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FIRST DEPARTMENT

CONTRACT LAW.

AN UNJUST ENRICHMENT CAUSE OF ACTION IS NOT AVAILABLE WHERE A CONTRACT COVERS THE RELEVANT ISSUE, EVEN IF THE DEFENDANTS ARE NONSIGNATORIES; UNJUST ENRICHMENT IS NOT A "CATCH ALL" CAUSE OF ACTION, CRITERIA EXPLAINED.

The First Department, reversing (modifying) Supreme Court, determined the existence of a contract covering the relevant issue precluded the unjust enrichment cause of action, even though defendants were not signatories to the contract: " 'The existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter' ... . It makes no difference that defendants are not parties to the contracts governing the dispute, as 'a nonsignatory to a contract cannot be held liable where there is an express contract covering the same subject matter' ... . * * * ... '[U]njust enrichment is not a catchall cause of action . . . . It is available only in unusual situations when, though the defendant has not breached a contract nor committed a recognized tort, circumstances create an equitable obligation running from the defendant to the plaintiff' ... . Here, plaintiff states a claim against defendants for recognized torts, obviating the need for the creation of that obligation." ***Iberdrola Energy Projects v. MUFG Union Bank, N.A.*, 2023 N.Y. Slip Op. 03841, First Dept 7-13-23**

LABOR LAW-CONSTRUCTION LAW, MUNICIPAL LAW, CIVIL PROCEDURE, CONTRACT LAW, EVIDENCE, PERSONAL INJURY.

PLAINTIFF, WORKING FOR A SUBSIDIARY OF VERIZON, WAS INJURED LAYING A CABLE UNDER A CITY STREET; THE MAJORITY HELD THERE WERE QUESTIONS OF FACT WHETHER A FRANCHISE AGREEMENT BETWEEN THE CITY AND VERIZON AND/OR THE ISSUANCE OF A CITY PERMIT RENDERED THE CITY A PROPER DEFENDANT; A TWO-JUSTICE DISSENT DISAGREED.

The First Department, in a full-fledged opinion by Justice Mendez, over a two-justice dissent, determined the City was not entitled to summary judgment in this Labor Law case. Plaintiff was working for a subsidiary of Verizon (Empire City) laying a conduit in a trench in the street when a backhoe pushed a metal plate onto his foot. The City argued it was not an owner under the Labor Law, had no notice of the alleged dangerous condition, and there was no nexus between the City and the work performed by Verizon. The majority held there were questions of fact about the existence of a franchise agreement between the City and Verizon, and whether a permit for the work had been issued by the City. Although the "lack of a nexus" argument was raised for the first time in reply, the majority held the issue raised a question of law and was properly considered by the motion court: "The witness's lack of knowledge renders his testimony inconclusive and speculative as to whether Empire City was working without a permit on the day plaintiff was injured, warranting denial of summary judgment ... . * * * ... [T]here remain triable issues of fact as to whether there existed a nexus between plaintiff and the City ... . Furthermore, plaintiff sought certified copies of the franchise agreements for both Verizon and Empire City as part of discovery and defendant failed to provide them. Thus, the City's challenge to the franchise documentation as being unauthenticated should have been rejected by the court, as copies of the documents remained in defendant's exclusive possession and control but were not provided to plaintiff ..." ***Powell v. City of New York*, 2023 N.Y. Slip Op. 03843, First Dept 7-17-23**

SECOND DEPARTMENT

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

ALTHOUGH DEFENDANT IN THIS FORECLOSURE ACTION DID NOT ASSERT THE AFFIRMATIVE DEFENSES OF LACK OF STANDING AND LACK OF PERSONAL JURISDICTION IN THE ANSWER, THE DEFENSES WERE NOT WAIVED AND THE MOTION TO AMEND THE ANSWER SHOULD HAVE BEEN GRANTED; EVEN THOUGH THE STATUTE PROVIDING THAT THE LACK OF STANDING DEFENSE WAS NOT WAIVED WAS NOT ENACTED AT THE TIME THE MOTION WAS DECIDED, THE APPELLATE COURT CAN APPLY THE LAW AS IT EXISTS AT THE TIME OF THE APPELLATE DECISION.

The Second Department, reversing Supreme Court in this foreclosure action, determined the defendant's failure to assert the plaintiff's lack of standing and lack of personal jurisdiction in the answer did not waive those affirmative defenses, Defendant's motion to amend the answer should have been granted. The court noted that even though RPAPL 1302-a, which provides that the failure to assert plaintiff's lack of stand-

ing in the answer does not waive the defense, had not been enacted at the time the motion below was decided, the statute can be applied on appeal: "RPAPL 1302-a ... provides that, notwithstanding the provisions of CPLR 3211(e), 'any objection or defense based on the plaintiff's lack of standing in a foreclosure proceeding related to a home loan, as defined in [RPAPL 1304(6)(a)], shall not be waived if a defendant fails to raise the objection or defense in a responsive pleading or pre-answer motion to dismiss.' 'The general rule holds that an appellate court must apply the law as it exists at the time of its decision' ... . Accordingly, RPAPL 1302-a may be considered in connection with the present appeal, even though that statute had not been enacted at the time the relevant orders in this action were decided by the Supreme Court ... . Although the defendant did not assert lack of personal jurisdiction in her answer and thereby waived this defense under CPLR 3211(e), such a defense can nevertheless be interposed in an answer amended by leave of court pursuant to CPLR 3025(b) ...". ***Deutsche Bank Natl. Trust Co. v. Groder*, 2023 N.Y. Slip Op. 03768, Second Dept 7-12-23**

CIVIL PROCEDURE, JUDGES.

IF THE JUDGE DOES NOT LAY OUT IN DETAIL THE SPECIFIC CONDUCT JUSTIFYING A DISMISSAL OF AN ACTION FOR NEGLECT TO PROSECUTE, THE REQUIREMENTS FOR DISMISSAL PURSUANT TO CPLR 3216 ARE NOT MET AND THE SIX-MONTH PERIOD FOR THE FILING OF ANOTHER COMPLAINT (CPLR 205(a)) IS AVAILABLE.

The Second Department, reversing Supreme Court, determined the requirements for dismissing the first complaint for neglect to prosecute were not met. Therefore, the six-month extension of the statute of limitations applied and the second complaint was not time-barred: "[T]he complaint in the prior action was not dismissed for 'neglect to prosecute' within the meaning of CPLR 205(a). 'Where a dismissal is one for neglect to prosecute the action made pursuant to [CPLR 3216] or otherwise, the judge shall set forth on the record the specific conduct constituting the neglect, which conduct shall demonstrate a general pattern of delay in proceeding with the litigation' ... . Although the court set forth on the record that the plaintiff failed to appear for a single conference and failed to supply an effective authorization for certain relevant medical records, such conduct did not demonstrate a general pattern of delay in proceeding with the litigation ... . The court's conclusory statements, to the effect that the plaintiff had engaged in a general pattern of delay, do not satisfy the statutory requirements that a court set forth on the record the 'specific conduct constituting the neglect, which conduct shall demonstrate a general pattern of delay in proceeding with the litigation'... . Thus, contrary to the Supreme Court's determination, the six-month extension afforded by CPLR 205(a) was applicable, and the instant action was timely commenced within six months of the termination of the prior action." ***Crudele v. Price*, 2023 N.Y. Slip Op. 03765, Second Dept 7-12-23**

CIVIL PROCEDURE, JUDGES.

HERE IT WAS NOT DEMONSTRATED THAT THE JUDGE LAID OUT THE SPECIFIC CONDUCT DEMONSTRATING A NEGLECT TO PROSECUTE AND IT WAS NOT DEMONSTRATED THE PLAINTIFF WAS AFFORDED NOTICE AND AN OPPORTUNITY TO BE HEARD IN OPPOSITION TO DISMISSAL FOR NEGLECT TO PROSECUTE.

The Second Department, reversing Supreme Court, determined compliance with the "specific conduct" and "notice" requirements of CPLR 3216 had not been demonstrated. Therefore, he motion to dismiss for neglect to prosecute should not have been granted: " 'Effective January 1, 2015, the legislature amended, in several significant respects, the statutory preconditions to dismissal under CPLR 3216' ... . One such precondition is that where a written demand to resume prosecution of the action is made by the court, as here, 'the demand shall set forth the specific conduct constituting the neglect, which conduct shall demonstrate a general pattern of delay in proceeding with the litigation' (CPLR 3216[b][3] ...). Here, the certification order is not included in the record, and, accordingly, this Court cannot make a determination as to whether that order set forth the information required by the statute. ... [A]nother precondition to dismissal is that where the court, on its own initiative, seeks to dismiss a complaint pursuant to CPLR 3216, it must first give the parties notice of its intention to do so (see id. § 3216[a] ...). Such notice is meant to provide the parties with an opportunity to be heard prior to the issuance of an order directing dismissal of the complaint ...". ***Designer Limousine, Inc. v. Authority Transp., Inc.*, 2023 N.Y. Slip Op. 03767, Second Dept 7-12-23**

CONTEMPT, MENTAL HYGIENE LAW, TRUSTS AND ESTATES.

THE PARTY SEEKING A CONTEMPT FINDING DID NOT DEMONSTRATE PREJUDICE FROM THE FAILURE TO COMPLY WITH ONE COURT ORDER AND THE OTHER COURT ORDER DID NOT EXPRESS AN UNEQUIVOCAL MANDATE; CONTEMPT FINDING REVERSED.

The Second Department, reversing (modifying) Supreme Court, determined the evidence did not support a contempt finding against the trustee of a special needs trust (Wiltshire). The guardian of the incapacitated person (Daniels) demonstrated that Wiltshire failed to provide an accounting and failed to promptly pay certain expenses, but the proof of Wiltshire's alleged failure to comply with a court order was not sufficient to support a contempt finding. For instance, it was not demonstrated that Daniels was prejudiced by Wiltshire's inaction: " 'In order to find that contempt has occurred in a given case, it must be determined that a lawful order of the court, clearly expressing an unequivocal mandate, was in effect. It must appear, with reasonable certainty, that the order has been disobeyed. Moreover, the party to be held in contempt must have had knowledge of the court's order. . . . Finally, prejudice to the right of a party to the litigation must be demonstrated' . 'The burden of proof is on the proponent of a contempt motion, and the contempt must be established by clear and convincing evidence' ... . Here, Daniels did not establish that she was prejudiced in any way by Wiltshire's failure to furnish an accounting of the SNT in violation of the ... so-ordered stipulation ... . Moreover, the [other] order directed Wiltshire to pay Daniels's guardianship fees from the SNT, but did not provide a deadline for the payment. That order thus did not clearly express an unequivocal mandate which would support holding Wiltshire in contempt of court ...". ***Matter of Serena W.*, 2023 N.Y. Slip Op. 03797, Second Dept 7-12-23**

CRIMINAL LAW, EVIDENCE.

THE APPLICATION FOR A SEARCH WARRANT WAS BASED ON INFORMATION PROVIDED BY AN INFORMANT WHO WAS NOT DEMONSTRATED TO BE RELIABLE; DEFENDANT'S SUPPRESSION MOTION SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined defendant's motion to suppress the firearm found in a search of his apartment should have been granted. The application for the search warrant was supported by uncorroborated information from an informant who was not shown to be reliable: "In support of the search warrant application, a police officer averred that he was informed by a confidential informant that the informant had observed the defendant with a handgun on three occasions, two of which were when the defendant was leaving the defendant's apartment. As the defendant correctly contends, the police failed to establish that the information given by the confidential informant was reliable . The confidential informant's statement was not under oath or against penal interests... , the informant had not demonstrated a 'proven track record of supplying reliable information in the past,' and the only information given by the informant that the police independently corroborated prior to executing the search warrant was the fact that the defendant lived at the subject apartment and the description of the premises given by the informant ...". ***People v. Vincent*, 2023 N.Y. Slip Op. 03808, Second Dept 7-12-23**

EDUCATION-SCHOOL LAW, EMPLOYMENT LAW.

A TEACHER MAY NOT ACCUMULATE CREDIT TOWARD TENURE IN ONE SCHOOL DISTRICT FOR WORK AS A SUBSTITUTE TEACHER IN ANOTHER DISTRICT.

The Second Department, in a full-fledged opinion by Justice Ford, determined a teacher may not accumulate credit towards tenure from working as a substitute teacher in a different district: "The narrow issue presented on this appeal, apparently one of first impression for an appellate court in this State, is whether a teacher may accumulate credit towards tenure, also known as 'Jarema credit,' pursuant to Education Law § 3012, for time spent teaching as a regular substitute teacher in a district other than the district in which the teacher is seeking tenure. ... [W]e conclude that a teacher is only entitled to 'Jarema credit' for regular substitute service if said service was completed in the district in which the teacher is seeking tenure." ***Matter of DeNigris v. Smithtown Cent. Sch. Dist.*, 2023 N.Y. Slip Op. 03783, Second Dept 7-12-23**

FAMILY LAW, CRIMINAL LAW, CIVIL PROCEDURE.

THE NONHEARSAY ALLEGATIONS IN THE JUVENILE DELINQUENCY PETITION DID NOT SUFFICIENTLY DEMONSTRATE THE "PHYSICAL INJURY" ELEMENT OF ASSAULT THIRD RENDERING THE PETITION JURISDICTIONALLY DEFECTIVE.

The Second Department, reversing (modifying) Family Court in this juvenile delinquency proceeding, determined the factual part of the petition alleging an act which would constitute assault third if done by an adult was jurisdictionally defective because it did not set forth every element of the offense. Specifically the petition did not sufficiently allege "physical injury": " 'For a juvenile delinquency petition, or a count thereof, to be sufficient on its face, the factual part of the petition or of any supporting depositions must set forth sworn, nonhearsay allegations sufficient to establish, if true, every element of each crime charged and the alleged delinquent's commission thereof' ... . Such allegations must be set forth in the petition or the supporting depositions (see Family Ct Act § 311.2[3] ...). 'The failure to comply with this requirement constitutes a nonwaivable jurisdictional defect that deprives the court of subject matter jurisdiction to entertain the petition or count' ... . Here, neither the petition nor the supporting depositions provided sworn, nonhearsay allegations as to a physical injury sustained by the complainant named in count 5 (see Penal Law § 120.00[2] ...). Accordingly, that count was jurisdictionally defective and must be dismissed ...". ***Matter of Yacere D.*, 2023 N.Y. Slip Op. 03781, Second Dept 7-12-23**

FAMILY LAW, EVIDENCE.

THE CHILDREN'S HEARSAY EVIDENCE AND KNOWLEDGE FATHER LEGALLY POSSESSED A FIREARM DID NOT SUPPORT THE NEGLECT FINDING; THE EVIDENTIARY CRITERIA FOR NEGLECT ARE EXPLAINED IN DETAIL.

The Second Department, reversing Family Court, determined the hearsay statements of the children and the children's knowledge father legally possessed a firearm were not sufficient to support the neglect finding against father. The proof requirements for neglect and the proper role of hearsay is discussed in some depth: "[T]he hearsay evidence presented by the petitioner at the fact-finding hearing was insufficient to permit a finding of neglect (see Family Ct Act § 1046[a][vi] ...). The hearsay statement of one child that she witnessed the father 'attacking her mother in the bedroom' failed to provide any detail as to the alleged domestic violence and was not corroborated by any other evidence of domestic violence in the record (see Family Ct Act § 1046[a][vi] ...). The hearsay statements of the children describing an incident in which the father yelled outside the children's home and 'reached for' or 'grabbed at' one of the children on their way inside, which the children described as 'uncomfortable,' 'weird,' and 'confus[ing],' causing one of them to be 'a little anxious' and the other to 'start[ ] to cry,' without more, was insufficient to establish that the children's physical, mental, or emotional condition was impaired or in imminent danger of becoming impaired ... . Furthermore, the children's knowledge that the father legally possessed a firearm in another state was insufficient to establish that the children's physical, mental, or emotional condition was impaired or in imminent danger of becoming impaired where there was no evidence that the father had threatened anyone with his firearm or otherwise connecting the firearm to the alleged incidents of neglect ...". ***Matter of Kashai E. (Kashif R.E.)*, 2023 N.Y. Slip Op. 03784, Second Dept 7-17-23**

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

ALTHOUGH THE STATUTE OF LIMITATIONS STARTED RUNNING WHEN THE FORECLOSURE ACTION WAS FIRST BROUGHT, THE SUBSEQUENT LOAN MODIFICATION AGREEMENT, ENTERED WHILE THE FORECLOSURE ACTION WAS STILL PENDING, STARTED THE STATUTE OF LIMITATIONS RUNNING ANEW.

The Second Department, reversing Supreme Court, determined that, although the six-year statute of limitations for the original foreclosure action had run, the loan modification agreement, which was entered after the foreclosure action was started and while it was still pending, restarted the statute of limitations: "RPAPL 1501(4) provides, in pertinent part, that '[w]here the period allowed by the applicable statute of limitation for the commencement of an action to foreclose a mortgage . . . has expired, any person having an estate or interest in the real property subject to such encumbrance may maintain an action . . . to secure the cancellation and discharge of record of such encumbrance.' Pursuant to General Obligations Law § 17-105, however, 'a promise to pay the mortgage debt, if made after the accrual of a right of action to foreclose the mortgage . . . by the express terms of a writing signed by the party to be charged is effective . . . to make the time limited for commencement of the action run from the date of the . . . promise'...". ***14 Fillm Corp. v. Mid-Island Mtge. Corp.*, 2023 N.Y. Slip Op. 03759, Second Dept 7-12-23**

FORECLOSURE, EVIDENCE.

IN A FORECLOSURE PROCEEDING, A REFEREE'S REPORT BASED UPON UNPRODUCED BUSINESS RECORDS SHOULD NOT BE CONFIRMED BY THE COURT.

The Second Department, reversing (modifying) Supreme Court, determined the referee's report in this foreclosure action should not have been confirmed because the referenced business records were not attached to the report: " 'The report of a referee should be confirmed whenever the findings are substantially supported by the record, and the referee has clearly defined the issues and resolved matters of credibility' ... . However, computations based on the 'review of unidentified and unproduced business records . . . constitute[ ] inadmissible hearsay and lack[ ] probative value' ... . [T]he referee's report was improperly premised upon unproduced business records. ... Therefore, the referee's findings were not substantially supported by the record ...". ***Nationstar Mtge., LLC v. Douglas*, 2023 N.Y. Slip Op. 03798, Second Dept 7-12-23**

LEGAL MALPRACTICE, CIVIL PROCEDURE, EVIDENCE.

A LEGAL MALPRACTICE COMPLAINT WHICH ALLEGES CONCLUSORY AND SPECULATIVE DAMAGES WILL BE DISMISSED FOR FAILURE TO STATE A CAUSE OF ACTION.

The Second Department, reversing Supreme Court, determined the legal malpractice complaint did not state a cause of action and should have been dismissed pursuant to CPLR 3211(a). Conclusory and speculative allegations of damages are not sufficient: " 'To state a cause of action to recover damages for legal malpractice, a plaintiff must allege: (1) that the attorney failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession; and (2) that the attorney's breach of the duty proximately caused the plaintiff actual and ascertainable damages' ... . 'To establish causation in a legal malpractice action, 'a plaintiff must show that he or she would have prevailed in the underlying action or would not have incurred any damages, but for the lawyer's negligence' ... . 'Conclusory allegations of damages or injuries predicated on speculation cannot suffice for a malpractice action, and dismissal is warranted where the allegations in the complaint are merely conclusory and speculative' ... . Here, the plaintiff failed to state a cause of action to recover damages for legal malpractice because the plaintiff's allegation that the restaurant would have had increased profits but for the defendants' alleged malpractice is conclusory and speculative ...". ***126 Main St., LLC v. Kriegsman*, 2023 N.Y. Slip Op. 03758, Second Dept 7-12-23**

NEGLIGENT DESIGN, MUNICIPAL LAW, CIVIL PROCEDURE.

A STORM DRAIN ALLEGEDLY CAUSED FLOODING ON PLAINTIFFS' PROPERTY; THE NEGLIGENT DESIGN CAUSE OF ACTION AGAINST THE VILLAGE ACCRUED WHEN THE STORM DRAIN WAS INSTALLED, NOT WHEN THE FLOODING OCCURRED, AND WAS TIME-BARRED.

The Second Department, reversing (modifying) Supreme Court in this action stemming from flooding cause by a village storm drain, determined the negligent design cause of action against the village was time-barred because it accrued at the time the storm drain was constructed. However, the trespass and negligent maintenance causes of action were timely: "General Municipal Law § 50-i provides that tort actions against municipalities 'shall be commenced within one year and ninety days after the happening of the event upon which the claim is based.' Here, the plaintiffs alleged in the third cause of action that the Village's negligent design of the storm drain system caused or contributed to the alleged property damage. Under these circumstances, 'the happening of the event upon which the claim [was] based' ... was the design and installation of the storm drain system, which occurred many years prior to the commencement of this action ...". ***Methal v. Village of Ardsley*, 2023 N.Y. Slip Op. 03775, Second Dept 7-12-23**

PERSONAL INJURY, CIVIL PROCEDURE, ATTORNEYS, EVIDENCE.

DEFENDANTS' MOTION TO COMPEL PLAINTIFF TO ALLOW THE EX PARTE INTERVIEW OF THE NONPARTY TREATING PHYSICIAN'S ASSISTANT ABOUT PLAINTIFF'S EXPLANATION OF THE CAUSE OF HER SLIP AND FALL WAS PROPERLY DENIED.

The Second Department, in a full-fledged opinion by Justice Maltese, in a matter of first impression, determined defendants' motion to compel plaintiff to authorize an ex parte interview of the nonparty physician's assistant (Molina) who treated plaintiff after her slip and fall was properly denied. Defendants sought to interview Molina about plaintiff's statement concerning the cause of her fall, not about her medical treatment. The Second Department reasoned that allowing questions about the cause of the fall would constitute an improper expansion of the Court of Appeals ruling in *Arons v. Jutkowitz*, 9 N.Y.3d 393: "The Court of Appeals in *Arons v Jutkowitz* did not explicitly address the issue involved in this case, where the defendants' counsel intends to interview a physician assistant about the reason that the plaintiff tripped, rather than about the plaintiff's injury or her medical condition. Instead, the Court of Appeals' decision in *Arons v Jutkowitz* distinguished between information about a medical condition that a plaintiff has placed in issue by commencing the action and information about other unrelated medical conditions which would still be protected under HIPAA. Furthermore, *Arons v Jutkowitz* involved three separate actions, all of which concerned allegations of medical malpractice, where causation is related to and intertwined with the issues of the patient's medical condition and treatment ... . Because the Court of Appeals did not explicitly rule on whether an *Arons* authorization would apply to information about causation and liability, where, as here, the plaintiff's alleged injury was not caused by medical treatment but instead was caused by a trip and fall accident, granting the subject branch of the defendants' motion would result in an extension of the scope of *Arons*." ***Yan v. Kalikow Mgt., Inc.*, 2023 N.Y. Slip Op. 03817, Second Dept 7-12-23**

THIRD DEPARTMENT

CRIMINAL LAW, APPEALS, JUDGES.

AFTER DECLARING A MISTRIAL, THE JUDGE DID NOT DISMISS THE INDICTMENT OR AUTHORIZE A NEW INDICTMENT; THE SUPERSEDING INDICTMENT WAS THEREFORE A NULLITY; BECAUSE THE DEFENDANT WAS CONVICTED OF TWO COUNTS IN THE SUPERSEDING INDICTMENT WHICH WERE IN THE ORIGINAL INDICTMENT (WHICH WAS STILL VALID) THOSE CONVICTIONS WERE ALLOWED TO STAND; THE CONVICTION ON THE COUNT WHICH WAS NOT IN THE ORIGINAL INDICTMENT WAS REVERSED; DOUBLE JEOPARDY DOES NOT ATTACH AFTER A MISTRIAL.

The Third Department, reversing defendant's conviction on one of three counts, determined the superseding indictment that came down after a mistrial on the original indictment was a nullity because the trial judge did not dismiss the original indictment or authorize the People to re-present a new indictment. The issue was not preserved and the Third Department considered it in the interest of justice. Because defendant had been convicted of two counts which were in the original indictment, those convictions were allowed to stand because the original indictment was never dismissed. The Third Department noted that double jeopardy principles do not attach to a mistrial. The conviction on the third count, which was not in the original indictment, was reversed: "[B]ecause the court did not, upon declaring the mistrial on the original indictment, 'dismiss the indictment or authorize the People to re-present a new indictment to the [g]rand [j]ury[,] . . . the People were limited to retrying defendant upon the same accusatory instrument' ... ; thus, the superseding indictment is a nullity ... . However, reversal of the judgment of conviction is not required given that both indictments contained two identical counts ... . * * * This conclusion, however, does not extend to count 1 of the superseding indictment, charging defendant with criminal possession of a controlled substance in the third degree ... , which was not charged in the original indictment; therefore, we reverse that conviction. To the extent that defendant raises double jeopardy concerns, as the first trial ended in a mistrial, double jeopardy principles do not attach ...". ***People v. Gentry*, 2023 N.Y. Slip Op. 03818, Third Dept 7-13-23**

CRIMINAL LAW, EVIDENCE.

DEFENDANT WAS OUTSIDE HIS RESIDENCE WHEN HE WAS ARRESTED AND A PROTECTIVE SWEEP WAS CONDUCTED INSIDE DEFENDANT'S RESIDENCE; ITEMS OBSERVED IN THE RESIDENCE WERE LATER SEIZED PURSUANT TO A SEARCH WARRANT; BECAUSE THE POLICE HAD NO REASON TO SUSPECT OTHERS WERE PRESENT IN THE RESIDENCE, THE PROTECTIVE SWEEP OF THE RESIDENCE WAS NOT JUSTIFIED AND THE OBSERVED ITEMS SHOULD HAVE BEEN SUPPRESSED.

The Third Department held that items observed by the police during a "protective sweep" of his residence should have been suppressed. At the time of defendant's arrest and the protective sweep defendant was outside of his residence. The police had no reason to believe others were inside the residence: "Upon a lawful arrest, the police may conduct a limited protective sweep of the premises, but this 'is justified only when the police have articulable facts upon which to believe that there is a person present who may pose a danger to those on the scene' ... . The purported protective sweep conducted here was improper, as there were no articulable facts supporting a belief that any other person was present inside the trailer, let alone a person who could pose a threat to those on the scene ... . Neither the search warrant nor the suppression hearing testimony reflected that anyone other than defendant was ever observed or believed to be inside the trailer, and there was nothing referenced that would serve to indicate that there was any lingering threat." ***People v. Hadlock*, 2023 N.Y. Slip Op. 03819, Third Dept 7-13-23**

ELECTION LAW, CONSTITUTIONAL LAW, ADMINISTRATIVE LAW.

THE NEW YORK STATE CONSTITUTION REQUIRES THAT THE INDEPENDENT REDISTRICTING COMMISSION SUBMIT A SECOND VOTING-DISTRICT REDISTRICTING PLAN AFTER THE REJECTION OF THE FIRST.

The Third Department, reversing Supreme Court, in a full-fledged opinion by Justice Garry, over a two-justice dissent, determined that the Independent Redistricting Commission (IRC) was required by statute to submit a second voting-district redistricting plan after the rejection of the first. The opinion provides a detailed analysis of the constitutional, legislative and administrative measures taken to reform the manner in which voting-district maps are drawn: "The IRC had an indisputable duty under the NY Constitution to submit a second set of maps upon the rejection of its first set (see NY Const, art III, § 4 [b]). The language of NY Constitution, article III, § 4 makes clear that this duty is mandatory, not discretionary. It is undisputed that the IRC failed to perform this duty." ***Matter of Hoffmann v. New York State Ind. Redistricting Commission*, 2023 N.Y. Slip Op. 03828, Third Dept 7-13-23**

MEDICAL MALPRACTICE, EVIDENCE.

PLAINTIFF'S EXPERT AFFIDAVIT IN THIS MEDICAL MALPRACTICE CASE WAS NOT CONCLUSORY OR SPECULATIVE AND RAISED A QUESTION OF FACT SUFFICIENT TO DEFEAT DEFENDANTS' SUMMARY JUDGMENT MOTION.

The Third Department, reversing Supreme Court, determined the plaintiff's expert evidence in this medical malpractice case was not conclusory or speculative and was sufficient to raise a question of fact. The decision is fact-specific and far too detailed to fairly summarize here: "[T]he internist [plaintiff's expert] specifically opined that earlier intubation ... would have produced a '70% chance of survival' by preventing the anoxic brain injury and allowing the sepsis, respiratory distress and ARDS symptoms to be treated. The internist also stated that earlier intubation would have made it 'more likely than not' that decedent's 'clinical condition would have improved.' When giving plaintiffs the benefit of all reasonable inferences as the nonmoving parties, a rational juror could infer that decedent would have had a better chance at recovering from the necrotizing pancreatitis and related sepsis and ARDS if she had been intubated ... prior to the second rapid response event ... . Thus, we conclude that the internist's affidavit was sufficient to raise a triable issue of fact as to causation, warranting denial of defendants' summary judgment motion ...". ***Sovocool v. Cortland Regional Med. Ctr.*, 2023 N.Y. Slip Op. 03826, Third Dept 7-13-23**

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