CasePrepPlus

June 16, 2023

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

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FIRST DEPARTMENT

ELECTION LAW, MUNICIPAL LAW, CIVIL PROCEDURE.

THE LOCAL LAW WHICH DISQUALIFIES CANDIDATES WHO HAVE CERTAIN FELONY CONVICTIONS SHOULD NOT HAVE BEEN INTERPRETED TO APPLY ONLY TO CONVICTIONS AFTER THE ENACTMENT OF THE LOCAL LAW.

The First Department, reversing Supreme Court, determined the Local Law which disqualified candidates who have certain felony convictions from running for city council and other officers should not have been interpreted to apply only to convictions after the enactment of the Local Law. Given the importance of the law, the proceeding should not have been converted to a summary judgment motion and decided on an expedited schedule because of the impending primary election: "Under the circumstances presented, where plaintiffs, without good reason, waited until shortly before the upcoming June 27, 2023 Democratic primary election to bring this action seeking a determination as to the constitutional and procedural validity of Local Law 15, enacted in February 2021, and to bring this motion seeking injunctive relief barring its enforcement, on an expedited basis that would not permit meaningful review of the important issues and that necessarily would result in electoral disruption, the court should not have converted, with limited notice to the City, the motion to one for summary judgment and resolved the merits of plaintiffs' claims on an expedited schedule. * * * We also find that the court, in prematurely resolving the merits of plaintiffs' challenges, erred to the extent it construed, against the statutory reading proffered by both parties in the motion court, Local Law 15 as not disqualifying candidates based on the specified felony convictions where the convictions predated the law's enactment in February 2021. A reading of the statutory language that the law applies to any person who 'has been convicted' makes clear, on its face, that the law applies to both pre- and post-enactment convictions and, as the City shows, the legislative comments entirely support that reading, as do the subsequent practices of the Board of Elections." ***Martinez v. City of New York*, 2023 N.Y. Slip Op. 03073, First Dept 6-8-23**

LANDLORD-TENANT, CONTRACT LAW.

PLAINTIFF LANDLORD WAS NOT ABLE TO SHOW THE FULLY EXECUTED LEASE WAS EVER DELIVERED TO DEFENDANT TENANT; THEREFORE, THE LANDLORD WAS NOT ENTITLED TO SUMMARY JUDGMENT BASED UPON THE TERMS OF THE LEASE.

The First Department, reversing Supreme Court, determined the plaintiff landlord was not entitled to summary judgment based on the terms of the second amended lease because the landlord could not show that the defendant-tenant was ever provided with a fully executed lease: "[A] leasehold estate cannot be conveyed without a legal delivery of the fully executed lease to the lessee ... , and plaintiff did not offer sufficient proof to rebut [defendant's] showing that he never received delivery of the executed second amendment during the lease period. Evidence of defendant's continued occupancy and payment of rent after expiration of the first amendment to the lease in 2016 is equally consistent with a month-to-month tenancy giving rise to an obligation to pay use and occupancy, and therefore does not, without more, prove delivery of the second amendment." ***Walber 82 St. Assoc., LP v. Fisher*, 2023 N.Y. Slip Op. 02993, First Dept 6-6-23**

PERSONAL INJURY.

DEFENDANT DAWSON FELL ON PLAINTIFF DURING A DANCE HOSTED BY DEFENDANT NON-PROFIT, LENOX HILL; PLAINTIFF SUED LENOX HILL ALLEGING NEGLIGENT SUPERVISION OF THE DANCE; LENOX HILL DID NOT OWE A DUTY OF CARE TO PLAINTIFF AND DID NOT PROXIMATELY CAUSE PLAINTIFF'S INJURY.

The First Department, reversing Supreme Court, determined plaintiff was unable to show defendant non-profit (Lenox Hill), which hosted a dance for its members, owed her a duty of care to her or proximately caused her injury. Both plaintiff and defendant, Dawson, were members of defendant Lenox Hill. Lenox Hill hosted a dance. During the dance Dawson fell on plaintiff, breaking her ankle. Plaintiff sued Lenox Hill alleging negligent supervision: "In general, a party does not have 'a duty to control the conduct of third persons to prevent them from causing injury to others ... . A duty can only be found where there exists a special relationship between the defendant and the plaintiff requiring the defendant to protect the plaintiff from the third party, or a special relationship 'between defendant and [the] third [party] person whose actions expose[d] plaintiff to harm,' which 'would require the defendant to attempt to control the third person's conduct' ... . [P]laintiff failed to plead that she had a special relationship to defendant requiring it to protect her ... . * * * Plaintiff also failed to establish proximate cause. To establish proximate cause, 'a plaintiff must show that the defendant's negligence was a substantial cause of the events which produced the injury' ... . In the context of the intervention of a third-party between defendant's conduct and plaintiff's injury, 'liability turns upon whether the intervening act is a normal or foreseeable consequence of the situation created by the defendant's negligence' ... . Here, Lenox Hill es-

tablished that Dawson's fall was not foreseeable. The record supports that Lenox Hill was not on notice of any similar incidents." ***Bindler v. Lenox Hill Neighborhood House, Inc.*, 2023 N.Y. Slip Op. 02966, First Dept 6-6-23**

SECOND DEPARTMENT

CIVIL PROCEDURE, FORECLOSURE.

PLAINTIFF-BANK'S MOTION TO EXTEND THE TIME TO SERVE THE SUMMONS AND COMPLAINT IN THE INTEREST OF JUSTICE SHOULD HAVE BEEN GRANTED, CRITERIA EXPLAINED.

The Second Department, reversing Supreme Court, determined it was an abuse of discretion to deny plaintiff-bank's CPLR 306-b motion to extend the time for the service of the summons and complaint: "CPLR 306-b provides, in pertinent part, that '[s]ervice of the summons and complaint . . . shall be made within one hundred twenty days after the commencement of the action . . . . If service is not made upon a defendant within the time provided in this section, the court, upon motion, shall dismiss the action without prejudice as to that defendant, or upon good cause shown or in the interest of justice, extend the time for service.' 'The interest of justice standard requires a careful judicial analysis of the factual setting of the case and a balancing of the competing interests presented by the parties. Unlike an extension request premised on good cause, a plaintiff need not establish reasonably diligent efforts at service as a threshold matter. However, the court may consider diligence, or lack thereof, along with any other relevant factor in making its determination, including expiration of the Statute of Limitations, the meritorious nature of the cause of action, the length of delay in service, the promptness of a plaintiff's request for the extension of time, and prejudice to defendant' ... . CPLR 306-b 'empowers a court faced with the dismissal of a viable claim to consider any factor relevant to the exercise of its discretion. No one factor is determinative—the calculus of the court's decision is dependent on the competing interests of the litigants and a clearly expressed desire by the Legislature that the interests of justice be served' ... . Here, the Supreme Court improvidently exercised its discretion in denying the plaintiff's motion pursuant to CPLR 306-b to extend the time to serve Cruz with the summons and complaint in the interest of justice, considering, inter alia, the expiration of the statute of limitations, the meritorious nature of the plaintiff's cause of action, the plaintiff's prompt request for the extension, and the lack of demonstrable prejudice to [defendant]." ***Deutsche Bank Trust Co. Ams. v. Lottihall*, 2023 N.Y. Slip Op. 02999, Second Dept 6-7-23**

EDUCATION-SCHOOL LAW, EMPLOYMENT LAW, ARBITRATION.

A COURT MUST ACCEPT AN ARBITRATOR'S INTERPRETATION OF CONFLICTING EVIDENCE; BUT THE TERMINATION OF THE TEACHER, WHO HAD AN UNBLEMISHED RECORD, FOR INAPPROPRIATELY RESTRAINING A FEMALE STUDENT, SHOCKED ONE'S SENSE OF FAIRNESS.

The Second Department, reversing (modifying) Supreme Court, determined the arbitrator's interpretation of conflicting evidence must be accepted, but termination of the teacher based on the evidence was not warranted. It was alleged the petitioner-teacher inappropriately restrained a female student who was trying to get past him: " 'Where, as here, the obligation to arbitrate arises through a statutory mandate (see Education Law § 3020-a), the determination of the arbitrator is subject to 'closer judicial scrutiny' under CPLR 7511(b) than it would otherwise receive' ... . 'An award in a compulsory arbitration proceeding must have evidentiary support and cannot be arbitrary and capricious' ... . Here, there was a rational basis and evidentiary support for the finding that the petitioner committed the conduct with which he was charged by inappropriately restraining a female student who was trying to get past him. Although a video of the incident, which was admitted into evidence at the hearing, could be interpreted in more than one way, this Court must 'accept the arbitrator's credibility determinations, even where there is conflicting evidence and room for choice exists' ... . However, in light of the petitioner's otherwise unblemished record of approximately 19 years as a teacher with the respondent, the penalty of termination of employment was so disproportionate to the offense as to be shocking to one's sense of fairness ...". ***Matter of O'Brien v. Yonkers City Sch. Dist.*, 2023 N.Y. Slip Op. 03011, Second Dept 6-7-23**

FALSE ARREST, MALICIOUS PROSECUTION, INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS, ATTORNEYS.

AFTER A DIVORCE PLAINTIFF SUED THE EX-WIFE AND HER ATTORNEYS ALLEGING FALSE ARREST, MALICIOUS PROSECUTION, INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS AND VIOLATION OF JUDICIARY LAW § 487; THOSE CAUSES OF ACTION SHOULD HAVE BEEN DISMISSED.

The Second Department, reversing (modifying) Supreme Court, determined the false arrest, malicious prosecution, intentional infliction of emotional distress and Judiciary Law § 487 causes of action against defendant attorneys should have dismissed for failure to state causes of action: "The plaintiff and the defendant Janet P. Lezama were married ... . Lezama commenced an action for a divorce ... in which she was represented by the defendants Dana Navins and Kass & Navins, PLLC ... . After the divorce ... , the plaintiff commenced this action against Lezama and the attorney defendants to recover damages for false arrest, malicious prosecution, negligent infliction of emotional distress, and violation of Judiciary Law § 487 based on allegations that the defendants concocted a 'plan' to obtain a divorce against the plaintiff and obtain an excessive 'financial settlement.' ... [P]laintiff alleged that, as part of this plan, Lezama made false allegations of child abuse and criminal conduct against the plaintiff. * * * 'To be held liable for false arrest, [a civilian] defendant must have affirmatively induced the officer to act, such as taking an active part in the arrest and procuring it to be made or showing active, officious and undue zeal, to the point where the officer is not acting of his or her own volition' ... . Similarly, to be held liable for malicious prosecution, it must be shown that the defendant played an active role in the prosecution, such as giving advice and encouragement or importuning the authorities to act ... . 'Merely giving

false information to the authorities does not constitute initiation of the proceeding without an additional allegation or showing that, at the time the information was provided, the defendant knew it to be false, yet still gave it to the police or District Attorney' ... . * * * With respect to the intentional infliction of emotional distress cause of action, the improper conduct alleged was not 'so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community' ... . With respect to the Judiciary Law § 487 cause of action, the plaintiff failed to allege with specificity any material misstatements of fact made by the attorney defendants in the divorce action with the intent to deceive that court ...". ***Tueme v. Lezama*, 2023 N.Y. Slip Op. 03036, Second Dept 6-7-23**

PERSONAL INJURY.

THE DEFENDANT PROPERTY OWNER DID NOT DEMONSTRATE THE FLOWER POT OVER WHICH PLAINTIFF TRIPPED WAS OPEN AND OBVIOUS AND NOT INHERENTLY DANGEROUS; THE CIRCUMSTANCES OF THE ACCIDENT RAISED A QUESTION OF FACT ON THAT ISSUE.

The Second Department, reversing Supreme Court, determined defendant property owner did not demonstrate the flower pot over which plaintiff tripped was open and obvious and not inherently dangerous: "The plaintiff commenced this action to recover damages for personal injuries she allegedly sustained when she tripped and fell over a white flowerpot located next to a white column on the landing of premises owned by the defendant. At her deposition, the plaintiff testified that, on the day at issue, she was standing on the landing outside the defendant's front door speaking with the defendant, who was standing in the doorway. The plaintiff testified that when the defendant moved the outer screen door toward her, she stepped back into the object, lost her balance, and fell from the landing. ... ... '[W]hether a hazard is open and obvious cannot be divorced from the surrounding circumstances' ... . 'A condition that is ordinarily apparent to a person making reasonable use of his or her senses may be rendered a trap for the unwary where the condition is obscured or the plaintiff is distracted' ... . Therefore, '[w]hether a dangerous or defective condition exists on the property so as to give rise to liability depends on the particular circumstances of each case and is generally a question of fact for the jury' ... . [T]he defendant failed to establish ... the alleged condition was open and obvious and not inherently dangerous under the circumstances surrounding the accident ...". ***Evans v. Fields*, 2023 N.Y. Slip Op. 03000, Second Dept 6-7-23**

PERSONAL INJURY.

THERE WERE TWO STEPS LEADING TO A LANDING AT DEFENDANT'S FRONT DOOR; PLAINTIFF ALLEGED THE ABSENCE OF A HANDRAIL WAS A PROXIMATE CAUSE OF HER FALL; THE COMPLAINT SHOULD NOT HAVE BEEN DISMISSED.

The Second Department, reversing Supreme Court, determined plaintiff raised a question of fact whether the absence of a handrail where two steps led to an elevated landing at defendant's front door was a proximate cause of her fall. Plaintiff alleged there was nothing to grab onto as she fell. Supreme Court had dismissed the complaint on the ground plaintiff did not know the cause of her fall: "The defendant failed to establish her prima facie entitlement to judgment as a matter of law dismissing the complaint ... . The defendant's submissions in support of her motion included, inter alia, a transcript of the plaintiff's deposition testimony, which revealed the existence of a triable issue of fact. In particular, the plaintiff testified, among other things, that she 'was looking for something to grab onto' as she fell but found nothing. 'Even if the plaintiff's fall was precipitated by a misstep,' her testimony that she looked for something to grab onto to stop her fall presented 'an issue of fact as to whether the absence of a handrail was a proximate cause of her injury' ... . Since the defendant failed to establish her prima facie entitlement to judgment as a matter of law, we need not consider the sufficiency of the opposing papers ...". ***Jean-Charles v. Carey*, 2023 N.Y. Slip Op. 03003, Second Dept 6-7-23**

PERSONAL INJURY, MUNICIPAL LAW.

THE CITY ISSUED TREE PIT PERMITS FOR THE SIDEWALK ABOVE A SUBWAY STATION; PLAINTIFF WAS INJURED IN THE SUBWAY STATION BELOW THE SIDEWALK WHEN A PIECE OF CONCRETE FELL; THE CITY DID NOT CLAIM IT DID NOT HAVE WRITTEN NOTICE OF THE SIDEWALK DEFECT; THERE WAS A QUESTION OF FACT WHETHER THE CITY CREATED THE DANGEROUS CONDITION (TREE PIT PERMITS).

The Second Department, in a full-fledged opinion by Justice Maltese, determined there was a question of fact whether the city created the dangerous condition on a sidewalk which resulted in a piece of concrete falling on plaintiff in the subway station below. Although the city can escape liability if it did not have written notice of the sidewalk defect, the city did not claim a lack of notice. Because the city issued permits for tree pits above the subway, there was a question of fact whether the city created the dangerous condition (as opposed to having written notice of it): "Generally, assuming that the alleged dangerous condition falls within the scope of Administrative Code § 7-201(c)(2), under the framework set forth in Smith v City of New York [210 AD3d 53] , the City would have the initial burden to show that it lacked prior written notice. Here, however, the City does not argue on appeal that it lacked prior written notice of the alleged defect. Therefore, we do not address this issue. Because the burden did not shift to the plaintiff to demonstrate the applicability of an exception to the prior written notice defense ... , we consider instead whether the City made a prima facie showing that, contrary to the allegations in the complaint, it did not cause or create the alleged dangerous condition. Here, the City failed to make a prima facie showing of its entitlement to judgment as a matter of law dismissing the complaint and all cross-claims insofar as asserted against it ... . As the Supreme Court noted, the City annexed to its motion papers street opening permits for 'tree pits' along Metropolitan Avenue between Union Avenue and Lorimer Street ... . Neither in its initial moving papers nor in its reply papers ... did the City submit evidence that the construction company's preparation of tree pits

above the subway station did not cause or create the defective condition which allegedly caused the injured plaintiff's accident." ***Morejon v. New York City Tr. Auth.*, 2023 N.Y. Slip Op. 03007, Second Dept 6-7-23**

PERSONAL INJURY, VEHICLE AND TRAFFIC LAW.

PLAINTIFF WAS ENTITLED TO SUMMARY JUDGMENT ON LIABILITY IN THIS INTERSECTION TRAFFIC ACCIDENT CASE; BUT DEFENDANTS' COMPARATIVE-NEGLIGENCE AFFIRMATIVE DEFENSE SHOULD NOT HAVE BEEN DISMISSED.

The Second Department, reversing (modifying) Supreme Court, determined plaintiff was entitled to summary judgment on liability in this intersection traffic accident case, but defendant's comparative-negligence affirmative defense should not have been dismissed: "[T]he plaintiff established prima facie entitlement to judgment as a matter of law by demonstrating that [defendant] Giunta entered the intersection without yielding the right-of-way to the plaintiff's vehicle, and that such negligence was a proximate cause of the accident (see Vehicle and Traffic Law § 1142[a] ...). ... [P]laintiff testified ... that his vehicle had been traveling for about six blocks before approaching the subject intersection; that he was operating his vehicle at or below the speed limit of 25 miles per hour as he approached the intersection; that he saw the defendants' vehicle 'speeding' while moving from left to right; and that he had only one second to react before the impact ... . In opposition, the defendants failed to raise a triable issue of fact ... . Giunta averred that he stopped at the stop sign and proceeded at 10 miles per hour through the intersection. Giunta further averred that after the front of his vehicle had passed through the intersection, the plaintiff's vehicle struck the right rear quarter panel of his vehicle with such 'tremendous force' that it caused his vehicle to spin around and roll over on its roof and then back onto its wheels. Under these circumstances, the defendants raised triable issues of fact, including whether the plaintiff exercised reasonable care in approaching the intersection and whether the plaintiff could have avoided the collision ...". ***Ki Hong Park v. Giunta*, 2023 N.Y. Slip Op. 03004, Second Dept 6-7-23**

ZONING, ADMINISTRATIVE LAW.

THERE WAS A QUESTION WHETHER THE EXPANSION OF A PREEXISTING NONCONFORMING USE FELL WITHIN THE NONCONFORMING USE; THE ZONING BOARD OF APPEALS' RULING ALLOWING THE EXPANSION OF A MARINA WAS ANNULLED.

The Second Department, reversing (modifying) Supreme Court, determined that, although the marina and shellfishing operation were preexisting nonconforming uses, there was a question whether the expansion of the marina fell within the nonconforming use. The zoning board of appeals' (ZBA's) determination allowing the expansion was annulled and the matter was remitted to the ZBA: " 'While nonconforming uses are generally permitted to continue, they may not be enlarged as a matter of right' ... . Although a mere increase in the volume in one's business may not constitute a change in use, 'a distinction is to be drawn where there has been a purposeful expansion of the nature of [the] operation' ... . 'The protection of vested rights in a nonconforming structure, existing or in process of erection at the time of the imposition of zoning restrictions, does not extend to subsequent new construction' ... . Here, the Reeves' [the marina owners'] failure to obtain site plan approval for the reconstruction of the docks and bulkhead, for which permits were initially issued in 2003, casts doubt on whether any of the new structures built after 2003 fall within the Reeves' nonconforming use for the marina and commercial shellfishing operation ... and calls into question the Building Department's unexplained finding that the dock and bulkhead reconstruction work 'did not constitute an expansion of a pre-existing, non-conforming use in 2003'—which was not specifically addressed in the ZBA's ... determination." ***Matter of Andes v. Zoning Bd. of Appeals of the Town of Riverhead*, 2023 N.Y. Slip Op. 03009, Second Dept 6-7-23**

THIRD DEPARTMENT

CRIMINAL LAW, ATTORNEYS, JUDGES, EVIDENCE.

IN THIS MURDER TRIAL, THE PROSECUTOR REPEATEDLY BROUGHT UP UNCHARGED CRIMES WHICH WERE NOT MENTIONED IN THE PRETRIAL SANDOVAL PROCEEDINGS; THE JUDGE DID NOT INTERVENE; THE DEFENSE DID NOT OBJECT; CONVICTIONS REVERSED.

The Third Department, reversing defendant's murder and weapons convictions, determined prosecutorial misconduct and the judge's failure to intervene (there were no defense objections) required a new trial. The prosecutor repeatedly mentioned uncharged crimes which were not brought up in the Sandoval proceedings: "During their direct case, however, the People elicited testimony from three different witnesses about a prior bad act that had not been included in their Sandoval/Molineux proffer. * * * The prosecutor asked defendant whether the incident, which had occurred approximately a decade earlier, involved him shooting a rifle toward another person. Defendant denied this, and he was then questioned as to whether he tried to reload the rifle but was stopped by bystanders, which he also denied. The prosecutor then asked, 'is that how you handle your confrontations, you grab a gun and just fire away?' The prosecutor continued the questioning in this vein by asking defendant whether it was '[k]ind of like . . . ... [when] you just fired a warning shot out the window, correct?' The prosecutor subsequently cross-examined defendant relative to the incident involving him shooting someone off a motorcycle — which ... was not included in the People's Sandoval/Molineux motion. ... [T]he prosecutor inquired as to whether defendant had stated in a recorded jail call that another inmate had urinated in his bed and that, if he caught who did it, he would stab that person in the neck with a pencil. * * * ... [T]he magnitude of the prosecutor's misconduct was the fact that County Court made no effort to intervene or otherwise attempt to minimize or alleviate the prejudice being caused to defendant ...". ***People v. Nellis*, 2023 N.Y. Slip Op. 03046, Third Dept 5-8-23**

EMPLOYMENT LAW, CONTRACT LAW, INSURANCE LAW.

THE EMPLOYEE RESTRICTIVE COVENANTS (NONSOLICITATION AGREEMENTS) WERE PROPERLY ENFORCED; NINE OF DEFENDANT INSURANCE COMPANY'S CUSTOMERS FOLLOWED PLAINTIFFS AFTER THEIR TERMINATION; TWO-JUSTICE DISSENT.

The Third Department, over a two-justice partial dissent, determined the defendant insurance company's motion for summary judgment enforcing the nonsolicitation agreements were properly granted. Nine of defendant's former customers followed plaintiffs after their termination from defendant's employ: "... '[T]he application of the test of reasonableness of employee restrictive covenants focuses on the particular facts and circumstances giving context to the agreement' ... . While such agreements are generally not favored, they can be 'justified by the employer's need to protect itself from unfair competition by former employees' ... . 'The employer has a legitimate interest in preventing former employees from exploiting or appropriating the goodwill of a client or customer, which had been created and maintained at the employer's expense, to the employer's competitive detriment' ... . Here, when plaintiffs joined defendant's insurance agency, neither had any prior experience in the insurance field, they were not licensed agents, nor did they have any clients or books of business of their own. As to the clients in question here, they were solicited, developed and serviced by defendant. As such, the accounts and clients are the product of defendant's efforts, financial expenditures and goodwill, all of which defendant has a legitimate interest in protecting." ***Davis v. Marshall & Sterling, Inc.*, 2023 N.Y. Slip Op. 03050, Third Dept 6-8-23**

FAMILY LAW, EVIDENCE.

MOTHER'S PETITION FOR PERMISSION TO RELOCATE TO FLORIDA WITH THE CHILDREN SHOULD HAVE BEEN GRANTED.

The Third Department, reversing Family Court, determined mother's petition for permission to relocate to Florida with the children should have been granted: " 'Taken as a whole, the mother's testimony demonstrated . . . that the mother's reasons for wanting to relocate were familial and economic and that the proposed relocation would likely enhance the lives of the mother and the child[ren] economically and emotionally' ... . * * * Although we recognize the importance of an ongoing relationship between the father and the children, the ... proof reflects that the mother is, by far, the more involved parent and the primary caregiver, that the lives of the mother and the children would be enhanced by the relocation to Florida, that the children want to make that move, and that the mother is willing to facilitate significant visitation between the children and the father if it occurs. As such, Family Court's determination denying the mother's relocation request is not supported by a sound and substantial basis in the record ...". ***Matter of Amber GG. v. Eric HH.*, 2023 N.Y. Slip Op. 03059, Third Dept 6-8-23**

FAMILY LAW, EVIDENCE, JUDGES.

FAMILY COURT SHOULD HAVE HELD A LINCOLN HEARING TO DETERMINE THE WISHES OF THE CHILD, WHO WAS ABOUT TO TURN 16, IN THIS CUSTODY MODIFICATION PROCEEDING.

The Third Department, reversing Family Court, determined the court should have held a Lincoln hearing in this modification of custody proceeding: "We find that Family Court abused its discretion in denying the attorney for the child's request for a Lincoln hearing to aid in the court's determination of whether a change in circumstances had occurred. While the determination of whether to conduct a Lincoln hearing lies within Family Court's discretion, it is indeed the preferred method for ascertaining the child's wishes ... . At the time of the hearing, the child was six days shy of being 16 years old and the mother's primary argument in support of her petition was that the child preferred to reside with her in Florida. '[A] Lincoln hearing would have provided the court with significant pieces of information it needed to make the soundest possible decision' ... . The wishes of this soon-to-be 16-year-old child, although not determinative, should have been considered, including any insight he may have provided as to the current status of his relationship with each parent ... . It was improper for Family Court to simply presume the child preferred to reside with his mother, as the fundamental purpose of a Lincoln hearing 'is to ascertain a child's preferences and concerns' ...". ***Matter of Samantha WW. v. Malek XX.*, 2023 N.Y. Slip Op. 03052, Third Dept 6-8-23**

REAL PROPERTY TAX LAW, MUNICIPAL LAW.

ALTHOUGH A PURPOSE OF THE WATERSHED CORPORATION WAS TO ENSURE CLEAN DRINKING WATER FOR NEW YORK CITY; OTHER PURPOSES INCLUDED FOSTERING DEVELOPMENT; THEREFORE, THE UPSTATE PROPERTY OWNED BY THE CORPORATION WAS NOT ENTITLED TO A CHARITABLE OR PUBLIC USE TAX EXEMPTION PURSUANT TO REAL PROPERTY TAX LAW 420-a.

The Third Department, reversing Supreme Court, determined the upstate property owned by the Catskill Watershed Corporation (petitioner) was not entitled to a charitable or public purpose exemption from the town's property tax. Although a purpose of the corporation was to ensure clean drinking water for New York City, the fact that the purposes included economic development precluded the charitable or public purpose tax exemption pursuant to Real Property Tax Law (RPTL) 420-a: "[P]etitioner's certificate of incorporation expressly provides that it is formed for, among other things, 'the exclusively charitable or public purposes of . . . aiding that part of the . . . [community in the Watershed] by attracting new commerce and industry to such area and by encouraging the development of, or retention of, commerce and industry in such area, and lessening the burdens of government and acting in the public interest.' These near-identical reasons were rejected by the Court of Appeals, which acknowledged that, even though a property may very well provide a laudable 'public benefit,' where the overall use is 'to further economic development and lessen the burdens of government, [such use] cannot be deemed 'charitable' within the meaning

of section 420-a (1) (a)' ... . Nor do we find convincing petitioner's federal tax-exempt status, as 'evidence of an organization's section 501 (c) (3) status, by itself, does not create a presumption that the entity is entitled to a tax exemption under [RPTL 420-a]' — particularly given that the 'IRS's definition of what constitutes an exempt 'charitable purpose' is exceedingly broad' ...". ***Matter of Catskill Watershed Corp. v. Assessor of the Town of Middletown*, 2023 N.Y. Slip Op. 03055, Third Dept 6-8-23**

FOURTH DEPARTMENT

CIVIL PROCEDURE, FAMILY LAW, ATTORNEYS, CONTRACT LAW.

AN ORAL STIPULATION IS INVALID PURSUANT TO DOMESTIC RELATIONS LAW SECTION § 236(B)(3) AND CANNOT BE RATIFIED; THERE IS NOW AN EVEN SPLIT AMONG THE APPELLATE DIVISION DEPARTMENTS ON THIS ISSUE.

The Fourth Department, reversing Supreme Court, noting a split among the appellate-division departments, determined an oral stipulation was invalid pursuant to Domestic Relations Law § 236(B)(3): "[T]he parties' oral stipulation is not enforceable because, although it was entered in open court, it was not reduced to writing, subscribed, or acknowledged by the parties, as required by Domestic Relations Law § 236 (B) (3). Although plaintiff's attorney stated at the time of the oral stipulation that she 'would prefer just to do the oral stipulation,' the statute unambiguously provides that, in order for an agreement regarding maintenance or a distributive award 'made before or during the marriage' to be valid and enforceable in a matrimonial action, the agreement must be 'in writing, subscribed by the parties, and acknowledged or proven in the manner required to entitle a deed to be recorded' ... . We have repeatedly held that oral stipulations do not comply with the statute ... . Supreme Court erred in denying the motion on the ground that plaintiff ratified the oral stipulation. The proposition that an agreement that fails to comply with Domestic Relations Law § 236 (B) (3) could be upheld if ratified by the parties was implicitly rejected by the Court of Appeals in *Matisoff*.[90 NY2d 135-136] ...". ***Cole v. Hoover*, 2023 N.Y. Slip Op. 03103, Fourth Dept 6-9-23**

CIVIL PROCEDURE, MEDICAL MALPRACTICE, NEGLIGENCE, EVIDENCE.

DEFENDANT PHYSICIAN'S AFFIDAVIT DID NOT PROVE PLAINTIFF'S DECEDENT WAS INFORMED OF THE PRESENCE OF A FOREIGN BODY IN HIS PELVIS; THE AFFIDAVIT RELIED ON INSUFFICIENT EVIDENCE OF THE DEFENDANT'S CUSTOM OR HABIT; THE COMPLAINT SHOULD NOT HAVE BEEN DISMISSED AS TIME-BARRED.

The Fourth Department, reversing Supreme Court, determined plaintiff's decedent's primary care physician (PCP) did not prove whether or when the decedent was informed of the foreign object (a sponge) which was left in decedent's pelvis after surgery. The PCP's affidavit relied on custom or habit evidence, which was not sufficient. Therefore, defendants did not prove whether or when decedent was informed of the foreign object. The complaint should not have been dismissed as time-barred: " '[E]vidence of habit has, since the days of the common-law reports, generally been admissible to prove conformity on specified occasions because one who has demonstrated a consistent response under given circumstances is more likely to repeat that response when the circumstances arise again' ... . 'The applicability of this doctrine is limited to cases where the proof demonstrates a deliberate and repetitive practice by a person in complete control of the circumstances . . . as opposed to conduct however frequent yet likely to vary from time to time depending upon the surrounding circumstances' ... . In order to establish the admissibility of the PCP's habit evidence, defendants were required to establish that the PCP engaged in a routine practice of informing patients of the results of their diagnostic procedures and that his practice did not vary from patient to patient ... . We conclude that defendants failed to do so. The affidavit of decedent's PCP, submitted in support of the motions, explicitly concedes that the manner in which he informs patients of the results of diagnostic procedures varies. * * * Inasmuch as defendants failed to establish that decedent was or should have been aware of the presence of the foreign body more than one year prior to commencing this action, the burden never shifted to plaintiff to aver evidentiary facts establishing that the limitations period had not expired, that it was tolled, or that an exception to the statute of limitations applied ...". ***Baker v. Eastern Niagara Hosp., Inc.*, 2023 N.Y. Slip Op. 03090, Fourth Dept 6-9-23**

CONTRACT LAW.

A SUBCONTRACTOR'S DAMAGES FOR CONSTRUCTION DELAY CANNOT BE PROVEN BY COMPARING ACTUAL COSTS TO THE BID PRICE.

The Fourth Department, reversing (modifying) Supreme Court, determined the subcontractor (Frey) did not submit sufficient proof of damages caused by construction delays: "[W]here a subcontractor is claiming delay damages, the subcontractor 'must establish the extent to which its costs were increased by the improper acts because its recovery will be limited to damages actually sustained' ... . '[I]t has repeatedly been held improper to prove excess labor costs by comparing the total labor costs for the project with the bid estimate for the labor, because of[, among other things,] the inherent unreliability of the price elements of a bid' ...". ***LPCiminelli, Inc. v. JPW Structural Contr., Inc.*, 2023 N.Y. Slip Op. 03112, Fourth Dept 6-9-23**

CRIMINAL LAW, APPEALS, JUDGES.

THE WAIVER OF APPEAL WAS INVALID BECAUSE THE JUDGE STATED THE WAIVER WAS AN ABSOLUTE BAR TO AN APPEAL.

The Fourth Department determined defendant's waiver of appeal was invalid: "[D]efendant's waiver of the right to appeal is invalid because County Court's oral colloquy mischaracterized it as an 'absolute bar' to the taking of an appeal ... . Furthermore, the written waiver executed by defendant did not contain any clarifying language to correct deficiencies in the oral colloquy. Rather, it perpetuated the oral colloquy's

mischaracterization of the waiver of the right to appeal as an absolute bar to the taking of a first-tier direct appeal and even stated that the rights defendant was waiving included the 'right to have an attorney appointed' if she could not afford one and the 'right to submit a brief and argue before an appellate court issues relating to [her] sentence and conviction' ...". ***People v. Shea'Honnie D.*, 2023 N.Y. Slip Op. 03137, Fourth Dept 6-9-23**

DEFAMATION, CIVIL RIGHTS LAW, EDUCATION-SCHOOL LAW, EMPLOYMENT LAW, PRIVILEGE.

THE CAUSES OF ACTION FOR A STIGMA-PLUS 42 U.S.C. § 1983 VIOLATION AND DEFAMATION SHOULD HAVE BEEN DISMISSED; THE CAUSES OF ACTION WERE BASED UPON A STATEMENT BY THE SCHOOL DISTRICT ACCUSING PLAINTIFF OF DISREGARDING COVID POLICY AND ENDANGERING STUDENTS; PLAINTIFF DID NOT SUFFER ECONOMIC HARM AND THE STATEMENT WAS PRIVILEGED.

The Fourth Department, reversing (modifying) Supreme Court, determined the stigma-plus 42 U.S.C. § 1983 cause of action and the defamation cause of action should have been dismissed. The action was brought by plaintiff, a school football coach, based upon a letter circulated by the school district accusing plaintiff of disregarding COVID precautions and recklessly exposing students to the virus. Initially the district was not going to renew plaintiff's contract but ultimately plaintiff was not terminated: "A stigma-plus cause of action requires a plaintiff to establish '(1) the utterance of a statement sufficiently derogatory to injure his or her reputation, that is capable of being proved false, and that he or she claims is false, and (2) a material state-imposed burden or state-imposed alteration of the plaintiff's status or rights' ... . Because a defamatory statement, standing alone, does not amount to a constitutional deprivation, 'the 'plus' imposed by the defendant[s] must be specific and adverse action clearly restricting the plaintiff's liberty—for example, the loss of employment' ... . * * * ... [T]he complaint alleges that the District superintendent, whose role included termination of employees like plaintiff, circulated the allegedly defamatory letter. A school superintendent is a principal executive whose statements may be protected by absolute privilege ... . Further, based on the allegations in the complaint, we conclude that 'the [superintendent] was acting wholly within the scope of his duties' when making the relevant statements ...". ***Sindoni v. Board of Educ. of Skaneateles Cent. Sch. Dist.*, 2023 N.Y. Slip Op. 03102, Fourth Dept 6-9-23**

EMINENT DOMAIN.

THE TAKING BY EMINENT DOMAIN OF PETITIONER'S DECOMMISSIONED ELECTRIC GENERATING STATION AND WATER INTAKE STRUCTURES ON THE NIAGARA RIVER SERVED A PUBLIC PURPOSE; THE DISSENT ARGUED THE TOWN SHOULD NOT BE ALLOWED TO TAKE PROPERTY AND THEN USE IT FOR EXACTLY THE SAME PURPOSE FOR WHICH THE PETITIONER IS NOW USING IT, I.E., ALLOWING BUSINESSES ACCESS TO INEXPENSIVE RAW WATER.

The Fourth Department, over a dissent, confirmed the taking by eminent domain of petitioner's property, a decommissioned coal-fired electric generating station and water intake structures on the Niagara River. Petitioner had been allowing businesses to use the water intake structures for access to inexpensive raw water. The dissent argued the town should not be able to take property and then use the property in exactly the same way petitioner is using it now: "We reject petitioner's contention that the condemnation will not serve a public use, benefit, or purpose (see EDPL 207 [C] [4]). 'What qualifies as a public purpose or public use is broadly defined as encompassing virtually any project that may confer upon the public a benefit, utility, or advantage' ... . Here, the Town's condemnation of the property serves the public uses of, inter alia, revitalizing and redeveloping the former industrial property, which was a blight on the Town, and maintaining the critical raw water supply to significant industrial employers in the Town ... . **From the dissent:** In my view, the takings clauses of the Federal and State Constitutions do not permit the government to take land through eminent domain and use it for the exact same purpose for which the landowner is already using it." ***Matter of Huntley Power, LLC v. Town of Tonawanda*, 2023 N.Y. Slip Op. 03089, Fourth Dept 6-9-23**

PERSONAL INJURY, MUNICIPAL LAW.

IN A SIDEWALK SLIP AND FALL CASE AGAINST A MUNICIPALITY, VERBAL NOTICE OF THE DEFECT, EVEN IF REDUCED TO WRITING, DOES NOT SATISFY THE WRITTEN NOTICE REQUIREMENT.

The Fourth Department, reversing Supreme Court in this sidewalk slip and fall case, determined the defendant city demonstrated it did not have written notice of the sidewalk defect and rejected the allegation that the city had verbal notice that may have been reduced to writing: "[P]laintiff and the cross-claim defendants never contested the City's 'proof that it had not received prior written notice of the defect, asserting, instead, that such notice was unnecessary' because the City had actual notice ... . However, 'it is well settled that verbal or telephonic communications to a municipal body, even if reduced to writing, do not satisfy a prior written notice requirement' ...". ***Runge v. City of N. Tonawanda*, 2023 N.Y. Slip Op. 03123, Fourth Dept 6-9-23**

PERSONAL INJURY, VEHICLE AND TRAFFIC LAW.

THERE IS A QUESTION OF FACT WHETHER DEFENDANT POLICE OFFICER ACTED WITH RECKLESS DISREGARD FOR THE SAFETY OF OTHERS IN THIS EMERGENCY-VEHICLE TRAFFIC ACCIDENT CASE; TWO-JUSTICE DISSENT.

The Fourth Department, reversing Supreme Court, over a two-justice dissent, determined there was a question of fact whether defendant police officer acted with reckless disregard for the safety of others in this emergency-vehicle traffic accident case. Defendant police officer was responding to a call concerning a burglar alarm and was driving without emergency lights at 70 mph on a sparsely populated rural two-lane road with a 55 mph speed-limit when plaintiff attempted a left turn and the collision occurred: "[D]efendant submitted the deposition testimony of plaintiff, who testified that as plaintiff approached the intersection from the two-lane, hilly, wet road, he did not see any other vehicles when he activated his left turn signal. Plaintiff testified that he began his left turn and was already in the process thereof when he first noticed

defendant's vehicle approaching his vehicle. Contrary to the dissent's position, plaintiff maintains that defendant failed to yield to plaintiff's right-of-way and did not concede the issue. Plaintiff further testified that defendant's vehicle was coming toward his vehicle at a 'high rate of speed' and did not have on any headlights, siren or flashing lights. While there was evidence that defendant attempted to brake before colliding with plaintiff's vehicle, there was undisputed evidence that defendant's vehicle was traveling 70 miles per hour in a 55 mile per hour zone just prior to the collision and that defendant was still traveling 47 miles per hour at the time of impact with plaintiff's vehicle. Defendant submitted his own deposition testimony which established that at the time of the accident defendant was responding to a police dispatch call of a 'possible burglar alarm.' Defendant further testified that he was not sure whether he was responding to an emergency situation and only knew at the time that he was responding to 'an alarm' at an address. **From the dissent:** ... [T]he evidence submitted by defendant established that he was traveling no more than 70 miles per hour when responding to the emergency, and that the posted speed limit in the area is 55 miles per hour. Data retrieved from the 'black box' in the police vehicle showed that defendant started slowing down five seconds before the collision, decreasing his speed to 47 miles per hour by the time of impact. It is well settled that speeding by a police officer while operating an emergency vehicle during an emergency operation 'certainly cannot alone constitute a predicate for liability, since it is expressly privileged under Vehicle and Traffic Law § 1104 (b) (3)' ... and the record here reveals no other conduct allegedly engaged in by defendant that made it 'highly probable that harm would follow' ...". ***Gernatt v. Gregoire*, 2023 N.Y. Slip Op. 03094, Fourth Dept 6-9-23**

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