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CasePrepPlus

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SECOND DEPARTMENT

CIVIL PROCEDURE, REAL ESTATE, CONTRACT LAW, HUMAN RIGHTS LAW, MUNICIPAL LAW, EVIDENCE.

THE AFFIDAVITS AND REAL ESTATE CONTRACT SUBMITTED IN SUPPORT OF THE MOTION TO DISMISS DID NOT CONSTITUTE DOCUMENTARY EVIDENCE WHICH UTTERLY REFUTED THE ALLEGATIONS OF UNLAWFUL DISCRIMINATION IN THE COMPLAINT.

The Second Department, reversing Supreme Court, determined the complaint alleging unlawful discrimination in a real estate deal should not have been dismissed because the documentary evidence did not utterly refute the allegations in the complaint. After the real estate purchase offer was signed by both parties and the down payment was made, defendant's attorney returned the down payment check with a letter saying that the defendant was no longer interested in selling to the plaintiff: "Here, neither the affidavits submitted in support of the defendant's motion nor the purported contract between the defendant and another purchaser constituted documentary evidence within the intendment of CPLR 3211(a)(1) ... , and the defendant's evidentiary submissions were 'insufficient to utterly refute the plaintiff's factual allegations' ... . Moreover, accepting the facts as alleged in the complaint as true, and according the plaintiffs the benefit of every possible favorable inference ... , the complaint sufficiently stated a cause of action alleging unlawful discrimination pursuant to Administrative Code § 8-107(5)." ***Jeffrey v. Collins*, 2023 N.Y. Slip Op. 03686, Second Dept 7-5-23**

CRIMINAL LAW, ATTORNEYS, EVIDENCE.

DEFENSE COUNSEL DID NOT OBJECT TO AN ACCOMPLICE'S TESTIMONY ABOUT THE GUILTY PLEA ENTERED BY A NON-TESTIFYING PARTICIPANT IN THE SHOOTING (DEFENDANT WAS THEREBY DEPRIVED OF THE RIGHT TO CONFRONT A WITNESS AGAINST HIM); DEFENSE COUNSEL DID NOT REQUEST THE ACCOMPLICE JURY INSTRUCTION (WHICH REQUIRES CORROBORATION OF THE ACCOMPLICE'S TESTIMONY) OR THE MISSING WITNESS JURY INSTRUCTION; NEW TRIAL ORDERED.

The Second Department, reversing defendant's conviction, determined defendant did not receive effective assistance of counsel. An accomplice, Brenda, testified that another accomplice, Roberto, had pled guilty for his role in the shooting and Roberto's cooperation agreement was placed in evidence with Brenda on the stand. Brenda also testified that defendant made incriminating statements after the shooting. Although the prosecution had informed defense counsel Roberto would be called as a witness, Roberto was not called. Defendant was therefore deprived of right to confront Roberto. In addition, the accomplice jury instruction was not requested or given and the missing witness jury instruction was not requested or given: "[D]efense counsel failed to object to evidence elicited by the People pertaining to the guilty plea of Roberto, a nontestifying alleged accomplice, including the introduction into evidence of the cooperation agreement in which Roberto agreed to give 'meaningful and truthful information' concerning the shooting. The admission of this evidence violated the defendant's Sixth Amendment right to confront the witnesses against him ... . * * * ... [D]efense counsel failed to request either an accomplice-in-law or accomplice-in-fact jury instruction with respect to Brenda's testimony. Since accomplice testimony is 'marked by obvious self-interest,' a defendant 'may not be convicted of any offense upon the testimony of an accomplice unsupported by corroborative evidence tending to connect the defendant with the commission of such offense' ... . * * * ... [D]efense counsel failed to timely request a missing witness charge ...". ***People v. Alvarenga*, 2023 N.Y. Slip Op. 03704, Second Dept 7-5-23**

CRIMINAL LAW, EVIDENCE.

ALLOWING A POLICE OFFICER TO NARRATE A VIDEO ALLEGEDLY DEPICTING THE DEFENDANT COMMITTING ASSAULT WAS REVERSIBLE ERROR; THE FUNCTION OF THE JURY WAS USURPED.

The Second Department, vacating some of defendant's convictions, determined it was error to allow a police officer to interpret the video alleged to depict defendant committing assault: "[T]he trial court should have precluded the testimony of a police detective regarding his opinion as to what a video of the assault on the first victim depicted. Such testimony improperly usurped the jury's function by interpreting, summarizing, and marshaling the evidence, and was improperly admitted into evidence as relevant to the detective's investigation. Rather than aiding the jury in understanding the investigation, the detective improperly narrated the video and the detective's interpretation of the video, which was not necessarily supported by the video itself, also improperly 'instruct[ed] the jury on the existence of the facts needed to satisfy the elements of the charged offense' ... . The error cannot be deemed harmless with regard to the convictions of assault in the first degree and gang assault in the first degree, which stemmed from the assault upon the first victim, and with regard to the conviction of criminal possession of a weapon in the third degree, since the evidence of the defendant's guilt of those crimes, without reference to the error, was not overwhelming,

and it cannot be said that there is no significant probability that the jury would have acquitted the defendant on those charges had it not been for the error ...". ***People v. Ramos*, 2023 N.Y. Slip Op. 03709, Second Dept 7-5-23**

FAMILY LAW, ATTORNEYS, JUDGES.

MOTHER WAS AWARE OF THE GROUND FOR DISQUALIFYING FATHER'S ATTORNEY FOR YEARS BEFORE THE MOTION TO DISQUALIFY WAS MADE; MOTHER THEREBY WAIVED ANY OBJECTION TO FATHER'S COUNSEL.

The Second Department, reversing (modifying) Family Court, determined mother's motion to disqualify father's attorney should not have been granted because mother was aware of the ground for the motion in 2019 and did not move to disqualify until 2022. She was deemed to have waived any objection to father's attorney: "The Family Court improvidently exercised its discretion in granting that branch of the mother's motion which was to disqualify the father's attorneys on the basis that the father's current wife, the children's stepmother, works as a paralegal in the law office that employs the father's attorneys. * * * Where a party seeks to disqualify its adversary's counsel in the context of ongoing litigation, courts consider when the challenged interests became materially adverse to determine if the party could have moved at an earlier time ... . If a party moving for disqualification was aware or should have been aware of the facts underlying an alleged conflict of interest for an extended period of time before bringing the motion, that party may be found to have waived any objection to the other party's representation ... . Here, the mother was aware of the employment of the father's current wife at the law firm representing the father since 2019. Accordingly, the mother's failure to move to disqualify the father's attorneys until April 2022 constituted a waiver of her objection to the father's legal representation ... . In any event, the mother failed to demonstrate that the children will be prejudiced by the father being represented by his current attorneys. There is no evidence that during the course of her employment, the father's current wife worked on the father's case or that she otherwise communicated with the children about the case ...". ***Matter of Marotta v. Marotta*, 2023 N.Y. Slip Op. 03694, Second Dept 7-5-23**

FREEDOM OF INFORMATION LAW (FOIL), ATTORNEYS.

BECAUSE PETITIONER HAD SUBSTANTIALLY PREVAILED ON THE FOIL CAUSE OF ACTION, PETITIONER WAS ENTITLED TO ATTORNEY'S FEES AND LITIGATION COSTS, DESPITE THE FACT THAT MUCH OF THE LEGAL REPRESENTATION WAS BY PRO BONO COUNSEL.

The Second Department, reversing (modifying) Supreme Court, determined the petitioner was entitled to attorney's fees and litigation costs because petitioner had substantially prevailed on its FOIL causes of action. The fact that much of the legal representation was pro bono was not a bar to recovery: "[T]he petitioner substantially prevailed on its FOIL cause of action, and the Town had no reasonable basis for denying access to the responsive documents. Accordingly, the petitioner was entitled to an award of reasonable attorneys' fees and litigation costs incurred on the FOIL cause of action ... . The fact that much of the petitioner's representation was undertaken by pro bono counsel did not affect the petitioner's entitlement to reasonable attorneys' fees and litigation costs under the statute ...". ***Matter of Ateres Bais Yaakov Academy of Rockland v. Town of Clarkstown*, 2023 N.Y. Slip Op. 03692, Second Dept 7-5-23**

PERSONAL INJURY, EVIDENCE.

IN A SLIP AND FALL CASE, EVIDENCE OF GENERAL CLEANING AND INSPECTION PRACTICES DOES NOT PROVE A LACK OF CONSTRUCTIVE NOTICE OF THE CONDITION; DEFENDANT MUST PROVE THE AREA WAS CLEANED OR INSPECTED CLOSE IN TIME TO THE FALL.

The Second Department, reversing Supreme Court, determined the defendant City of New York did not demonstrate when the area where plaintiff slipped and fell was last cleaned or inspective. Therefore the city did not demonstrate a lack of constructive notice of the dangerous condition: "[T]he defendants failed to establish ... that they did not have constructive notice of the alleged hazardous snow and ice condition that caused the plaintiff to fall. The evidence submitted by the defendants in support of their motion did not show when the staircase was last cleaned or inspected in relation to when the subject accident occurred, but rather merely described their general cleaning and inspection practices for the staircase ...". ***Islam v. City of New York*, 2023 N.Y. Slip Op. 03685. Second Dept 7-5-23**

PERSONAL INJURY, EVIDENCE, MUNICIPAL LAW.

IN THIS SIDEWALK/CURB SLIP AND FALL CASE, THE VILLAGE DEMONSTRATED IT DID NOT HAVE WRITTEN NOTICE OF THE CONDITION AND THE ABUTTING PROPERTY OWNER DEMONSTRATED HE DID NOT CREATE THE CONDITION OR CAUSE THE CONDITION BY SPECIAL USE.

The Second Department, reversing Supreme Court in this sidewalk/curb slip and fall case, determined (1) the defendant village did not have written notice of the alleged dangerous condition. and (2), the defendant abutting property owner did create the condition or cause the condition by special use. Therefore the complaint against both defendants should have been dismissed: "[T]he Village correctly contends that, contrary to the Supreme Court's conclusion, it was not required to establish both that it lacked prior written notice of the defect and that it had not created the defect ... . Rather, upon the Village's prima facie showing that it lacked prior written notice of the defect, the burden shifted to the plaintiff to demonstrate that an exception to the prior written notice statute applied ... . As the plaintiff did not meet this burden, the court should have granted the Village's motion, in effect, for summary judgment dismissing the complaint and all cross-claims insofar as asserted against it. ... Scipione [defendant abutting property owner] demonstrated, prima facie, that he did not create the defect, that he did not cause the defect to occur because of a special use, and that the relevant section of the Village Charter did not make abutting landowners liable for injuries caused by sidewalk defects ... . With respect to the issue of special use, Scipione's evidence showed that the intended use of

the step on which the plaintiff allegedly fell was the normal intended use of the public way,' and that he did not 'derive[ ] a special benefit from that property unrelated to the public use' ...". ***Morales v. Village of Ossining*, 2023 N.Y. Slip Op. 03690, Second Dept 7-5-23**
Similar "written notice" issue and result in ***O'Connor v. City of Long Beach***, 2023 N.Y. Slip Op. 03702, Second Dept 7-5-23

PERSONAL INJURY, MUNICIPAL LAW.

BECAUSE, BASED ON A LINE OF DUTY REPORT, THE CITY HAD TIMELY KNOWLEDGE OF THE CIRCUMSTANCES AND LOCATION OF PETITIONER'S SLIP AND FALL, THE CITY WAS NOT PREJUDICED BY A DELAY IN FILING THE NOTICE OF CLAIM; THE PETITION FOR LEAVE TO FILE THE LATE NOTICE SHOULD HAVE BEEN GRANTED, DESPITE THE ABSENCE OF A REASONABLE EXCUSE FOR FAILING TO TIMELY FILE.

The Second Department, reversing Supreme Court, determined petitioner's application for leave to file a late notice of claim in a slip and fall case should have been granted, despite petitioner's failure to provide a reasonable excuse for the delay. The city had timely notice of the incident based on a line of duty report, and the city, because it had timely notice, was not prejudiced by the delay: "The line-of-duty injury report prepared and filed shortly after the petitioner's accident provided the City with timely actual knowledge of the essential facts constituting the claim. Further, its specificity regarding the location and circumstances of the incident permitted the City to readily infer that a potentially actionable wrong had been committed ... Furthermore, as the City acquired timely knowledge of the essential facts constituting the claim, the petitioner met his initial burden of showing that the City would not be prejudiced by the late notice of claim ... . In response to the petitioner's initial showing, the City failed to come forward with particularized evidence demonstrating that the late notice of claim substantially prejudiced its ability to defend the claim on the merits ... . Since the City had actual knowledge of the essential facts underlying the claim and no substantial prejudice to the City was demonstrated, the petitioner's failure to provide a reasonable excuse for the delay in serving the notice of claim did not serve as a bar to granting leave to serve a late notice of claim ...". ***Matter of Brown v. City of New York*, 2023 N.Y. Slip Op. 03693, Second Dept 7-5-23**

REAL ESTATE, FRAUD.

A SELLER OF REAL PROPERTY CAN REMAIN SILENT ABOUT DEFECTS IN THE PROPERTY BUT CANNOT TAKE STEPS TO THWART A BUYER'S DISCOVERY OF DEFECTS; HERE IT WAS ALLEGED THE SELLERS COVERED WATER DAMAGED WOOD WITH NEW PLYWOOD.

The Second Department, reversing Supreme Court, determined the complaint alleging the defendant sellers concealed water damage to the property should not have been dismissed. A seller of real property can remain silent about property defects (caveat emptor, buyer beware) but cannot act to thwart discovery of the defects. Here plaintiffs alleged the sellers put new plywood over wood damaged by water: " 'New York adheres to the doctrine of caveat emptor and imposes no liability on a seller for failing to disclose information regarding the premises when the parties deal at arm's length, unless there is some conduct on the part of the seller which constitutes active concealment' ... . 'If, however, some conduct (i.e., more than mere silence) on the part of the seller rises to the level of active concealment, a seller may have a duty to disclose information concerning the property' ... . 'To maintain a cause of action to recover damages for active concealment, the plaintiff must show, in effect, that the seller or the seller's agents thwarted the plaintiff's efforts to fulfill his [or her] responsibilities fixed by the doctrine of caveat emptor' ... . Here, accepting the facts alleged in the amended complaint as true, and according the plaintiffs the benefit of every possible favorable inference ... , the amended complaint sufficiently states a cause of action to recover damages for fraud on the theory that the ... defendants actively concealed extensive water damage to the property. The amended complaint, as amplified by an affidavit of one of the plaintiffs ... , alleges, among other things, that the ... defendants took measures to actively conceal the existence of leaks and water damage to the property, including placing new wood on top of rotten wood to hide the extent of the damage. The plaintiffs' allegations, if true, might have thwarted the plaintiffs' efforts to fulfill their responsibilities imposed by the doctrine of caveat emptor with respect to the property ...". ***Striplin v. AC&E Home Inspection Corp***., 2023 N.Y. Slip Op. 03720, Second Dept 7-5-23

THIRD DEPARTMENT

CRIMINAL LAW, EVIDENCE.

THE EVIDENCE THAT DEFENDANT INTENDED TO PURCHASE DEALER QUANTITIES OF COCAINE FROM A DEALER (SANCHEZ) AND COOKED CRACK COCAINE FOR THAT DEALER WAS NOT LEGALLY SUFFICIENT EVIDENCE OF AN INTENT TO ORGANIZE OR LEAD THE DEALER'S DISTRIBUTION NETWORK; CONSPIRACY CONVICTION REVERSED.

The Third Department, reversing defendant's conspiracy to distribute cocaine conviction, determined the conviction was not supported by legally sufficient evidence: "[D]efendant's conviction of conspiracy in the second degree based upon the underlying crime of operating as a major trafficker is not supported by legally sufficient evidence. The evidence presented by the People shows only that defendant intended to purchase dealer quantities of cocaine from Sanchez and cooked crack cocaine for Sanchez when requested, but wholly fails to connect defendant to Sanchez's broader cocaine dealing network, as defendant was not linked to any of the stash houses or the other individuals with whom Sanchez was in contact. Although Penal Law § 220.77 (1) does not contain a defined mens rea term, it is not a strict liability crime (see Penal Law § 15.15 [2]), and its plain language requires proof that defendant engaged in conduct constituting the administration, organization or leadership of a controlled substance organization. The proof offered by the People does not set forth a valid line of reasoning to permissibly infer that this specific intent was met here. While defendant's purchase of dealer quantities of cocaine from Sanchez and an agreement to cook

crack cocaine for him might be sufficient to establish his knowledge of a broader cocaine distribution network ... , they are not sufficient to infer that defendant intended Sanchez to administer, organize or lead a controlled substance organization, as the knowledge of such an organization is not equivalent to the intent to control one." ***People v. Lundy*, 2023 N.Y. Slip Op. 03727, Third Dept 7-6-23**

FAMILY LAW, CIVIL PROCEDURE, ADMINISTRATIVE LAW, ATTORNEYS, SOCIAL SERVICES LAW, MUNICIPAL LAW.

LAWYERS FOR CHILDREN, WHICH IS CONTRACTUALLY OBLIGATED TO PROVIDE ATTORNEYS IN CHILD WELFARE MATTERS, HAS STANDING TO CHALLENGE THE HOST FAMILY HOMES PROGRAM WHICH PLACES CHILDREN WITHOUT THE PARTICIPATION OF ATTORNEYS.

The Third Department reversing Supreme Court, determined Lawyers for Children, which provides attorneys for child welfare matters, had standing to bring a petition challenging the Host Family Homes program which facilitates temporary placement of children in foster care without an attorney: "[P]ursuant to Social Services Law § 358-a (6), Family Court is tasked with appointing an attorney for the children should there be a hearing before it. Petitioner Lawyers for Children had initially contracted with the Office of Court Administration (hereinafter OCA) respecting voluntary foster care placements and, since the legislative changes in 1999, has consistently represented children in New York City who have been voluntarily placed outside of the home. Similarly, petitioner Legal Aid Society contracted with OCA and receives assignments through New York City Family Court. Petitioner Legal Aid Bureau of Buffalo, Inc., likewise, has contracted with OCA and receives funding to represent children in child welfare matters. In December 2021, respondent Office of Children and Family Services (hereinafter OCFS) promulgated regulations creating the Host Family Homes program, a system for the temporary care of children by pre-vetted volunteers without resorting to the voluntary placement process in the Social Services Law ... . * * * Children cared for by a host family under this program were not entitled to assigned counsel, although they could communicate with an attorney ... . * * * ... [P]etitioners sufficiently alleged an injury in fact that is not merely conjectural, as implementation of the program would, in essence, place children outside their home without the right to legal representation to which they would be entitled by Social Services Law § 358-a and that petitioners have a contractual obligation to provide ...". ***Matter of Lawyers for Children v. New York State Off. of Children & Family Servs.*, 2023 N.Y. Slip Op. 03747, Third Dept 7-6-23**

FAMILY LAW, CIVIL PROCEDURE, JUDGES, ATTORNEYS.

THE JUDGE SHOULD HAVE ALLOWED TIME FOR OBJECTIONS TO PETITIONER'S APPLICATION TO WITHDRAW THE NEGLECT PETITION AND CANCEL THE FACT-FINDING HEARING.

The Third Department, reversing Family Court, determined Family Court should not have granted petitioner's request to withdraw the neglect petition and cancel the fact-finding hearing without allowing time for objections to be raised: "We agree with the AFC that Family Court erred in granting petitioner's application to dismiss the neglect petition without allowing any time for objections to be raised. We are cognizant that, 'ordinarily[,] a party cannot be compelled to litigate and, absent special circumstances, discontinuance should be granted' ... . However, one should be given an opportunity to present any such special circumstances or any other arguments concerning the application, such as the effect upon a subject child's welfare ... , whether prejudice should attach to the discontinuance ... or whether another party should be permitted, in the court's discretion, to commence a neglect proceeding (see Family Ct Act § 1032 [b] ...). Because Family Court dismissed the petition without allowing the parties — including the father as a nonrespondent parent — to present any arguments regarding petitioner's application for a discontinuance, we remit this matter to allow them the opportunity to do so." ***Matter of Lauren X. (Daughn X.)*, 2023 N.Y. Slip Op. 03732, Third Dept 7-6-23**

FAMILY LAW, CRIMINAL LAW, JUDGES.

AT THE TIME OF THE JUVENILE'S ADMISSION TO POSSESSION OF STOLEN PROPERTY THE JUDGE DID NOT INFORM HIM OR HIS MOTHER OF THE EXACT NATURE OF HIS "PLACEMENT OUTSIDE THE HOME OR ITS POSSIBLE DURATION" AS REQUIRED BY FAMILY COURT ACT § 321.3(1); ORDER REVERSED.

The Third Department, reversing the juvenile's admission in this juvenile delinquency proceeding, determined the juvenile and his mother were not adequately informed of the consequences of the admission to possession of stolen property: "[T]he allocution in which respondent admitted to [possession of stolen property] was fatally defective because Family Court ... failed to comply with the requirements of Family Ct Act § 321.3 (1). At the time of his admission, Family Court commented on some possible dispositions including being 'placed outside of [his] home . . . for a period of time.' Neither respondent nor his mother were informed of 'the exact nature of his placement outside of the home or its possible duration' ... . 'Inasmuch as the provisions of Family Ct Act § 321.3 (1) are mandatory and cannot be waived, the order must be reversed' ...". ***Matter of Tashawn MM.*, 2023 N.Y. Slip Op. 03745, Third Dept 7-6-23**

FAMILY LAW, CRIMINAL LAW.

THE SPEEDY TRIAL REQUIREMENTS FOR A JUVENILE DELINQUENCY PROCEEDING WERE VIOLATED.

The Third Department, reversing the juvenile delinquency adjudication and dismissing the petition, determined the speedy trial requirements were violated: " 'Where [a] juvenile is not detained, an adjudication on the merits of the petition's charges, known as the 'fact-finding' phase of the process, 'shall commence not more than [60] days after the conclusion of the initial appearance,' subject to adjournments for good cause and special circumstances' (... Family Ct Act § 340.1 [2]). A court may adjourn a fact-finding hearing 'on its own motion or on motion

of the presentment agency for good cause shown for . . . not more than [30] days if the respondent is not in detention' and '[t]he court shall state on the record the reason for any adjournment of the fact-finding hearing' ... . However, 'a judicial referral for adjustment under Family C[t] Act § 320.6 operates to toll the limitations period set forth in Family C[t] Act § 340.1' ... . 'Efforts at adjustment . . . may not extend for a period of more than three months without leave of the court, which may extend the period for an additional two months' ... . Here, the record establishes that the initial appearance on the petition was on February 1, 2021, at which time respondent appeared with counsel, was arraigned and entered a general denial to the petition (see Family Ct Act §§ 320.1; 320.4). Measured from the February 1 initial appearance date, 273 days passed before the scheduled November 1, 2021 fact-finding hearing.[FN3] Of the 273 days, tolling for the entire adjustment period of 153 days[*3], leaves 120 days before the scheduled fact-finding hearing, well-beyond the initial 60-day speedy trial period, as well as the 90-day speedy trial period, assuming without deciding that the 30-day adjournment was properly granted (see Family Ct Act § 340.1 [4], [5]). As such, the speedy trial requirements relative to juvenile delinquency proceedings were violated and the petition must be dismissed." ***Matter of Zachary L.*, 2023 N.Y. Slip Op. 03735, Third Dept 7-6-23**

FAMILY LAW, EVIDENCE.

IN THIS TERMINATION OF PARENTAL RIGHTS PROCEEDING, PETITIONER DID NOT MEET ITS BURDEN TO PROVE IT MADE DILIGENT EFFORTS TO ASSIST RESPONDENT MOTHER IN ADDRESSING HER MENTAL HEALTH; MOTHER'S PARENTAL RIGHTS SHOULD NOT HAVE BEEN TERMINATED.

The Third Department, reversing Family Court, determined the petitioner did not prove it made diligent efforts toward reunification of mother and child, given mother's mental health and the incomplete measures to address her mental health needs. Therefore mother's parental rights should not have been terminated. The facts are far too complex to summarize here: "The petitioning agency 'bears the burden of proving . . . that such diligent efforts were made,' and must do so by clear and convincing evidence ... . To satisfy that burden, the agency 'must develop a plan that is realistic and tailored to fit [the] respondent's individual situation' ... , and 'make affirmative, repeated, and meaningful efforts to assist the parent in overcoming these handicaps' ... . The petitioning agency 'should mold its diligent efforts to fit the individual circumstances so as to allow the parent to provide for the child's future' ... . [The] 'terms and conditions" placed upon respondent required ... that she 'undergo a complete mental health evaluation by a licensed professional approved by [petitioner]'; engage in a domestic violence program; attend all of the child's medical appointments and all scheduled visitation; and 'successfully complete Family Services of Chemung County's Protective Parenting Program.' We agree with respondent and the AFC that petitioner did not prove, by clear and convincing evidence, that it made diligent efforts to assist respondent in satisfying these conditions." ***Matter of Willow K. (Victoria L.)*, 2023 N.Y. Slip Op. 03730, Third Dept 7-6-23**

LANDLORD-TENANT, CONTRACT LAW.

THE DATE BY WHICH AN OPTION TO RENEW A LEASE IS TO BE EXERCISED CAN BE WAIVED BY THE ACCEPTANCE OF AN UNTIMELY ELECTION TO RENEW; THE REQUEST FOR A NEW LEASE WITH THE SAME MATERIAL TERMS DOES NOT AFFECT THE VALIDITY OF THE ELECTION TO RENEW.

The Third Department, reversing Supreme Court, determined there were questions of fact about whether defendant tenant had exercised its option to renew the lease. The court noted that the date by which an option to renew must be exercised is for the benefit of the landlord and therefore can be waived by the landlord: "[W]e agree with plaintiff that, to the extent that Supreme Court concluded that defendant could not have exercised the option to renew because the option lapsed after November 30, 2018, that finding was erroneous. Although an 'optionee must exercise the option in accordance with its terms within the time and in the manner specified in the option' ... , the relevant case law establishes that the notice provision associated with the option was 'solely for plaintiff's benefit as the landlord and may be waived, even in the absence of a written waiver' ... . Here, plaintiff's assertion that he confirmed and accepted defendant's untimely election constitutes such waiver. ... [W]here an option is exercised and all of the essential and material terms of the parties' agreement are provided for in the original lease, the fact that a party contemplates 'the subsequent execution of a more formal writing [that was] not done will not impair [the] effectiveness' of the election ... . Nor would plaintiff's inquiry as to whether defendant would like a future option to renew render defendant's exercise of the option conditional ... . The core question is whether defendant exercised its option to renew, as a matter of law." ***Moore v. Schuler-Haas Elec. Corp.*, 2023 N.Y. Slip Op. 03739, Third Dept 7-6-23**

PERSONAL INJURY, COURT OF CLAIMS, EVIDENCE.

A ROCKY LEDGE UNDER FOUR INCHES OF WATER IN A NATURAL SWIMMING HOLE SURROUNDED BY IRREGULAR ROCK WAS OPEN AND OBVIOUS AND PLAINTIFF ASSUMED THE RISK OF STRIKING HER FOOT ON THE ROCK LEDGE.

The Third Department, reversing (modifying) the Court of Claims, determined defendant (a state-owned park with a natural swimming area surrounded by irregular rock) was not liable for plaintiff's injury caused by striking a rock ledge covered by four inches of water. Defendant demonstrated the water was clear and the rock ledge was open and obvious. Defendant further demonstrated the swimming area had been made as safe as possible. In addition plaintiff assumed the risk of swimming there: "The open and obvious nature of the rock shelf obviated any duty on defendant's part to warn park users of its presence ... . * * * While it may be true that a rocky underwater surface could be less optimal for swimming than an engineered swimming pool, it nevertheless remains the case that claimant's striking of her foot on a rock ledge was a reasonably foreseeable risk inherent in swimming in the gorge, and the swimming conditions were as safe as they appeared to be ...". ***McQuillan v. State of New York*, 2023 N.Y. Slip Op. 03734, Third Dept 7-6-23**

FOURTH DEPARTMENT

CRIMINAL LAW, EVIDENCE, APPEALS.

THE DEFENDANT'S ACCOMPLICE TO MURDER CONVICTION RESTED ENTIRELY ON THE TESTIMONY OF A JAILHOUSE INFORMANT WHICH WAS AT ODDS WITH THE SURVEILLANCE VIDEO; THE TESTIMONY OF THE INFORMANT WAS REJECTED, RENDERING DEFENDANT'S CONVICTION AGAINST THE WEIGHT OF THE EVIDENCE. The Fourth Department, reversing defendant's accomplice-to-murder conviction, determined the conviction was against the weight of the evidence. There was evidence the shooter came to and left the area where the shooting took place in a white sedan. Defendant owned a white sedan but it was not possible to tell whether the white sedan in the surveillance video was defendant's. The People presented the testimony of a jailhouse informant who claimed defendant admitted dropping off and picking up the shooter. But the evidence given by the informant did not comport with the video surveillance of the white sedan and was therefore rejected by the Fourth Department: "[W]e find that the version of events that the informant attributed to defendant is completely at odds with the video evidence establishing that the codefendant took an efficient, one-block circuitous route from the side street where the white sedan parked to the bar and then back to the sedan. The timing of events as established by the video evidence is too tight to permit any potential diversions or alternate routes to have been taken by the codefendant, much less the irrational choice of running along a busy thoroughfare several blocks away from the white sedan. Further, the informant's testimony is too specific to permit the conclusion that any inconsistency between it and the video evidence is the innocuous result of an imprecise account. We therefore conclude that this is an appropriate case to substitute our own credibility determination for that made by the jury and find that the informant's testimony is not credible … . Absent the informant's testimony, there is no evidence from which to reasonably infer that defendant shared the codefendant's intent to cause the death of another person ... or that defendant knew that the codefendant was armed at the time defendant transported him to the bar ...". ***People v. Ramos*, 2023 N.Y. Slip Op. 03755, Fourth Dept 7-6-23**

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