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FIRST DEPARTMENT

BANKING LAW.

QUESTION OF FACT WHETHER THE PRESUMPTION A CERTIFICATE OF DEPOSIT (CD) HAS BEEN PAID OUT WITHIN 20 YEARS OF WHEN IT CAME DUE APPLIED TO CD'S IN PLAINTIFF'S DECEASED HUSBAND'S IRA WHICH WERE RENEWED AUTOMATICALLY.

The First Department, reversing Supreme Court, determined the defendant bank's motion for summary judgment in this action seeking the payment of certificates of deposit (CD's) held in an independent retirement account (IRA) should not have been dismissed. The presumption that a CD has been paid out within 20 years of when it came due may not apply to these CD's which were in plaintiff's deceased husband's IRA and were renewed automatically: "Defendant [bank] relied upon the common law rebuttable presumption of payment to establish its prima facie case. It presumes that payment on a CD has occurred within 20 years after the time it came due ... . In opposition, plaintiff has raised issues of fact with respect to whether the presumption applies because the CD, held by an IRA, renewed automatically each year. Plaintiff has also provided an affidavit stating that she never presented the CD to defendant for payment and explaining the delay. Plaintiff's affidavit was sufficient to warrant denial of summary judgment ...". ***Friedfeld v. Citibank, N.A.*, 2020 N.Y. Slip Op. 05575, First Dept 10-8-20**

CIVIL PROCEDURE, TRADE SECRETS.

SUPREME COURT SHOULD NOT HAVE SEALED THE ENTIRE COURT RECORD, REDACTION IS APPROPRIATE FOR TRADE SECRETS.

The First Department, reversing Supreme Court, determined the entire court record should not have been sealed. The facts were not discussed, but the court noted redaction is appropriate to protect trade secrets, confidential business information or proprietary information: "We reverse the order of the motion court for two reasons. First, the motion court erred by sealing the entire court file. As we have previously explained, 'We recognize that it may be easier for the parties and the motion court to seal an entire court record, rather than make a determination on a document by document basis about sealing, but administrative convenience is not a compelling reason to justify sealing' ... . Indeed, 'In camera review and appropriate redaction is a valid method of protecting trade secrets' ... . Second, defendants failed to meet their burden of showing grounds for protecting from public access any or all of the information in Exhibit A to the complaint, let alone the entire court record. They failed to show that Exhibit A, or any other document likely to become part of the record, contains trade secrets, confidential business information, or proprietary information ...". ***Vergara v. Mission Capital Advisors, LLC*, 2020 N.Y. Slip Op. 05610, First Dept 10-8-20**

FAMILY LAW, EVIDENCE.

HEARSAY STATEMENTS OF THE ALLEGED VICTIM WERE NOT CORROBORATED, NEGLECT FINDING REVERSED.

The First Department, reversing the neglect finding, determined the hearsay statements of the alleged victim were not corroborated: "The finding of neglect was not supported by a preponderance of the evidence. 'Unsworn out-of-court statements of the victim may be received and, if properly corroborated, will support a finding of abuse or neglect' ... . Here, the child's out-of-court statement made during his videotaped interview with an investigator from the the Child Advocacy Center, that respondent bit him on the right shoulder during a January 2017 incident, was not sufficiently corroborated ... . Although medical findings confirmed that the child sustained injuries that were consistent with a bite mark, those findings in no way connected those marks to respondent. Further, there is no dispute that the child told respondent that he was going to make false allegations against her to the Administration for Children's Services while the fact-finding hearing was pending, rendering his overall credibility quite impaired." ***Matter of Jaylin S. (Jasmine E.T.)*, 2020 N.Y. Slip Op. 05606, First Dept 10-8-20**

FREEDOM OF INFORMATION LAW (FOIL).

SALARIES OF UNDERCOVER POLICE OFFICERS NOT SUBJECT TO DISCLOSURE PURSUANT TO A FREEDOM OF INFORMATION LAW REQUEST.

The First Department, reversing (modifying) Supreme Court, determined the salary of undercover police officers should not be disclosed: "FOIL provides that '[n]othing in [the statute] shall be construed to require any entity to prepare any record not possessed or maintained by such entity' (Public Officers Law § 89[3][a]), with exceptions not raised here. Accordingly, respondent is not obligated to compile 'aggregate data' 'from the documents or records in its possession' ... . In any event, the information sought as to the salaries of undercover police officers, whether aggregated or individualized, is exempt from disclosure under FOIL's public safety exemption (Public Officers Law § 87[2][f]). Respondent met its burden of making a particularized showing that publicly releasing this information would create "a possibility of endangerment" to the public's safety ... . Respondent submitted an affidavit of the Undercover Coordinator of the New York City Police Department (NYPD) establishing that this information could be used to estimate the total number of undercover officers employed by NYPD. The analysis of petitioner's request must consider not only the instant FOIL request for information as to fiscal year 2017, but also future requests which could be made for equivalent information as to other years. Such information would allow members of the public to estimate the increases or decreases in the overall number of undercover officers, which could 'undermine their deterrent effect, hamper NYPD's counterterrorism operations, and increase the likelihood of another terrorist attack' ... . Respondent's past disclosure of salary and other information as to certain public employees not employed by NYPD is not dispositive." ***Matter of Empire Ctr. for Pub. Policy v. New York City Off. of Payroll Admin.*, 2020 N.Y. Slip Op. 05449, First Dept 10-6-20**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

NO NEED TO SHOW THE LADDER WAS DEFECTIVE IN THIS LABOR LAW § 240(1) ACTION; IT WAS SUFFICIENT TO SHOW THE LADDER WAS UNSECURED AND FELL WHEN PLAINTIFF WAS STRUCK BY DEBRIS.

The First Department, reversing Supreme Court, determined plaintiff's motion for summary judgment on his Labor Law § 240(1) cause of action should have been granted. Plaintiff was using an unsecured ladder when he was struck by debris causing him and the ladder to fall. There was no need to show the ladder was defective. It was sufficient to show the ladder was not secured: "The undisputed facts show prima facie that defendants violated Labor Law § 240(1) by failing to provide adequate safety devices to plaintiff, who was injured doing demolition work when the unsecured ladder he was using to remove a ceiling was struck by a piece of falling metal debris, causing him and the ladder to fall to the ground ... . The record lacks any conflicting evidence relevant to the issue of whether Labor Law 240 (1) was violated, sufficient to raise a material issue of fact. The issues of fact relied upon by the motion court in denying partial summary judgment are immaterial to the issue of whether defendants' violation of section 240(1) was a proximate cause of plaintiff's injuries. Plaintiff was not required to show that the ladder he was using was defective, where testimony established prima facie that defendant failed to provide a safety device to insure the ladder would remain upright while plaintiff used it ...". ***Avila v. Saint David's Sch.*, 2020 N.Y. Slip Op. 05571, First Dept 10-8-20**

PERSONAL INJURY, CIVIL PROCEDURE, APPEALS.

ALTHOUGH THE INCONSISTENT VERDICT ARGUMENT WAS NOT PRESERVED, THE FAILURE TO AWARD DAMAGES FOR FUTURE PAIN AND SUFFERING, IN THE FACE OF AWARDING DAMAGES FOR PAST PAIN AND SUFFERING AND FUTURE MEDICAL EXPENSES, REQUIRED A NEW TRIAL ON THAT ISSUE.

The First Department, setting aside the verdict for future damages and ordering a new trial on that issue, determined the awards for past pain and suffering and future medical expenses rendered the failure to award damages for future pain and suffering a material deviation from reasonable compensation: "Plaintiff failed to preserve for appellate review his claim that the verdict was inconsistent because the claim was raised after the jury had been discharged. However, where the jury verdict awards plaintiff damages for past pain and suffering and future medical expenses, but declines to award damages for future pain and suffering, the verdict on future pain and suffering is contrary to a fair interpretation of the evidence and constitutes a material deviation from what would be reasonable compensation ...". ***Paucay v. D.P. Group Gen. Contrs./Devs., Inc.*, 2020 N.Y. Slip Op. 05611, First Dept 10-8-20**

PERSONAL INJURY, MUNICIPAL LAW, ATTORNEYS.

ALTHOUGH COUNSEL'S FAILURE TO IDENTIFY THE PROPER PARTY TO SUE WAS ARGUABLY NOT EXCUSABLE, THE DEFENDANT HAD TIMELY KNOWLEDGE OF THE NATURE OF THE ACTION AND WAS NOT PREJUDICED BY THE DELAY; THE APPLICATION TO FILE A LATE NOTICE OF CLAIM IN THIS SLIP AND FALL CASE SHOULD HAVE BEEN GRANTED.

The First Department, reversing Supreme Court, determined petitioner's application to file a late notice of claim in this slip and fall case should have been granted. Although the excuse for not filing on time was not a good one, counsel's failure to identify the proper party to sue, the defendant had timely knowledge of the nature of the action: "Although counsel's

error in identifying the proper party was arguably not excusable, the error was not due to any fault or delay on the part of petitioner, and '[t]he failure to set forth a reasonable excuse is not, by itself, fatal to the application' ... . This is particularly true where, as here, the record shows that respondents received timely and actual notice of the essential facts underlying plaintiff's claim ... . Here, the incident report gave respondents actual knowledge of the pertinent facts constituting the claim. The report makes clear that petitioner fell on the sidewalk, and the photographs contained in the report show that the sidewalk is cracked and raised, presenting a tripping hazard ... . Furthermore, according to petitioner's 50-h testimony, her fall was notable enough that a security guard immediately called his supervisor to the scene, and there is no indication that respondents are prejudiced by the delay ...". ***English v. Board of Trustees of the Fashion Inst. of Tech.*, 2020 N.Y. Slip Op. 05450, First Dept 10-6-20**

SECOND DEPARTMENT

CIVIL PROCEDURE.

THE LATE SUMMARY JUDGMENT MOTION AND THE EXCUSE OFFERED IN REPLY PAPERS SHOULD NOT HAVE BEEN CONSIDERED.

The Second Department, reversing Supreme Court, determined the late summary judgment motion and an excuse offered in reply papers should not have been considered: "Pursuant to CPLR 3212, courts have 'considerable discretion to fix a deadline for filing summary judgment motions,' so long as the deadline is not 'earlier than 30 days after filing the note of issue or (unless set by the court) later than 120 days after the filing of the note of issue, except with leave of court on good cause shown' ... . As a general matter, a court should not consider a good cause argument proffered by a movant if it is presented for the first time in reply papers ... . Here, it is undisputed that the defendant moved for summary judgment approximately 30 days after the date set by the Supreme Court without seeking leave of the court or offering an explanation showing good cause for the delay in their moving papers. As a result, the court improvidently exercised its discretion in considering that branch of the defendant's motion which was for summary judgment dismissing the complaint insofar as asserted against it and in considering the good cause arguments raised for the first time in the defendant's reply papers ...". ***O'Neil v. Environmental Prods. Corp.*, 2020 N.Y. Slip Op. 05516, Second Dept 10-7-20**

CIVIL PROCEDURE.

CRITERIA FOR AN EXTENSION OF TIME TO SERVE A SUMMONS AND COMPLAINT PURSUANT TO CPLR 306-b EXPLAINED.

The Second Department, reversing Supreme Court, determined plaintiff's motion pursuant to CPLR 306-b to extend the time to serve the defendant should have been granted and explained the criteria: "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 for an extension of time to serve the defendant 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 the defendant ...". ***U.S. Bank N.A. v. Viera*, 2020 N.Y. Slip Op. 05549, Second Dept 10-7-20**

CRIMINAL LAW.

COUNTY COURT SHOULD HAVE FURTHER RESTRICTED DISCOVERY FOR THE PROTECTION OF WITNESSES.

The Second Department, reversing (modifying) County Court, determined certain aspects of the People's application to restrict discovery for witness safety should have been granted: "... [T]he application to vacate or modify the order ... is granted to the extent that the order is modified by deleting the provision thereof granting the People's motion for a protective order only to the extent that the People may withhold the name of the confidential informant until 15 days prior to a scheduled pre-trial hearing or trial, and substituting therefor a provision granting the People's motion for a protective order to the extent that (1) disclosure of the audio and video recordings of the narcotics sales shall be made to defense counsel only, to

be viewed at the prosecutor's office, (2) disclosure of the name and contact information of the confidential informant shall be delayed until the commencement of trial, and (3) disclosure of the names and work affiliation of the undercover personnel shall be delayed until the commencement of trial ...". ***People v. Jeanty*, 2020 N.Y. Slip Op. 05555, Second Dept 10-7-20**

CRIMINAL LAW.

SUPREME COURT SHOULD HAVE RESTRICTED THE RELEASE OF THE NAMES OF COMPLAINANTS AND COMPLAINANTS' PARENTS FOR THEIR PROTECTION.

The Second Department, reversing (modifying) Supreme Court, determined Supreme Court should have restricted the release of the names of complainants and their parents for their protection: "... [T]he application by the People pursuant to CPL 245.70(6) is granted to the extent that the order ... is modified by directing that the disclosure of the names of complainants 1, 2, and 3 shall be delayed until the commencement of the trial and shall be provided to defense counsel only, and that the disclosure of the names of the parents of complainants 1, 2, and 3 shall be delayed until 15 days prior to the commencement of the trial and shall be provided to defense counsel only ...". ***People v. Harrigan*, 2020 N.Y. Slip Op. 05612, Second Dept 10-8-20**

CRIMINAL LAW.

COUNTY COURT'S ORDER MODIFIED TO ALLOW WITHHOLDING THE NAMES OF THE CONFIDENTIAL INFORMANT AND UNDERCOVER OFFICERS UNTIL TRIAL AND RESTRICTING ACCESS TO THE AUDIO AND VIDEO RECORDINGS OF THE NARCOTICS SALES.

The Second Department, reversing (modifying) County Court, determined the name of the confidential informant can be withheld until trial, the names of the undercover officers can be withheld until trial, and audio and video recordings of the narcotics sales can only be shown to defense counsel at the prosecutor's office: "... [T]he order is modified by ... granting the People's motion for a protective order to the extent that (1) disclosure of the audio and video recordings of the narcotics sales shall be made to defense counsel only, to be viewed at the prosecutor's office, (2) disclosure of the name and contact information of the confidential informant shall be delayed until the commencement of trial, and (3) disclosure of the names and work affiliation of the undercover personnel shall be delayed until the commencement of trial ...". ***People v. Singh*, 2020 N.Y. Slip Op. 05479, Second Dept 10-6-20**

CRIMINAL LAW, EVIDENCE.

CO-DEFENDANT'S REDACTED STATEMENT SHOULD NOT HAVE BEEN ALLOWED IN EVIDENCE, NEW TRIAL ORDERED.

The Second Department, reversing defendant's conviction, determined the co-defendant's redacted admission should not have been admitted in evidence: "... [W]e agree with the defendant that, under the instant circumstances, the Supreme Court's admission of codefendant Jason Villanueva's redacted statement to the police violated the rule articulated in Bruton v. United States (391 US 123), because the subject redaction would have caused the jurors to 'realize that the confession refers specifically to the defendant' or to one of the other nonconfessing codefendants ... . In addition, the error was not harmless. '[I]t cannot be said that 'there is no reasonable possibility that the erroneously admitted [statement] contributed to the conviction' ... , given that the statement was inconsistent with the defendant's justification defense, and the court failed to give the jurors a proper limiting instruction to only consider the statement against Villanueva." ***People v. Casares*, 2020 N.Y. Slip Op. 05520, Second Dept 10-7-20**

CRIMINAL LAW, EVIDENCE, APPEALS.

ALTHOUGH THE EVIDENCE WAS DEEMED LEGALLY SUFFICIENT TO SUPPORT THE CONVICTIONS STEMMING FROM AN ATTACK ON THE COMPLAINANT, THOSE CONVICTIONS WERE DEEMED AGAINST THE WEIGHT OF THE EVIDENCE BECAUSE OF THE WEAKNESS OR ABSENCE OF IDENTIFICATION EVIDENCE.

The Second Department, reducing defendant's convictions, determined: (1) the evidence of a sexual touching of complainant by defendant captured on video in the laundromat was legally insufficient; (2) the evidence that defendant attacked the complainant after she left the laundromat was legally sufficient; (3) but the convictions stemming from the attack on the complainant after she left the laundromat were against the weight of the evidence because of the weakness or absence of identification evidence. So this is a rare decision where the evidence was explicitly found legally sufficient but the related convictions were found to be against the weight of the evidence: "Viewing the evidence in the light most favorable to the prosecution, here, there was legally sufficient evidence to support the defendant's convictions of sexual abuse in the first degree and criminal obstruction of breathing or blood circulation. The surveillance video footage showed the defendant leaving the laundromat just after the complainant had left. Both the complainant and the defendant were shown walking down Woodhaven Boulevard, and the defendant's clothing matched the complainant's description of the clothes worn by her assailant. Therefore, a rational juror could have concluded that the defendant was the perpetrator of the assault on the complainant that occurred near her home. However, the evidence was not legally sufficient to support the defendant's

conviction of sexual abuse in the third degree. ... [O]ur viewing of the video recording taken inside the laundromat did not establish that the contact between the defendant and the complainant as he was exiting the laundromat was of a sexual nature. At best, the video was ambiguous as to the nature of the touching depicted. * * * In the face of the markedly disparate descriptions offered by the detectives and the complainant, and in the absence of an in-court identification, the verdict of the jury finding the defendant guilty of sexual abuse in the first degree and criminal obstruction of breathing or blood circulation was against the weight of the evidence ... . ***People v. Kassebaum*, 2020 N.Y. Slip Op. 05529, Second Dept 10-7-20**

CRIMINAL LAW, EVIDENCE, APPEALS.

ROBBERY AND ASSAULT SECOND CONVICTIONS WERE AGAINST THE WEIGHT OF THE EVIDENCE BECAUSE OF THE WEAKNESS OF THE EVIDENCE OF PHYSICAL INJURY.

The Second Department, reversing defendant's conviction, determined the robbery and assault second degree convictions were against the weight of the evidence because of the weakness of the evidence of physical injury. The convictions were reduced to robbery and assault third degree: " 'Physical injury' is defined as 'impairment of physical condition or substantial pain' (Penal Law § 10.00[9]). ... Here, the victim gave testimony about an incident in which the defendant attacked her and forcibly stole property from her. During the incident, the defendant pushed the victim down onto a bed, bound her wrists with a coaxial cable, placed the cable around her neck, and placed her in a choke hold with his arm across her throat. After the incident, the victim had an indentation on her wrist where the cord had been tied, her wrist was sore and had redness, and she had a red mark on her neck. She was 'pretty numb' at the time and was not experiencing pain. She declined to go to the hospital. A few days later, she had difficulty swallowing and her throat was 'kind of sore' for '[j]ust a couple of days.' When she testified before the grand jury, approximately one week after the incident, she was asked if she had any pain or discomfort, and she answered, 'just the muscle in my arm.' Under these particular facts, the weight of the evidence does not support a finding that the victim suffered impairment of physical condition or substantial pain. Accordingly, we reduce the conviction of robbery in the second degree to robbery in the third degree ...". ***People v. Tactikos*, 2020 N.Y. Slip Op. 05535, Second Dept 10-7-20**

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA).

A SINGLE PROMOTING PRISON CONTRABAND CONVICTION FOUR YEARS BEFORE DID NOT SUPPORT A TEN POINT ASSESSMENT FOR UNSATISFACTORY CONDUCT; RISK LEVEL REDUCED FROM TWO TO ONE.

The Second Department determined the 10 point assessment for unsatisfactory conduct was not supported and reduced defendant's risk level from two to one: "... [T]he record does not contain clear and convincing evidence to support the assessment of 10 points under risk factor 13, for 'unsatisfactory' conduct while confined, based upon his conviction of the class A misdemeanor of promoting prison contraband in the second degree (Penal Law § 205.20). This conviction constituted the sole act of misconduct while confined cited by the People, and it occurred approximately four years before the SORA hearing, prior to the defendant's transfer to State prison. Since the defendant's misconduct was neither recent nor repeated, the assessment of points for that misdemeanor was not supported by the record ...". ***People v. Hernandez*, 2020 N.Y. Slip Op. 05540, Second Dept 10-7-20**

FORECLOSURE, EVIDENCE.

THE REFEREE RELIED ON HEARSAY TO DETERMINE THE AMOUNT OWED IN THIS FORECLOSURE ACTION; SUPREME COURT SHOULD NOT HAVE CONFIRMED THE REFEREE'S REPORT.

The Second Department, reversing Supreme Court, determined the evidence relied upon by the referee to determine the amount owed to plaintiff bank in this foreclosure action did not meet the requirements of the business records exception to the hearsay rule. The bank's motion for summary judgment should not have been granted: "With respect to the amount due to the plaintiff, the referee based his findings on an affidavit of Jillian Thrasher, a vice president of Ocwen Loan Servicing, LLC (hereinafter Ocwen), the servicer of the subject loan. ... 'A proper foundation for the admission of a business record must be provided by someone with personal knowledge of the maker's business practices and procedures' ... . Here, Thrasher's affidavit was insufficient to establish a proper foundation for the admission of a business record pursuant to CPLR 4518(a), because she failed to attest that she was personally familiar with the record-keeping practices and procedures of her employer, Ocwen, the entity that generated the subject business records. Accordingly, she failed to demonstrate that the records relied upon in her affidavit were admissible under the business records exception to the hearsay rule ... . Thus, Thrasher's affidavit, upon which the referee relied, 'constituted inadmissible hearsay and lacked probative value' on the issue of the amount due and owing to the plaintiff, including the amount of interest due for the relevant period ... , and the Supreme Court erred in confirming the report. The error in relying on hearsay evidence was not harmless, as the referee's determination is not substantially supported by other evidence in the record ...". ***IndyMac Fed. Bank, FSB v. Vantassell*, 2020 N.Y. Slip Op. 05495, Second Dept 10-7-20**

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

THE BANK DID NOT SUBMIT SUFFICIENT EVIDENCE OF STANDING OR COMPLIANCE WITHE THE RPAPL 1304 NOTICE REQUIREMENTS IN THIS FORECLOSURE ACTION; THE BANKS' MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined plaintiff bank did not present sufficient evidence of standing to bring the foreclosure action and compliance with the RPAPL 1304 notice requirements: "... [T]he plaintiff failed to establish, prima facie, that it had standing to commence this action. Although the employee of the plaintiff's loan servicer stated in her affidavit, which was submitted by the plaintiff in support of its motion, that the plaintiff was the holder of the note, she never stated that the plaintiff was the holder of the note at the time the action was commenced ... . Further, the plaintiff failed to establish that the note was attached to the complaint at the time of the commencement of the action ... . [T]he plaintiff failed to establish, prima facie, that it complied with RPAPL 1304 because the employee of the plaintiff's loan servicer, in her affidavit, failed to assert personal knowledge of the purported mailing or make the requisite showing that she was familiar with the plaintiff's mailing practices and procedures in order to establish 'proof of a standard office practice and procedure designed to ensure that items are properly addressed and mailed' ...". ***Bank of Am., N.A. v. Palacio*, 2020 N.Y. Slip Op. 05480, Second Dept 10-7-20**

INSURANCE LAW.

AFTER OBTAINING AN UNPAID JUDGMENT AGAINST THE INSURED, PLAINTIFF PROPERLY SUED THE INSURER WHICH HAD DISCLAIMED COVERAGE ALLEGING THE INSURED HAD REFUSED TO COOPERATE; THE PROOF OF THE INSURED'S ALLEGED FAILURE TO COOPERATE WAS NOT SUFFICIENT TO RAISE A QUESTION OF FACT; PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AGAINST THE INSURER WAS PROPERLY GRANTED.

The Second Department, in a comprehensive decision explaining the law, determined plaintiff properly sued the defendant's insurer after obtaining an unpaid judgment against the insured. The insurer argued it had properly disclaimed coverage because the insured did not cooperate by answering questions. However, the insurer's submissions did not demonstrate the insured's failure to cooperate and plaintiff was entitled to summary judgment against the insurer: "[The] statutory right, presently codified at Insurance Law § 3420, among other things, 'grants an injured party a right to sue the tortfeasor's insurer, but only under limited circumstances—the injured party must first obtain a judgment against the tortfeasor, serve the insurance company with a copy of the judgment and await payment for 30 days' ... . 'Compliance with these requirements is a condition precedent to a direct action against the insurance company' ... . * * * Here, the insurer contended that [the insured's] principal, Michael Stoicescu, refused to cooperate and thereby breached the subject policy. The insurer did not allege that any other individuals associated with [the insured] failed to cooperate. Although the insurer claimed that Stoicescu refused to cooperate in the underlying action, it is undisputed that he appeared for an examination before trial where he testified at length ... . The insurer failed to identify any information that Stoicescu refused to disclose, or any document that he refused to provide in connection with the underlying action ... . The insurer's contention that Stoicescu refused to respond to certain telephone calls and letters was insufficient to show 'an attitude of willful and avowed obstruction' ... . Furthermore, although the insurer submitted evidence to show that, after years of litigation, Stoicescu had stated during one or more telephone calls that he would not attend a trial in the underlying action, any such statements were made before a date for the trial had even been set ... , and the insurer did not allege that Stoicescu actually failed to appear for any required court appearance ...". ***DeLuca v. RLI Ins. Co.*, 2020 N.Y. Slip Op. 05487, Second Dept 10-7-20**

INSURANCE LAW.

DEFENDANT INSURER'S MOTION FOR SUMMARY JUDGMENT DISMISSING THE "BAD FAITH" COMPLAINT—ALLEGING A BAD FAITH FAILURE TO SETTLE PLAINTIFF'S PERSONAL INJURY ACTION STEMMING FROM A TRAFFIC ACCIDENT—SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined defendant insurer demonstrated it did not act in bad faith when it refused to settle a personal injury action. Plaintiff VanNostrand sued Froelich in an action stemming from a traffic accident and recovered a $300,000 verdict. Froelich's insurer, defendant New York Central Mutual Fire Insurance Company, had refused to settle. Froelich assigned his rights in the policy to VanNostrand and they sued the insurer alleging a bad faith failure to settle. The Second Department held the insurer's motion for summary judgment should have been granted: " '... [A] bad-faith plaintiff must establish that the defendant insurer engaged in a pattern of behavior evincing a conscious or knowing indifference to the probability that an insured would be held personally accountable for a large judgment if a settlement offer within the policy limits were not accepted' ... . [T]he evidence submitted by the defendant in support of its motion for summary judgment established ... the defendant had a rational basis for concluding that a jury in the underlying action could find that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) as a result of the subject accident, which would preclude her from recovery in the underlying action (see Insurance Law § 5104[a]). Specifically, the defendant monitored the plaintiff's claim in the underlying action and, among other things, retained expert physicians to examine the plaintiff and review the MRI films of her spine. One of the defendant's experts concluded, inter

alia, that the alleged disc herniation at L5-S1 did not involve any root impingement. As far as the alleged disc herniation at C3-C4 was concerned, the defendant's expert found no herniation and, at most, a bulge. Moreover, it was undisputed that the plaintiff returned to work within one month of the accident and did not seek recovery for lost wages. It was further undisputed that as of November 2001, two years after the accident, and at the time of trial in April 2013, the plaintiff was not taking any medication or undergoing any further treatment. In opposition, the plaintiff failed to raise a triable issue of fact." ***VanNostrand v. New York Cent. Mut. Fire Ins. Co.*, 2020 N.Y. Slip Op. 05550, Second Dept 10-7-20**

INSURANCE LAW, CONTRACT LAW, FRAUD, NEGLIGENCE.

PLAINTIFF HOMEOWNERS' ACTION AGAINST THE INSURER FOR BREACH OF CONTRACT, FRAUD AND NEGLIGENCE SHOULD HAVE BEEN DISMISSED; PLAINTIFF ACKNOWLEDGED THE HOME WAS VACANT WHEN THE POLICY WAS PURCHASED AND AT THE TIME OF THE FIRE AND THE POLICY EXCLUDED COVERAGE FOR VACANT PROPERTY.

The Second Department, reversing Supreme Court, determined the insurer's motion for summary judgment in this "disclaimed coverage" case should have been granted. Plaintiff homeowner acknowledged the home had been vacant and was vacant at the time of the fire. Plaintiff's allegation that the insurance agent was aware the house was vacant when the policy was purchased was rejected because plaintiff was deemed to have read the policy (which excluded coverage for vacant property): "The defendants demonstrated, prima facie, that the policy only provided coverage if the premises were used as a residence by the plaintiffs and that the plaintiffs never resided at the premises during the policy period ... . * * * 'The element of justifiable reliance is 'essential' to any fraud claim' ... . Here, the defendants established, prima facie, that any reliance by [plaintiff] on an alleged misrepresentation made by [the insurance agent] was not justifiable since [plaintiff] testified that he received a copy of the policy when it was issued in August 2010, and again in 2011, when it was renewed ... . The defendants made a prima facie showing of their entitlement to judgment as a matter of law dismissing [the negligence] cause of action by submitting evidence which demonstrated that [plaintiff] only made a general request for homeowner's insurance, and did not specifically request coverage for premises that were not owner occupied ... , and that no special relationship existed between the parties ...". ***Waknin v. Liberty Ins. Corp.*, 2020 N.Y. Slip Op. 05551, Second Dept 10-7-20**

MUNICIPAL LAW, EMPLOYMENT LAW.

THE CIVIL SERVICE LAW, NOT THE COLLECTIVE BARGAINING AGREEMENT, CONTROLS THE TERMINATION OF AN INJURED FIREFIGHTER ABSENT FOR MORE THAN A YEAR DUE TO THE INJURY.

The Second Department, reversing Supreme Court, determined the Civil Service Law, not the collective bargaining agreement, controlled the termination of an injured firefighter who had been absent for more than a year due to the injury: "Civil Service Law § 71 provides that where an employee has been separated from the service by reason of a disability resulting from occupational injury or disease as defined in the worker's compensation law, 'he or she shall be entitled to a leave of absence for at least one year, unless his or her disability is of such a nature as to permanently incapacitate him or her for the performance of the duties of his or her position.' The legislature provided that the state civil service commission shall 'prescribe and amend suitable rules and regulations for carrying into effect the provisions of this chapter,' including 'rules for . . . leaves of absence' (Civil Service Law § 6[1]). The Department of Civil Service has promulgated implementing regulations for Civil Service Law § 71, including detailed procedures for notifying an employee of the right to a one-year leave of absence during continued disability, and notifying an employee of an impending termination following the expiration of that one-year period and the right to a hearing and to apply for a return to duty (see 4 NYCRR 5.9). Here, the specific directives of Civil Service Law § 71 and 4 NYCRR 5.9 leave no room for negotiation of the procedures to be followed prior to the termination of an employee's employment upon the exhaustion of the one-year period of leave. Therefore the presumption in favor of collective bargaining is overcome ...". ***Matter of City of Long Beach v. New York State Pub. Empl. Relations Bd.*, 2020 N.Y. Slip Op. 05504, Second Dept 10-7-20**

REAL PROPERTY LAW.

NATURE OF AN INGRESS AND EGRESS EASEMENT EXPLAINED.

The Second Department discussed the elements of an easement for ingress and egress only: " 'Express easements are governed by the intent of the parties' ... . 'As a [result], where the intention in granting an easement is to afford only a right of ingress and egress, it is the right of passage, and not any right in a physical passageway itself, that is granted to the easement holder' ... . 'Indeed, an owner of land that is burdened by an express easement for ingress and egress 'may narrow it, cover it over, gate it or fence it off, [as] long as the easement holder's right of passage is not impaired' ...". ***Panday v. Allen*, 2020 N.Y. Slip Op. 05519, Second Dept 10-7-20**

FOURTH DEPARTMENT

CIVIL PROCEDURE, FRAUD.

IN THIS FRAUD ACTION, PLAINTIFF COULD NOT DEMONSTRATE THE FRAUDULENT STATEMENTS WERE MADE IN ERIE COUNTY; THEREFORE THE PLACE OF DEFENDANT'S RESIDENCE, NEW YORK COUNTY, WAS PROPERLY DESIGNATED THE VENUE FOR THE ACTION.

The Fourth Department, in a full-fledged opinion by Justice Troutman, determined New York County was the proper venue for this fraud action because plaintiff did not demonstrate the fraudulent statements allegedly made by defendant were made in Erie County, as opposed to Cleveland, Ohio. Absent proof the statements were made in Erie County, the fact that defendant resides in New York County controlled: "... New York County is indisputably a proper county based upon defendant's residence therein (see CPLR 503 [a]). Because none of the parties resides in Erie County, the sole question before the trial court was whether 'a substantial part of the events or omissions giving rise to the claim occurred' in Erie County ... . The legislature only recently added a provision to CPLR 503 (a) that allows venue based on the location of the events underlying the claim ... , but the Federal Rules of Civil Procedure contain an identical provision (see 28 USC § 1391 [b] [2]), doubtless the model for the amended language in CPLR 503 (a). In determining whether venue is proper under that provision, the Second Circuit applies a two-part inquiry. First, the court must 'identify the nature of the claims and the acts or omissions that the plaintiff alleges give rise to those claims' ... . Second, the court must 'determine whether a substantial part of those acts or omissions occurred in the district where suit was filed, that is, whether 'significant events or omissions material to [those] claim[s] . . . have occurred in the district in question' ... . In a fraud claim, the act giving rise to the claim is the alleged making of the fraudulent statement ... . Consistent with that, federal courts have found venue to be proper based upon 'where the defendant allegedly made the fraudulent statements' ... . Plaintiff ... failed to show that material, fraudulent statements were made in Erie County ...". ***Harvard Steel Sales, LLC v. Bain*, 2020 N.Y. Slip Op. 05635, Fourth Dept 10-9-20**

CIVIL PROCEDURE, PERSONAL INJURY.

ALTHOUGH THE TRAFFIC ACCIDENT OCCURRED IN VIRGINIA, PLAINTIFF'S CHOICE OF FORUM (NEW YORK) SHOULD HAVE BEEN UPHELD; VIRGINIA WITNESSES MAY COME TO NEW YORK VOLUNTARILY OR THE VIRGINIA WITNESSES COULD BE DEPOSED IN VIRGINIA; SUPREME COURT SHOULD NOT HAVE SPECULATED ABOUT THE AVAILABILITY OF VIRGINIA WITNESSES.

The Fourth Department, reversing Supreme Court, determined the plaintiff's choice of forum should have been upheld: "Dalaine M. Piesker (plaintiff) was injured in a motor vehicle accident while driving a truck owned by defendant. Plaintiffs are residents of New York, and defendant has an office and transacts business in New York, but the accident occurred in Virginia. Plaintiffs thereafter commenced this negligence action in New York. Supreme Court subsequently granted defendant's motion to dismiss the complaint on forum non conveniens grounds, reasoning that defendant would be prejudiced by litigating this action in New York because it would be unable to subpoena either the Virginia State Police officers who investigated the accident or the medical providers who treated plaintiff in Virginia immediately following the accident. '[W]here a plaintiff is a New York resident, a defendant bears the heavy burden of establishing that New York is an inappropriate forum before plaintiff's choice of forum will be disturbed' ... . Defendant failed to meet that heavy burden here. Although 'New York courts lack the authority to subpoena out-of-state nonparty witnesses' ..., defendant submitted no evidence establishing that the investigating police officers and the emergency medical providers would not testify voluntarily in New York. The court's speculation to the contrary is unsupported by the record. In any event, both New York and Virginia are parties to the Uniform Interstate Depositions and Discovery Act (see CPLR 3119; Va Code Ann § 8.01-412.10), and defendant could, if necessary, depose the subject witnesses in Virginia and thereafter introduce those depositions at trial in lieu of in-person testimony in New York (see CPLR 3117 [a] [3] [ii])." ***Piesker v. Price Leasing Corp.*, 2020 N.Y. Slip Op. 05648, Fourth Dept 10-9-20**

CRIMINAL LAW.

BURGLARY SECOND COUNT DISMISSED AS A LESSER INCLUSORY COUNT OF THE TWO BURGLARY FIRST COUNTS.

The Fourth Department dismissed the burglary second count as a lesser inclusory count of the two burglary first counts: "... [C]ount three of the indictment, charging burglary in the second degree, must be dismissed as a lesser inclusory concurrent count of counts one and two, charging burglary in the first degree (see CPL 300.40 [3] [b] ...)." ***People v. Smith*, 2020 N.Y. Slip Op. 05643, Fourth Dept 10-9-20**

CRIMINAL LAW.

WAIVER OF APPEAL OF THE UNDERLYING OFFENSE DOES NOT PRECLUDE APPEAL OF THE SENTENCE IMPOSED FOR A SUBSEQUENT VIOLATION OF PROBATION; SENTENCE DEEMED HARSH AND EXCESSIVE.

The Fourth Department determined defendant's sentence was harsh and excessive and noted a waiver of appeal for the underlying offense does not apply to an appeal of the sentence imposed for a subsequent violation of probation: "... [A]s defendant contends and the People correctly concede, even if defendant executed a valid waiver of the right to appeal at the underlying plea proceeding, it would not encompass her challenge to the severity of the sentence imposed following her violation of probation ... . We agree with defendant that the sentence is unduly harsh and severe. In light of defendant's young age, minimal criminal history, and prior efforts to address her substance abuse issues, as well as the nonviolent nature of the underlying crimes and the relatively minor infractions for which she was discharged from her treatment program thereby resulting in her violation of probation, we modify the judgment as a matter of discretion in the interest of justice ... by reducing the sentence on each count to a determinate term of imprisonment of three years, to be followed by the two years of postrelease supervision imposed by County Court, with the sentences remaining concurrent." ***People v. Griffin*, 2020 N.Y. Slip Op. 05645, Fourth Dept 10-9-20**

CRIMINAL LAW.

DEFENDANT WAS NOT PRESENT AT A SIDEBAR CONCERNING THE BIAS OF A PROSPECTIVE JUROR, CONVICTION REVERSED.

The Fourth Department, reversing defendant's conviction, determined defendant was deprived of his right to be present at a side bar concerning the bias of a prospective juror: "A ... prospective juror was peremptorily excused by defendant's counsel, however, and, during a sidebar conference at which defendant was not present, that juror was questioned 'to search out [her] bias, hostility or predisposition to believe or discredit the testimony of potential witnesses' (Antommarchi, 80 NY2d at 250). Consequently, we conclude that, 'absent a knowing and voluntary waiver by defendant of his right to be present at that sidebar conference, his conviction cannot stand' ... . The only evidence in the record concerning a waiver consists of a conversation between the court, defendant's counsel and codefendant's counsel that occurred after the prospective juror was excused, in which codefendant's counsel indicated that he had just discussed with codefendant the right to approach the bench during such conferences, and defendant's counsel merely assented. Inasmuch as the discussion was vague and prospective, and there is no indication that defendant or defendant's counsel were waiving defendant's Antommarchi rights retrospectively, that conversation is insufficient to establish that defendant waived those rights concerning the questioning of the prospective juror at issue here. We therefore reverse the judgment of conviction and grant a new trial." ***People v. Mckenzie-Smith*, 2020 N.Y. Slip Op. 05653, Fourth Dept 10-9-20**

CRIMINAL LAW, EVIDENCE.

CITIZEN INFORMANT WHO WALKED INTO THE POLICE STATION PROVIDED SUFFICIENT INFORMATION TO JUSTIFY APPROACHING A VAN IN WHICH DEFENDANT WAS SLEEPING, LEADING TO DEFENDANT'S ARREST; A TWO-JUSTICE DISSENT ARGUED THE INFORMATION PROVIDED BY THE FACE-TO-FACE INTERVIEW WITH THE INFORMANT DID NOT PROVIDE THE POLICE WITH REASONABLE SUSPICION.

The Fourth Department, over a two-justice dissent, determined the police, after interviewing a citizen informant who walked into the police station, had reasonable suspicion to approach a van in which the defendant was sleeping. Thereafter the police were justified in asking the defendant to step out of the van for safety reasons and in arresting the defendant when an officer saw a handgun in defendant's waistband. The dissent argued the informant (who identified himself to the police but was not identified to the defendant) did not provide sufficiently detailed information to justify approaching the van: "... [T]he testimony of a police officer during the suppression hearing established that a citizen informant walked into a police station at 4:30 a.m. and reported that two men had 'ripped him off' during 'a drug deal gone wrong.' The informant, who identified himself by name to the officer but whose identity was not disclosed to defendant, appeared to be angry and upset and did not seem to be intoxicated. The informant alleged, inter alia, that the two men were in a purple minivan at a specific address on Stevens Street in the City of Buffalo, and that 'there were drugs in the vehicle' and one of the men 'was holding [a] handgun in his lap.' The police officer interviewed the informant for 10 to 15 minutes, during which time the officer had an opportunity to evaluate his reliability on the basis of his appearance and demeanor ... . The informant's reliability was enhanced because he identified himself to the officer and reported that he had attempted to take part in a drug transaction, thus making a declaration against penal interest and subjecting himself to potential prosecution for his own criminal activity ... . The informant also waited at the police station while officers investigated the allegations, thereby subjecting himself to 'the criminal sanctions attendant upon falsely reporting information to the authorities' ... . Thus, we conclude that the People established the reliability of the informant by establishing that the officer obtained information from him during a face-to-face encounter ... , and that information did not constitute an anonymous tip ... . **From the dissent:** ... [A]lthough the majority relies on the ability of the police 'to evaluate [the] reliability [of the informant]' during face-to-face contact ... , the testimony of the police officer who met the informant reveals that the officer lacked sufficient information to make such an evaluation. The officer believed that the informant appeared agitated, and conceded that he did not know

whether the informant was sober. The informant offered the officer no description of the men who purportedly 'ripped him off' or how the alleged drug deal had gone wrong, and the officer testified that he never even asked the informant when that incident took place. Instead, the informant offered no more than the description of the outside of a vehicle ...". ***People v. Edwards*, 2020 N.Y. Slip Op. 05672, Fourth Dept 10-9-20**

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA).

INSUFFICIENT EVIDENCE OF SEXUAL CONTACT; RISK LEVEL REDUCED FROM LEVEL TWO TO ONE.

The Fourth Department, reducing defendant's risk level from two to one, determined the evidence of sexual contact was not sufficient: "... [T]he record is devoid of any evidence, much less the requisite clear and convincing evidence ... , that defendant touched the victim's 'sexual or other intimate parts.' Rather, the record contains only a statement from the victim that defendant 'touched her inappropriately.' An 'inappropriate' touch, however, encompasses a far broader array of conduct than that classified as 'sexual conduct' by section 130.00 (3). ... [A]lthough defendant was indicted for aggravated sexual battery under Tennessee law—an offense that includes 'sexual contact' as an element (see Tenn Code Ann §§ 39-13-501 [6]; 39-13-504 [a])—he was ultimately convicted only of attempted aggravated sexual battery, and it is well established that 'the fact that an offender was arrested or indicted for an offense is not, by itself, evidence that the offense occurred' ...". ***People v. Bryant*, 2020 N.Y. Slip Op. 05646, Fourth Dept 10-9-20**

DEBTOR-CREDITOR, UNIFORM COMMERCIAL CODE, PERSONAL PROPERTY.

IN THIS DEFICIENCY JUDGMENT ACTION, THE PLAINTIFF DID NOT PRESENT SUFFICIENT PROOF OF THE AMOUNT OWED BY THE DEFENDANT OR THE REASONABLENESS OF THE SALE OF THE COLLATERAL.

The Fourth Department, vacating the damages award in this action on a motor vehicle retail installment contract, determined the plaintiff did not present evidence sufficient to determine the correct amount of the deficiency judgment or the reasonableness of the sale of the collateral: "... [T]he court should have denied plaintiff's motion insofar as it sought summary judgment on the amount of damages. Plaintiff did not meet its initial burden of establishing the amount of the alleged deficiency as a matter of law ... . We note in particular that plaintiff failed to provide evidence of defendant's payment history, and failed to establish whether it applied certain applicable credits, including an unearned credit service charge pursuant to Personal Property Law §§ 305 and 315. Moreover, plaintiff's moving papers failed to establish that the vehicle was sold in a commercially reasonable manner ... . A 'secured party seeking a deficiency judgment from the debtor after sale of the collateral bears the burden of showing that the sale was made in a commercially reasonable manner' (... see generally UCC 9-627 [b]). We conclude that, '[h]aving failed to set forth any of the facts and circumstances surrounding the sale, plaintiff failed to satisfy a prerequisite to obtaining a deficiency judgment and is not entitled to summary judgment' with respect to damages ...". ***Ally Fin. Inc. v. Jonathan*, 2020 N.Y. Slip Op. 05630, Fourth Dept 10-9-20**

FAMILY LAW, CIVIL PROCEDURE.

FAMILY COURT CAN EXERCISE JURISDICTION OVER A NONRESIDENT PUTATIVE FATHER IN A PATERNITY ACTION AS LONG AS THE FACTS HAVE A CONNECTION WITH NEW YORK STATE; THE PETITION SHOULD NOT HAVE BEEN DISMISSED WITH PREJUDICE.

The Fourth Department determined the paternity petition should not have been dismissed with prejudice because there are circumstances where the New York Family Court can obtain jurisdiction over an out-of-state respondent in the paternity action: "In a paternity proceeding, personal jurisdiction over a nonresident putative father may be established pursuant to Family Court Act § 580-201. Petitioner, however, admittedly failed to allege in her petition that respondent engaged in sexual intercourse with the mother in New York State at the time of conception, or that he had any other relevant ties to New York State, and no other grounds for jurisdiction apply (see Family Ct Act § 580-201 [6], [8]). Under the circumstances of this case, we conclude that the court should have granted the motion on the ground that petitioner failed to state a cause of action predicated upon respondent's sexual intercourse with petitioner in New York State ... . Inasmuch as such a dismissal is not on the merits, however, we further conclude that the petition should be dismissed without prejudice ...". ***Matter of Joyce M.M. v. Robert J.G.*, 2020 N.Y. Slip Op. 05616, Fourth Dept 10-9-20**

INSURANCE LAW, CONTRACT LAW.

THE UNAMBIGUOUS INSURANCE POLICY DID NOT INCLUDE COVERAGE FOR LOSS OF BUSINESS INCOME AND THE POLICY MUST BE ENFORCED AS WRITTEN.

The Fourth Department, reversing Supreme Court, determined the coverage unambiguously described in an insurance policy must be enforced as written and there is no coverage for anything, here loss of business income, which is not explicitly described in the contract: "... [T]he insurance contract unambiguously does not include coverage for actual loss of business income. The contract provides coverage 'as described and limited' for certain categories of loss 'for which a Limit Of Insurance is shown in the Declarations.' Actual loss of business income, however, is neither described nor limited by the declarations. Thus, there is no actual loss of business income coverage 'by reason of 'lack of inclusion' ... , and 'the policy

as written could not have covered the liability in question under any circumstances' ...". ***Downstairs Cabaret, Inc. v. Wesco Ins. Co.*, 2020 N.Y. Slip Op. 05637, Fourth Dept 10-9-20**

INSURANCE LAW, TOXIC TORTS. PERSONAL INJURY

SUPREME COURT SHOULD NOT HAVE HELD AS A MATTER OF LAW THAT THE TRIGGERING EVENT FOR INSURANCE COVERAGE FOR ASBESTOS-INJURY IS THE FIRST EXPOSURE TO ASBESTOS AS OPPOSED TO EXPOSURE TO A CERTAIN LEVEL OF ASBESTOS.

The Fourth Department, reversing (modifying) Supreme Court in this asbestos exposure case, held it should not have been determined as a matter of law that insurance coverage is triggered by the first exposure to asbestos, as opposed after exposure to a certain level of asbestos: "The parties do not dispute that the applicable test in determining what event constitutes personal injury sufficient to trigger coverage is injury-in-fact, 'which rests on when the injury, sickness, disease or disability actually began' ... . Rather, the parties dispute when an asbestos-related injury actually begins: plaintiffs assert that injury-in-fact occurs upon first exposure to asbestos, while defendant denies that assertion and instead maintains that injury-in-fact occurs only when a threshold level of asbestos fiber or particle burden is reached that overtakes the body's defense mechanisms. The court concluded, as a matter of law, that injury-in-fact occurs upon first exposure to asbestos. ... [T]he court erred in that regard, and we therefore modify the judgment by denying the subject motion for partial summary judgment and vacating the declaration with respect to that motion." ***Carrier Corp. v. Allstate Ins. Co.*, 2020 N.Y. Slip Op. 05620, Fourth Dept 10-9-20**

PERSONAL INJURY, MUNICIPAL LAW.

PLAINTIFF DID NOT RAISE A QUESTION OF FACT WHETHER THE COUNTY WAS AFFIRMATIVELY NEGLIGENT IN THIS ICE AND SNOW SLIP AND FALL CASE; THEREFORE THE COUNTY'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED.

The Fourth Department, reversing Supreme Court, determined the county's motion for summary judgment in this slip and fall case should have been granted. The county demonstrated it did not have written notice of the condition and was not affirmatively negligent: "The complaint alleged that a dangerous or defective condition existed as a result of defendant's negligent snow and ice removal operations and procedures, and its failure to provide 'a means of ingress/egress with a handrail.' ... Defendant established its entitlement to judgment as a matter of law by submitting evidence that it did not receive prior written notice of the allegedly dangerous or defective condition as required by Chautauqua County Local Law No. 4-09 ... . In opposition, plaintiff failed to raise a triable issue of fact whether such prior written notice was given ... . Further, plaintiff failed to raise an issue of fact regarding the applicability of an exception to the prior written notice requirement, i.e., as relevant here, that defendant 'affirmatively created the defect through an act of negligence' ... . A municipality 'may not be held liable for the mere passive failure to remove all snow and ice' or to install a handrail because '[s]uch acts are acts of omission rather than affirmative acts of negligence' ... . Here, plaintiff's submissions establish only defendant's alleged 'nonfeasance, as opposed to affirmative negligence,' and the exception to the prior written notice requirement for affirmative acts of negligence therefore does not apply ...". ***Brockway v. County of Chautauqua*, 2020 N.Y. Slip Op. 05659, Fourth Dept 10-9-20**

PERSONAL INJURY, CIVIL PROCEDURE.

COMPLAINT SUING A RETAILER WHICH SOLD AMMUNITION TO A 20-YEAR-OLD WHO SHOT PLAINTIFF'S DECEDENT PROPERLY SURVIVED A MOTION TO DISMISS.

The Fourth Department determined the complaint alleging defendant retailer negligently sold ammunition to a 20-year old (Klocek) who shot plaintiff's decedent properly survived a motion to dismiss. The action was not precluded by the Protection of Lawful Commerce in Arms Act (PLCAA, 15 U.S.C. § 7901): "... [A] qualified civil liability action [prohibited by the PLCAA] does not include ... 'an action brought against a seller for negligent entrustment or negligence per se' ... or 'an action in which a manufacturer or seller of a qualified product knowingly violated a State or Federal statute applicable to the sale or marketing of the product, and the violation was a proximate cause of the harm for which relief is sought' ... . [P]laintiffs allege that defendant violated 18 USC § 922 (b) (1) and Penal Law § 270.00 (5) when defendant allegedly sold 'handgun ammunition' to Klocek, who was 20 years old at the time. The federal statute prohibits the sale or delivery of ammunition 'other than . . . ammunition for a shotgun or rifle' to anyone the seller or deliverer 'knows or has reasonable cause to believe is less than twenty-one years of age' (18 USC § 922 [b] [1]). The state statute prohibits the sale of ammunition 'designed exclusively for use in a pistol or revolver' to anyone not authorized to possess a pistol or revolver (Penal Law § 270.00 [5]). Plaintiffs' allegations, if true, establish that defendant committed a predicate offense under 15 USC § 7903 (5) (A) (ii) and, as a result, establish that this action is not a qualified civil liability action and not subject to immediate dismissal." ***King v. Klocek*, 2020 N.Y. Slip Op. 05619, Fourth Dept 10-9-20**

PERSONAL INJURY, EDUCATION-SCHOOL LAW, EVIDENCE.

DEFENDANT SCHOOL DISTRICT DID NOT DEMONSTRATE THE APPLICABILITY OF THE STORM-IN-PROGRESS RULE IN THIS SLIP AND FALL CASE; DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The Fourth Department, reversing Supreme Court, determined defendant school district did not demonstrate the applicability of the storm-in-progress rule in this slip and fall case: "... [D]efendants did not meet their initial burden of establishing that plaintiff's injuries were the result of 'an icy condition occurring during an ongoing storm or for a reasonable time thereafter' ... . Although defendants submitted an affidavit from a meteorologic expert, Doppler radar data, and deposition testimony establishing that it had been snowing and icy on the date of the accident from the early morning hours through 3:00 p.m., the time plaintiff fell, defendants also submitted conflicting evidence regarding how much snow actually accumulated in the area of the middle school. Defendants' expert never set forth, by opinion or otherwise, any specific amount of snowfall in the Town of Yorkshire on the date of plaintiff's fall. ... Thus, defendants' own submissions raised a question of fact whether there was a storm in progress at the time of the fall. Even assuming, arguendo, that defendants met their initial burden, plaintiff raised an issue of fact whether the ice upon which she fell preexisted the weather event ... . Plaintiff submitted the affidavit of an expert meteorologist who averred that a thaw in the days prior to the accident, followed by a drop in temperatures from the night before into the morning hours of the accident, would account for the formation of the ice. Plaintiff also submitted deposition testimony establishing that there had been thick ice in the parking lot since the day before the accident, and that defendants' groundskeeper had plowed down to the ice ... . We also conclude that plaintiff raised an issue of fact whether defendants had constructive notice of the condition ...". ***Ayers v. Pioneer Cent. Sch. Dist.*, 2020 N.Y. Slip Op. 05622, Fourth Dept 10-9-20**

PERSONAL INJURY, MUNICIPAL LAW.

THE MUNICIPALITY DID NOT OWE A SPECIAL DUTY TO PLAINTIFF'S DECEDENT WHO CALLED 911 DURING A SNOW STORM AFTER HIS CAR HAD BECOME STUCK AND WAS FOUND DEAD IN HIS CAR THREE DAYS LATER.

The Fourth Department determined the municipality was entitled to summary judgment in this wrongful death action. Plaintiff's decedent's car was stuck in snow during a snow storm. He called 911 three times over the course of seven hours and was found dead in his car three days later: "Preliminarily, we conclude that, during the events that led to decedent's unfortunate death, defendants were acting in a governmental capacity ... . 'Under the public duty rule, although a municipality owes a general duty to the public at large to furnish police protection, this does not create a duty of care running to a specific individual sufficient to support a negligence claim, unless the facts demonstrate that a special duty was created' ... . According to plaintiff, a special relationship was formed in this case by ... the voluntary assumption of a duty of care by defendants. That method requires plaintiff to establish '(1) an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part of the municipality's agents that inaction could lead to harm; (3) some form of direct contact between the municipality's agents and the injured party; and (4) that party's justifiable reliance on the municipality's affirmative undertaking' ... . Here, only the first and fourth elements are at issue. We conclude that defendants met their burden on the motion by establishing as a matter of law that there was no voluntary assumption of a duty of care, and plaintiff failed to raise a triable issue of fact whether defendants assumed, through promise or action, any duty to act on decedent's behalf ... . [D]efendants also met their initial burden by establishing that any alleged reliance upon representations made by defendants or their agents was not justifiable, and plaintiff failed to raise a triable issue of fact in that regard ...". ***Bauer v. County of Erie*, 2020 N.Y. Slip Op. 05623, Fourth Dept 10-9-20**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

FALL WHILE UNLOADING A FLATBED TRUCK CAN BE A COVERED ACTIVITY AND INVOLVED AN ELEVATION-RELATED RISK; INDUSTRIAL CODE VIOLATION FIRST ASSERTED IN OPPOSITION PAPERS SHOULD NOT HAVE BEEN REJECTED; DEFENDANT'S MOTION FOR SUMMARY JUDGMENT IN THIS LABOR LAW §§ 240(1) AND 241(6) ACTION SHOULD NOT HAVE BEEN GRANTED.

The Fourth Department, reversing Supreme Court, determined defendant's motion for summary judgment on the Labor Law §§ 240(1) and 241(6) causes of action should not have been granted. Plaintiff was unloading a man lift from a flatbed truck and was on the man lift when it rolled off the truck. The Fourth Department determined: (1) unloading a truck at an active construction site is a covered activity; (2) the fall involved an elevation-related risk; and (3), although an industrial code violation was first asserted in opposition paper, it should not have been rejected: "Delivery of equipment is a covered activity if the equipment is being delivered to an active construction site ... or is being 'readied for immediate use' ... . Delivery of equipment is not a covered activity if it is being delivered to an inactive construction site and is merely being 'stockpil[ed] for future use' ... . Although a fall from a flatbed truck generally does not present the sort of elevation-related

risk that Labor Law § 240 (1) is intended to cover ... , we have distinguished those cases in which a falling object causes the injured worker to fall ... . Although plaintiff alleged a violation of section 23-1.5 (c) (3) for the first time in opposition to the motion, a plaintiff may be entitled to leave to amend his or her bill of particulars where, as here, he or she makes a showing of merit, raises no new factual allegations or legal theories, and causes the defendant no prejudice ...". ***Shaw v. Scepter, Inc.*, 2020 N.Y. Slip Op. 05651, Fourth Dept 10-9-20**

REAL PROPERTY LAW, CIVIL PROCEDURE.

DEFENDANT'S HOME WAS CONSTRUCTED ABOUT EIGHT FEET FROM THE PROPERTY LINE VIOLATING THE COVENANT OR RESTRICTION REQUIRING TEN FEET; PLAINTIFF, AFTER A BALANCING OF THE EQUITIES, WAS NOT, HOWEVER, ENTITLED TO EQUITABLE RELIEF.

The Fourth Department determined the defendant had violated a covenant or restriction imposed on property owners in a subdivision, but that plaintiff was not entitled to equitable relief. Defendant had constructed the home about eight feet from the property line and the covenant or restriction required ten feet: "... [D]efendant knew, or should have known, of the side setback violation on the right side, yet he chose to construct his house in disregard of the fourth paragraph of the covenants and restrictions, defendant did not act in good faith with respect to that violation, and the hardship was self imposed ... . [E]nforcement of the restriction would have little benefit to plaintiff inasmuch as the violation had no impact on the value of plaintiff's home, the violation did not detract from any neighbor's view of the lake, and the violation occurred on the side of defendant's property that was not adjacent to another residential lot. A balancing of the equities under all the circumstances of the case established that plaintiff was not entitled to injunctive relief for the right side lot line violation ...". ***Kleist v. Stern*, 2020 N.Y. Slip Op. 05652, Fourth Dept 10-9-20**

TOXIC TORTS, PERSONAL INJURY, CIVIL PROCEDURE.

EVIDENCE OF CAUSATION IN THE ASBESTOS EXPOSURE CASE WAS SUFFICIENT, MOTION TO SET ASIDE THE VERDICT PROPERLY DENIED.

The Fourth Department determined the evidence of causation in this asbestos exposure case was sufficient to support the plaintiffs' verdict and the motion to set aside was properly denied: "Although, to prove specific causation, plaintiff and decedent were required to establish that decedent 'was exposed to sufficient levels of the toxin to cause' his alleged injuries, 'it is not always necessary for a plaintiff to quantify exposure levels precisely or use the dose-response relationship' ... . There simply 'must be evidence from which the factfinder can conclude that the plaintiff was exposed to levels of [the] agent that are known to cause the kind of harm that the plaintiff claims to have suffered' ... . Such evidence may include an expert's use of estimates generated by mathematical models taking a plaintiff's work history into account, or the use of 'more qualitative means' to determine the level of a plaintiff's exposure, such as comparing the plaintiff's exposure level 'to the exposure levels of subjects of other studies' ...". ***Matter of Eighth Jud. Dist. Asbestos Litig.*, 2020 N.Y. Slip Op. 05621, Fourth Dept 10-9-20**

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