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FIRST DEPARTMENT

CORPORATION LAW, LIMITED LIABILITY COMPANY LAW, DEBTOR-CREDITOR.

ACTION TO ENFORCE A FOREIGN JUDGMENT AGAINST A DELAWARE DISSOLVED LIMITED LIABILITY COMPANY COULD NOT BE MAINTAINED BECAUSE THE CERTIFICATE OF CANCELLATION HAS NOT BEEN NULLIFIED.

The First Department, reversing Supreme Court, determined the action to domesticate and enforce a foreign judgment after defendant corporation had been dissolved could not be maintained: "Plaintiff commenced this action against defendant, a Delaware limited liability company, to domesticate and enforce a foreign judgment in its favor several months after defendant had been dissolved and a certificate of cancellation filed (see 6 Del C § 18-203[a]). As the certificate of cancellation has not been nullified and plaintiff does not seek nullification, plaintiff cannot maintain this action (6 Del C § 18-803[b]) ...". ***Epie v. Herakles Farms, LLC*, 2020 N.Y. Slip Op. 05283, First Dept 10-1-20**

CRIMINAL LAW.

ALTHOUGH DEFENDANT WAS NOT INFORMED OF THE PERIOD OF POST-RELEASE SUPERVISION AT THE ORIGINAL PLEA AND SENTENCING, HE WAS SO INFORMED AT RESENTENCING; DEFENDANT HAD AN OPPORTUNITY AT RESENTENCING TO MOVE TO WITHDRAW HIS PLEA AND THE SENTENCING JUDGE WAS NOT OBLIGATED TO INFORM DEFENDANT, SUA SPONTE, OF THE AVAILABILITY OF A MOTION TO WITHDRAW; DEFENDANT'S MOTION TO SET ASIDE HIS RESENTENCE PROPERLY DENIED.

The First Department determined defendant's motion to set aside his resentence was properly denied. Defendant was not informed of the period of post-release supervision (PRS) at the time of the original plea and the original sentence, but was so informed at the resentence: "In 2002, defendant pleaded guilty without being informed of the mandatory postrelease supervision (PRS) component of the promised sentence ... , and was sentenced in a proceeding in which the court also did not pronounce that component of the sentence ... . Seven years later, he was returned to court with his attorney for further proceedings. Defense counsel advised the court that he had spoken to his client who was prepared to accept the amended sentence. The court explained that five years of PRS would be imposed. Defense counsel responded that that was fine. The court then resentenced defendant to a term that included the mandatory PRS period ... . Defendant was not denied a meaningful opportunity, at resentencing, to seek to withdraw his plea based on the plea court's failure to inform him that his sentence was required to include PRS. Generally, a defendant is entitled to an opportunity to withdraw a plea where a sentence exceeds the original promise. However, we find no support for defendant's argument that this places a sua sponte obligation on the court to inform a counseled defendant of the right to move for plea withdrawal ...". ***People v. Perez*, 2020 N.Y. Slip Op. 05297, First Dept 10-1-20**

CRIMINAL LAW, EVIDENCE.

SUPREME COURT SHOULD HAVE ENSURED DEFENDANT WAS KNOWINGLY AND INTELLIGENTLY WAIVING THE INTOXICATION DEFENSE BEFORE ACCEPTING DEFENDANT'S GUILTY PLEA; IN THE PLEA COLLOQUY DEFENDANT TOLD THE COURT HE WAS DRUNK AND DIDN'T KNOW WHAT HE WAS DOING.

The First Department, vacating defendant's guilty plea (attempted burglary), determined Supreme Court should have ensured that the defendant understood he was waiving the intoxication defense by pleading guilty. During the plea colloquy defendant indicated he was drunk and didn't know what he was doing when he entered a woman's hotel room: "Once defendant raised the possible defense of intoxication during the allocution, the court was obligated to determine if he understood the defense, whether he in fact, had a viable defense and whether he wanted to waive the same ... . Defendant's statement that he entered the victim's hotel room 'looking for money from the lady' did not effectively recant his earlier statement as to intoxication and did not relieve the court of its duty to engage in an additional inquiry into defendant's understanding of the intoxication defense or the facts of the offense ...". ***People v. Muniz-Cayetano*, 2020 N.Y. Slip Op. 05156, First Dept 9-29-20**

ELECTION LAW.

RESPONDENT CANDIDATE FOR THE NYS ASSEMBLY DID NOT DEMONSTRATE HE MAINTAINED A RESIDENCE IN NEW YORK FOR FIVE YEARS; PETITIONERS' APPLICATION TO INVALIDATE RESPONDENT'S CANDIDACY SHOULD HAVE BEEN GRANTED.

The First Department, reversing Supreme Court, determined respondent, a candidate for the NYS Assembly, did not establish he maintained a residence in New York for five years. Therefore the petitioners' application to invalidate respondent's candidacy should have been granted: "Petitioners brought this proceeding pursuant to Election Law § 16-102 to declare invalid the designating petitions naming respondent. Petitioners alleged that, because respondent lived continuously in Illinois from 2009 until 2016, he failed to satisfy the New York residency requirements of article III (§ 7) of the State Constitution. Section 7 provides: 'No person shall serve as a member of the legislature unless he or she . . . has been a resident of the state of New York for five years' ... . Petitioner presented evidence that, in April 2009, respondent left Germany and briefly relocated to Albany, New York, the home of his father and aunt. He visited there for approximately four months until August 2009, at which time he moved to Chicago, Illinois. Respondent took up residence ... [in] Chicago, Illinois, from which he: obtained an Illinois driver's license; registered to vote in the State of Illinois; enrolled in a graduate school program; obtained employment; paid Illinois state and Federal income taxes using the Chicago residence address; and obtained a cell phone with a Chicago area code. We note that respondent's having voted in Illinois during the five year period preceding the upcoming election is inconsistent with his claim to have maintained New York as his residence throughout that five year period ... . While we have held that being registered to vote in another state, standing alone, is not necessarily dispositive ... , in this case, respondent's time in Illinois ... does not support his argument that he "always intended to return" to New York as required by Election Law § 1-104 (22)." ***Matter of Patch v. Bobilin*, 2020 N.Y. Slip Op. 05172, First Dept 9-29-20**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

LIABILITY UNDER LABOR LAW § 200 DOES NOT REQUIRE THAT PLAINTIFF BE ENGAGED IN CONSTRUCTION WORK; HERE PLAINTIFF FELL OFF THE TOP OF A TRACTOR-TRAILER; THE LABOR LAW § 200 CAUSE OF ACTION SHOULD NOT HAVE BEEN DISMISSED.

The First Department, reversing Supreme Court, determined plaintiff's Labor Law § 200 cause of action should not have been dismissed. The court noted that liability under Labor Law § 200 does not require that the plaintiff be engaged in construction work: "Plaintiff was injured when he fell to the ground from the top of a tractor-trailer, as he was attempting to manually roll out a tarp to cover trash in the trailer, as required by [defendant] Tully. The trailer with the allegedly defective tarping mechanism was owned by Strength and leased to plaintiff's employer. Plaintiff is entitled to the protection afforded by Labor Law § 200 for his work because that section codifies the common-law duty of an owner to provide workers with a safe place to work, which is not limited to construction work ... . The record presents an issue of fact as to Tully's authority to control the activity that brought about plaintiff's injury ... . Plaintiff testified that Tully directed him in how to proceed at the facility and mandated that he cover the trash with the tarp, and the facility manager testified that Tully had a policy prohibiting drivers from standing on the tops of trailers. There is also a factual issue as to whether Tully permitting the tractor-trailer to be overfilled created the condition that may have cause plaintiff's injuries ...". ***Landron v. Wil-Cor Realty Co. Inc.*, 2020 N.Y. Slip Op. 05287, First Dept 10-1-20**

LIEN LAW, DEBTOR-CREDITOR.

A NOTICE OF LIEN CAN NOT BE DISCHARGED ABSENT A TRIAL IF IT IS VALID ON ITS FACE.

The First Department, reversing Supreme Court, determined the notice of lien should not have been discharged because it was valid on its face: "... Supreme Court ... granted the motion of defendants ... to reduce or discharge the mechanic's lien filed by plaintiff ... to the extent of reducing the lien from $33,837,618.34 to $3,566,357.42 ... . A court has no inherent power to vacate, modify or discharge a notice of lien pursuant to Lien Law § 19(6) where there is no defect on the face of the lien, and any dispute concerning the lien's validity must await a trial ...". ***Pizzarotti, LLC v. FPG Maiden Lane LLC*, 2020 N.Y. Slip Op. 05305, First Dept 10-1-20**

MEDICAL MALPRACTICE, DENTAL MALPRACTICE, EVIDENCE, PERSONAL INJURY.

PLAINTIFF'S EXPERT'S AFFIDAVIT DID NOT ADDRESS THE CLAIM ASSOCIATED WITH TOOTH NUMBER 28 IN THIS DENTAL MALPRACTICE ACTION; THEREFORE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ON THAT CLAIM SHOULD HAVE BEEN GRANTED.

The First Department, reversing (modifying) Supreme Court, noted that the plaintiff's expert's affidavit did not address the plaintiff's dental malpractice claim with respect to one tooth (tooth number 28). Therefore defendant's motion for summary judgment should have been granted on that claim: "Even assuming, as defendant claims, that plaintiff would still have had to undergo future dental work had these six teeth been saved, and that any disfigurement was not fairly attributable to defendant because plaintiff opted to have another dentist install her dentures, these facts do not negate the primary injury claimed by plaintiff — the unnecessary loss of these teeth. It is immaterial that plaintiff's expert did not indicate that he

or she had reviewed plaintiff or her husband's deposition testimony, as review of these documents was not necessary to make an informed determination about the appropriateness of treatment. * * * However, defendant's motion for summary judgment should have been granted insofar as plaintiff's claims are directed at tooth number 28, because plaintiff's expert failed to raise an issue of fact regarding a departure of care with respect to this tooth." ***Castro v. Yakobashvilli*, 2020 N.Y. Slip Op. 05281, First Dept 10-1-20**

MUNICIPAL LAW, BATTERY, CIVIL RIGHTS LAW, CIVIL PROCEDURE.

THE COMPLAINT STATED CAUSES OF ACTION FOR ASSAULT, BATTERY AND VIOLATION OF 42 U.S.C. § 1983 AGAINST POLICE OFFICERS.

The First Department, reversing Supreme Court, determined the complaint stated causes of action against police officers for assault, battery and violation of 42 U.S.C. § 1983: "The allegations in the complaint, as amplified by the notice of claim, which must be liberally construed when determining a CPLR 3211(a)(7) motion ... sufficiently set forth a claim for assault and battery. Plaintiff alleged that he was assaulted and battered by police during his arrest and suffered injuries that required hospital treatment. Plaintiff specified the location of the assault and stated that defendants committed the assault and battery knowingly, that the arrest was without probable cause and that he was not ultimately charged with a crime. Moreover, in the notice of claim, plaintiff alleged that he was 'grabbed, had his arms twisted and forcefully handcuffed,' that he was physically abused and that he did not resist arrest. 'To plead a cause of action to recover damages for assault, a plaintiff must allege intentional physical conduct placing the plaintiff in imminent apprehension of harmful contact' ... . 'A valid claim for battery exists where a person intentionally touches another without that person's consent' ... . [A] party may allege assault and battery as the basis for a suit under 42 USC § 1983 ...". ***Corcoran v. City of New York*, 2020 N.Y. Slip Op. 05133, First Dept 9-29-20**

MUNICIPAL LAW, PERSONAL INJURY.

PETITIONER POLICE OFFICER'S FALL GETTING OUT OF A POLICE CAR WAS NOT AN UNEXPECTED ACCIDENT OR DUE TO A RISK INHERENT IN THE JOB; PETITIONER WAS NOT ENTITLED TO ACCIDENTAL DISABILITY RETIREMENT BENEFITS.

The First Department, reversing Supreme Court, determined petitioner police officer was not entitled to accidental disability retirement stemming from a fall. Petitioner was getting out of a police car in response to a family disturbance call when his firearm caught on the seatbelt causing him to fall to the ground: "Supreme Court erred in granting the petition and annulling the board's determination that petitioner's injury did not arise from an unexpected accident or from a risk inherent in the job of being a police officer. The board correctly determined that petitioner's injury was not caused by an accident as defined in the NYC Administrative Code and applicable case law. '[N]ot every line-of-duty injury will support an award of accidental disability retirement . . . an injury which occurs without an unexpected event as the result of activity undertaken in the performance of ordinary employment duties . . . is not an accidental injury' ...". ***Matter of Galluccio v. O'Neill*, 2020 N.Y. Slip Op. 05136, First Dept 9-29-20**

PERSONAL INJURY, LANDLORD-TENANT.

DEFENDANT LANDLORD NOT LIABLE FOR PLAINTIFF'S FALL OUT OF A WINDOW; NO ALLEGATION OF THE VIOLATION OF ANY RULE, REGULATION, CODE OR STANDARD.

The First Department, reversing Supreme Court, determined defendant property owner was not liable for plaintiff's fall out of a window to the sidewalk below: "The record demonstrates that defendants may not be held liable for the injuries sustained by plaintiff when, upon tripping over speaker wires, he fell out of his bedroom window and onto the sidewalk below. Defendants met their burden for summary judgment by submitting evidence that the window, neither by its configuration or condition, presented a hazard in and of itself, and that defendants had no statutory or common-law duty to install window guards or stops for the benefit of adult plaintiff ... . Plaintiff's expert's affidavit was insufficient to defeat the motion for summary judgment as it was not based on any rules, regulations, codes, standards or on the factual record ...". ***Fraser v. Reclaim Hous. Dev. Fund Corp.*, 2020 N.Y. Slip Op. 05135, First Dept 9-29-20**

PERSONAL INJURY, MUNICIPAL LAW, VEHICLE AND TRAFFIC LAW.

TRANSIT AUTHORITY'S MOTION FOR SUMMARY JUDGMENT IN THIS BUS-PASSENGER INJURY CASE SHOULD HAVE BEEN GRANTED; THE BUS DRIVER REACTED APPROPRIATELY TO A CAR SUDDENLY PULLING OUT IN FRONT OF THE BUS TO MAKE A U-TURN.

The First Department, reversing Supreme Court, determined defendant transit authority's motion for summary judgment in this bus-passenger injury case should have been granted. The driver of a double-parked car pulled out in front of the bus to make a u-turn and the driver properly slammed on the brakes: "... [D]efendants established their prima facie entitlement to judgment as a matter of law by showing that their bus driver was presented with an emergency situation that was not of his own making when a vehicle that was double-parked on the right side of the roadway suddenly made a U-turn in front

of him, and that he took reasonable and prudent action to avoid a collision ... . They also met their initial burden of showing that their bus driver's actions before the accident did not cause or contribute to the emergency, because the bus driver testified at his deposition that he was traveling no more than 15 miles per hour, warned the double-parked car before he attempted to pass by sounding his horn, and had his foot hovering over the brakes when the sedan suddenly made a U-turn in front of his bus when it was approximately five feet away. What is more, the driver had no duty to anticipate that another driver would make a sudden, illegal maneuver ... . [T]he record shows that the driver was obliged to take immediate action when the car suddenly cut in front of the bus to make a U-turn, and stepping on the brakes to avoid a collision was a reasonable response to a situation not of defendants' own making ...". ***Santana-Lizardo v. New York City Tr. Auth.*, 2020 N.Y. Slip Op. 05164, First Dept 9-29-20**

SECOND DEPARTMENT

CIVIL PROCEDURE.

A MOTION TO DISMISS AN ACTION FOR A DECLARATORY JUDGMENT FOR FAILURE TO STATE A CAUSE OF ACTION, WHERE THERE ARE NO QUESTIONS OF FACT, SHOULD BE TREATED AS A MOTION FOR A DECLARATION IN DEFENDANT'S FAVOR.

The Second Department noted that where a motion to dismiss an action for declaratory judgment is made, the motion should be deemed for a declaration in defendant's favor: "The courts may consider 'the merits of a properly pleaded cause of action for a declaratory judgment upon a motion to dismiss for failure to state a cause of action where 'no questions of fact are presented [by the controversy]' ... . 'Under such circumstances, the motion to dismiss the cause of action for failure to state a cause of action should be taken as a motion for a declaration in the defendant's favor and treated accordingly' ...". ***Astoria Landing, Inc. v. New York City Council*, 2020 N.Y. Slip Op. 05174, Second Dept 9-30-20**

CIVIL PROCEDURE.

NASSAU COUNTY SUPREME COURT CANNOT VACATE A DEFAULT ORDER ISSUED BY NEW YORK COUNTY SUPREME COURT, DESPITE THE CHANGE OF VENUE FROM NEW YORK COUNTY TO NASSAU COUNTY.

The Second Department, reversing Supreme Court, determined the Nassau County Supreme Court could not vacate the default order issued by New York County Supreme Court, even though New York County Supreme Court had granted a change of venue to Nassau County: "The Supreme Court, Nassau County, had no authority to vacate the order of the Supreme Court, New York County ... . A motion to vacate an order must be addressed to the court that made the order (see CPLR 5015[a]), and no court other than the one that rendered the order may entertain a motion to vacate it ... . In any event, contrary to the defendants' contention, the Supreme Court, New York County, did not lack subject matter jurisdiction to issue the New York County default order one day after its order granting a change of venue to Nassau County, since the 'Supreme Court is a court possessing State-wide jurisdiction and is competent to entertain a motion no matter where the underlying action is pending' ...". ***London v. 107 (160) Realty, LLC*, 2020 N.Y. Slip Op. 05195, Second Dept 9-30-20**

CONTRACT LAW, ATTORNEYS. JUDGES.

SUPREME COURT SHOULD NOT HAVE, SUA SPONTE, DETERMINED THE PROVISION OF AN "AGREEMENT OF PURCHASE AND SALE OF STOCK" WHICH CALLED FOR RECOVERY OF DOUBLE ATTORNEYS FEES BY THE PREVAILING PARTY IN LITIGATION WAS AN UNENFORCEABLE PENALTY.

The Second Department determined Supreme Court should not have, sua sponte, held that the provision of the "Agreement of Purchase and Sale of Stock" (PSA) which awarded double attorney's fees if litigation resulted from a breach was an unenforceable penalty. The decision, which includes legal analysis well worth reading, is a complex discussion of the covenant not to compete and the non-solicitation agreement which is too detailed and fact-specific to summarize here. There is an extensive dissent. With respect to the "double attorney's fees" provision, the court wrote: "We disagree with the Supreme Court's sua sponte determination that the provision of the PSA, which, in the event of litigation, allows for a recovery of double the amount of attorneys' fees expended by the substantially prevailing party, is an unenforceable penalty. When parties set down their agreement in a clear, complete document, their writing should be enforced according to its terms ... . Paragraph 10.11 of the PSA clearly sets forth the intent of the parties, two sophisticated businesspeople with the benefit of counsel, that, should litigation arise out of the PSA, the 'substantially prevailing party' is entitled to two times reasonable attorneys' fees. Where, as here, 'there is no deception or overreaching' in the making of such agreement, the agreement should be enforced as written ... . Moreover, while each party asserted in the Supreme Court, and asserts on appeal, that he should prevail and be treated as the prevailing party for the purpose of paragraph 10.11, neither party contended in the Supreme Court that the double attorneys' fees provision of paragraph 10.11 should not be enforced." ***Loughlin v. Meghji*, 2020 N.Y. Slip Op. 05196, Second Dept 9-30-20**

CRIMINAL LAW, EVIDENCE.

DEFENDANT'S MOTION TO VACATE HIS CONVICTION OF A 1996 MURDER BASED UPON NEWLY DISCOVERED EVIDENCE OF THIRD-PARTY CULPABILITY PROPERLY GRANTED.

The Second Department determined County Court properly granted defendant's motion to vacate his conviction stemming from a 1996 murder, despite defendant's confession, based upon evidence of third-party culpability, i.e., statements allegedly made by Gombert to Santoro about Gombert's involvement in the crime: "... [W]e find that the newly discovered evidence 'is of such character as to create a probability that had such evidence been received at the trial the verdict would have been more favorable to the defendant' (CPL 440.10[1][g]). A reasonable jury could credit Santoro's testimony regarding the statements made by Gombert, including that he could not be charged with the rape and murder of the victim because '[t]hey already got the other suckers,' and find that such statements raise a reasonable doubt as to the defendant's involvement in the subject crimes ... . Moreover, had Santoro's testimony been available to the defendant at trial, defense counsel could have advanced the theory that Gombert was the actual perpetrator of the crimes, rather than merely denying the defendant's involvement ... . In fact, the codefendant was acquitted following his third trial, at which Santoro's testimony was admitted for the first time. Further, although the evidence presented at the defendant's trial included the defendant's statement confessing to the crimes, the record reveals the existence of circumstances casting doubt on that statement. The portion of the defendant's statement regarding how he tied the victim's hands together was inconsistent with the testimony of a medical examiner for the People as to the manner in which the victim was 'hogtied' with rope. In addition, the defendant presented testimony at trial from a polygraph examiner, who opined that the defendant was telling the truth during a polygraph examination when he initially denied raping and killing the victim." ***People v. Krivak*, 2020 N.Y. Slip Op. 05226, Second Dept 9-30-20**

CRIMINAL LAW, EVIDENCE, APPEALS.

INSUFFICIENT EVIDENCE DEFENDANT CONSTRUCTIVELY POSSESSED WEAPONS FOUND IN A LOCKED ROOM BELONGING TO DEFENDANT'S DECEASED BROTHER; WEAPONS POSSESSION CONVICTIONS WERE AGAINST THE WEIGHT OF THE EVIDENCE.

The Second Department, reversing the possession-of-a-weapon convictions, determined the evidence of construction possession was insufficient and the convictions were therefore against the weight of the evidence: "The evidence demonstrated that the defendant resided in the third bedroom of the searched premises, and that the defendant's brother had resided in the first bedroom up until his death in 2014 or 2015. There was also testimony that, after the defendant's brother passed away, the door to the first bedroom was locked and remained locked. There was no evidence that the defendant frequented the first bedroom, had a key to that room or kept his belongings in that room. Although the police witnesses testified that they could not recall any damage to the door to the first bedroom, the defense introduced a photograph depicting damage to the door and frame after the search. Moreover, although the police officers recovered a magazine containing seven 9 millimeter cartridges from the defendant's bedroom, the evidence demonstrated that it was not the correct magazine for the pistol recovered from the first bedroom; it had to be manipulated in order to function properly with the pistol. Apart from the magazine, there was no other evidence connecting the defendant to the first bedroom or the weapons found therein." ***People v. Branch*, 2020 N.Y. Slip Op. 05220, Second Dept 9-30-20**

CRIMINAL LAW, EVIDENCE, ATTORNEYS.

SUPREME COURT SHOULD NOT HAVE REQUIRED DEFENSE COUNSEL TO SEEK COURT APPROVAL BEFORE ALLOWING INVESTIGATORS OR OTHER EMPLOYEES ACCESS TO RECORDINGS.

The Second Department, reversing Supreme Court, determined Supreme Court should not have required that defense counsel seek court approval before allowing investigators or other employees access to recordings: "Pursuant to CPL 245.70(6), a party who has unsuccessfully sought, or opposed the granting of, a protective order relating to the name, address, contact information, or statements of a person may obtain expedited review by an individual justice of the intermediate appellate court to which an appeal from a judgment of conviction would be taken. Where, as here, 'the issue involves balancing the defendant's interest in obtaining information for defense purposes against concerns for witness safety and protection, the question is appropriately framed as whether the determination made by the trial court was a provident exercise of discretion' ... . Applying the factors set forth in CPL 245.70(4), including concerns for witness safety and protection, I conclude that the Supreme Court improvidently exercised its discretion in requiring defense counsel to seek approval of the court before exhibiting the subject recordings to investigators or others employed by counsel. Under the particular circumstances of this case, the court should have permitted defense counsel to disclose the recordings to those employed by counsel or appointed to assist in the defense, without prior approval from the Supreme Court ...". ***People v. Clarke*, 2020 N.Y. Slip Op. 05221, Second Dept 9-30-20**

CRIMINAL LAW, EVIDENCE, ATTORNEYS.

DEFENDANT'S MOTION TO VACATE HIS 1999 MURDER CONVICTION BASED UPON THE PROSECUTION'S FAILURE TO TURN OVER BRADY MATERIAL PROPERLY GRANTED.

The Second Department determined defendant's motion to vacate his 1999 murder conviction based upon the prosecution's failure to turn over Brady material regarding a prosecution witness (Corti) was properly granted: "The People are obligated to disclose exculpatory evidence in their possession which is favorable to the defendant and material to the issues of guilt or innocence ... . Moreover, the duty of disclosing exculpatory material extends to disclosure of evidence impeaching the credibility of a prosecution witness whose testimony may be determinative of guilt or innocence ... . Here, the defendant was not provided with material regarding Cort's participation as a witness in two unrelated homicide trials, along with prior agreements between Cort and law enforcement, including her use as a confidential informant by police and her placement in a witness relocation program following her participation in one of the unrelated homicide trials, during which her rent was paid by the Office of the Kings County District Attorney for approximately one year. This material contradicted Cort's trial testimony that she did not have any 'deals' with law enforcement and had not been in touch with the District Attorney's Office 'for a long period of time,' as well as the prosecutor's arguments during summation that Cort 'never took a deal' and 'never asked for anything in return.' Significantly, Cort's credibility was critical as she was the People's only witness to testify that it was the defendant who shot the victim, and there was no other trial evidence directly linking the defendant to the crime ... . Under these circumstances, in the context of the entire trial, Cort's involvement with law enforcement 'was both favorable and material to the defense, and the People's failure to disclose this information to the defense violated defendant's constitutional right to due process' ... . In addition, the errors were compounded by the prosecution's repetition and emphasis on the misinformation during summation ...". ***People v. Rodriguez*, 2020 N.Y. Slip Op. 05234, Second Dept 9-30-20**

CRIMINAL LAW, EVIDENCE, ATTORNEYS.

SOME RESTRICTIONS ON DISCLOSURE SHOULD HAVE BEEN IMPOSED BY COUNTY COURT.

The Second Department, reversing County Court, determined some restrictions on making discovery available to the defense should have been imposed: "Applying the factors set forth in CPL 245.70(4), including the concerns for witness safety and protection, I conclude that the County Court improvidently exercised its discretion in denying the People's request in its entirety. Under the particular facts and circumstances of this case ... the County Court should have directed disclosure of the audio and video recordings of the narcotics sales be made available forthwith to defense counsel only, to be viewed at the prosecutor's office. Additionally, the County Court should have delayed disclosure of the names, addresses, and contact information of the confidential informant and undercover personnel until the commencement of the trial." ***People v. Zayas*, 2020 N.Y. Slip Op. 05236, Second Dept 9-30-20**

FAMILY LAW, CONTRACT LAW.

THE CHILD SUPPORT PROVISIONS OF THE STIPULATION OF SETTLEMENT IN THE DIVORCE ACTION VIOLATED THE CHILD SUPPORT STANDARDS ACT AND MUST BE VACATED; THE VACATUR SHOULD HAVE EXTENDED BACK TO THE DATE OF THE STIPULATION, NOT MERELY TO THE DATE OF THE RELATED MOTION.

The Second Department, reversing (modifying) Supreme Court in this action on the child support provisions of a stipulation of settlement in a divorce action, determined the child support provisions violated the Child Support Standards Act and the required vacatur should extend back to the date of the stipulation: "The Child Support Standards Act (Domestic Relations Law § 240[1-b][h]; hereinafter CSSA) mandates vacatur of original child support stipulations when they fail to comply with CSSA guidelines. Here ... the Supreme Court found that the parties' failure to strictly comply with the CSSA with regard to the deviation from the statutory support obligations vitiated the child support provision of the stipulation of settlement with regard to apportionment of unreimbursed medical costs. ... [T]he court improperly determined that the reimbursement of the medical costs and child care expenses was retroactive only to the filing date of the motion, relying on Luisi v. Luisi (6 AD3d 398). However, in Luisi, this Court held that it was improper to award child support arrears retroactive to the date of a stipulation of settlement because the party seeking such recalculation only did so by motion in the matrimonial action rather than by plenary action ... . Here, the defendant did properly commence a plenary action to vacate those provisions of the stipulation of settlement which pertained to the calculation of the medical costs and child care expenses and, upon vacatur, to recalculate the amounts owed. ... Thus, the court should have granted those branches of the defendant's motion which sought a recalculation of the arrears owed retroactive to the date of the stipulation of settlement ...". ***Martelloni v. Martelloni*, 2020 N.Y. Slip Op. 05197, Second Dept 9-30-20**

FORECLOSURE, CIVIL PROCEDURE, EVIDENCE.

THE REFEREE'S REPORT IN THIS FORECLOSURE ACTION SHOULD NOT HAVE BEEN CONFIRMED; THE REFEREE RELIED ON HEARSAY AND FAILED TO CONDUCT A HEARING ON NOTICE AS REQUIRED BY THE CPLR.

The Second Department, reversing Supreme Court, determined the referee's report should not have been confirmed. The evidence of default presented to the referee was hearsay and the referee did not hold a hearing on notice as required by CPLR 4320: "... [W]ith respect to the amount due to the plaintiff, the referee based his findings on the affidavit of Nicholas J. Raab, an employee of Specialized Loan Servicing, LLC, the plaintiff's loan servicing agent for the subject loan. While Raab provided a proper foundation for the admission of business records made by a prior servicer ... , he failed to attach the business records themselves to his affidavit. Accordingly, Raab's assertions regarding the date of the defendant's default in making her mortgage payments, the total sum due to the plaintiff, which included the amount of accrued interest calculated from the date of default, and amounts purportedly paid in an escrow advance and for property preservation, without the business records themselves, constituted inadmissible hearsay ... . [T]he referee should not have computed the amount due to the plaintiff without holding a hearing on notice to the defendant (see CPLR 4313 ...). 'While [the] Supreme Court has the authority to engage a Referee to compute and report the amount due under a mortgage (see, RPAPL 1321[1]), and can, in its order of reference, define the scope of the reference and delineate the Referee's powers and duties thereunder (CPLR 4311), absent any specified restrictions the Referee has those powers and duties delineated in CPLR article 43 and also must comply with the procedures specified therein ... . One of the specified procedures is the conducting of a hearing (CPLR 4320[a]), upon notice (CPLR 4313)' ...". ***Wells Fargo Bank, N.A. v. Yesmin*, 2020 N.Y. Slip Op. 05257, Second Dept 9-30-20**

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

CANCELLATION AND DISCHARGE OF A MORTGAGE PURSUANT TO RPAPL 1501(4) MUST BE SOUGHT BY AN ACTION OR COUNTERCLAIM, NOT BY A MOTION.

The Second Department, reversing (modifying) Supreme Court, determined the motion to cancel and discharge the mortgage pursuant to RPAPL 1501(4) should not have been granted. That relief must be sought by an action or counterclaim: "Supreme Court should not have granted that branch of the motion which was to cancel and discharge the mortgage pursuant to RPAPL 1501(4), since that relief must be sought in an action or counterclaim and not by motion ...". ***Bank of N.Y. Mellon v. 11 Bayberry St., LLC*, 2020 N.Y. Slip Op. 05175, Second Dept 9-30-20**

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

PLAINTIFF BANK FAILED TO SHOW COMPLIANCE WITH THE NOTICE PROVISIONS OF THE MORTGAGE AGREEMENT AND RPAPL 1304; PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT IN THIS FORECLOSURE ACTION SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined plaintiff bank failed to demonstrate the notice of default was provided in accordance with the mortgage agreement, failed to demonstrate compliance with the notice requirements of RPAPL 1304 and failed to demonstrate such compliance was not required: "... [T]he plaintiff failed to demonstrate, prima facie, that it complied with a condition precedent contained in the consolidated mortgage agreement, requiring the lender to send a notice of default prior to the commencement of the action. In this respect, the unsubstantiated and conclusory statements in the affidavit of an employee of the plaintiff's servicer, which indicated that the required notice of default was sent in accordance with the terms of the mortgage, combined with a copy of the notice of default, failed to show that the required notice was mailed by first-class mail or actually delivered to the notice address if sent by other means, as required by the consolidated mortgage agreement ..... [T]he plaintiff failed to demonstrate, prima facie, that it properly served upon the defendant the notice required by RPAPL 1304. The mailing required under that statute 'is established with proof of the actual mailings, such as affidavits of mailing or domestic return receipts with attendant signatures, or proof of a standard office mailing procedure designed to ensure that items are properly addressed and mailed, sworn to by someone with personal knowledge of the procedure' ... . Here, the plaintiff proffered neither evidence of the actual mailings nor evidence of a standard office mailing procedure, but rather relied upon its servicer's conclusory and unsubstantiated affidavit averring that the notice was sent, along with a copy of the notice. This evidence failed to satisfy the plaintiff's burden ... . Moreover, contrary to the Supreme Court's conclusion, affidavits of service pertaining to the summons and complaint as well as the defendant's verified answer, which demonstrated that the defendant was present in the State of Florida at the time of service of those pleadings, failed to demonstrate, prima facie, that the subject property was not the defendant's 'principal dwelling,' so as to establish that compliance with RPAPL 1304 was not required ...". ***U.S. Bank N.A. v. Negrin*, 2020 N.Y. Slip Op. 05253, Second Dept 9-30-20**

FORECLOSURE, REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL), UNIFORM COMMERCIAL CODE (UCC), CIVIL PROCEDURE, EVIDENCE.

LOST NOTE AFFIDAVIT INSUFFICIENT TO ESTABLISH STANDING; PROOF OF COMPLIANCE WITH RPAPL 1304 INSUFFICIENT; OUT OF STATE AFFIDAVIT LACKED A CERTIFICATE OF CONFORMITY; NEITHER PLAINTIFF NOR DEFENDANT ENTITLED TO SUMMARY JUDGMENT.

The Second Department, reversing Supreme Court, determined plaintiff-bank's motion for summary judgment in this foreclosure action should not have been granted. The lost note affidavit was insufficient to establish standing the proof of compliance with the notice requirements of RPAPL 1304 was insufficient and the out of state affidavit lacked a certificate of conformity. Defendants' cross-motion for summary judgment, however, was properly denied: "... [T]he plaintiff failed to proffer evidence establishing that the note was assigned to it, and the affidavit of lost note submitted in support of its motion failed to establish the facts that prevented the plaintiff from producing the original note (see UCC 3-804 ...). We also note that the out-of-state affidavit from the vice president of loan documentation for Wells Fargo lacked a certificate of conformity as required by CPLR 2309(c), although such defect by itself would not be fatal to the plaintiff's motion ,,, , ... [A]lthough the plaintiff submitted a copy of the 90-day notice purportedly sent to the defendants, it failed to submit an affidavit of service or other proof of mailing establishing that it properly served them by registered or certified mail and first-class mail in accordance with RPAPL 1304 ... . The defendants' bare denial of receipt of the RPAPL 1304 notice, without more, was insufficient to establish their prima facie entitlement to judgment as a matter of law ...". ***Trust v. Moneta*, 2020 N.Y. Slip Op. 05181, Second Dept 9-30-20**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

PLAINTIFF ALLEGEDLY FELL SIX FEET FROM A SCAFFOLD WITHOUT GUARD RAILS; PLAINTIFF'S SUMMARY JUDGMENT MOTION ON HIS LABOR LAW § 240(1) CAUSE OF ACTION SHOULD NOT HAVE BEEN GRANTED; DEFENDANT'S SUMMARY JUDGMENT MOTION ON PLAINTIFF'S LABOR LAW § 200 CAUSE OF ACTION SHOULD HAVE BEEN GRANTED; AND DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ON PLAINTIFF'S LABOR LAW § 241(6) CAUSE OF ACTION WAS PROPERLY DENIED.

The Second Department, reversing (modifying) Supreme Court, determined plaintiff's summary judgment motion on his Labor Law § 240(1) cause of action should not have been granted, defendant's (Henry Street's) motion for summary judgment on plaintiff's Labor Law § 200 cause of action should have been granted, and defendant's motion for summary judgment on plaintiff's Labor Law § 241(6) cause of action was properly denied. Plaintiff fell approximate six feet for a scaffold which did not have guard rails: "The plaintiff failed to eliminate triable issues of fact as to whether the scaffolding at issue provided proper protection under Labor Law § 240(1) ... . Here, the plaintiff's accident did not involve any dangerous or defective condition on Henry Street's premises. Rather, the accident involved the manner in which the plaintiff performed his work ... . Henry Street established, prima facie, that it did not have the authority to exercise supervision and control over the subject work ... . In opposition, the plaintiff failed to raise a triable issue of fact. Accordingly, the Supreme Court should have granted that branch of Henry Street's cross motion which was for summary judgment dismissing the causes of action alleging common-law negligence and a violation of Labor Law § 200 insofar as asserted against it. .. [W]e agree with the Supreme Court's determination to deny that branch of Henry Street's cross motion which was for summary judgment dismissing so much of the cause of action alleging a violation of Labor Law § 241(6) as was predicated upon an alleged violation of Industrial Code provision 12 NYCRR 23-5.1(b) insofar as asserted against it. That section provides that '[t]he footing or anchorage for every scaffold erected on or supported by the ground, grade or equivalent surface shall be sound, rigid, capable of supporting the maximum load intended to be imposed thereon without settling or deformation and shall be secure against movement in any direction.' Henry Street failed to sustain its prima facie burden of demonstrating that Industrial Code provision 12 NYCRR 23-5.1(b) was either factually inapplicable to this case or was satisfied ...". ***Medina-Arana v. Henry St. Prop. Holdings, LLC*, 2020 N.Y. Slip Op. 05199, Second Dept 9-30-20**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

PLAINTIFF WAS INJURED BY A HAZARD INHERENT IN THE JOB HE WAS HIRED TO DO; HIS LABOR LAW § 200 CAUSE OF ACTION SHOULD HAVE BEEN DISMISSED.

The Second Department, reversing Supreme Court, determined defendant's motion for summary judgment on plaintiff's Labor Law § 200 cause of action should have been granted because plaintiff was injured in the normal course of the tasks he was hired to do. Plaintiff was removing debris when his shovel struck a subway track: "The plaintiff's specific task was to shovel concrete debris, which had been chipped from the subway tunnel's walls, into bags for removal. During the project, eight-by-four foot pieces of plywood had been placed atop the subway tracks covering its rails and the trough between the rails, onto which the debris would fall making it easier to shovel. The plaintiff allegedly was injured when his shovel struck a rail of a track that was not covered by plywood. ... The duty to provide workers with a safe place to work does not extend to hazards that are part of, or inherent in, the very work the worker is performing or defects the worker is hired to repair ... . Here, the defendants established, prima facie, that the plaintiff's job responsibilities required him to remove the debris from the subway tracks, and that his alleged injuries were caused in the normal course of his removal of the debris

in that area ... . In support of their motion, the defendants submitted, among other things, the transcripts of the deposition testimony ... demonstrated tha t[defendant] decided to and actually placed the plywood over the tracks for the purpose of making it easier to remove the debris rather than for a safety purpose." ***Pacheco v. Judlau Contr., Inc.*, 2020 N.Y. Slip Op. 05216, Second Dept 9-30-20**

PERSONAL INJURY, MUNICIPAL LAW.

THE VILLAGE DID NOT DEMONSTRATE INFANT PLAINTIFF ASSUMED THE RISK OF INJURY FROM A TIRE SWING IN THE VILLAGE PLAYGROUND; THE VILLAGE'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined the village did not demonstrate infant plaintiff assumed the risk of injury from a tire swing in a village playground. Apparently the swing struck a railing causing infant plaintiff's leg to slip out from under him and his leg struck a support post: "... [T]he Village failed to demonstrate its entitlement to judgment as a matter of law based on the doctrine of primary assumption of risk. Although the locations of the railing and support post were open and obvious, the submissions of the Village failed to establish, prima facie, that the structure was not negligently designed so as to permit the tire to come into contact with the railing and support post, thereby unreasonably increasing the risks over and above the usual dangers that are inherent in playing on a tire swing ... . In addition, in light of the infant plaintiff's age and limited experience with this tire swing, it cannot presently be determined as a matter of law that he was aware of and fully appreciated the risks involved with the tire being able to come into contact with the railing and support post ... . Further, the Village failed to establish, prima facie, that it neither created the allegedly dangerous condition nor had actual or constructive notice of the condition ... , or that the infant plaintiff's accident was not foreseeable ...". ***Berrin v. Incorporated Vil. of Babylon*, 2020 N.Y. Slip Op. 05177, Second Dept 9-30-20**

THIRD DEPARTMENT

CIVIL PROCEDURE, LIEN LAW, APPEALS.

WHEN THE MERITS OF A MOTION TO REARGUE ARE ADDRESSED THE DENIAL IS APPEALABLE; THE PERSONAL SERVICE REQUIREMENTS FOR THE NOTICE OF SALE PURSUANT TO THE LIEN LAW WERE NOT MET, THEREFORE THE 10-DAY PERIOD FOR BRINGING A SPECIAL PROCEEDING TO CONTEST THE VALIDITY OF THE LIEN DID NOT START TO RUN.

The Third Department noted that where the court addresses the merits of a motion to reargue it will be deemed to have granted the motion to reargue for purposes of appeal. Therefore, although the denial of a motion to reargue is not appealable, the denial after addressing the merits is appealable. In that case the motion is treated as if the motion to reargue were granted and then the original decision was adhered to. The court also noted that the requirements for the personal service of a notice of sale were not met in this case. Therefore the 10-day period for bringing a special proceeding to determined the validity of the lien did not start to run: " 'Although, generally, no appeal lies from an order denying a motion to reargue, where the court actually addresses the merits of the moving party's motion, we will deem the court to have granted reargument and adhered to its prior decision — notwithstanding language in the order indicating that reargument was denied' ... . * * * Under Lien Law §201-a, petitioner's 10-day time period to 'commence a special proceeding to determine the validity of the lien' does not begin to run until service upon it of the 'notice of sale' by respondent, the lienor. Service of such notice of sale by the lienor must be effectuated by personal service 'within the county where [the] lien arose,' unless the person to be served 'cannot with due diligence be found within such county' (Lien Law § 201). ... As Supreme Court correctly found, and as the record reflects, respondent failed to submit any proof that it exercised due diligence in seeking to effect personal service upon petitioner of the notice of lien and sale before improperly resorting to the statutory alternative of certified mail service. As a result, the 10-day time limitation for petitioner to challenge the lien under Lien Law § 201-a did not begin to run ...". ***Matter of Manufacturers & Traders Trust Co. v. J.D. Mar. Serv.*, 2020 N.Y. Slip Op. 05260, Third Dept 10-1-20**

UNEMPLOYMENT INSURANCE.

CLAIMANT DELIVERY DRIVER WAS AN EMPLOYEE OF A BUSINESS LOGISTICS COMPANY WHICH ARRANGED DELIVERIES FOR ITS CLIENTS; CLAIMANT WAS THEREFORE ENTITLED TO UNEMPLOYMENT INSURANCE BENEFITS.

The Third Department determined claimant delivery driver was an employee of TN Couriers (TNC) entitled to unemployment insurance benefits: "TN Couriers LLC (hereinafter TNC) is a business logistics company that acts as a broker between delivery drivers and clients seeking to have products transported from one location to another. Claimant was retained by TNC to deliver auto parts for The Radiator Store, one of TNC's clients. * * * Although the daily delivery activities of claimant and other drivers were directed by TNC's client, TNC retained control over other important aspects of the work. These included screening driver applicants, assigning drivers to clients, setting the rate of pay, partially reimbursing expenses, establishing performance standards, requiring valid licenses and insurance, and handling client complaints. In view of

this, we find that substantial evidence supports the Board's finding that TNC exercised a sufficient indicia of control over claimant to be deemed his employer and liable for additional contributions ...". ***Matter of Murray (TN Couriers LLC--Commissioner of Labor)*, 2020 N.Y. Slip Op. 05269, Third Dept 10-1-20**

UNEMPLOYMENT INSURANCE.

CLAIMANT, A HAIRCARE PRODUCT SALES REPRESENTATIVE, WAS NOT AN EMPLOYEE OF THE PRODUCER OF THE HAIRCARE PRODUCTS AND THEREFORE WAS NOT ENTITLED TO UNEMPLOYMENT INSURANCE BENEFITS.

The Third Department, reversing the Unemployment Insurance Appeal Board, determined claimant, a haircare product sales representative, was not an employee of Alterna Holding Corporation, the producer of the haircare products: "Alterna Holding Corporation produces haircare products that are sold at various retail stores. To facilitate its business, Alterna places sales and education representatives at the stores. These representatives educate store employees and customers about Alterna's products. Claimant was a representative for Alterna at Sephora stores in the New York City area from April 2012 to September 2014. * * * The record reflects that claimant received no initial training or instruction on how to perform her duties. Claimant was not required to submit reports, attend meetings or regularly check in with Alterna. Claimant was not responsible for supplying the product to the Sephora stores, and the sales of the product were carried out by Sephora employees. Although Alterna provided claimant with a list of Sephora stores for her to visit, she was not required to visit all the stores on the list if she did not want to, and claimant testified that there were some stores that she never visited. Claimant was never supervised while at the stores or had her performance reviewed. Claimant was advised to work five days a week, but she set her own schedule and she could take time off, including a week at a time, without notifying Alterna." ***Matter of Jordan (Alterna Holdings Corp.--Commissioner of Labor)*, 2020 N.Y. Slip Op. 05266, Third Dept 10-1-20**

UNEMPLOYMENT INSURANCE, LABOR LAW.

CLAIMANT TRUCK DRIVER WAS AN EMPLOYEE OF FLS UNDER THE COMMON LAW AND UNDER THE LABOR LAW, DESPITE THE FACT THAT FLS DID NOT MAINTAIN A FLEET OF TRUCKS; CLAIMANT WAS THEREFORE ENTITLED TO UNEMPLOYMENT BENEFITS.

The Third Department determined Fundamental Labor Strategies (FLS) was claimant truck driver's employer, pursuant to common law and the Labor Law (NYS Commercial Goods Transportation Industry Fair Play Act), despite the fact FLS did not maintain a fleet of trucks: "Labor Law § 862-b (1) provides, in relevant part, that '[a]ny person performing commercial goods transportation services for a commercial goods transportation contractor shall be classified as an employee of the commercial goods transportation contractor unless' such person is either a separate business entity as defined by Labor Law § 862-b (2) or an independent contractor within the meaning of Labor Law § 862-b (1) (a)-(c). The statutory scheme further defines 'commercial goods transportation services' as 'the transportation of goods for compensation by a driver who possesses a state-issued driver's license, transports goods in . . . New York, and operates a commercial motor vehicle' (Labor Law § 862-a [3]), and a 'commercial goods transportation contractor' includes any legal entity that compensates a driver for performing such services (Labor Law § 862-a [1]). ... FLS falls squarely within the definition of a commercial goods transportation contractor as set forth in Labor Law § 862-a (1). Hence, the statutory presumption of employment applies in the first instance (see Labor Law § 862-b [1]). To overcome the statutory presumption, FLS needed to establish that claimant was 'free from control and direction in performing [his] job, 'both under the terms of his letter agreement with FLS and 'in fact' (Labor Law § 862-b [1] [a]), that the services rendered by claimant were 'performed outside [FLS's] usual course of business' (Labor Law § 862-b [1] [b]) and that claimant was 'customarily engaged in an independently established trade, occupation, profession, or business that is similar to the service' he performed for FLS (Labor Law § 862-b [1] [c]). All three criteria — commonly referred to as the ABC test — had to be met in order for claimant to be classified as an independent contractor (see Labor Law § 862-b [1]). ... [S]ubstantial evidence supports the Board's finding that FLS failed to establish that claimant was free from direction and control in performing his job." ***Matter of Doster (Fundamental Labor Strategies--Commissioner of Labor)*, 2020 N.Y. Slip Op. 05262, Third Dept 10-1-20**

WORKERS' COMPENSATION.

CLAIMANT DID NOT TRY TO HIDE THE DOG-WALKING BUSINESS AND WAS ONLY TANGENTIALLY INVOLVED IN THE OPERATION OF THE BUSINESS; THEREFORE THE EVIDENCE DID NOT SUPPORT THE CONCLUSION SHE HAD MADE A MATERIAL FALSE STATEMENT IN HER CLAIM FOR WORKERS' COMPENSATION BENEFITS STEMMING FROM HER FORMER EMPLOYMENT AS A BARTENDER.

The Third Department, reversing the Workers' Compensation Board, determined claimant did not make a material false claim about her involvement in a dog-walking business after the injuries for which she sought Workers' Compensation benefits. The Board had reversed the Workers' Compensation Law Judge's (WCLJ's) finding to that effect. The Third Department held the evidence did not support the conclusion that claimant was involved in the dog-walking business, run by her brother, and therefore the evidence did not support the conclusion claimant had violated Workers' Compensation Law § 114-a by making a false statement: " … [T]he record does not establish that claimant knowingly made a material

false statement to influence her claim for compensation in violation of Workers' Compensation Law § 114-a ... . There is no indication that claimant actively participated in the business after she began receiving temporary total disability payments. Her involvement was tangential at best. Although the business remained intact, it was claimant's brother who ran the day-to-day operations. Significantly, there is nothing to indicate that claimant attempted to hide the business, as the Board was well aware of its existence at the time that the WCLJ made the reduced earnings award. Accordingly, the Board's decision finding that claimant violated Workers' Compensation Law § 114-a and imposing penalties is not supported by substantial evidence and must be reversed." ***Matter of Nikac v. Joal Rest. Corp.*, 2020 N.Y. Slip Op. 05274, Third Dept 10-1-20**

WORKERS' COMPENSATION.

CLAIMANT WAS SIMULTANEOUSLY ENTITLED TO A SCHEDULE LOSS OF USE (SLU) AWARD AND A PERMANENT PARTIAL DISABILITY CLASSIFICATION.

The Third Department, reversing (modifying) the Workers' Compensation Board, determined claimant was simultaneously entitled to an award for a schedule loss of use [SLU] and a permanent partial disability classification: "For the reasons more fully discussed in Matter of Arias v. City of New York (182 AD3d 170, 172 [2020]), we agree with claimant's contention that the Board erred in disregarding or attempting to distinguish Matter of Taher [162 AD3d 1288] ... . Under Matter of Taher, a claimant who sustains both schedule and nonschedule permanent injuries in the same work-related accident and returns to work at preinjury wages — and, thus, has not received a reduced-earnings award based upon a nonschedule permanent partial disability classification (see Workers' Compensation Law § 15 [3]) — is entitled to an SLU [schedule loss of use] award for permanent partial impairments to the statutorily enumerated body parts, here, claimant's knee and possibly his left elbow (see Workers' Compensation Law § 15 [3] [a] ...)." ***Matter of Garrison-Bey v. Department of Educ.*, 2020 N.Y. Slip Op. 05273, Third Dept 10-1-20**

WORKERS' COMPENSATION, CIVIL PROCEDURE.

AN UNPAID PENALTY ASSESSED FOR DEFENDANT'S FAILURE TO MAINTAIN WORKERS' COMPENSATION COVERAGE WAS ENTERED AS A SUPREME COURT JUDGMENT BY THE COUNTY CLERK IN ACCORDANCE WITH THE WORKERS' COMPENSATION LAW; BY THE TERMS OF THE STATUTE, SUPREME COURT DID NOT HAVE SUBJECT MATTER JURISDICTION AND DEFENDANT COULD NOT MOVE TO VACATE THE DEFAULT JUDGMENT.

The Third Department determined a judgment entered in Supreme Court by the county clerk pursuant to the Workers' Compensation Law § 26 is not reviewable by Supreme Court. The Workers' Compensation Board assessed a penalty against defendant for failure to maintain workers' compensation coverage. When the penalty was not paid the judgment was entered by the county clerk as a ministerial act which cannot be addressed by a motion in Supreme Court to vacate a default judgment: "Defendants ... ignore the peculiar statutory scheme by which only this Court may review a final determination by plaintiff with respect to, among other things, assessments ordered pursuant to Workers' Compensation Law § 52 (5) up until the time that a judgment against an employer is entered. At that point, no appeal is permitted ... . Workers' Compensation Law § 26 provides that where an employer fails to pay an assessment imposed pursuant to Workers' Compensation Law § 52 (5) within 20 days after it is due, plaintiff's chair may file a certified copy of the order imposing such assessment with the county clerk where the employer's principal place of business is maintained. '[T]hereupon[,] judgment must be entered in the [S]upreme [C]ourt, by the clerk of such county in conformity therewith immediately upon such filing. . . . Such judgment shall be entered in the same manner, have the same effect and be subject to the same proceedings as though rendered in a suit duly heard and determined by the [S]upreme [C]ourt, except that no appeal may be taken therefrom' (Workers' Compensation Law § 26 ...). The entry of such judgment is 'merely a ministerial act' made pursuant to Workers' Compensation Law § 26 ... . Indeed, the statute provides that the court shall 'vacate or modify' the judgment only 'to conform to any later award or decision of [plaintiff]' and '[t]he award may be so compromised [only] by [plaintiff and] in the discretion of [plaintiff]' (Workers' Compensation Law § 26). Inasmuch as the entry of plaintiff's order here by the County Clerk was 'merely a ministerial act' ... , Supreme Court lacked the authority to vacate the judgment because the underlying order was not issued by the court ... . To allow defendants to petition a different court to vacate its default after judgment has been entered would undermine this statutory scheme by allowing a court other than this one to, in effect, review a final decision of plaintiff." ***Workers' Compensation Bd. of the State of N.Y. v. Williams Auto Parts Inc.*, 2020 N.Y. Slip Op. 05261, Third Dept 10-1-20**

FOURTH DEPARTMENT

APPEALS, CIVIL PROCEDURE, PERSONAL INJURY.

ALTHOUGH THE DISMISSAL OF THE COMPLAINT IN THIS TRAFFIC ACCIDENT CASE INVOLVING A LIMOUSINE BUS WAS REVERSED ON APPEAL, PLAINTIFFS DID NOT ADDRESS ON APPEAL THE ASPECT OF THE DECISION WHICH DISMISSED THE FAILURE-TO-PROVIDE-SEATBELTS CAUSE OF ACTION; THEREFORE ANY CHALLENGE TO THAT ASPECT OF THE DISMISSAL WAS ABANDONED BY PLAINTIFFS.

The Fourth Department, reversing Supreme Court's dismissal of the complaint in this traffic accident case, noted that the plaintiffs' failure to address an aspect of the decision granting defendants' motion for summary judgment constituted an abandonment of any challenge to that portion of the decision. The motion court had dismissed the complaint in its entirety including plaintiffs' cause of action alleging defendants were negligent in not providing seatbelts for the limousine in which plaintiff was a passenger. However the seatbelt ruling was not challenged by the plaintiffs on appeal. Therefore Supreme Court's dismissal of the seatbelt cause of action remained in effect: "Supreme Court erred in granting that part of defendants' motion seeking summary judgment dismissing the complaint based on application of the emergency doctrine. 'The existence of an emergency and the reasonableness of a driver's response thereto generally constitute issues of fact' ... . Upon our review of the record, we conclude that 'whether the emergency doctrine precludes liability presents a question of fact and, therefore, summary judgment for defendants . . . was inappropriate' ... . We note, however, that the court also granted that part of defendants' motion seeking to dismiss plaintiffs' claim that defendants were negligent in failing to provide seatbelts on the ground that defendants were under no duty to do so. Plaintiffs failed to brief any argument with respect to the dismissal of that claim, thereby abandoning any challenge to that part of the order ... . We therefore modify the order by denying the motion in part and reinstating the complaint except insofar as the complaint, as amplified by the bill of particulars, alleges that defendants were negligent in failing to provide seatbelts." ***VanEpps v. Mancuso*, 2020 N.Y. Slip Op. 05359, Fourth Dept 10-2-20**

ARCHITECTURAL MALPRACTICE, CONTRACT LAW, APPEALS.

PLAINTIFF WAS A THIRD-PARTY BENEFICIARY OF THE CONTRACT WITH THE ARCHITECTS; THEREFORE THE ARCHITECTURAL MALPRACTICE ACTION ACCRUED WHEN THE CONSTRUCTION WAS COMPLETE, RENDERING THE ACTION TIME-BARRED.

The Fourth Department determined the architectural malpractice action accrued when the construction was complete, despite the fact that plaintiff was not a party to the contract with the architects. Therefore the action was time-barred. The court noted that Supreme Court should have settled the record on appeal by including the transcript of the motion to dismiss the complaint as well as the accompanying memorandum of law to demonstrate preservation of the issues for appeal: "Before breaking ground on the project, plaintiff entered into an agreement with an engineering firm, pursuant to which the engineering firm agreed to provide professional engineering services on the project. The engineering firm, in turn, entered into a contract with defendant, pursuant to which defendant agreed to provide professional architectural services on the project. * * * A claim against an architect accrues upon the completion of performance ... . 'This rule applies 'no matter how a claim is characterized in the complaint' because 'all liability' for defective construction 'has its genesis in the contractual relationship of the parties' ... . 'Even if the plaintiff is not a party to the underlying construction contract, the claim may accrue upon completion of the construction where the plaintiff is not a 'stranger to the contract,' and the relationship between the plaintiff and the defendant is the 'functional equivalent of privity' ... . Despite the lack of privity between plaintiff and defendant, plaintiff was 'not a stranger to the contract' ... . Indeed, we conclude that plaintiff was an intended third-party beneficiary of the contract ... . * * * Because plaintiff 'is not a 'stranger to the contract,' its professional malpractice cause of action accrued upon completion of performance by defendant ...". ***Town of W. Seneca v. Kideney Architects, P.C.*, 2020 N.Y. Slip Op. 05323, Fourth Dept 10-2-20**

CRIMINAL LAW, APPEALS.

WAIVER OF APPEAL OF THE UNDERLYING PLEA DOES NOT PROHIBIT APPEAL OF THE SENTENCE FOR A SUBSEQUENT VIOLATION OF PROBATION; NO PRESERVATION REQUIREMENT; APPELLATE COURT HAS POWER TO MODIFY A LEGAL SENTENCE.

The Fourth Department, reducing defendant's sentence, noted that a waiver of appeal at the underlying plea proceeding did not prohibit the appeal of the severity of the sentence for a subsequent violation of probation. The court further noted there is no preservation requirement for the appeal of an excessive sentence: "... [E]ven if defendant executed a valid waiver of the right to appeal at the underlying plea proceeding, it would not encompass his challenge to the severity of the sentence imposed following his violation of probation ... . Contrary to the People's contention, defendant's challenge to the severity

of the sentence is not subject to a preservation requirement ... . 'A claim that a sentence is excessive is, by definition ... , addressed to this Court's interest of justice jurisdiction, and does not need to be preserved as a question of law ...' . Contrary to the People's further contention, in reviewing that challenge, 'it is inappropriate for this Court to address whether the sentencing court abused its discretion' ... . Rather, this Court 'has broad, plenary power to modify a sentence that is unduly harsh or severe under the circumstances, even though the sentence may be within the permissible statutory range,' and such 'sentence-review power may be exercised, if the interest of justice warrants, without deference to the sentencing court' ... . We agree with defendant that the sentence is unduly harsh and severe under the circumstances of this case, and we therefore modify the sentence as a matter of discretion in the interest of justice to a determinate term of imprisonment of five years ...". ***People v. Kibler*, 2020 N.Y. Slip Op. 05365, Fourth Dept 10-2-20**

CRIMINAL LAW, APPEALS.

THE APPEAL WAS HELD IN ABEYANCE AND THE MATTER WAS SENT BACK FOR A RECONSTRUCTION HEARING ON WHETHER DEFENSE COUNSEL CONSENTED TO ANNOTATIONS ON THE VERDICT SHEET; THE RECONSTRUCTION HEARING WAS HELD BUT SUPREME COURT DID NOT MAKE A RULING; THE MATTER WAS REMITTED AGAIN FOR THE RULING.

The Fourth Department, holding the appeal in abeyance, had sent the matter back for a reconstruction hearing on whether defense counsel consented to annotations on the verdict sheet. The hearing was held but Supreme Court did not make a ruling. So the matter was remitted for that purpose: "We previously held this case, reserved decision, and remitted the matter to Supreme Court 'to determine, following a hearing if necessary, whether defense counsel consented to the annotated verdict sheet' ... . Upon remittal, the court convened a reconstruction hearing, heard testimony of the parties' trial counsel, and closed the hearing without making any determination. That was error. The intent of our prior decision was for the court to make a determination, not merely to conduct a hearing ... . It is of course better for the hearing court, which has the advantage of seeing the witnesses and hearing their testimony, to make the determination following a reconstruction hearing, particularly where, as here, witness credibility is at issue ... . We therefore hold the case, reserve decision, and remit the matter to Supreme Court to determine whether defense counsel consented to the annotated verdict sheet ...". ***People v. Wilson*, 2020 N.Y. Slip Op. 05385, Fourth Dept 10-2-20**

CRIMINAL LAW, ATTORNEYS.

DEFENDANT ENTITLED TO A HEARING ON HIS MOTION TO VACATE HIS CONVICTION ON THE GROUND DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO INFORM HIM THE DECISION WHETHER TO TESTIFY WAS HIS TO MAKE.

The Fourth Department, reversing Supreme Court, determined a hearing was required on defendant motion to vacate his conviction alleging defense counsel was ineffective for failing to inform him the decision whether to testify was defendant's to make: "... [T]he court erred in denying his motion without a hearing with respect to whether defense counsel fulfilled his duty of advising defendant that his decision to testify was ultimately his own, not defense counsel's, to make (see People v. Cosby, 82 AD3d 63, 66 [4th Dept 2011], lv denied 16 NY3d 857 [2011]). Defendant has made a proper showing for a hearing by asserting a viable legal basis for the motion, substantiated by his own unrefuted sworn allegations and other evidentiary submissions ... , and neither the mandatory denial provisions of CPL 440.10 (2) nor the permissive denial provisions of CPL 440.10 (3) apply to this case ... . Cosby, relied on by both the court and the People in support of denying the motion, is distinguishable from this case inasmuch as a hearing pursuant to CPL 440.30 (5) was held in Cosby, thereby permitting us to determine on the merits that defendant was not deprived of his constitutional right to effective assistance of counsel and, consequently, that his right to a fair trial was not seriously compromised ... . No such determination on the merits can be made on the record before us. We therefore reverse the order and remit the matter to Supreme Court for a hearing pursuant to CPL 440.30 (5) on that part of defendant's motion." ***People v. Mirabella*, 2020 N.Y. Slip Op. 05388, Fourth Dept 10-2-20**

CRIMINAL LAW, EVIDENCE.

THE POLICE DID NOT HAVE REASONABLE SUSPICION TO JUSTIFY THE TRAFFIC STOP AND DID NOT HAVE PROBABLE CAUSE TO ARREST AT THE TIME DEFENDANT GOT OUT OF THE CAR; THE STATEMENTS MADE BY DEFENDANT AND THE COCAINE SEIZED FROM HIS PERSON SHOULD HAVE BEEN SUPPRESSED.

The Fourth Department, reversing the convictions related to statement which should have been suppressed, determined the police did not have reasonable suspicion to justify a traffic stop and did not have probable to handcuff the defendant, a de facto arrest, when he got out of the car. Therefore the statements which led to the search and seizure of cocaine, as well as the seized cocaine, should have been suppressed: "Inasmuch as the officer conducting the surveillance and directing the stop of defendant 'did not see what the defendant and [the alleged buyer] exchanged, could not see if one of the [participants] gave the other something in return for something else, and did not see money pass between the two [individuals],' we con-

clude that the officers detaining defendant lacked reasonable suspicion to do so ... . Although the use of handcuffs does not automatically transform a defendant's detention into a de facto arrest ... , such use must be justified by some additional circumstances, such as a threat of evasive conduct ... . [T]here was no testimony that the officer who handcuffed defendant 'reasonably suspect[ed] that he [was] in danger of physical injury by virtue of [defendant] being armed' ... . '[T]he test for determining whether a defendant is in custody or has been subjected to a de facto arrest is 'what a reasonable [person], innocent of any crime, would have thought had he [or she] been in the defendant's position' ...". ***People v. Hernandez*, 2020 N.Y. Slip Op. 05321, Fourth Dept 9-30-20**

CRIMINAL LAW, EVIDENCE.

GRAND JURY EVIDENCE WAS SUFFICIENT TO SUPPORT THE STRANGULATION COUNT DESPITE THE ABSENCE OF A DEFINITION OF THE "STUPOR" ELEMENT OF THE OFFENSE.

The Fourth Department, reversing County Court on a People's appeal and reinstating the strangulation count, determined the evidence before the grand jury was sufficient to charge strangulation. County Court had reduced the charge to criminal obstruction of breathing or blood circulation. County Court ruled the People had not presented evidence sufficient to support the theory the strangulation caused "stupor" citing the People's failure to define the term: "In order to sustain the charge of strangulation in the second degree against defendant, the People were required to present to the grand jury legally sufficient evidence of the following three elements: (1) that defendant applied pressure on the throat or neck of the alleged victim; (2) that defendant did so with the intent to impede the normal breathing or circulation of the blood of the alleged victim; and (3) that defendant thereby caused stupor, loss of consciousness for any period of time, or any other physical injury or impairment to the alleged victim ... . [T]he prosecutor's instructions to the grand jury comported with the statute and mirrored the pattern criminal jury instructions ... , and we conclude that the failure of the prosecutor to offer a definition of the term 'stupor' did not impair the integrity of the grand jury proceedings or potentially prejudice defendant ... . [T]he alleged victim testified before the grand jury that defendant 'put both of his hands around [her] neck and choked [her] until [she] could barely breathe anymore' and 'was starting to lose consciousness.' She was 'pushed up against the wall and the door" and felt "[v]ery light-headed and kind of like—like there was a buzzing in [her] head and everything was starting to turn purple in [her] vision before—by the time [the alleged victim] got him to let go.' " ***People v. Ruvalcaba*, 2020 N.Y. Slip Op. 05354, Fourth Dept 10-2-20**

CRIMINAL LAW, EVIDENCE.

ANONYMOUS 911 CALL JUSTIFIED TRAFFIC STOP; DISSENT DISAGREED.

The Fourth Department, over a dissent, determined an anonymous 911 call provided reasonable suspicion for a traffic stop, officer safety warranted handcuffing the defendant and seeing a rifle in the car provided probable cause for arrest. The dissent argued the anonymous 911 call did not justify the traffic stop: ... " '[P]olice stops of automobiles in New York State are legal 'when there exists at least a reasonable suspicion that the driver or occupants of the vehicle have committed, are committing, or are about to commit a crime'" ... . The evidence at the suppression hearing established that police officers were dispatched based on a 911 call reporting a group of people at a specific location, one of whom had been observed getting into a van while possessing 'a long gun.' The dispatch provided the license plate number of a van in which the group had driven away from the location where they had been seen by the 911 caller. One or two minutes after the dispatch, one of the responding officers located the van in the area. The officer confirmed that the van's license plate number matched the one provided in the dispatch, and he initiated a traffic stop. Contrary to defendant's assertion, 'the totality of the information known to the police at the time of the stop of [the van] 'supported a reasonable suspicion of criminal activity . . . [, i.e.,] that quantum of knowledge sufficient to induce an ordinarily prudent and cautious [person] under the circumstances to believe criminal activity is at hand' ... . In particular, we conclude that the 911 call as relayed in the dispatch 'contained sufficient information about defendant['s] unlawful possession of a weapon to create reasonable suspicion' justifying the stop of the van ...". ***People v. Walls*, 2020 N.Y. Slip Op. 05337, Fourth Dept 10-2-20**

DEFAMATION, EMPLOYMENT LAW.

DEFAMATION CAUSE OF ACTION AGAINST DEFENDANT AND HIS EMPLOYER, UNDER A RESPONDEAT SUPERIOR THEORY, SHOULD NOT HAVE BEEN DISMISSED.

The Fourth Department, reversing (modifying) Supreme Court, determined the defamation cause of action against defendant Polit and Polit's employer, ADP, should not have been dismissed. Polit allegedly posted defamatory statements on defendant-restaurant's Facebook page on behalf of Polit's employer: "Plaintiffs commenced this action seeking damages arising from an allegedly defamatory statement authored by defendant David Thomas Polit and published by him to the Facebook page of plaintiff Crave L & D, LLC (Crave), a restaurant. Polit's statement advised potential customers to stay away from the restaurant, alleging, among other things, health code violations, mistreatment of staff, and criminal activity.

... [W]e conclude that plaintiffs sufficiently pleaded the existence of respondeat superior liability through ... allegations, including, among other things, that Polit visited Crave for the sole purpose of soliciting plaintiffs to enter into a payroll service agreement with ADP, that Polit represented himself as ADP's district manager and requested Crave's business and payroll records in order to provide Crave with a quote for ADP's services, that the post was based on Polit's review of those records, that ADP encouraged Polit to use social media in connection with his sales work, that Polit published the post during regular business hours, and that ADP was aware of Polit's use of Facebook and authorized his conduct." ***Elizabeth Votsis & Crave L&D, LLC v. ADP, LLC*, 2020 N.Y. Slip Op. 05311, Fourth Dept 10-2-20**

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

GENERAL OBLIGATIONS LAW § 17-105, NOT § 17-101, APPLIES TO THE REVIVAL OF AN EXPIRED STATUTE OF LIMITATIONS FOR A MORTGAGE FORECLOSURE; THE RELEVANT DOCUMENTS HERE DID NOT MEET THE CRITERIA OF SECTION 17-105; FORECLOSURE WAS THEREFORE TIME-BARRED.

The Fourth Department, in a full-fledged opinion by Justice Peradotto, determined that General Obligations Law § 17-105, not § 17-101, applied to the revival of an expired statute of limitations for foreclosure of a mortgage and the documents in this case did not meet the criteria of section 17-105. Therefore the foreclosure action was time-barred. The court noted that Supreme Court should have issued a judgment declaring the rights of the parties pursuant to RPAPL 1501 and 1521: "General Obligations Law § 17-105 (1) provides, in relevant part: 'A waiver of the expiration of the time limited for commencement of an action to foreclose a mortgage of real property or a mortgage of a lease of real property, or a waiver of the time that has expired, or a promise not to plead the expiration of the time limited, or not to plead the time that has expired, or a promise to pay the mortgage debt, if made after the accrual of a right of action to foreclose the mortgage and made, either with or without consideration, by the express terms of a writing signed by the party to be charged is effective, subject to any conditions expressed in the writing, to make the time limited for commencement of the action run from the date of the waiver or promise.' We agree with plaintiffs for the reasons that follow that General Obligations Law § 17-105 (1), and not § 17-101, applies in this case. * * * ... [T]he financial statements submitted by defendant do not meet the requirements of subdivision (1) of section 17-105 because those documents merely list the mortgage as a liability and do not constitute an express promise to pay the mortgage debt ...". ***Batavia Townhouses, Ltd. v. Council of Churches Hous. Dev. Fund Co., Inc.*, 2020 N.Y. Slip Op. 05331, Fourth Dept 10-2-20**

FORECLOSURE, CONTRACT LAW.

THE MERE PRESENCE OF A REINSTATEMENT CLAUSE IN THE MORTGAGE, WHICH ESSENTIALLY ALLOWS A BORROWER IN DEFAULT TO PAY THE ARREARS AND STOP THE ACCELERATION OF THE DEBT, DOES NOT AFFECT OR IMPEDE THE ACCELERATION OF THE DEBT WHEN A FORECLOSURE ACTION IS STARTED; THE DEBT HERE WAS ACCELERATED WHEN THE FIRST FORECLOSURE ACTION WAS COMMENCED IN 2009 RENDERING THE INSTANT FORECLOSURE ACTION TIME-BARRED.

The Fourth Department, in a full-fledged opinion by Justice Curran, agreeing with the Second Department, determined the mere presence of a reinstatement clause in a mortgage, which allows a borrower who has missed payments to pay the amount of the missed payments and resume monthly payments, does not affect or impede the acceleration of the debt when a foreclosure action is brought. Therefore the foreclosure action at issue was time-barred: "The mortgage is a uniform instrument issued by Fannie Mae, among others, for use in New York State and contains several provisions that are relevant on appeal. Section 22 (acceleration provision) permits the lender to require immediate payment of the loan in full upon the borrower's default, provided certain conditions are met. Section 19 (reinstatement provision) grants a borrower in default the right to effectively de-accelerate the maturity of the mortgage debt by paying in full the past due amount, thereby returning the loan to its pre-default status. * * * ... [W]e conclude that the mortgage's reinstatement provision does not in any way affect or impede acceleration of the full mortgage debt. The reinstatement provision is not mentioned anywhere in the text of the mortgage's acceleration provision, which governs when Fannie Mae could exercise its option to accelerate the full debt ... . Further, the language of the reinstatement provision "indicates that [Fannie Mae's] right to accelerate the entire debt may be exercised before the [borrower's] rights under the reinstatement provision . . . are exercised or extinguished" ... . Thus, in effect, the reinstatement provision merely 'gives the borrower the contractual option to de-accelerate the mortgage when certain conditions are met' ... —which presupposes that an acceleration has already occurred." ***Federal Natl. Mtge. Assn. v. Tortora*, 2020 N.Y. Slip Op. 05410, Fourth Dept 10-2-20**

FRAUD, CONTRACT LAW.

THE RELEASE DID NOT APPLY TO THE ALLEGATIONS OF FRAUD IN THE INDUCEMENT AND THERE WAS A QUESTION OF FACT WHETHER PLAINTIFFS JUSTIFIABLY RELIED ON THE ALLEGED MISREPRESENTATIONS; THE FRAUD IN THE INDUCEMENT CAUSE OF ACTION SHOULD NOT HAVE BEEN DISMISSED.

The Fourth Department, reversing (modifying) Supreme Court, determine plaintiffs' action for fraud in the inducement should not have been dismissed. The release did not require dismissal and there was a question of fact whether plaintiffs justifiably relied on the alleged misrepresentations: "... [D]efendants failed to meet their initial burden of establishing, as a matter of law, that the release barred plaintiffs' claims that they were fraudulently induced to enter the liquidation agreement by misrepresentations that defendants made in violation of their obligations thereunder ... . [D]efendants' own submissions establish that plaintiffs 'made a significant effort to protect themselves against the possibility of false financial statements: they obtained representations and warranties to the effect that nothing in the financials was materially misleading'... , i.e., that [defendant] had no material liabilities beyond those disclosed in the financial statements and no circumstances existed that could reasonably be expected to result in such a material obligation. Thus, '[i]f plaintiffs can prove the allegations in the complaint, whether they were justified in relying on the warranties they received is a question to be resolved by the trier of fact' ...". ***Dillon v. Peak Envtl., LLC*, 2020 N.Y. Slip Op. 05332, Fourth Dept 10-2-20**

INSURANCE LAW, BATTERY.

THE MANAGER OF PLAINTIFF BAR PUSHED A MAN DOWN A SET OF STAIRS CAUSING FATAL INJURIES; THE ASSAULT AND BATTERY EXCLUSION IN DEFENDANT'S INSURANCE POLICY APPLIED AND THE INSURER WAS NOT OBLIGATED TO DEFEND THE BAR.

The Fourth Department, reversing Supreme Court, determined the assault and battery insurance policy exclusion applied and the insurer was not obligated to defend the plaintiff in the underlying personal injury action. The manager at plaintiff bar had pushed a man down a set of stairs, causing fatal injuries. The manager pled guilty to manslaughter: "Generally, an insurer is 'required to provide a defense unless it can demonstrate that the allegations of the complaint cast that pleading solely and entirely within the policy exclusions, and, further, that the allegations, in toto, are subject to no other interpretation' ... . [A]ll of the claims against plaintiffs in the underlying action are 'based on' or arise out of the bar manager's assault, 'without which [the plaintiff in the underlying personal injury action] would have no cause of action' ... . In other words, 'no cause of action would exist but for the assault' and, therefore, the assault and battery exclusion is applicable and precludes coverage ... . [A] determination on this issue need not await discovery in the personal injury action. The analysis of whether an exclusion applies 'depends on the facts which are pleaded, not the conclusory assertions' contained in the underlying complaint ... . '[T]he allegations of the complaint [in the underlying personal injury action] cast that pleading solely and entirely within the policy exclusions, and . . . the allegations, in toto, are subject to no other interpretation' ... . Even if it were learned during discovery that there was a defect with respect to the stairs, the fact remains that, but for the bar manager's assault, decedent would not have fallen down the stairs." ***NHJB, Inc. v. Utica First Ins. Co.*, 2020 N.Y. Slip Op. 05319, Fourth Dept 10-2-20**

INSURANCE LAW, FRAUD, EVIDENCE.

EVIDENCE DID NOT ESTABLISH AS A MATTER OF LAW THAT THE INSURED'S WATER-DAMAGE CLAIM WAS FRAUDULENTLY INFLATED; INSURER WAS NOT ENTITLED TO SUMMARY JUDGMENT DISCLAIMING COVERAGE.

The Fourth Department, reversing Supreme Court, determined the defendant insurer (Allegany) did not present sufficient evidence an inflated water-damage claim to warrant disclaiming coverage. The insurer's summary judgment motion should not have been granted: "Allegany failed to meet its initial burden on its motion of establishing as a matter of law that the claim was inflated ... . A policy may be voided if the insured 'willfully and fraudulently placed in the proofs of loss a statement of property lost which [the insured] did not possess, or has placed a false and fraudulent value upon the articles which [the insured] did own' ... . 'Incorrect information is not necessarily tantamount to fraud or material misrepresentation as the insurer must tender 'proof of intent to defraud—a necessary element to the defense' ... . '[U]nintentional fraud or false swearing or the statement of any opinion mistakenly held[, however,] are not grounds for vitiating a policy' ... . [A]lthough Allegany's submissions in support of its motion demonstrate a disparity between the estimates of plaintiff's contractor and Allegany's assessor of the amount of damage and loss ... , the submissions fail to establish fraudulent intent on the part of plaintiff … . Plaintiff's proof of loss statement did not include duplicative items, unincurred expenses, or substantial sums of money that were unaccounted for ... , and the disparity between the damage estimate of plaintiff's contractor and the estimate of Allegany's assessor is not 'so grossly excessive as to constitute false swearing and misrepresentation' ...". ***Magnano v. Allegany Co-Op Ins. Co.*, 2020 N.Y. Slip Op. 05339, Fourth Dept 10-2-20**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

DEFENDANT MANUFACTURER OF METAL ROOFING WAS A CONTRACTOR WITHIN THE MEANING OF LABOR LAW § 240(1) BECAUSE IT HAD THE AUTHORITY TO EXERCISE CONTROL OVER PLAINTIFF'S WORK, EVEN IF IT DID NOT DO SO; PLAINTIFF SHOULD HAVE BEEN AWARDED SUMMARY JUDGMENT ON HIS LABOR LAW § 240(1) CAUSE OF ACTION STEMMING FROM A FALL FROM A ROOF WHERE THE METAL ROOFING WAS BEING INSTALLED.

The Fourth Department, reversing (modifying) Supreme Court, determined defendant Union was a contractor within the meaning of Labor Law § 240(1) and plaintiff was entitled to summary judgment against Union on his Labor Law § 240(1) cause of action stemming from his fall from the roof of a residence where metal roofing manufactured by Union was being installed by plaintiff's employer: "It is well settled that the Labor Law 'holds . . . general contractors absolutely liable for any breach of the statute even if the job was performed by an independent contractor over which [they] exercised no supervision or control' ... , inasmuch as '[t]heir status as contractors is dependent on their right to exercise control, not whether they in fact did so' ... . In determining whether a defendant may be found liable pursuant to section 240 (1), it is well settled that, where, as here, a defendant 'ha[s] the authority to choose the part[y] who did the work, and directly enter[s] into [a] contract[] with th[at party], it ha[s] the authority to exercise control over the work, even if it [does] not actually do so' ... . [P]laintiff submitted evidence establishing that Union entered into a contract with plaintiff's employer to install the roofing materials at issue and that the contract provided Union with the power to, inter alia, perform inspections, stop work, and remove plaintiff's employer from the job. We therefore conclude that plaintiff demonstrated as a matter of law that Union is a "contractor" within the meaning of Labor Law § 240 (1) ...". ***Barker v. Union Corrugating Co.*, 2020 N.Y. Slip Op. 05349, Fourth Dept 10-2-20**

PERSONAL INJURY.

QUESTION OF FACT WHETHER DEFENDANT'S ACTIONS WERE JUSTIFIED BY THE EMERGENCY DOCTRINE IN THIS AUTOMOBILE ACCIDENT CASE; THE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined the defendant's motion for summary judgment pursuant to the emergency doctrine should not have been granted in this automobile accident case: "A white van that was exiting the Parkway proceeded to the stop sign where the off-ramp intersects with Greenleaf Road and then made a sudden left-hand turn in front of the vehicle that defendant was operating. Defendant tried to avoid the van by braking and swerving to the right. In doing so, he maneuvered his vehicle the wrong way onto the off-ramp, where it collided with the driver's side of the vehicle operated by plaintiff. ... 'In general, the issues whether a qualifying emergency existed and whether the driver's response thereto was reasonable are for the trier of fact' ... , and this case is no exception to the general rule. Even assuming, arguendo, that defendant was faced with a qualifying sudden and unexpected emergency, we conclude that defendants failed to meet their initial burden on the motion of establishing that defendant's conduct was appropriate under the circumstances ...". ***Schwallie v. Farnan*, 2020 N.Y. Slip Op. 05316, Fourth Dept 10-2-20**

PERSONAL INJURY.

PLAINTIFF GOLFER ASSUMED THE RISK OF SLIPPING AND FALLING ON A LANDING WET FROM RAIN AT THE TWELFTH HOLE OF DEFENDANT GOLF COURSE.

The Fourth Department, reversing Supreme Court, determined plaintiff assumed the risk of slipping and failing on a stairway landing wet from rain. The stairway is used to accessed the tee box on the twelfth hole of defendant golf course: " 'As a general rule, participants properly may be held to have consented, by their participation, to those injury-causing events which are known, apparent or reasonably foreseeable consequences of the participation' ... . 'It is not necessary to the application of assumption of [the] risk that the injured plaintiff have foreseen the exact manner in which his or her injury occurred, so long as he or she is aware of the potential for injury of the mechanism from which the injury results' ... . 'The doctrine of primary assumption of the risk, however, will not serve as a bar to liability if the risk is unassumed, concealed, or unreasonably increased' ... . Here, defendants established on their motion that plaintiff was an experienced golfer who had played defendants' golf course several times in the past ... . Moreover, defendants demonstrated that, at the time of the incident, plaintiff knew that the course was still wet from rain that had just fallen, and that he was familiar with the stairway in question, having just used it moments before his accident." ***Conrad v. Holiday Val., Inc.*, 2020 N.Y. Slip Op. 05333, Fourth Dept 10-2-20**

PERSONAL INJURY, EVIDENCE.

THERE WAS A QUESTION OF FACT WHETHER DEFENDANT HAD CONSTRUCTIVE KNOWLEDGE OF A RECURRING ICY CONDITION IN THIS SLIP AND FALL CASE.

The Fourth Department, reversing Supreme Court, determined there was a question of fact whether defendant had constructive knowledge of a recurring icy condition where plaintiff allegedly slipped and fell. Plaintiff slipped after leaving a tenant's apartment. The tenant testified at a deposition: "... [P]laintiff submitted, inter alia, the deposition testimony of the tenant that she had treated on the day of the incident. The tenant testified that, 'basically[,] what happens is there's a lot of runoff from the ground over here. When the snow melts the whole area gets flooded and then it freezes, and then you have a solid sheet of ice pretty much over these last few blocks of the sidewalk and then down in the end, right at the end where the parking lot meets the sidewalk. I've actually contacted management many times in regards to that issue.' The tenant further testified that, when he contacted the property manager on such occasions prior to the incident, he was told that there was nothing that could be done because 'the snow melts, thaws and freezes, and there's nothing they can do about water.' He also noted that he had been living at the property for 11 years, and no steps had been taken during that time to eliminate water from pooling on the sidewalk." ***Monnin v. Clover Group, Inc.*, 2020 N.Y. Slip Op. 05325, Fourth Dept 10-2-20**

PERSONAL INJURY, EVIDENCE.

INSUFFICIENT EVIDENCE DEFENDANT HAD CONSTRUCTIVE NOTICE OF A LOOSE PANEL ON A SELF CHECK OUT MACHINE IN DEFENDANT'S STORE; THE PANEL ALLEGEDLY FELL OFF AND INJURED PLAINTIFF'S FOOT; DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED.

The Fourth Department, reversing Supreme Court, determined the defendant's (BJ's) motion for summary judgment in this personal injury case should have been granted. There was insufficient evidence BJ's had constructive notice that a metal panel on a self-check-out machine could detach and fall off. It was alleged plaintiff's foot was injured by the panel: "It is well established that, '[t]o constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit [a] defendant's employees to discover and remedy it' ... . Here, defendants' submissions on the motions established that no one, including plaintiff, observed any defect in the machine or the metal panel that injured plaintiff ... . Indeed, defendants' evidence demonstrated that the self-check-out machine was inspected and tested on the morning of the incident, that an employee was stationed directly in front of the machine prior to the incident and observed nothing abnormal about the machine, and that plaintiff herself had observed nothing abnormal about the machine while standing in line and waiting to use it. Although the deposition testimony of one of BJ's employees referenced that the employee had previously 'adjust[ed]' a panel on an unidentified self-check-out machine at some time, nothing in that testimony indicated that BJ's had notice of a defective or dangerous condition of the machine that injured plaintiff." ***Ginsberg v. BJ's Wholesale Club, Inc.*, 2020 N.Y. Slip Op. 05350, Fourth Dept 10-2-20**

PERSONAL INJURY, VEHICLE AND TRAFFIC LAW.

DEFENDANT, IN VIOLATION OF THE VEHICLE AND TRAFFIC LAW, FAILED TO YIELD THE RIGHT OF WAY WHEN PULLING OUT OF A PARKING LOT IN THIS TRAFFIC ACCIDENT CASE; PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED.

The Fourth Department, reversing Supreme Court, determined plaintiffs' motion for summary judgment in this traffic accident case should have been granted. Defendant failed to yield the right of way when entering the roadway from a parking lot: " 'It is well settled that a driver who has the right-of-way is entitled to anticipate that the drivers of other vehicles will obey the traffic laws that require them to yield. Because [defendant] was entering the roadway from a parking lot, []he was required to yield the right-of-way to [plaintiff's] vehicle' (... see Vehicle and Traffic Law § 1143). Here, plaintiffs met their initial burden of proof with respect to defendant's negligence by submitting, inter alia, plaintiff's deposition testimony recounting the circumstances of the accident and the corroborating police report, which established as a matter of law that defendant violated Vehicle and Traffic Law § 1143, breached his duty to operate his vehicle with due care, and thereby caused the accident ... . Defendant's claimed inability to recall the circumstances of the accident 'is not affirmative proof that the event did not happen[and is] . . . thus insufficient to create an issue of fact' ... . Moreover, while defendant made inconsistent statements about his actions before pulling into the street from the parking lot, those statements offered no basis for a rational factfinder to excuse his violation of Vehicle and Traffic Law § 1143 or negate his responsibility for the accident ...". ***Kowalyk v. Wal-Mart Stores, Inc.*, 2020 N.Y. Slip Op. 05346, Fourth Dept 10-2-20**

ZONING, LAND USE.

PETITIONERS WERE NOT REQUIRED TO OBTAIN A USE VARIANCE BEFORE APPLYING FOR A SPECIAL PERMIT TO OPERATE THEIR RESIDENCE AS AN AIRBNB, SUPREME COURT REVERSED.

The Fourth Department, reversing Supreme Court, determined the Zoning Board of Appeals' (ZBA's) ruling that petitioners would have to obtain a use variance before applying for a special use permit to operate their residence as an Airbnb rental lacked a rational basis: "Town Code § 280-31 provides that the uses and structures permitted in the R-1 District, where petitioners' residence is located, include the principal uses and structures permitted under section 280-24, which governs R-E Districts, except those specified in subdivisions four and five of the six enumerated subdivisions in that section. The sixth subdivision allows '[t]he following uses by special use permit authorized by the Planning Board: . . . (b) Bed-and-breakfast establishments and tourist homes' ... . A plain reading of sections 280-24 and 280-31 therefore unambiguously demonstrates that special uses are permitted principal uses, subject to authoriztion by the Planning Board ... . [W]e conclude that the Town Code establishes that special uses are permitted uses in specific districts, but the burden is on an applicant for a special use permit to show that the proposed use is allowable within that district by establishing that the use has the requisite individual characteristics ... . Our interpretation of the Town Code is supported by Town Law § 274-b (1), which defines a special use permit as 'an authorization of a particular land use which is permitted in a zoning ordinance or local law, subject to requirements imposed by such zoning ordinance or local law to assure that the proposed use is in harmony with such zoning ordinance or local law and will not adversely affect the neighborhood if such requirements are met.' " ***Matter of Churchill v. Town of Hamburg*, 2020 N.Y. Slip Op. 05356, Fourth Dept 10-2-20**

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