or her ... . Additionally, Levoritz failed to establish, prima facie, that he was acting within the scope of his employment at the time of the incident, and was not engaged in a willful or intentional tort ... . The Supreme Court should have granted that branch of the plaintiff's cross-motion which was for summary judgment on the issue of liability on the cause of action to recover damages for assault and battery insofar as asserted against Levoritz. The plaintiff established his prima facie entitlement to judgment as a matter of law on the issue of liability on the cause of action to recover damages for assault and battery by showing, through the submission of his affidavit, that there was bodily contact, that the contact was offensive, that Levoritz intended to make the contact without the plaintiff's consent, and that Levoritz placed the plaintiff in 'imminent apprehension of harmful contact' ... . In opposition, Levoritz failed to raise a triable issue of fact." ***Tarasiuk v. Levoritz*, 2023 N.Y. Slip Op. 02698, Second Dept 5-17-23**

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

THE ESTATE WAS A NECESSARY PARTY IN THE FORECLOSURE ACTION; THE COURT SHOULD DETERMINE WHETHER THE NECESSARY PARTY CAN BE SUMMONED AND, IF NOT, WHETHER THE ACTION CAN CONTINUE IN THE PARTY'S ABSENCE; THE FACT THAT THE STATUTE OF LIMITATIONS HAS RUN DOES NOT PRECLUDE SUMMONING THE NECESSARY PARTY.

The Second Department, modifying Supreme Court, explained the proper procedure where it is alleged the complaint should be dismissed for failure to include a necessary party, here the failure to include an estate in a foreclosure action. First the court should determine whether the party can be summoned, noting that the expiration of the statute of limitations does not bar summoning the party. Second, if the party cannot be summoned the court should determine whether the action can continue in the party's absence: " 'Pursuant to RPAPL 1311 (1), 'necessary defendants' in a mortgage foreclosure action include, among others, '[e]very person having an estate or interest in possession, or otherwise, in the property as tenant in fee, for life, by the courtesy, or for years, and every person entitled to the reversion, remainder, or inheritance of the real property, or of any interest therein or undivided share thereof, after the determination of a particular estate therein' ... . 'Particularly where, as here, the plaintiff seeks a deficiency judgment, and alleges a default in payment subsequent to the death of the deceased mortgagor, the estate of the mortgagor is a necessary party to the foreclosure action' ... . When a necessary party has not been made a party and is "subject to the jurisdiction" of the court, the proper remedy is not dismissal of the complaint, but rather for the court to order that the necessary party be summoned (see CPLR 1001[b] ...). Contrary to the intervenors' contention, the Supreme Court's ability to direct joinder of a representative of [the] estate at this juncture is not affected by the purported running of the statute of limitations, because the expiration of a statute of limitations is not a jurisdictional defect ... . [W]hen jurisdiction over an absent necessary party 'can be obtained only by [that party's] consent or appearance, the court, when justice requires, may allow the action to proceed without [that party],' upon consideration of various enumerated factors (CPLR 1001[b] ...)." ***U.S. Bank Trust N.A. v. Germoso*, 2023 N.Y. Slip Op. 02704, Second Dept 5-17-23**

CIVIL PROCEDURE, EVIDENCE, ATTORNEYS.

AN ANSWER OR A COMPLAINT VERIFIED BY AN ATTORNEY DOES NOT PROVE THE CONTENTS.

The Second Department, reversing (modifying) Supreme Court, noted that an answer verified by an attorney (as opposed to the defendant) and a complaint verified by an attorney (as opposed to the plaintiff) do not prove the contents: "[A]n answer verified by an attorney is insufficient to demonstrate that the defendant has a potentially meritorious defense ... . [A]lthough a verified complaint 'may be used as the affidavit of the facts constituting the claim,' the complaint 'must contain evidentiary facts from one with personal knowledge since a pleading verified by an attorney pursuant to CPLR 3020(d)(3) is insufficient to establish its merits' ... . Since the complaint in this case was verified only by the plaintiff's attorney, and not by the plaintiff, the plaintiff could not rely on its contents to supply proof of the facts constituting the claim." ***Pemberton v. Montoya*, 2023 N.Y. Slip Op. 02674, Second Dept 5-17-23**

CRIMINAL LAW.

A SENTENCE CANNOT BE ALTERED AFTER THE DEFENDANT HAS BEGUN SERVING IT; HERE THE AMENDED UNIFORM SENTENCE AND COMMITMENT FORM DID NOT MERELY CORRECT AN INADVERTENT MISTAKE, IT ALTERED THE SENTENCE AND WAS THEREFORE INVALID.

The Second Department, reversing County Court, determined the amended uniform sentence and commitment form which was filed after defendant had begun serving his sentence was invalid. Defendant was originally sentenced for three felonies, two of which were to run consecutively with the third. By operation of law, the two which were to run consecutively with the third ran concurrently with each other. The amended uniform sentence and commitment form purported to have all three sentences run consecutively: "[T]he defendant correctly contends that his legal sentence was improperly altered, in violation of CPL 430.10, by the amended uniform sentence and commitment form after he began serving his sentence. At sentencing, the County Court identified the sentences which were to run consecutively when it stated that, '[i]n other words, [the attempted murder count] and the [assault count] are to run consecutively to the [intentional murder count].' Contrary to the People's contention, the court did not, at any point during the sentencing proceeding, specify how the attempted murder count and the assault count were to run with respect to each other. As a result, the sentences imposed on those counts run concurrently as a matter of law (see Penal Law § 70.25[1][a] ...). Thus, the original uniform sentence and commitment form reflected the sentence unambiguously imposed by the court during the sentencing proceeding. The record does not indicate that the court misspoke or that its failure to specify that the terms of imprisonment imposed on the intentional murder, attempted murder and assault counts were all to run consecutively to each other was accidental. Therefore, the amended uniform sentence and commitment form effected an improper alteration of the defendant's sentence in violation of CPL 430.10 ...". ***People v. Parsley*, 2023 N.Y. Slip Op. 02683, Second Dept 5-17-23**

CRIMINAL LAW, EVIDENCE.

THE WITNESS'S TRIAL TESTIMONY THAT HE DID NOT SEE THE PERPETRATOR'S FACE AND DID NOT SEE THE DEFENDANT FIRE A GUN MERELY FAILED TO CORROBORATE OR BOLSTER THE PEOPLE'S CASE, IT DID NOT CONTRADICT OR DISPROVE ANY EVIDENCE; THEREFORE, THE PROSECUTOR SHOULD NOT HAVE BEEN ALLOWED TO IMPEACH THE WITNESS.

The Second Department, reversing defendant's conviction and ordering a new trial, determined the prosecutor should not have been allowed to impeach her own witness because the witness's testimony merely failed to corroborate or bolster the People's case, it did not contradict or disprove any evidence. The witness testified he did not see the perpetrator's face and did not see defendant fire a gun: " '... [B]efore a party may impeach its own witness, the testimony on a 'material fact' must 'tend[ ] to disprove the party's position or affirmatively damage[ ] the party's case' ... . 'Trial testimony that the witness has no knowledge of or cannot recall a particular event, whether truthful or not, does not affirmatively damage the People's case' ...". ***People v. Sams*, 2023 N.Y. Slip Op. 02684, Second Dept 5-17-23**

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA).

DEFENDANT WAS ENTITLED TO A DOWNWARD DEPARTURE TO A LEVEL ONE BECAUSE HE HAD BEEN AT LIBERTY FOR 17 YEARS WITHOUT REOFFENDING.

The Second Department, reversing Supreme Court, determined defendant was entitled a downward departure to level one because he had been at liberty for 17 years without reoffending: "In light of the purpose of SORA, which is to assess the risk that the offender poses while at liberty, lengthy periods during which the defendant has been at liberty after the offense are significant in determining the risk of reoffense and the danger posed in the event of reoffense ... . Since these periods are not taken into account in the risk assessment instrument, they are a permissible ground for departure ... . Here, the defendant was released from prison for the underlying sex offense in 2002. In the time between his release and the SORA hearing, which was held in 2019, the defendant was at liberty for approximately 17 years without reoffending. In light of the lengthy amount of time without reoffense, we designate the defendant a level one sex offender ...". ***People v. Gurley*, 2023 N.Y. Slip Op. 02686, Second Dept 5-17-23**

ELECTION LAW, MUNICIPAL LAW.

A LOCAL LAW WHICH CURTAILS THE POWER OF AN ELECTED OFFICER TO ACT WAS DEEMED INVALID BECAUSE IT WAS NOT SUBJECT TO A PUBLIC REFERENDUM.

The Second Department, over an extensive dissent, determined a Local Law which curtailed the power of an elected officer to act was invalid because it was not subject to a public referendum. The decision and the dissent are too detailed to fairly summarize here: "Chapter 263 is substantively invalid on its face because the supermajority requirement continually curtails the power of a local officer to act ... . This goes to the wisdom and merit of the local law. 'Unless specifically provided by statute or charter provisions, one [local] legislature may not bind the hands of its successors in areas relating to governmental matters' ... . 'A local law . . . which . . . has the effect of curtailing the power of such elective officers . . . becomes operative only after approval by the majority of the qualified' voters ... , since it 'curtail[s] each legislator's relative ability to cast the deciding vote' ... . To rule otherwise in the instant case would bind the hands of the Town Board and the public indefinitely, merely because years in the past, no one saw fit to challenge a law which would only have practical effect years in the future.... . * * * The power of the Town Board cannot be limited indefinitely merely because there was a procedure which would have allowed for the passage of such a provision, and although that procedure was not followed, the four-month statute of limitations for challenging procedural defects had passed.

This was not a mere procedural defect. Rather, the Town Board imposed a continuing illegal infringement on the rights of future members of the Town Board, and a continuing infringement upon the rights of the voters." ***Hoehmann v. Town of Clarkstown*, 2023 N.Y. Slip Op. 02606, Second Dept 5-15-23**

Affirmed by the Court of Appeals: ***Hoehmann v. Town of Clarkstown***, 2023 N.Y. Slip Op. 02750, CtApp 5-19-23

FAMILY LAW.

ALTHOUGH FATHER'S GIRLFRIEND HAD ONLY SEEN THE ABUSED CHILD TWO OR THREE TIMES, SHE WAS DEEMED A PERSON LEGALLY RESPONSIBLE FOR THE CHILD; THERE WAS A STRONG DISSENT.

The Second Department, over an extensive dissent, determined father's girlfriend, Aisha, who only seen the abused child, Erica, two or three times, was correctly deemed a person legally responsible for Erica. The decision and the dissent are too fact-specific to fairly summarize here: " 'Determining whether a particular person has acted as the functional equivalent of a parent is a discretionary, fact-intensive inquiry which will vary according to the particular circumstances of each case. Factors such as the frequency and nature of the contact between the child and respondent, the nature and extent of the control exercised by the respondent over the child's environment, the duration of the respondent's contact with the child, and the respondent's relationship to the child's parent(s) are some of the variables which should be considered and weighed by a court' ... . 'The factors listed here are not meant to be exhaustive, but merely illustrate some of the salient considerations in making an appropriate determination' ... . Although 'article 10 should not be construed to include persons who assume fleeting or temporary care of a child such as a supervisor of a play-date or an overnight visitor' ... , the definition 'expressly encompasses paramours who regularly participate in the family setting and who therefore share to some degree in the supervisory responsibility for the children' ... . Aisha's relationship to the father, as well as Erica, weighs in favor of a finding that she was a person legally responsible for Erica during the relevant time period ... . In January 2016, when Erica was injured, Aisha was the father's girlfriend and the mother of their child Eric Jr., Erica's half-sibling. Aisha began a romantic relationship with the father in 2013 and met Erica for the first time in August 2014, when Erica was approximately six months old. Aisha testified that in January 2016, she 'treated [Erica] like if she was my child' ... . Aisha further testified that she brought Erica to her niece's birthday party because Erica was going to be her stepdaughter and that 'any child of [the father's] is mine[ ], so any children that [the father] has is a part of me as well.' The father testified that the interaction between Aisha and Erica was 'as of a parent to a child,' and further testified that Aisha 'treated Erica no different than she treated Eric [Jr.].' " ***Matter of Erica H.-J. (Tarel H.)*, 2023 N.Y. Slip Op. 02662, Second Dept 5-17-23**

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

THE BANK DID NOT PRESENT SUFFICIENT EVIDENCE OF STANDING TO FORECLOSE; THE EVIDENCE DID NOT DEMONSTRATE THE ALLONGE WAS FIRMLY ATTACHED TO THE NOTE; EVIDENCE FIRST OFFERED IN REPLY SHOULD NOT HAVE BEEN CONSIDERED.

The Second Department, reversing Supreme Court, determined the bank did not demonstrate it had standing to foreclose because the evidence the allonge was firmly attached to the note was insufficient. The court noted Supreme Court should not have considered evidence first submitted in reply: "Although the vice president of loan documentation attested in her affidavit, based on her review of the plaintiff's business records, that an allonge containing an endorsement in blank by 'Federal Deposit Insurance Corporation As Receiver of AmTrust Bank fka Ohio Savings Bank' was attached to the consolidated note, she did not aver that the allonge was 'firmly affixed' to the consolidated note within the meaning of UCC 3-202(2). 'Although the foundation for the admission of a business record may be provided by the testimony of the custodian, it is the business record itself, not the foundational affidavit, that serves as proof of the matter asserted' ... . Moreover, the affidavit was sworn to on January 9, 2020, subsequent to the commencement of this action, and the affiant did not state when she reviewed the copy of the note and the allonge. Thus, her affidavit was insufficient to establish, prima facie, that the allonge was 'so firmly affixed [to the consolidated note] as to become a part thereof' (UCC 3-202[2]) at the time of commencement of either the 2014 action or the 2015 action ... . Nor did the affidavit of the employee of the plaintiff's attorneys establish compliance with the requirements of UCC 3-202(2), as it made no reference to an allonge to the consolidated note. Affidavits submitted by the plaintiff with its reply papers, asserting that the allonge was attached to the consolidated note at the time of commencement of the 2015 action, should not have been considered by the Supreme Court, since a party moving for summary judgment 'cannot meet its prima facie burden by submitting evidence for the first time in reply' ...". ***Wells Fargo Bank, N.A. v. Mitselmakher*, 2023 N.Y. Slip Op. 02709, Second Dept 5-17-23**

INSURANCE LAW, CONTRACT LAW, LIMITED LIABILITY COMPANY LAW.

THE SOLE MEMBER OF AN LLC WHICH OWNS THE PROPERTY HAS AN INSURABLE INTEREST IN THE PROPERTY; AN INSURER WHICH ACCEPTS PAYMENT ON A POLICY AFTER LEARNING OF THE INSURED'S ALLEGED MISREPRESENTATIONS WAIVES THE RIGHT TO RESCIND THE POLICY.

The Second Department, reversing Supreme Court, determined: (1) plaintiff, as the sole member of an LLC which owned the property, had an insurable interest in the property; and (2) defendant's accepting payment on the policy after defendant was aware of plaintiff's alleged misrepresentations waived defendant's right to rescind the policy: "[A]s the sole owner of the LLC, the plaintiff had an insurable interest in the subject property, since destruction of the subject property would necessarily cause economic detriment to the plaintiff (see Insurance Law § 3401 ...). ... 'The continued acceptance of premiums by an insurance carrier after learning of sufficient facts which allow for the rescission of the policy, constitutes a waiver of the right to rescind' ... . Here, the plaintiff established his prima facie entitlement to judgment as a matter of law by demonstrating that the defendant waived its right to assert the plaintiff's misrepresentations as a basis for rescinding the policy, since

the defendant renewed the policy and accepted a premium payment after it discovered the misrepresentations." ***Sabharwal v. Hyundai Mar. & Fire Ins. Co., Ltd.*, 2023 N.Y. Slip Op. 02690, Second Dept 5-17-23**

JUDGES.

THE JUDGE SHOULD NOT HAVE, SUA SPONTE, GRANTED RELIEF NO PARTY REQUESTED.

The Second Department, reversing (modifying) Supreme Court, determined the judge should not have, sua sponte, granted relief which was not requested by any party: "The Supreme Court should not have, sua sponte, directed the plaintiffs to prepare documents for a closing and to schedule a closing, or to pay to the defendant 27% of the profits of the plaintiff corporations. 'Generally, a court may, in its discretion, grant relief that is warranted by the facts plainly appearing on the papers on both sides, if the relief granted is not too dramatically unlike the relief sought, the proof offered supports it, and there is no prejudice to any party'... . Here, no party sought the relief granted, which could be prejudicial to the appealing plaintiffs ...". ***Newburgh Commercial Dev. Corp. v. Cappelletti*, 2023 N.Y. Slip Op. 02670, Second Dept 5-17-23**

REAL ESTATE, CONTRACT LAW.

A DEADLINE SET IN A TIME-IS-OF-THE-ESSENCE LETTER CAN BE WAIVED ORALLY, OR EVEN BY CONDUCT ALONE.

The Second Department, reversing (modifying) Supreme Court, determined there was a question of fact whether defendant orally waived the deadline for the real estate transaction set in a time-is-of-the-essence letter: "... '[I]t is well settled, in New York, that an oral waiver of the time for the sale of real property will be given effect' ... . [Plaintiff's] assertion, made under the penalties of perjury, that he was assured by the defendant's president that the plaintiff would not be held in default in the event that it failed to close the transaction on May 15, 2019, was sufficient to raise a triable issue of fact as to whether the defendant's president made a statement ... that operated as a waiver of the defendant's right to enforce the May 15, 2019 deadline for the closing. Contrary to the defendant's contention, in order for such a waiver to occur, it was not necessary that the [time-is-of-the-essence] letter be withdrawn in a formal communication from the defendant's attorney. A waiver of the right to timely performance under a contract "need not be in writing in order to be valid and enforceable" ... . Such a waiver may occur even without an oral statement, such as the one that was allegedly made in this case, and may instead be inferred solely from a party's conduct ...". ***LG723, LLC v. Royal Dev., Inc.*, 2023 N.Y. Slip Op. 02653, Second Dept 5-17-23**

REAL PROPERTY TAX LAW , FORECLOSURE, MUNICIPAL LAW, CONSTITUTIONAL LAW.

ALTHOUGH THERE IS MERIT TO THE DEFENDANTS' ARGUMENT, THEY WERE DEPRIVED OF THEIR PROPERTY WITHOUT JUST COMPENSATION IN THESE TAX FORECLOSURE PROCEEDINGS WHERE THEIR PROPERTIES WERE TRANSFERRED TO NEIGHBORHOOD RESTORE UNDER NYC'S THIRD PARTY TRANSFER PROGRAM, THE DEFENDANTS' FAILURE TO ANSWER IN THE TAX FORECLOSURE ACTIONS AND THEIR FAILURE TO REDEEM WITHIN FOUR MONTHS PRECLUDED ANY RECOVERY.

The Second Department, in a full-fledged opinion by Justice Wooten, determined the tax foreclosures on defendants' properties were valid and the transfer of the properties under New York City's Third Party Transfer Program (TPT program) was proper. The court noted that, under the current procedure, property worth $2 million could be lost for nonpayment of a small water bill and the owner would receive no compensation. Here the city demonstrated it fulfilled the tax-foreclosure notification requirements and defendants did not answer and did not attempt to redeem the property within the four-month redemption period: "[T]he defendants' motions were time-barred due to their failure to move to vacate the judgment of foreclosure or to take any action to redeem the subject properties within the four-month redemption period ... . In light of the presumption of regularity created by the entry of the judgment of foreclosure against the subject properties (see Administrative Code § 11-411), which became conclusive four months after the entry of the judgment ..., there is no basis to consider the defendants' contentions that the subject properties were not distressed ... . Further, this Court has held that where, as here, the defendant property owners failed to interpose a timely answer or to redeem the property during the four-month period following the entry of the judgment of foreclosure, they are not entitled to 'compensation' for any 'surplus money as a result of the foreclosure and transfer of the property' under the TPT program ... . Thus, while we emphasize that there is potential merit to the defendants' contentions that they were deprived of their properties without just compensation, and that the transfer of a property which was not distressed under the TPT program was improper, we are constrained to conclude that those issues are not reviewable by this Court under the circumstances presented." ***Matter of Tax Foreclosure Action No. 53*, 2023 N.Y. Slip Op. 02711, Second Dept 5-17-23**

TRESPASS, NUISANCE.

A CON EDISON TRANSFORMER MINI PAD WHICH ENCROACHED SIX INCHES ONTO PLAINTIFFS' PROPERTY WAS A TRESPASS ENTITLING PLAINTIFFS TO NOMINAL DAMAGES; THE STICKER ON THE TRANSFORMER WARNING TO STAY THREE FEET AWAY FROM THE TRANSFORMER WAS A NUISANCE, AN INTANGIBLE INTRUSION, NOT A TRESPASS.

The Second Department, reversing (modifying) Supreme Court, determined the installation of a transformer mini pad by Con Edison which encroached six inches onto plaintiffs' property was a trespass and defendant was liable for nominal damages of $1. The sticker on the mini pad warning people to stay three feet away was not a trespass. Rather the warning was an intangible intrusion constituting a nuisance: " '[A] trespass claim represents an injury to the right of possession' ... . '[C]ourts have precluded trespass claims where the entry or intrusion was intangible, such as the occurrence of vibrations, shading of a plaintiff's property, or a permeating odor or vapors of gasoline' ... . 'Generally, intangible intrusions, such as by noise, odor, or light alone, are treated as nuisances, not trespass [because] they interfere with nearby property owners' use and enjoyment of their land, not with their exclusive possession of it'... '[N]ominal damages are presumed from a trespass even

where the property owner has suffered no actual injury to his or her possessory interest' ... . 'Nominal damages are defined as a trifling sum awarded to a plaintiff in an action where there is no substantial loss or injury to be compensated, but still the law recognizes a technical invasion of his [or her] rights or a breach of the defendant's duty' ... . 'These are formal damages as distinguished from real or substantial ones' ...". ***Shrage v. Con Edison Co.*, 2023 N.Y. Slip Op. 02694, Second Dept 5-17-23**

THIRD DEPARTMENT

CRIMINAL LAW, EVIDENCE, APPEALS.

THE CONVICTION UPON WHICH DEFENDANT'S SECOND-FELONY-OFFENDER STATUS WAS BASED WAS MORE THAN 10 YEARS BEFORE THE CURRENT OFFENSE AND THE PEOPLE DID NOT DEMONSTRATE THAT ANY PORTION OF THE 10-YEAR PERIOD WAS TOLLED BY INCARCERATION; SENTENCE VACATED AND MATTER REMITTED FOR A HEARING AND RESENTENCING.

The Third Department, vacating defendant's sentence as a second felony offender and remitting the matter for a hearing. determined the People did not submit evidence demonstrating when defendant was incarcerated such that the 10-year look-back period for the prior felony conviction could be calculated. The court noted that the issue need not be preserved for appeal: "[D]efendant contends that he was not properly sentenced as a second felony offender. ... [D]efendant was not required to preserve such a claim where, as here, the purported illegality is plain 'from the face of the appellate record' ... . [W]e agree with defendant that the record reflects that his April 11, 2011 sentence on his predicate felony conviction was imposed more than 10 years before the commission of the instant offense, which occurred on July 6, 2021 ... , and the People failed to meet their burden of showing that the 10-year look-back period was tolled by any periods of incarceration ... . At sentencing, defendant admitted to the prior offense, but the People's predicate felony statement did not set forth defendant's dates of incarceration ... . Since the record fails to disclose the legality of sentencing defendant as a second felony offender, the matter must be remitted for a hearing on this issue and resentencing ...". ***People v. McCall*, 2023 N.Y. Slip Op. 02719, Third Dept 5-18-23**

ENVIRONMENTAL LAW, ADMINISTRATIVE LAW.

THE OFFICE OF RENEWABLE ENERGY SITING (ORES) CONDUCTED A PROPER REVIEW BEFORE ISSUING THE CHALLENGED REGULATIONS CONCERNING THE SITING OF MAJOR RENEWABLE ENERGY FACILITIES.

The Third Department, in a full-fledged opinion by Justice Pritzker, determined that the Office of Renewable Energy Siting (ORES) had conducted a proper review before issuing regulations concerning the siting of major renewable energy facilities. The opinion is far too detailed to fairly summarize here: "[P]etitioners — who include numerous municipalities, municipal corporations and private entities — commenced the instant combined proceeding pursuant to CPLR article 78 and action for declaratory judgment, seeking, among other things, to annul the regulations and direct ORES to engage in a proper SEQRA [State Environmental Quality Review Act] review. Specifically, petitioners alleged that, among other things, ORES: (1) mischaracterized the action as an unlisted action rather than a type I action; (2) failed to take a hard look at the environmental consequences of the regulations; (3) violated the home rule provision of the NY Constitution; and (4) violated the express terms of Executive Law § 94-c. * * * ... [W]e agree with petitioners' threshold argument that ORES misclassified this action as unlisted, rather than type I. ... ... [T]he promulgation of the regulations should have been classified as a type I action that would carry the presumption of requiring preparation of an EIS [Environment Impact Statement] ... . However, 'a misclassification does not always lead to the annulment of the negative declaration if the lead agency conducts the equivalent of a type I review notwithstanding the misclassification' ... , and, notably, 'a type I action does not, per se, necessitate the filing of an EIS' ... . * * * A review of the vast record reveals that ORES took a thorough and hard look at the potential negative environmental impacts associated with the proposed regulations." ***Matter of Town of Copake v. New York State Off. of Renewable Energy Siting*, 2023 N.Y. Slip Op. 02721, Third Dept 5-18-23**

WORKERS' COMPENSATION.

THE EVIDENCE SUPPORTED A CAUSAL CONNECTION BETWEEN THE STRESS CAUSED BY INTERACTION WITH CLAIMANT'S SUPERVISOR AND CLAIMANT'S HEART ATTACK.

The Third Department, reversing the Workers' Compensation Board, determined the evidence supported a causal relationship between the stress caused by interaction with claimant's supervisor and the subsequent heart attack: "We agree with claimant's contention that the Board's decision is not supported by substantial evidence as its finding that claimant did not sustain a physical injury is inconsistent with the medical evidence as well as its own finding that claimant sustained a myocardial infarction. The sole medical evidence presented was that from Leslie Parikh, a cardiologist who treated claimant at the emergency room. Parikh testified unequivocally that claimant was diagnosed as suffering a myocardial infarction based upon the elevated troponin levels in claimant's blood, which was consistent with a stress event on the heart, and opined that the heart attack was causally-related to claimant's interaction with her supervisor at work. Based on this uncontroverted evidence, the Board, in fact, found that claimant suffered a myocardial infarction causally-related to work. The Board, nevertheless, found that claimant did not sustain a physical injury, characterizing the incident as claimant having been 'in mild emotional distress and . . . experience[ing] a stress event.' ... This is contrary to the unrefuted and unequivocal medical evidence and diagnosis that claimant suffered a myocardial infarction." ***Matter of DiMeo v. Trinity Health Corp.*, 2023 N.Y. Slip Op. 02731, Third Dept 5-18-23**

WORKERS' COMPENSATION.

ALTHOUGH INJURY IN A TRAFFIC ACCIDENT ON THE WAY TO WORK IS USUALLY NOT COVERED BY WORKERS' COMPENSATION, HERE THE "SPECIAL ERRAND" EXCEPTION APPLIED BECAUSE CLAIMANT, A POLICE OFFICER, WAS ENGAGED IN AN INVESTIGATION AND ON HIS WAY TO PICK UP A POLICE VEHICLE WHEN THE ACCIDENT OCCURRED.

The Third Department, reversing the Workers' Compensation Board, determined the "special errand" exception applied and claimant, who was injured on his way to the police precinct after being called to investigate a grand larceny, was entitled to Workers' Compensation benefits. Although injury on the way to work is usually not covered, here claimant had already coordinated an investigation into the grand larceny and was on his way to pick up his police vehicle at the time of the traffic accident: "At the hearing, there was testimony from the employer's witness that claimant's shift and overtime pay did not begin until claimant arrived at the police station and checked out a police vehicle. Even if true, however, these facts are not dispositive of whether the special errand exception applies. Irrespective of when claimant's overtime pay began, the record reflects that claimant was contacted at 4:15 a.m., at which time claimant began his command and coordination of the criminal investigation of the grand larceny. It was at this point that claimant was engaged in a special errand, as he was then required to report to work early in order to pick up a police vehicle so that he could proceed directly to the crime scene in that vehicle. Although claimant testified that he traveled to the police station along his 'usual geographical' route, the work-related activity that claimant was encouraged/required by his employer to do and performed for the employer's benefit upon being called in early while on standby required claimant to 'alter[ ] the usual . . . temporal scheme of travel, thereby altering the risks to which [claimant was] usually exposed during normal travel' (*Matter of Neacosia v New York Power Auth*., 85 NY2d at 479 ...). The Board identified the correct standard articulated by the Court of Appeals but misapplied the special errand exception by overlooking the altered temporal scheme of claimant's travel and significance of the work-related activity performed by claimant for the employer's benefit upon being contacted by the employer while on standby ...". ***Matter of Serrata v. Suffolk County Police Dept*., 2023 N.Y. Slip Op. 02725, Third Dept 5-18-23**

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