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COURT OF APPEALS

CONTRACT LAW, SECURITIES, NEGLIGENCE.

THE SOLE REMEDY PROVISION IN THE REPRESENTATIONS AND WARRANTIES AGREEMENT IN THIS RESIDENTIAL MORTGAGE-BACKED SECURITIES CASE WAS VALID AND ENFORCEABLE; THE GROSS NEGLIGENCE PUBLIC POLICY RULE DOES NOT APPLY WHERE THE SOLE REMEDY PROVISION IMPOSES REASONABLE LIMITATIONS ON LIABILITY OR REMEDIES.

The Court of Appeals, reversing the Appellate Division, in a full-fledged opinion by Judge Fahey, over a partial dissent, held that the sole remedy provision in the Representations and Warranties Agreement (RWA) in this residential mortgage-backed securities (RBMS) case was valid and enforceable. Plaintiff unsuccessfully tried to avoid the sole remedy provision by arguing the defendants breached the contract with gross negligence: "[W]e ... conclude that the parties' contract, as written, means what it says. In this RMBS put-back action, plaintiff seeks to avoid a provision in the contract ... that sets out a sole remedy for a breach by alleging that defendants breached the contract with gross negligence. This sole remedy provision purports to limit, but not eliminate, the remedies available to the plaintiff in the event of a breach. We conclude that, in a breach of contract action, the public policy rule prohibiting parties from insulating themselves from damages caused by grossly negligent conduct applies only to exculpatory clauses or provisions that limit liability to a nominal sum. The rule does not apply to contractual limitations on remedies that do not immunize the breaching party from liability for its conduct. The sole remedy provision is not an exculpatory or nominal damages clause. Plaintiff cannot render it unenforceable through allegations of gross negligence. * * * We have previously considered the application of the gross negligence public policy rule only in cases where the contract provision at issue was an exculpatory clause, purporting to wholly immunize a party from liability, or a nominal damages clause limiting damages to, at most, $250 ... . We have not yet determined whether grossly negligent conduct may render unenforceable contractual provisions that do not wholly insulate a party from liability for its breach, but instead impose reasonable limitations on either liability or the remedies available to the non-breaching party. We conclude that, in a breach of contract case, grossly negligent conduct will render unenforceable only exculpatory or nominal damages clauses, and the public policy rule does not extend to limitations on the remedies available to the non-breaching party." ***Matter of Part 60 Put-Back Litig.*, 2020 N.Y. Slip Op. 07687, CtApp 12-22-20**

CRIMINAL LAW, APPEALS.

THE OMISSION OF NON-ELEMENTAL FACTUAL INFORMATION, HERE THE TIME OF THE INCIDENT, FROM THE WAIVER OF INDICTMENT FORM WAS A DEFECT WAIVED BY THE GUILTY PLEA.

The Court of Appeals, reversing the Appellate Division, determined the omission of the time of the incident from the waiver of indictment form was a defect waived by the guilty plea: "Shortly after the Appellate Division rendered its decision, we held in *People v Lang* (34 NY3d 545, 567 [2019]) that any 'omission from the indictment waiver form of non-elemental factual information that is not necessary for a jurisdictionally-sound indictment is [] forfeited by a guilty plea' and 'must be raised in the trial court' ... . The time of incident is not an element of second-degree criminal possession of a weapon (Penal Law § 265.03 [2]), and defendant was on notice of the crime charged. Therefore, Lang controls." ***People v. Zaquan Walley*, 2020 N.Y. Slip Op. 07691, CtApp 12-22-20**

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA), IMMIGRATION LAW, APPEALS.

UPWARD DEPARTURE SUPPORTED BY EVIDENCE DEFENDANT COMMITTED RAPE TO TAKE REVENGE UPON SOMEONE OTHER THAN THE VICTIM; THE FACT DEFENDANT HAD BEEN DEPORTED DID NOT RENDER THE APPEAL MOOT.

The Court of Appeals, in a brief memorandum decision, upheld the Appellate Division's finding that the upward departure was justified because it was based on a risk factor not addressed the Sex Offender Registration Act (SORA) Guidelines. The court noted that the fact defendant had been deported did not render the appeal moot: "Under the circumstances presented here, we reject the People's argument that defendant's appeal is rendered moot by his deportation ... . On the merits, we conclude that it was not an abuse of discretion for the Appellate Division to sustain the upward departure based on the

People's proof that defendant raped the victim in order to take revenge upon someone other than the victim—a risk factor not adequately captured by the Guidelines." ***People v. Rosario*, 2020 N.Y. Slip Op. 07688, CtApp 12-22-20**

REAL PROPERTY TAX LAW (RPTL), MUNICIPAL LAW.

THE COUNTY MUST REIMBURSE THE TOWNS FOR UNPAID PROPERTY MAINTENANCE AND DEMOLITION CHARGES.

The Court of Appeals, in a full-fledged opinion by Judge DiFiore, reversing the Appellate Division, determined Monroe County was required to credit unpaid property maintenance and demolition charges assessed by the Town of Irondequoit and the Town of Brighton. The county is required to deduct the unpaid town charges from the sales tax owed by the towns to the county: "Requiring that these charges be credited pursuant to section [RPTL] 936 accords with the overall structure for the enforcement of property tax liens, including the legislative grant of exclusive authority to counties in RPTL 1123 to commence in rem proceedings to foreclose on real property to 'enforce the payment of delinquent taxes or other lawful charges which have accumulated and become liens against certain property' ... , permitting counties—but not towns—to initiate proceedings to enforce the types of liens at issue here. Indeed, Town Law § 64 (5-a) directs that these charges 'levied' on 'real property' are to 'be collected in the same manner and at the same time as other town charges' by virtue of the normal process of levying and collecting town property taxes, in which towns make the first attempt at collection and after which enforcement shifts to the county ... . It appears that the Legislature, recognizing that towns have little power to recoup their costs for unpaid real property tax liens, has shifted the risk of loss to counties, which are in the best position to recover the funds through in rem foreclosure proceedings. The same considerations apply to blighted properties, where the Legislature may have presumed that counties are in a better position to recover charges imposed on real property pursuant to the Town Law ... . Thus, the County was required to credit the maintenance and demolition charges, and its determination to the contrary should have been annulled." ***Matter of Town of Irondequoit v. County of Monroe*, 2020 N.Y. Slip Op. 07689, CtApp 12-22-20**

FIRST DEPARTMENT

CRIMINAL LAW.

DESPITE THE HORRIFIC NATURE OF THE CRIME, DEFENDANT'S SENTENCE WAS REDUCED BECAUSE OF HIS MENTAL ILLNESS AND INTELLECTUAL DISABILITY.

The First Department, despite the horrific nature of the crime in this attempted murder and robbery case, over a dissent, reduced defendant's sentence from 14 to 10 years because of his mental illness and intellectually disability: "This Court takes very seriously the severity of the injuries inflicted on the two victims in this case, and our reduction of defendant's prison sentence in no way diminishes our horror at the pain and suffering they endured at the hands of defendant and his codefendants. However, based on the record before us, we find that defendant presents an extraordinary circumstance meriting the use of our interest of justice powers to reduce his prison sentence. First, the record unequivocally shows that defendant has suffered intellectual and mental deficiencies since his childhood, which our Court has held renders a defendant's conduct less blameworthy ... . Second, defendant's cognitive disabilities rendered him overly susceptible to influence and manipulation ... . Here, prior to the incident defendant had no felony or misdemeanor convictions and only one youthful offender adjudication stemming from a school fight. For the first 19 years of his life, defendant exhibited no inclination towards committing crime, let alone violent crime. This strongly suggests that defendant's association with codefendant Torres, which began just one to two years prior to the incident, played an outsize influence on defendant and his role in the attacks. Third, defendant was 19 at the time of the incident, which, in combination with his cognitive deficiencies, rendered him even more susceptible to negative influences ... . We have long held that a defendant's young age may render the individual less culpable ... . Finally, in research cited by defendant, people with serious psychiatric disorders are more likely to be violently victimized and housed in segregation while incarcerated. ... As defendant himself stated in his CPL article 730 examination, he attempted suicide over 35 times while at Rikers Island. We find, therefore, that an extended term of incarceration would have an extremely harsh impact on defendant." ***People v. Watt*, 2020 N.Y. Slip Op. 07721, First Dept 12-22-20**

CRIMINAL LAW, EVIDENCE.

A PHOTOGRAPH OF DEFENDANT WITH A HANDGUN TAKEN SIX WEEKS BEFORE THE SHOOTING WAS PROPERLY ADMITTED IN EVIDENCE AS TENDING TO SHOW HIS IDENTITY AS THE SHOOTER.

The First Department noted that a photograph of defendant with a small handgun taken six weeks before the charged shooting was properly admitted in evidence: "A photograph of defendant holding a small handgun, taken approximately six weeks before the charged shooting, and recovered from defendant's phone pursuant to the warrant, was properly admitted. It could be inferred from video footage introduced at trial that a small handgun was used in the shooting. As in *People v Alexander* (169 AD3d 571 [1st Dept 2019], *lv denied* 34 NY3d 927 [2019]), the photograph was 'relevant to show that defendant had access to such a weapon, thus tending to establish his identity as the perpetrator, and there was no require-

ment of proof that the [firearm] in the photograph was the actual weapon used in the crime' ...". ***People v. Bush*, 2020 N.Y. Slip Op. 07722, First Dept 12-22-20**

FAMILY LAW.

ALTHOUGH THE PARENTS HAD BEEN FOUND TO HAVE ABUSED THE CHILDREN, THEY HAVE DEMONSTRATED THEY ARE LOVING AND CARING PARENTS; IN LIGHT OF THE CHILDREN'S EMOTIONAL PROBLEMS ASSOCIATED WITH FOSTER CARE, THE MOTION FOR A TRIAL DISCHARGE TO THE PARENTS SHOULD HAVE BEEN GRANTED.

The First Department, reversing Family Court, determined the motion for a trial discharge of the children to the parents, who had been found to have abused the children, should have been granted: "Family Court's denial of respondents' motions pursuant to Family Ct Act § 1061 for a trial discharge of the children Ashlynn and Yeovanny to their care, a position vigorously supported by the foster care agency and the attorney for the children, does not have a sound and substantial basis in the record ... . At the time of the motions, these children had recently been placed in their fourth foster home, and the agency was already investigating a fifth placement. Meanwhile, respondents had complied with all services, including full mental health evaluations ordered by the court at disposition, regularly attended unsupervised visitation, and had received uniformly positive reports from those who observed them interact with the children that they were loving and caring parents whose parenting skills were continually improving. Under these circumstances, although respondents continued to maintain that Ian and Yeovanny's injuries were accidental, 'their acceptance of ultimate responsibility for [the children's] injuries [was] demonstrated by their conduct' ... . In view of the parents' demonstrated ability to care for the children, ACS [Administration for Children's Services] failed to show that it would be in Ashlynn and Yeovanny's best interest for continued foster placement ... especially when weighed against the emotional harm on children when they are removed from the home ... . Such emotional harm was amply documented here and disturbingly downplayed by both petitioner and the court. The record shows that Ashlynn suffered from severe anxiety, nightmares, and other mental health issues that her therapist and agency caseworker attributed to being separated from respondents and shuttled through a succession of foster care placements. At the hearing on the motions, the agency caseworker submitted evidence that Ashlynn had to be taken to a hospital emergency room for night terrors shortly after she began living in her fourth foster home. Based on the foregoing, respondents showed 'good cause' under Family Ct Act § 1061 for a trial discharge …". ***Matter of Ashlynn R. (Maria R.-Yeovany R.)*, 2020 N.Y. Slip Op. 07726, First Dept 12-22-20**

LABOR LAW-CONSTRUCTION LAW, EVIDENCE, WORKERS' COMPENSATION, PERSONAL INJURY.

HEARSAY INSUFFICIENT TO DEFEAT PLAINTIFF'S SUMMARY JUDGMENT MOTION IN THIS LABOR LAW §§ 240(1) AND 241(6) ACTION; THE INDEMNIFICATION AND CONTRIBUTION CLAIM WAS PROPERLY DISMISSED BECAUSE PLAINTIFF DID NOT SUFFER GRAVE INJURY WITHIN THE MEANING OF WORKERS' COMPENSATION LAW § 11.

The First Department determined hearsay was not sufficient to defeat plaintiff's summary judgment in this Labor Law §§ 240(1) and 241(6) case. In addition the indemnification and contribution claims were properly dismissed because plaintiff did not suffer a "grave injury" within the meaning of Workers' Compensation Law § 11: "Plaintiff commenced this action alleging, inter alia, violations of Labor Law §§ 240(1) and 241(6) seeking to recover for personal injuries he sustained when, while dismantling a scaffold in an elevator shaft of a building under renovation, he fell from the scaffold to the bottom of the shaft. ... Plaintiff testified that his employer had instructed him to dismantle the scaffold and the sole support for Empire's contention that dismantling the scaffold was outside the scope of his duties was inadmissible hearsay testimony. ... Pursuant to their contract, Empire agreed to indemnify Pen & Brush for damages, 'arising from any act, omission, negligence, potential claims and losses' of, inter alia, Empire or its subcontractors 'during the performance of the Contract.' Its indemnification obligation was triggered here where plaintiff's injuries arose from the act of Empire's subcontractor, Lough Allen, in dismantling the scaffold and a finding of negligence is not required ... . Supreme Court properly determined plaintiff had not sustained a grave injury and dismissed the common-law indemnification and contribution claims against Lough Allen ... . As relevant here, 'grave injury' within the meaning of Workers' Compensation Law § 11 includes 'an acquired injury to the brain caused by external physical force resulting in permanent total disability.' Permanent total disability in the context of Workers' Compensation Law § 11 means unemployable in any capacity ...". ***Clarke v. Empire Gen. Contr. & Painting Corp.*, 2020 N.Y. Slip Op. 07698, First Dept 12-22-20**

PERSONAL INJURY, EVIDENCE.

QUESTION OF FACT WHETHER THE DEFENDANT'S DOUBLE-PARKED CAR WAS A PROXIMATE CAUSE OF THE ACCIDENT; PLAINTIFF'S DECEDENT, A BICYCLIST, WAS STRUCK BY A TRUCK WHEN HE ATTEMPTED TO GO AROUND DEFENDANT'S DOUBLE-PARKED CAR.

The First Department determined there were questions of fact about defendant driver's (Sung's) negligence and whether the negligence proximately caused plaintiff bicyclist's injuries and death. Defendant was stopped in the right lane and when plaintiff attempted to go around defendant's car he was struck by a truck (driven by Cruz-Marte). The First Department noted that hearsay was properly considered in opposition to the summary judgment motion: "Issues of fact exist with

respect to whether Wenhua Sung negligently obstructed traffic with his vehicle based on his own testimony, in which he admitted that he was issued a ticket for obstructing a lane of traffic ... , as well as that of Cruz-Marte, who testified that a vehicle was 'double-parked,' although he was not sure what that vehicle looked like. This evidence was sufficient to raise issues of fact regarding Sung's negligence, even absent proof of Sung's purported contemporaneous admissions to police that he was double-parked. Those admissions may also, however, be properly considered. Even if they are hearsay, they were offered in opposition to a motion for summary judgment and were not the only evidence submitted ... . Issues of fact also exist with respect to whether the Sung defendants' negligence proximately caused the accident, as a jury could reasonably find that a bicyclist swerving and being hit by a passing vehicle was a reasonably foreseeable consequence of double-parking or obstructing a lane of traffic ...". ***Dong v. Cruz-Marte*, 2020 N.Y. Slip Op. 07699, First Dept 12-22-20**

SECOND DEPARTMENT

ADMINISTRATIVE LAW, CONSTITUTIONAL LAW, MUNICIPAL LAW, APPEALS.

THE NYC BOARD OF HEALTH'S RESOLUTION MANDATING VACCINATION AGAINST MEASLES IS VALID AND LAWFUL; THE OBJECTIONS RAISED ON RELIGIOUS GROUNDS WERE REJECTED BECAUSE THE RESOLUTION DID NOT SINGLE OUT, TARGET OR EVEN MENTION RELIGION.

The Second Department, in a full-fledged, comprehensive opinion by Justice Scheinkman, determined the resolution by the NYC Board of Health mandating vaccination against measles was lawful and valid and did not violate petitioners' freedom of religion. As a threshold matter the court considered the matter as an exception to the mootness doctrine, because measles outbreaks are likely to occur in the future: "On April 17, 2019, the Board of Health of the Department of Health and Mental Hygiene of the City of New York adopted a resolution stating that, due to the active outbreak of measles among people residing within certain areas of Brooklyn, any person over the age of six months who was living, working, or attending school or child care in the affected areas had to be immunized against measles, absent a medical exemption. Failure to comply was made punishable by fines authorized by law, rule, or regulation, for each day of noncompliance. The plaintiffs/petitioners (hereinafter the petitioners), residents of areas covered by the resolution, challenge its validity. We hold that the resolution was lawful and enforceable, reserving, however, whether any fine imposed upon violation is excessive. The resolution was within the authority of the Board of Health of the Department of Health and Mental Hygiene to make and the resolution itself did not violate any right of the petitioners, including their freedom of religion. * * * The petitioners profess to hold religious beliefs that hold that a healthy body should not assimilate foreign objects, including vaccine ingredients ... . * * * The Board's resolution does not target religion or single out religion; it does not even mention religion. There is absolutely no indication that the resolution was adopted for the purpose of infringing the petitioners' religious practices or suppressing their religious views ... . The resolution treats all persons equally, whether religious or not ... . The resolution does not create any favored classes at all, much less ones that are secular rather than religious. As the resolution is religiously neutral and generally applicable, it is not subject to strict scrutiny." ***C.F. v. New York City Dept. of Health & Mental Hygiene*, 2020 N.Y. Slip Op. 07867, Second Dept 12-23-20**

CIVIL PROCEDURE, DEBTOR-CREDITOR.

IN THIS ACTION SEEKING TO ENFORCE AFFIDAVITS OF CONFESSION OF JUDGMENT, INFORMATION SUBPOENAS ISSUED BY PLAINTIFFS SHOULD NOT HAVE BEEN QUASHED.

The Second Department, reversing Supreme Court, in an action seeking to enforce affidavits of confession of judgment, determined the motion to quash information subpoenas should not have been granted: "... Supreme Court improvidently exercised its discretion in granting the defendants' motion to quash the information subpoenas. CPLR 5223 compels disclosure of 'all matter relevant to the satisfaction of the judgment.' A judgment creditor is entitled to discovery from either the judgment debtor or a third party in order 'to determine whether the judgment debtor[ ] concealed any assets or transferred any assets so as to defraud the judgment creditor or improperly prevented the collection of the underlying judgment' ... . [A] party moving to quash a subpoena has the initial burden of establishing either that the requested disclosure 'is utterly irrelevant to the action or that the futility of the process to uncover anything legitimate is inevitable or obvious' ... . Contrary to the defendants' contention, the fact that they are seeking to rescind the judgment by confession in a separate action against the plaintiffs, without more, does not preclude enforcement of the judgment in favor of the plaintiffs and against the defendants ... . Furthermore, the defendants failed to proffer any evidence that the requested disclosure is utterly irrelevant to the action or that the futility of the process to uncover anything legitimate is inevitable or obvious." ***Lisogor v. Nature's Delight, Inc.*, 2020 N.Y. Slip Op. 07879, Second Dept 12-23-20**

CIVIL PROCEDURE, FORECLOSURE.

THE CONDITIONAL ORDER OF DISMISSAL FOR FAILURE TO PROSECUTE DID NOT MEET THE CRITERIA OF CPLR 3216; THEREFORE THE MATTER SHOULD NOT HAVE BEEN ADMINISTRATIVELY DISMISSED.

The Second Department, reversing Supreme Court, determined the plaintiff's motion to vacate the conditional order of dismissal should have been granted because the conditions in CPLR 3216 were not met by the order: " 'CPLR 3216 permits a court, on its own initiative, to dismiss an action for want of prosecution where certain conditions precedent have been complied with' ... . As relevant here, an action cannot be dismissed pursuant to CPLR 3216(a) unless a written demand is served upon the party against whom such relief is sought in accordance with the statutory requirements, along with a statement that the default by the party upon whom such notice is served in complying with such demand within said ninety day period will serve as a basis for a motion by the party serving said demand for dismissal as against him or her for unreasonably neglecting to proceed ... . 'While a conditional order of dismissal may have the same effect as a valid 90-day notice pursuant to CPLR 3216' ... , the conditional order of dismissal here 'was defective in that it failed to state that the plaintiff's failure to comply with the notice 'will serve as a basis *for a motion*' by the court to dismiss the action for failure to prosecute' ... . The Supreme Court should not have administratively dismissed the action without further notice to the parties and without benefit of further judicial review ...". ***Deutsche Bank Natl. Trust Co. v. Henry*, 2020 N.Y. Slip Op. 07863, Second Dept 12-23-20**

CIVIL PROCEUDURE, FORECLOSURE.

ISSUE WAS NEVER JOINED, THE MATTER SHOULD NOT HAVE BEEN DISMISSED FOR FAILLURE TO PROSECUTE.

The Second Department, reversing Supreme Court, determined dismissal for failure to prosecute was not available because issue was not joined: " 'A court may not dismiss an action based on neglect to prosecute unless the CPLR 3216 statutory preconditions to dismissal are met' ... . One of the statutory preconditions of CPLR 3216 is that issue must have been joined ... . Here, there is no dispute that issue was not joined. Insofar as joinder of issue was a condition precedent to dismissal pursuant to CPLR 3216, [appellant] did not forfeit this argument by failing to raise it in its initial opposition to the defendants' motion ...". ***Private Capital Group, LLC v. Llobell*, 2020 N.Y. Slip Op. 07933, Second Dept 12-23-20**

CRIMINAL LAW.

DEFENDANT WAS REMOVED FROM THE COURTROOM WHEN HE DISRUPTED THE PROCEEDINGS AS THE GUILTY VERDICT WAS BEING DELIVERED; DEFENDANT SHOULD FIRST HAVE BEEN WARNED THAT HE WOULD BE REMOVED IF HE CONTINUED TO DISRUPT THE PROCEEDINGS; NEW TRIAL ORDERED.

The Second Department, reversing the conviction, over a dissent, determined the defendant should not have been removed from the courtroom without first issuing a warning. The defendant was removed after disrupting the court as the verdict was being delivered: "After the jury foreperson announced 'guilty' on the final charge (count 4) of criminal possession of a weapon in the second degree, the clerk proceeded to read back the verdict in order to inquire collectively of the jurors whether such was their verdict (see CPL 310.80). Before the jurors could respond, the defendant disrupted the proceeding by using profanity and declaring his innocence. The trial court immediately directed that the court officers remove the defendant from the courtroom. The defendant repeated his protestation and again the court directed that he be removed from the courtroom. Three more times the defendant either proclaimed his innocence or uttered a one-word profanity, and in each instance the court responded by directing that the defendant be removed from the courtroom. At some point during the foregoing exchanges, the defendant was apparently removed from the courtroom. The clerk read the verdict again, and made the requisite inquiry, to which the jurors responded. The defendant's counsel thereafter requested that the jury be polled ... . The jury was polled and the verdict was entered. ... A criminal defendant's right to be present at all material stages of trial is encompassed within the confrontation clauses of the Federal and State Constitutions ... and the New York Criminal Procedure Law ... . The defendant's outbursts and removal from the courtroom occurred during a material stage of the trial, as the jury had not yet been polled and the verdict had therefore not yet been entered ... . However, '[a] defendant's right to be present during trial is not absolute,' and '[t]he defendant may be removed from the courtroom if, after being warned by the trial court, the disruptive conduct continues' ...". ***People v. Antoine*, 2020 N.Y. Slip Op. 07907, Second Dept 12-23-20**

CRIMINAL LAW, EVIDENCE.

EVIDENCE OF SERIOUS PHYSICAL INJURY INSUFFICIENT, ASSAULT SECOND CONVICTION VACATED.

The Second Department, vacating the assault second conviction, determined the evidence of "serious physical injury" was insufficient: "The Legislature has defined the term '[s]erious physical injury' to mean 'physical injury which creates a substantial risk of death, or which causes death or serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ' ... . Here ... the evidence at the trial failed to demonstrate that the complainant suffered the protracted impairment of the function of a bodily organ as a result of the attack charged in count 2 of the indictment. This prong of the statute, by the plain language of the word 'protracted,' requires evidence that

the effects of the physical injury were experienced over an 'extended' period of time ... . The People fail to cite to any evidence in this case, medical or otherwise, to show that the injury to the complainant resulted in any 'protracted impairment' in the functioning of any of the complainant's organs ...". ***People v. Clark*, 2020 N.Y. Slip Op. 07911, Second Dept 12-23-20**

CRIMINAL LAW, JUDGES.

THE APPELLATE DIVISION REDUCED DEFENDANT'S SENTENCE, IN PART BECAUSE THE SENTENCING JUDGE MAY HAVE BEEN REACTING TO CRITICISM OF HOW THE TRIAL WAS HANDLED.

The Second Department, reducing defendant's sentence, over a dissent, determined the sentencing judge reacted to criticism of how the trial was conducted: "The Supreme Court imposed the maximum period of imprisonment of 4–1/2 years' incarceration ... and 2 years postrelease supervision ... , apparently based upon the defendant's claim during the presentence interview that the judge, the prosecutor, and the jury showed favoritism to the arresting officer, and the defendant did not like how the trial was conducted. At sentencing, when the court asked the defendant to explain that statement, the defendant stated that, although he thought the jury showed 'favoritism,' he wanted 'to move on from this' and he 'learned [his] lesson.' The court, in response, stated that although '[o]bviously this is not the crime of the century,' and 'you're entitled to your opinion,' that opinion demonstrated a 'willingness not to accept any responsibility.' 'An intermediate appellate court has broad, plenary power to modify a sentence that is unduly harsh or severe under the circumstances' ... . Contrary to the conclusion of our dissenting colleague, that power 'may be exercised, if the interest of justice warrants, without deference to the sentence court' ... , especially where, as here, the sentencing court acted, at least in part, out of umbrage to criticism as to how the trial was conducted. In this case, considering the nonviolent nature of the crime involving a relatively small amount of drugs in the defendant's possession, the defendant's reported substance abuse issues, and the fact that the defendant is married and has a young child, the sentence was excessive to the extent indicated herein ...". ***People v. Morales*, 2020 N.Y. Slip Op. 07919, Second Dept 12-23-20**

DEFAMATION.

A FALSE IMPUTATION OF HOMOSEXUALITY IS NOT DEFAMATION PER SE; THEREFORE SPECIAL DAMAGES MUST BE ALLEGED; THE FAILURE TO ALLEGE SPECIAL DAMAGES REQUIRED DISMISSAL OF THE COMPLAINT.

The Second Department, in a full-fledged, comprehensive opinion by Justice Roman which cannot be fully summarized here, reversing Supreme Court, determined a false imputation of homosexuality is not defamation per se. Therefore the defamation cause of action, which did not allege special damages, should have been dismissed (defamation per se does not require special damages): "As set forth in the complaint, Pastor Maurice stated before approximately 300 members of the church that 'the [p]laintiff was a homosexual,' and that 'the [p]laintiff disrespected the church by viewing gay pornography on the church's computer.' * * * We agree with our colleagues in the Third Department that the earlier cases, including this Court's decision in *Matherson* [100 AD2d 233], which held that the false imputation of homosexuality constitutes a category of defamation per se, are inconsistent with current public policy. * * * ... [W]e conclude that the false imputation of homosexuality does not constitute defamation per se. *Matherson*'s holding to the contrary should no longer be followed. Furthermore, the additional allegation that the plaintiff viewed gay pornography on the church's computer likewise does not fit within any of the categories of defamation per se. Therefore, the plaintiff was required to allege special damages." ***Laguerre v. Maurice*, 2020 N.Y. Slip Op. 07877, Second Dept 12-23-20**

EVIDENCE, ATTORNEYS, FORECLOSURE.

AN INFORMAL JUDICIAL ADMISSTION BY PLAINTIFF BANK'S FORMER COUNSEL IN THIS FORECLOSURE ACTION RAISED A QUESTION OF FACT WHETHER THE LOAN HAD BEEN MODIFIED.

The Second Department, reversing Supreme Court, determined the bank's motion for summary judgment in this foreclosure action should not have been granted because of an informal judicial admission made by plaintiff's former counsel. The admission raised a question of fact whether the note and mortgage had been superseded by a loan modification: "... [T]he averment of the plaintiff's former counsel, in support of the voluntary discontinuance of the prior foreclosure action, that the loan had been modified, constituted an informal judicial admission by the plaintiff of that fact ... . Informal judicial admissions are not conclusive, but are evidence of the fact admitted ... . On its motion, the plaintiff failed to proffer any evidence to explain the alleged error of its former counsel in a manner which would negate the probative value of his statement as an informal judicial admission. Accordingly, even assuming that the plaintiff's submissions were otherwise sufficient to demonstrate, prima facie, the absence of a loan modification (see generally CPLR 4518[a] ...) the former counsel's admission raised a triable issue of fact as to the existence of a loan modification, which precluded summary judgment ...". ***HSBC Bank USA, N.A. v. Fortini*, 2020 N.Y. Slip Op. 07873, Second Dept 12-23-20**

FORECLOSURE, EVIDENCE.

THE BANK DID NOT PRESENT ADMISSIBLE EVIDENCE OF DEFENDANTS' DEFAULT IN THIS FORECLOSURE ACTION.

The Second Department, reversing Supreme Court, determined the bank did not present admissible evidence of defendants' default in this foreclosure action: "... [T]he plaintiff failed to establish, prima facie, a default in payment by Vanterpool and Chalas [defendants]. While the plaintiff submitted an affidavit by someone with personal knowledge of the plaintiff's loan servicer's business practices and procedures, the affiant failed to submit any business record to substantiate the alleged default ... . Further, '[w]hile a witness may read into the record from the contents of a document which has been admitted into evidence, a witness's description of a document not admitted into evidence is hearsay' ... . '[I]t is the business record itself, not the foundational affidavit, that serves as proof of the matter asserted' ...". ***U.S. Bank Trust, N.A. v. Vanterpool*, 2020 N.Y. Slip Op. 07946, Second Dept 12-23-20**

FORECLOSURE, EVIDENCE, CIVIL PROCEDURE.

THE BANK PRESENTED INADMISSIBLE EVIDENCE OF STANDING TO BRING THE FORECLOSURE ACTION.

The Second Department, reversing Supreme Court, determined the bank did not submit admissible evidence of standing to bring the foreclosure action: "While a witness may always testify as to matters within his or her personal knowledge through personal observation ... , here, Klein [plaintiff's counsel] did not provide any factual details concerning when Cohn & Roth [Klein's lawfirm] came into physical possession of the consolidated note and allonges ... . Modlin's [an authorized signatory's] affidavit was similarly deficient inasmuch as she failed to identify the documents reviewed or any basis for the conclusion that the consolidated note and allonges had been in the plaintiff's possession and were sent to Cohn & Roth prior to the commencement of the action. Under these circumstances, the statements made by Klein and Modlin constituted inadmissible hearsay and lacked probative value ...". ***U.S. Bank Trust N.A. v. Auxila*, 2020 N.Y. Slip Op. 07945, Second Dept 12-23-20**

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

THE MOTION TO AMEND THE ANSWER TO ASSERT THE LACK OF STANDING DEFENSE IN THIS FORECLOSURE ACTION SHOULD HAVE BEEN GRANTED; PLAIINTIFF FAILED TO DEMONSTRATE STANDING WITH ADMISSIBLE EVIDENCE.

The Second Department, reversing Supreme Court, determined defendant should have been allowed to amend the answer to assert the lack-of-standing defense and plaintiff bank did not demonstrate standing with admissible evidence: " 'In the absence of prejudice or surprise resulting directly from the delay in seeking leave, applications to amend or supplement a pleading are to be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit' (... see CPLR 3025[b]). The burden of demonstrating prejudice or surprise, or that a proposed amendment is palpably insufficient or patently devoid of merit, falls upon the party opposing the motion ... . 'Mere lateness is not a barrier to the amendment. It must be lateness coupled with significant prejudice to the other side, the very elements of the laches doctrine'... . Here, BAC Home failed to show that any surprise or prejudice would result from the proposed amendments and did not demonstrate that the proposed amendments were palpably insufficient or patently devoid of merit ... . The defendant did not waive the defense of lack of standing by failing to interpose the defense in his original answer or in a pre-answer motion to dismiss (see RPAPL 1302-a). Here, in order to establish its standing, BAC Home [plaintiff's predecessor] submitted affidavits from two document execution representatives of Ditech [plaintiff], each of whom stated that review of Ditech's business records relating to the subject mortgage loan had confirmed that BAC Home was in possession of the note at the time the action was commenced. However, neither affiant identified any particular document reviewed, nor did they attach to their respective affidavits any admissible document to show that BAC Home possessed the note prior to the commencement of this action. The affidavits also failed to show that either affiant possessed personal knowledge of whether BAC Home possessed the note prior to the commencement of the action. Under these circumstances, the affidavits constituted inadmissible hearsay and lacked any probative value (see CPLR 4518[a] ...)." ***Ditech Fin., LLC v. Khan*, 2020 N.Y. Slip Op. 07865, Second Dept 12-23-20**

FORECLOSURE, EVIDENCE, UNIFORM COMMERCIAL CODE (UCC).

PLAINTIFF BANK DID NOT DEMONSTRATE STANDING WITH ADMISSIBLE EVIDENCE AND THE LOST NOTE AFFIDAVIT WAS INSUFFICIENT.

The Second Department, reversing Supreme Court, determined the bank did not demonstrate standing with admissible evidence and the lost note affidavit was insufficient: "… [T]he only business record entered into evidence to support DeCaro's [plaintiff's loan verification consultant's] testimony that the plaintiff was in possession of the note on the date of commencement was plaintiff's Exhibit 7, a computer screen printout of a database tracking system. However, plaintiff's Exhibit 7 failed to evince the facts for which it was relied upon. More specifically, while DeCaro contended that the docu-

ment demonstrated that Wells Fargo, as custodian for the plaintiff, received the note July 16, 2005, and that the note was in Wells Fargo's vault from July 2005 until December 2009, the document, in itself, failed to establish those facts. Further, pursuant to UCC 3-804, which is intended to provide a method for recovering on instruments that are lost, destroyed, or stolen, a plaintiff is required to submit due proof of the plaintiff's ownership of the note, the facts which prevent the plaintiff from producing the note, and the note's terms ... . Here, the lost note affidavit, which failed to establish when the note was acquired and failed to provide sufficient facts as to when the search for the note occurred, who conducted the search, or how or when the note was lost, failed to sufficiently establish the plaintiff's ownership of the note ...". ***HSBC Bank USA, N.A. v. Gilbert*, 2020 N.Y. Slip Op. 07874, Second Dept 12-23-20**

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

THE BANKS' COMPLIANCE WITH THE NOTICE REQUIREMENTS OF RPAPL 1304 WAS NOT DEMONSTRATED; THE BANK'S MOTION FOR SUMMARY JUDGMENT IN THIS FORECLOSURE ACTION SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined plaintiff bank's motion for summary judgment in this foreclosure action should not have been granted because compliance with the notice requirements of RPAP 1304 was not demonstrated with admissible evidence: "... [T]he plaintiff submitted, inter alia, an affidavit of a business operations analyst employed by the plaintiff, together with copies of 90-day notices sent to the defendants and proof of filing statements from the New York State Department of Financial Services. Although some of the copies of the 90-day notices contain what appear to be bar codes with 22-digit numbers that include the words 'USPS CERTIFIED MAIL,' the plaintiff failed to submit any evidence that the mailings were sent by first-class mail in addition to certified mail ... . The plaintiff also failed to submit evidence of a standard office mailing procedure or an affidavit of the individual(s) who effected the service ... . The submission by the plaintiff of evidence that it filed statements with the New York State Department of Financial Services, without more, is insufficient to establish that the mailing was accomplished pursuant to RPAPL 1304 ...". ***CitiMortgage, Inc. v. McGregor*, 2020 N.Y. Slip Op. 07855, Second Dept 12-23-20**

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

THE DEFENDANTS DEFAULTED IN THIS FORECLOSURE ACTION; THE JUDGE SHOULD NOT HAVE, SUA SPONTE, DISMISSED THE COMPLAINT BASED ON THE BANK'S ALLEGED FAILURE TO COMPLY WITH THE NOTICE REQUIREMENTS OF RPAPL 1304, WHICH IS NOT A JURISDICTIONAL DEFECT AND THEREFORE MUST BE RAISED AS A DEFENSE.

The Second Department determined the judge should have, sua sponte, dismissed the complaint in this foreclosure action on the ground the bank did not comply with the notice requirements of RPAL 1304. The defendants defaulted and failure to comply with RPAPL 1304 is not a jurisdictional defect. Therefore it must be raised as a defense before a judge can rule on it: "In this action to foreclose a mortgage, in which the defendants failed to appear or answer the complaint, the Supreme Court should have granted the plaintiff's motion for leave to enter a default judgment and for an order of reference, and should not have, sua sponte, directed dismissal of the complaint based on its determination that the plaintiff failed to establish that it complied with RPAPL 1304 ... . Therefore, a plaintiff is not required to disprove the defense unless it is raised by defendants, and in this case the defendants failed to appear in the action or answer the complaint ...". ***Chase Home Fin., LLC v. Guido*, 2020 N.Y. Slip Op. 07854, Second Dept 12-23-20**

JUDGES, APPEALS, CIVIL PROCEDURE.

THE DECRETAL PARAGRAPH OF THE APPELLATE DECISION REMITTING THE MATTER FOR RETRIAL DID NOT IMPOSE THE CONDITIONS ON RETRIAL WHICH WERE IMPOSED BY SUPREME COURT; NEW TRIAL ORDERED.

The Second Department, reversing Supreme Court, determined the decretal paragraph in the appellate decision remitting the matter to Supreme Court did not impose restrictions on the issues to be retried: " 'A trial court, upon remittitur, lacks the power to deviate from the mandate of the higher court' ... . 'An order or judgment entered by the lower court on a remittitur 'must conform strictly to the remittitur' ... . The language in the decretal paragraph controls the extent of the remittitur ... . Here, there is no limiting language in the decretal paragraph of our prior decision and order that would indicate that the new trial would be on issues of apportionment of liability among the defendants. Further, there is no language in that decretal paragraph indicating that the damages awards remain undisturbed. Accordingly, the Supreme Court should not have limited the new trial to issues of apportionment of liability among the defendants." ***Daniele v. Pain Mgt. Ctr. of Long Is.*, 2020 N.Y. Slip Op. 07860, Second Dept 12-23-20**

JUDGES, CIVIL PROCEDURE.

THE JUDGE SHOULD NOT HAVE, SUA SPONTE, IMPOSED AN INJUNCTION AND DETERMINED ISSUES OF FACT; NO MOTION WAS BEFORE THE COURT AND NO HEARING WAS HELD.

The Second Department, reversing Supreme Court, determined the judge should not have, sua sponte, imposed an injunction on defendant and determined issues of fact without a motion before the court and without holding a hearing: "The Supreme Court, after a status conference ... , issued an order, sua sponte, ... which, ... directed the defendant ... to take all steps necessary to obtain a permit from the Department of Buildings to complete the work on one of the subject properties and expedite repairs to that property, including the submission of new plans by the defendant ... . Since no motion was pending before it, the Supreme Court should not have, sua sponte, and without a hearing, imposed an injunction on the defendant and determined issues of fact ... . 'A court is generally limited to noticed issues that are the subject of the motion before it' ... . The plaintiffs did not move for an injunction ... and the court did not hold a hearing ...". ***City of New York v. Quadrozzi*, 2020 N.Y. Slip Op. 07857, Second Dept 12-23-20**

JUDGES, CONTRACT LAW.

THE JUDGE SHOULD NOT HAVE, SUA SPONTE, INCREASED A PENALTY TO WHICH THE PARTIES HAD AGREED IN A SO-ORDERED STIPULATION.

The Second Department, reversing Supreme Court, determined the judge, sua sponte, should not have increased a penalty to which the parties had stipulated: " 'A so-ordered stipulation is a contract between the parties thereto and as such, is binding on them and will be construed in accordance with contract principles and the parties' intent' ... . 'When an agreement between parties is clear and unambiguous on its face, it will be enforced according to its terms and without resort to extrinsic evidence' ... . Accordingly, a court 'should not, under the guise of contract interpretation, 'imply a term which the parties themselves failed to insert' or otherwise rewrite the contract' ... . Here, we disagree with the Supreme Court's sua sponte determination to change the $1,000 per week penalty set forth in the 2013 stipulation ... . Although the New York City Landmarks Preservation Law authorizes a penalty of up to $5,000 per day ... , the parties expressly agreed to a different penalty in their 2013 stipulation. Thus, the court should not have 'rewritten' the terms of the 2013 stipulation by changing the amount of the penalty agreed to by the parties." ***City of New York v. Quadrozzi*, 2020 N.Y. Slip Op. 07856, Second Dept 12-23-20**

LEGAL MALPRACTICE, NEGLIGENCE, ATTORNEYS, MUNICIPAL LAW.

FAILURE TO FILE A NOTICE OF CLAIM AGAINST THE NEW YORK TRANSIT AUTHORITY (AS OPPOSED TO THE CITY OF NEW YORK) IN THIS SLIP AND FALL CASE, AND THE FAILURE TO APPLY FOR PERMISSION TO FILE A LATE NOTICE OF CLAIM, GAVE RISE TO THIS LEGAL MALPRACTICE AND JUDICIARY LAW § 487 ACTION WHICH SHOULD NOT HAVE BEEN DISMISSED; THE DISTINCTION BETWEEN THE TWO CAUSES OF ACTION EXPLAINED.

The Second Department, reversing Supreme Court, determined the legal malpractice and Judiciary Law § 487 causes of action against one of two groups of attorney-defendants should not have been dismissed. The first group of attorneys (the Schneider defendants) failed to file a timely notice of claim against the New York Transit Authority (NYTA) in this slip and fall case. Then plaintiff retained the second group of attorneys (the Kletzkin defendants) and the action was dismissed with prejudice. Then plaintiff sued both groups of attorneys for legal malpractice and for violations of Judiciary Law 487. Supreme Court granted the Kletzkin defendants motion to dismiss and denied the Schneider defendants' motion to dismiss. The facts were not discussed, but the court noted the difference between a legal malpractice and a Judiciary Law 487 cause of action: "... [T]he plaintiff adequately pleaded the cause of action alleging legal malpractice against the Kletzkin defendants and the Schneider defendants. Contrary to the contentions of those defendants, neither conclusively established that an application for leave to serve a late notice of claim or to deem the late notice of claim timely served upon the NYCTA nunc pro tunc would have been futile ... . Contrary to the Kletzkin defendants' contention, the complaint adequately states a cause of action to recover damages for violation of Judiciary Law § 487. Contrary to the Schneider defendants' contention, the cause of action alleging violation of Judiciary Law § 487 is not duplicative of the cause of action alleging legal malpractice. 'A violation of Judiciary Law § 487 requires an intent to deceive (see Judiciary Law § 487), whereas a legal malpractice claim is based on negligent conduct' ...". ***Bianco v. Law Offs. of Yuri Prakhin*, 2020 N.Y. Slip Op. 07849, Second Dept 12-23-20**

PERSONAL INJURY, EVIDENCE.

A WALKWAY WET FROM RAIN WHICH WAS FALLING AT THE TIME OF THE SLIP AND FALL WAS NOT ACTIONABLE.

The Second Department, reversing Supreme Court, determined the plaintiff did not demonstrate the slip and fall was caused by a dangerous condition. The walkway where plaintiff fell was wet from rain, which was falling at the time: "The mere fact that an outdoor walkway or stairway becomes wet from precipitation is insufficient to establish the existence of a dangerous condition ... . Here, the defendants established their prima facie entitlement to judgment as a matter of law by showing that the plaintiff's slip and fall on the landing of a stairway leading to the entrance of the restaurant occurred solely

because that area was wet due to precipitation. Among other things, in support of their motions, the defendants submitted the transcript of plaintiff's deposition testimony, which indicates that the location where the plaintiff slipped and fell was wet due to the rain that had fallen and was falling at the time of his accident ... ". ***Derosa v. Zaliv, LLC*, 2020 N.Y. Slip Op. 07862, Second Dept 12-23-20**

PERSONAL INJURY, MUNICIPAL LAW.

THE VILLAGE DEMONSTRATED IT DID NOT HAVE WRITTEN NOTICE OF THE ROAD DEFECT WHICH ALLEGEDLY CAUSED PLAINTIFF'S BICYCLE ACCIDENT, BUT IT FAILED TO DEMONSTRATE IT DID NOT CREATE THE DEFECT; THEREFORE THE VILLAGE'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined the village's motion for summary judgment in this bicycle-related injury case should not have been granted. Plaintiff alleged a road defect caused his accident. The village demonstrated it did not have written notice of the defect but failed to demonstrate it did not create the defect: " '[T]he prima facie showing which a defendant must make on a motion for summary judgment is governed by the allegations of liability made by the plaintiff in the pleadings' ... . Here, the plaintiffs alleged in their complaint that the Village affirmatively created the defect that caused the accident. Therefore, in order to establish its prima facie entitlement to judgment as a matter of law, the Village had to demonstrate, prima facie, both that it did not have prior written notice of the defect, and that it did not create the defect ... . The Village established, prima facie, that it did not have prior written notice of the alleged defect, but it failed to establish, prima facie, that it did not affirmatively create the alleged defect ... . Therefore, the burden never shifted to the plaintiffs to submit evidence sufficient to raise a triable issue of fact ...". ***Holleran v. Incorporated Vil. of Floral Park*, 2020 N.Y. Slip Op. 07871, Second Dept 12-23-20**

REAL ESTATE, LANDLORD-TENANT, CONTRACT LAW.

ONCE THE PLAINTIFFS-TENANTS PROPERLY SOUGHT TO EXERCISE THEIR OPTION TO PURCHASE, THE LANDLORD, WHO IMPROPERLY REFUSED TO HONOR THE OPTION, NO LONGER HAD A RIGHT TO USE AND OCCUPANCY PAYMENTS.

The Second Department, reversing Supreme Court, determined plaintiffs' cause of action for return of the rent paid to defendant after the plaintiffs exercised their option to purchase the property should have been granted. Plaintiffs were defendant landlord's tenants. Plaintiffs sought to exercise an option to purchase the property which was in the lease. Once the plaintiffs properly exercised the option to purchase, the landlord, who refused to honor the option, could no longer seek payment for plaintiffs' use and occupancy: "... '[I]t is well settled that the legal owner of real property is not entitled to an award for use and occupancy from a contract vendee in possession unless there also exists a landlord-tenant relationship between the parties' ... . Under the merger doctrine, 'execution of a contract of sale [for real property] between landlord and tenant serves to merge the landlord-tenant relationship into the vendor-vendee relationship and thus effectively terminates the former, unless the parties clearly intend the contrary result' ... . 'An intention to deviate from the general rule and to avoid a merger may be directly expressed in the agreement or may be inferred from a medley of factors such as the terms of the agreement, the circumstances of its making, and the subsequent behavior of the parties' ... . Here ... the parties did not express an intention to deviate from the general rule or to avoid a merger upon the exercise of the purchase option. To the contrary, the terms of the rider provided, in relevant part, that '[i]n the event that Tenant decides not to exercise its option to purchase, all provisions herein remain in full force and effect and Tenant remains liable for all payments hereunder, including but not limited to rent' ... . Since the plaintiffs validly exercised their option to purchase on July 21, 2015, and became a contract vendee in possession, it follows that the landlord-tenant relationship terminated on that date by application of the merger doctrine ...". ***Blackburn Food Corp. v. Ardi, Inc.*, 2020 N.Y. Slip Op. 07850, Second Dept 12-23-20**

TRUSTS AND ESTATES, REAL PROPERTY LAW.

THE REAL PROPERTY PASSED TO THE BENEFICIARY IN THE WILL UPON DEATH, NOT UPON SUBSEQUENT PROBATE; THEREFORE THE CONVEYANCE WAS VALID AND THE DEED SHOULD NOT HAVE BEEN DEEMED VOID.

The Second Department, reversing Surrogate's Court, determined plaintiff's deed inherited the real property upon decedent's death, not after probate. Therefore the conveyance of the property by the beneficiary, McKenzie, to plaintiff was valid: "... [T]he decedent's will, unequivocally and without limitation, devised McKenzie one third of the residuary estate, and this interest vested in McKenzie at the moment of the decedent's death ... . Although the vesting of McKenzie's interest was 'subject to the executor['s] duty to ensure that all debts and obligations of the estate[ ] were met' ... , the defendants failed to establish, prima facie, that McKenzie's conveyance of her interest impeded the executor's duties, and thus, failed to establish, prima facie, that McKenzie's interest had not yet vested when she conveyed it to the plaintiff after the decedent's death ...". ***72634552 Corp. v. Okon*, 2020 N.Y. Slip Op. 07845, Second Dept 12-23-20**

THIRD DEPARTMENT

CIVIL PROCEDURE.

PLAINTIFF'S MOTION TO AMEND THE COMPLAINT TO CORRECTLY NAME THE DEFENDANT PURSUANT TO CPLR 305(c) AFTER THE STATUTE OF LIMITATIONS HAD RUN SHOULD HAVE BEEN GRANTED.

The Third Department, reversing Supreme Court, determined plaintiff's motion to amend to complaint to reflect the correct name of the defendant should have been granted: "In September 2016, plaintiff allegedly slipped and fell in the bathroom of a McDonald's restaurant located in the Town of Williamson, Wayne County. In August 2019, plaintiff commenced this action against defendant to recover for the injuries that he sustained. Defendant answered, asserting, among other affirmative defenses, a lack of personal jurisdiction and that she is not a proper party because she does not own, operate, maintain or control the business in which plaintiff was allegedly injured. Defendant subsequently moved to dismiss the complaint on the same grounds, contending that 'Nancyone, Inc.,' a New York corporation for which defendant is a corporate officer, owned and operated the subject McDonald's restaurant and that it had not been properly served with the summons and complaint prior to the expiration of the statute of limitations. ... Plaintiff contends that Supreme Court erred in denying that part of his cross motion that sought leave to amend his complaint pursuant to CPLR 305(c). We agree. As relevant here, '[i]f a defendant has been misnamed in the caption of the summons and complaint, but has nonetheless been properly served within the limitations period, amendment of the summons and complaint should be allowed in the absence of demonstrated prejudice to a substantial right' ...". ***Kachadourian v. Wilkes*, 2020 N.Y. Slip Op. 07972, Third Dept 12-24-20**

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

CPLR 204(a) IN CONJUNCTION WITH RPAPL 1301(3) TOLLED THE STATUTE OF LIMITATIONS WHILE THE FIRST FORECLOSURE ACTION WAS PENDING, FROM 2010 TO 2013, RENDERING THE SECOND FORECLOSURE ACTION IN 2017 TIMELY.

The Third Department, in a full-fledged opinion by Justice Mulvey, reversing Supreme Court, determined the instant foreclosure action was not time barred because CPLR 2014(a) in conjunction with Real Property Actions and Proceedings Law (RPAPL) 1301(3) prohibited bringing the instant action while the first action was pending: "In September 2003, defendant, in exchange for a loan to purchase a residence, executed a note secured by a mortgage on that real property. The note and mortgage were later assigned to plaintiff. After defendant failed to make some payments, on May 5, 2010 plaintiff commenced a foreclosure action against defendant, which Supreme Court (Drago, J.) dismissed on October 30, 2013 for failure to prosecute. In April 2015, Supreme Court (Buchannan, J.) denied plaintiff's motion to vacate the dismissal. In 2017, plaintiff commenced a second foreclosure action. * * * CPLR 204 (a) provides that, '[w]here the commencement of an action has been stayed by a court or by statutory prohibition, the duration of the stay is not a part of the time within which the action must be commenced.' * * * The statute that plaintiff relies on, in conjunction with CPLR 204 (a), is RPAPL 1301 (3), which provides that, while an action for a mortgage debt 'is pending or after final judgment for the plaintiff therein, no other action shall be commenced or maintained to recover any part of the mortgage debt, without leave of the court in which the former action was brought.' The purpose of RPAPL 1301 (3) is 'to shield the mortgagor from the expense and annoyance of two independent actions at the same time with reference to the same debt' ... . [P]laintiff established that the statute was tolled during the pendency of the first foreclosure action, from May 2010 to October 2013." ***Citimortgage, Inc. v. Ramirez*, 2020 N.Y. Slip Op. 07970, Third Dept 12-24-20**

CRIMINAL LAW, EVIDENCE, APPEALS.

DEFENDANT WAS THE TARGET OF A STING WHERE THE INVESTIGATOR POSED AS THE STEPFATHER OF A 14-YEAR-OLD GIRL WITH WHOM THE DEFENDANT WAS INVITED TO HAVE SEX; WHEN THE INVESTIGATOR SUMMONED THE STEPDAUGHTER TO MEET THE DEFENDANT, HE GOT UP AND WALKED AWAY; THE ATTEMPTED RAPE, CRIMINAL SEXUAL ACT AND ENDANGERING THE WELFARE OF A CHILD CONVICTIONS WERE NOT SUPPORTED BY LEGALLY SUFFICIENT EVIDENCE.

The Third Department, reversing defendant's convictions and dismissing the indictment, determined defendant did not come close enough to committing the sexual offenses suggested by the undercover investigator to meet the criteria for attempted rape, attempted criminal sexual act, and attempted endangering the welfare of a child. The undercover investigator suggested sex with his fictional 14-year-old stepdaughter. When the investigator indicated he was summoning the stepdaughter to meet the defendant, the defendant got up and walked away: "... [W]e cannot conclude that defendant came dangerously near engaging in sexual intercourse or oral sexual contact of any iteration with a minor under the age of 15 or any other act that would likely be injurious to the physical, mental or moral welfare of a child ... . Although defendant engaged in conversations contemplating sexual contact with a 14-year-old and drove to a location where he was told a 14-year-old would be, under the circumstances of this case, his conduct did not pass the stage of mere preparation and bring him dangerously close to committing the attempted crimes of rape in the second degree, a criminal sexual act in the second degree or an act endangering the welfare of a child ... . Moreover, intent to engage in sexual intercourse and the

criminal sexual acts charged in the indictment cannot be inferred from the evidence, particularly given defendant's passive and noncommittal statements when discussing potential contact with the 14-year-old stepdaughter, as well as the fact that defendant did not bring a condom or any other sexual item to the campsite ... . Accordingly, inasmuch as the verdict is not supported by legally sufficient evidence, we reverse the judgment of conviction and dismiss the indictment ...". ***People v. Hiedeman*, 2020 N.Y. Slip Op. 07954, Third Dept 12-24-20**

CRIMINAL LAW, APPEALS, JUDGES.

DEFENDANT WAS NOT INFORMED OF THE RIGHTS HE WAS GIVING UP BY PLEADING GUILTY, THE JUDGE IMPROPERLY IMPOSED AN ENHANCED SENTENCE AND CHANGED THE TERMS OF THE PLEA AGREEMENT; GUILTY PLEA VACATED IN THE INTEREST OF JUSTICE.

The Third Department, vacating defendant's guilty plea in the interest of justice, determined: (1) defendant was not informed of the rights he was giving up by pleading guilty; (2) the judge improperly enhanced defendant's sentence; and (3) the judge improperly changed the terms of the plea agreement: "County Court advised defendant that, by pleading guilty, he would be giving up 'all of [his] constitutional rights, [his] presumption of innocence, [his] rights to a jury trial, suppression hearings, also all of [his] appellate rights.' There was no mention of defendant's right to be confronted by witnesses or the privilege against self-incrimination ... . Furthermore, the record fails to disclose that the court ascertained whether defendant conferred with his counsel regarding the trial-related rights that were being forfeited upon his guilty plea ... . Rather, the court merely asked him whether he had enough time to talk with his counsel about 'the facts of [the] drug charges, going to trial, not going to trial[] and things like that' and '[his] jury trial rights, all [his] other rights.' In the absence of any affirmative showing that defendant fully comprehended and voluntarily waived his constitutional rights, the plea must be vacated as invalid ... . 'A sentencing court may not impose an enhanced sentence unless it has informed the defendant of specific conditions that the defendant must abide by or risk such enhancement, or give the defendant an opportunity to withdraw his or her plea before the enhanced sentence is imposed' ... . The plea colloquy reflects that, by pleading guilty, the People would recommend that defendant be sentenced to concurrent prison terms of 3–1/2 years ... . [T]he court abruptly sentenced defendant to concurrent prison terms of nine years ... and directed that the sentence be served under the supervision of Willard. County Court abused its authority by changing the terms of the plea agreement ... . [T]he court, without any discussion with the parties, unilaterally conditioned defendant's opportunity to participate in the Willard program on accepting the maximum nine-year sentence. Additionally, the record does not indicate that defendant was given the opportunity to withdraw his plea ... . Because defendant was not informed of, or actually understood, the ramifications of the sentencing change nor was provided with the opportunity to withdraw his guilty plea, the plea was invalid ...". ***People v. Drayton*, 2020 N.Y. Slip Op. 07952, Third Dept 12-24-20**

CRIMINAL LAW, EVIDENCE, APPEALS.

ALTHOUGH DEFENDANT DID NOT GIVE TIMELY NOTICE OF ALIBI EVIDENCE, COUNTY COURT DEPRIVED DEFENDANT OF HIS CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE BY PRECLUDING THE ALIBI EVIDENCE; THE UNPRESERVED ERROR WAS CONSIDERED IN THE INTEREST OF JUSTICE.

The Third Department, reversing the grand larceny conviction in the interest of justice, determined defendant's late request to present alibi evidence should have been granted: "County Court abused its discretion by precluding defendant from introducing testimony from defendant's father at trial. ... The court rested its entire conclusion on the failure to comply with the Criminal Procedure Law and that good cause was not shown, despite the fact that defendant was not given an opportunity to respond to the People's informal motion to preclude the alibi testimony. Notably, the court did not make any findings that defendant had an improper purpose in providing the late notice nor did it weigh the possibility of prejudice to the People against the right of defendant to present a defense ... . Instead, the court, without hearing from defendant, implemented the most 'drastic sanction' without considering any lesser sanctions that may have protected the People from potential prejudice ... . In making the appropriate inquiry, alibi testimony would have been important to defendant's defense given that much of the People's argument was based on accomplice testimony and that the People would not have been prejudiced as they were already aware of the father's statement. 'Therefore, we find that County Court violated defendant's constitutional right to present a defense' ...". ***People v. Lukosavich*, 2020 N.Y. Slip Op. 07953, Third Dept 12-24-20**

FAMILY LAW, JUDGES.

FATHER SHOULD NOT HAVE BEEN SENTENCED TO JAIL FOR NONPAYMENT OF CHILD SUPPORT BECAUSE HE HAD PAID THE ARREARS BEFORE THE ORDER OF COMMITMENT WAS ISSUED.

The Third Department, reversing Family Court, determined it was an abuse of discretion to sentence father to jail for failure to pay child support after father paid the arrears: "The father contends that Family Court abused its discretion by imposing a 90-day jail sentence for the father's willful violation of the prior support order. We agree. Where a willful violation has

been found, Family Court may 'commit the respondent to jail for a term not to exceed six months' ... . 'Such a sentence is in the nature of a civil contempt, which may only continue until such time as the offender, if it is within his or her power, complies with the support order' ... . Here, the father presented payment at the hearing for the full amount of arrears owed and, therefore, Family Court abused its discretion when it issued the order of commitment ...". ***Matter of Rondeau v. Jerome*, 2020 N.Y. Slip Op. 07960, Third Dept 12-24-20**

FREEDOM OF INFORMATION LAW (FOIL), ATTORNEYS, APPEALS, ENVIRONMENTAL LAW.

ONE PURPOSE FOR ASSESSING ATTORNEY'S FEES AGAINST THE AGENCY IN A FREEDOM OF INFORMATION LAW CASE IS TO DISCOURAGE DELAYS IN RESPONSES TO REQUESTS FOR DOCUMENTS; THEREFORE, EVEN THOUGH THE DEPARTMENT OF ENVIRONMENTAL PROTECTION (DEP) TURNED OVER THE DOCUMENTS BEFORE THE APPEAL, THE DEP STILL SHOULD PAY THE ATTORNEY'S FEES RELATED TO THE APPEAL.

The Third Department, reversing Supreme Court, determined the request for attorney's fees for the appeal in this Freedom of Information Law action should not have been denied. Supreme Court reasoned that the Department of Environmental Protection (DEP) had turned over the requested documents before the appeal: "Supreme Court suggested that it would be 'unduly punitive' to include appellate counsel fees and costs in its award given that DEC had already disclosed all responsive, nonprivileged documents to petitioners. The goal of an award of counsel fees and costs under Public Officers Law § 89 (4) (c), however, is to deter 'unreasonable delays and denials of access and thereby encourage every unit of government to make a good faith effort to comply with the requirements of FOIL' ... . As we detailed in our prior decision (169 AD3d at 1311-1312), DEC failed to respond to petitioners' FOIL administrative appeal in a timely manner and disclosed responsive documents after petitioners advanced a FOIL claim in this action/proceeding, and DEC then resisted petitioners' efforts to recover counsel fees and costs incurred as a result of its dilatory conduct. In our view, those facts demonstrate that the portion of the prior appeal relating to petitioners' FOIL claim stemmed from 'the very kinds of unreasonable delays and denials of access which the counsel fee provision seeks to deter,' and Supreme Court accordingly abused its discretion in declining to include the counsel fees and costs connected thereto in its award ...". ***Matter of 101CO, LLC v. New York State Dept. of Envtl. Conservation*, 2020 N.Y. Slip Op. 07969, Third Dept 12-24-20**

MUNICIPAL LAW, NEGLIGENCE.

CLAIMANT'S APPLICATION TO SERVE A LATE NOTICE OF CLAIM IN THIS SLIP AND FALL CASE SHOULD HAVE BEEN GRANTED, DESPITE THE ABSENCE OF A VALID EXCUSE FOR THE DELAY.

The Third Department, reversing Supreme Court, determined petitioner's application to serve a late notice of claim with respect to one of the two defendants (Albany Port District Commission) should have been granted. Although the excuse for failure to file was inadequate (ignorance of the requirement), the defendant had timely notice of the claim by virtue of surveillance cameras and an incident report, and defendant was not prejudiced by the delay: "... [M]embers of the Port Security Department came to the scene of the accident soon after petitioner's fall to check on his condition and were able to observe the area where petitioner fell. Petitioner also averred that the Port Security Department was located approximately one hundred feet from where he fell and that there are surveillance cameras on the Port Security Department office building that are pointed at the area where petitioner fell. Petitioner also proffered an incident report form completed by one of the members of the Port Security Department who came to the scene the day of the accident. This form reflects the location of petitioner's fall and that petitioner fell on ice, injured his back and was transported to the hospital by an ambulance. Thus, the Port had 'more than merely generalized awareness of an accident and injuries' sufficient to establish actual notice ... . [T]he ... standard requires a petitioner to initially 'present some evidence or plausible argument that supports a finding of no substantial prejudice' ... . Here, petitioner met this burden by showing ... that the Port had actual notice of the incident sufficient to allow it to investigate the accident shortly after it occurred ... . Additionally, petitioner submitted photographs and a video that suggest that the condition has not substantially changed from its appearance at the time of the accident." ***Matter of Perkins v. Albany Port Dist. Commn.*, 2020 N.Y. Slip Op. 07963, Third Dept 12-24-20**

WORKERS' COMPENSATION, EVIDENCE.

ALTHOUGH THE CARRIER HAD WAIVED ITS DEFENSE THAT THE INJURIES DID NOT ARISE OUT OF CLAIMAINT'S EMPLOYMENT BY FAILING TO SERVE A PREHEARING CONFERENCE STATEMENT, CLAIMANT WAS STILL REQUIRED TO PRESENT SUBSTANTIAL EVIDENCE OF SUCH A CONNECTION.

The Third Department, reversing the Workers' Compensation Board, determined that, although the carrier had waived its defense that claimant's injuries did not arise out of claimants' employment as a police chief (by not serving a prehearing conference statement), the claimant was still required to present affirmative proof of that causal connection: "... [W]e agree with the Board that, as a result of its waiver of defenses, the carrier was precluded from submitting evidence on the issue

of whether claimant's injuries arose out of and in the course of claimant's employment ... . However, the waiver of defenses did not relieve claimant of his obligation of coming forward with sufficient proof to establish that he sustained a compensable injury ... . In that regard, claimant bore the burden of demonstrating that a sufficient causal nexus existed between his employment and the motor vehicle accident that caused his injuries ... . The degree of control exercised by the employer over the claimant's activities at the time of the accident is controlling in determining whether the requisite causal nexus exists ... . The record evidence establishes that claimant, the Village Chief of Police, was in an accident while driving his police vehicle on the third day of a personal weekend trip to his son's college, roughly 4½ to 5 hours away from the Village. Claimant testified that he carried his work cell phone, that he was on call 24 hours a day and that he drove his police vehicle to his weekend destination so that he could return to the Village if needed. However, claimant testified that he was not recalled at any point during the weekend and was not in the course of returning to work or attending to any other police matter at the time of his accident." ***Matter of Love v. Village of Pleasantville*, 2020 N.Y. Slip Op. 07968, Third Dept 12-24-20**

FOURTH DEPARTMENT

COURT OF CLAIMS, PERSONAL INJURY.

CLAIMANT'S DECEDENT WAS KILLED IN A MULTIVEHICLE ACCIDENT IN WHITE OUT CONDITIONS ON A STATE HIGHWAY; QUESTIONS OF FACT ABOUT NOTICE OF THE RECURRING CONDITION AND PROXIMATE CAUSE (NO SNOW FENCE) WERE RAISED; THE STATE'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The Fourth Department, reversing the Court of Claims, determined the state's motion for summary judgment in this "white out" traffic accident case should not have been granted. Claimants argued the state had notice of a recurring white=out condition caused by blowing snow on a portion of a state highway. Claimant's decedent died in a multivehicle accident in white out conditions: "... [T]he claimants raised a triable issue of fact with respect to whether defendant had actual knowledge of 'an ongoing and recurring dangerous condition in the area of the accident' ... . Notably, claimants submitted a Highway Safety Investigation Report that was prepared by an employee of defendant in December 2008. The report states that it was written in response to the subject accident with the purpose of 'evaluat[ing] the frequency and potential for similar accidents and evaluate potential countermeasures.' The report compared the number and severity of the accidents on that portion of highway to those occurring elsewhere on I-390, and noted that, '[a]lthough the number of accidents in the study area was lower, the severity of the accidents was [greater].' The report also noted that '[s]everal factors exist which increase the degree of risk of poor visibility and drifting due to blowing snow in this section.' Such factors included the large, flat airport property next to the highway, the 'abrupt, topographic change due to the proximity of the airport runway and former Pennsylvania railroad embankment,' and the section's slight reverse curve. The data thus suggested that 'snow on the road [was] an issue to be addressed in this area' and that, although the number of accidents was not extraordinarily high, 'their occurrence was sufficiently sensational, disquieting to the public, and disruptive to the traveling public and [defendant] to justify making more than ordinary efforts to prevent them.' Furthermore, the deposition testimony of employees of defendant established that, for years prior to the accident, blowing and drifting snow had been an issue on that section of I-390. We also agree with claimants that the court erred in determining that defendant established that the lack of a snow fence was not a proximate cause of the accident." ***Klepanchuk v. State of N.Y. Dept. of Transp.*, 2020 N.Y. Slip Op. 07766, Fourth Dept 12-23-20**

CRIMINAL LAW.

SECOND DEGREE MURDER COUNT DISMISSED A LESSER INCLUDED COUNT OF FIRST DEGREE MURDER.

The Fourth Department dismissed the second degree murder count as a lesser included count of first degree murder. ***People v. Beard*, 2020 N.Y. Slip Op. 07763, Fourth Dept 12-23-20**

CRIMINAL LAW.

ATTEMPTED SECOND DEGREE MURDER COUNT MUST BE DISMISSED AS AN INCLUSORY CONCURRENT COUNT OF ATTEMPTED FIRST DEGREE MURDER.

The Fourth Department determined the attempted second degree murder count must be dismissed as an inclusory concurrent count of attempted first degree murder: "... [T]he part of the judgment convicting defendant of attempted murder in the second degree must be reversed and count two of the indictment dismissed because attempted murder in the second degree is an inclusory concurrent count of attempted murder in the first degree ...". ***People v. Mcdonald*, 2020 N.Y. Slip Op. 07825, Fourth Dept 12-23-20**

CRIMINAL LAW, APPEALS, ATTORNEYS.

THE APPEAL WAIVERS WERE NOT EXECUTED UNTIL SENTENCING AND WERE THEREFORE INVALID; ARGUMENTS ABOUT A LATE FILED OMNIBUS MOTION AND DEFENSE COUNSEL'S FAILURE TO FILE OMNIBUS MOTIONS DID NOT SURVIVE THE GUILTY PLEAS.

The Fourth Department determined the waivers of appeal were invalid and defendant's arguments the court should have considered a late omnibus motion and defense counsel was ineffective for failing to file omnibus motions did not survive the guilty pleas: "The written waivers do not establish valid waivers because they were not executed until sentencing ... and, even assuming, arguendo, that the written waivers had been executed at the time of the pleas, the court 'failed to confirm that [defendant] understood the contents of the written waivers' ... . Defendant contends in appeal No. 1 that the court abused its discretion in refusing to entertain, in the interest of justice and for good cause shown ... , that part of his untimely omnibus motion seeking a Huntley hearing. We conclude, however, that defendant, by pleading guilty, forfeited appellate review of that contention. ... To the extent that defendant further contends in all three appeals that his first attorney's failure to file a timely omnibus motion constituted ineffective assistance of counsel, we conclude under these circumstances that defendant's contention likewise does not survive his guilty pleas." ***People v. Parker*, 2020 N.Y. Slip Op. 07747, Fourth Dept 12-23-20**

CRIMINAL LAW, ATTORNEYS.

DEFENDANT WAS DEPRIVED OF HIS RIGHT TO COUNSEL WHEN HE REPRESENTED HIMSELF AT RESENTENCING.

The Fourth Department, reversing the resentencing, determined defendant was deprived of his right to counsel when he represented himself at resentencing: "We agree with defendant's contention in his main and pro se supplemental briefs, as the People correctly concede, that he was deprived of his right to counsel when Supreme Court permitted defendant to represent himself at the resentencing proceeding without properly ruling on defendant's multiple requests for assignment of counsel ... . Denial of the right to counsel during a particular proceeding does not invariably require remittal for a repetition of the tainted proceeding, or any other remedy, inasmuch as 'the remedy to which a defendant is entitled ordinarily depends on what impact, if any, the tainted proceeding had on the case as a whole' ... . Here, however, the court's failure to consider defendant's motion for assigned counsel had an adverse impact on the resentencing proceeding because the absence of counsel prevented defendant from, inter alia, adequately contesting his adjudication as a second felony offender and arguing against the imposition of the maximum sentence permissible under the law. We therefore reverse the resentence and remit the matter to Supreme Court for resentencing, and we direct the court to ensure that defendant is afforded his right to counsel ...". ***People v. Caswell*, 2020 N.Y. Slip Op. 07810, Fourth Dept 12-23-20**

CRIMINAL LAW, EVIDENCE.

AN EXCEPTION TO THE BEST EVIDENCE RULE APPLIED, ALLOWING TESTIMONY DESCRIBING THE CONTENTS OF DESTROYED VIDEO SURVEILLANCE.

The Fourth Department, in a full-fledged opinion by Justice Bannister, determined an exception to the best evidence rule applied and testimony about the contents of a destroyed video surveillance was properly admitted in this grand larceny case: "Defendant appeals from a judgment ... arising from the theft of wireless speakers valued in excess of $3,000 from a Target store ... . Prior to trial, the People moved in limine for permission to introduce testimony from the store's asset protection team leader (APT leader) regarding the contents of destroyed video surveillance footage that had depicted the incident. * * * The best evidence rule 'simply requires the production of an original writing where its contents are in dispute and sought to be proven' ... 'The rule protects against fraud, perjury, and inaccurate recollection by allowing the [factfinder] to judge a document by its own literal terms' ... . 'Under a long-recognized exception to the best evidence rule, secondary evidence of the contents of an unproduced original may be admitted upon threshold factual findings by the trial court that the proponent of the substitute has sufficiently explained the unavailability of the primary evidence . . . and has not procured its loss or destruction in bad faith' ... . The proponent of the secondary evidence 'has the heavy burden of establishing, preliminarily to the court's satisfaction, that it is a reliable and accurate portrayal of the original. Thus, as a threshold matter, the trial court must be satisfied that the proffered evidence is authentic and correctly reflects the contents of the original before ruling on its admissibility' ... . * * * ... [T]he People met their burden of establishing that the APT leader's testimony regarding the unpreserved footage was a reliable and accurate portrayal of the contents of that footage ...". ***People v. Jackson*, 2020 N.Y. Slip Op. 07744, Fourth Dept 12-23-20**

CRIMINAL LAW, EVIDENCE, APPEALS.

WITNESS TAMPERING CONVICTION AFTER TRIAL REVERSED; NO CHARGES WERE PENDING AT THE TIME OF THE COMMUNICATIONS WITH THE WITNESS.

The Fourth Department, reversing the witness tampering conviction and dismissing the indictment, determined the evidence was legally insufficient: "On appeal from a judgment convicting him upon a jury verdict of tampering with a witness in the third degree ... , defendant contends that the conviction is based upon legally insufficient evidence. We agree. Although the evidence established that defendant assaulted the victim in violation of an order of protection and a few days later left the victim voicemails threatening her with violence if she pressed charges against him, defendant had not yet been arrested or charged with a crime in connection with the violation of the order of protection at the time he left the voicemails. Thus, at that time, the victim was not 'about to be called as a witness in a criminal proceeding' ...". ***People v. Diroma*, 2020 N.Y. Slip Op. 07817, Fourth Dept 12-23-20**

CRIMINAL LAW, EVIDENCE, APPEALS.

CONSIDERING ALL THE MITIGATING FACTORS, DEFENDANT SHOULD HAVE BEEN ADJUDICATED A YOUTHFUL OFFENDER.

The Fourth Department, reversing defendant's assault conviction in the interest of justice and adjudicating defendant a youthful offender, in a full-fledged, comprehensive opinion by Justice Troutman, determined mitigating factors supported youthful offender status. Defendant was attacked by another high school student and didn't realize the victim, a teacher, had intervened. The defendant injured the teacher's hand with a knife. The Fourth Department went through all the so-called *Cruikshank* mitigating factors (*People v. Cruickshank*, 105 A.D.2d 325, 334 (3d Dep't 1985)) and further noted the sentencing court did not abuse its discretion by considering additional factors not mentioned in Cruikshank. All involved, including the prosecutor, the victim and the probation department, had recommended a youthful offender adjudication: "In addition to the *Cruickshank* factors, the parties raised and the court considered additional matters related to equity and discrimination. We reject defendant's contention that the court abused its discretion in considering matters outside the *Cruickshank* factors. The applicable precedent states that the factors that must be considered 'include' those nine factors ... , and thus, as a matter of logic, those factors were never meant to be an exhaustive list of considerations. We conclude that matters of equity and discrimination are appropriate for sentencing courts to consider. Although we do not conclude that the court abused its discretion, we urge future courts to consider whether a defendant may be facing discrimination based on protected characteristics such as race or gender and to take an intersectional approach by considering the combined effect of the defendant's specific characteristics and any bias that may arise therefrom ... . Here, the prosecutor employed appropriate and effective restorative justice techniques and advocated for the result he believed just. We note that 'prosecutors have 'special responsibilities . . . to safeguard the integrity of criminal proceedings and fairness in the criminal process' ' ... , and this prosecutor deserves to be commended for discharging those responsibilities here." ***People v. Z.H.*, 2020 N.Y. Slip Op. 07824, Fourth Dept 12-23-20**

CRIMINAL LAW, JUDGES.

THE SENTENCING COURT DID NOT CONSIDER THE REQUIRED FACTORS WHEN SENTENCING DEFENDANT AFTER DEFENDANT'S VIOLATION OF THE TERMS OF INTERIM PROBATION; SENTENCE VACATED.

The Fourth Department, reversing Supreme Court, determined the sentencing court did not take the necessary factors into consideration in sentencing defendant after defendant violated the terms of interim probation: "We agree with defendant that the court failed to exercise its discretion at sentencing. '[T]he sentencing discretion is a matter committed to the exercise of the court's discretion . . . made only after careful consideration of all facts available at the time of sentencing' ... . Due consideration should be 'given to, among other things, the crime charged, the particular circumstances of the individual before the court and the purpose of a penal sanction, i.e., societal protection, rehabilitation and deterrence' ... . Here, the court initially imposed a sentence of interim probation and advised defendant that, if he violated the terms of interim probation, the court would impose a term of 4½ years' incarceration with 3 years' postrelease supervision. When defendant violated the terms of interim probation, the court informed defendant at sentencing that it would not consider a lesser sentence because 'your word is your word. That was the deal. I don't think that would speak well for the program nor would it speak well of me . . . I'd lose confidence in myself.' The court further stated that '[w]e made an agreement, we made a deal . . . I'm going to abide by that deal.' The sentencing transcript is devoid of any indication that the court considered the crime charged, defendant's circumstances, or the purpose of the penal sanction ... . Nor is there any indication that the court considered the presentence report, which was prepared after the plea. We conclude that 'the sentencing transcript, read in its entirety, does not reflect that the court conducted the requisite discretionary analysis' ...". ***People v. Ruise*, 2020 N.Y. Slip Op. 07785, Fourth Dept 12-23-20**

MEDICAL MALPRACTICE, PERSONAL INJURY, EVIDENCE.

PLAINTIFF'S EXPERT AFFIDAVIT DID NOT ADDRESS ONE CAUSE OF ACTION IN THIS MEDICAL MALPRACTICE CASE; THEREFORE THAT CAUSE OF ACTION SHOULD HAVE BEEN DISMISSED.

The Fourth Department, reversing (modifying) Supreme Court, determined the cause of action alleging defendant doctor caused the bowel perforation should have been dismissed because plaintiff's expert's affidavit did not address it: "The affidavit of plaintiff's expert addressed defendant's conduct only with respect to the claims that he failed to diagnose and treat the bowel perforation intraoperatively and failed to timely and properly treat the bowel perforation postoperatively. Plaintiff's expert acknowledged that bowel perforation is a known complication from this type of surgery. Thus, plaintiff failed to raise a triable issue of fact with respect to the claims that defendant negligently caused the bowel perforation ... . We therefore conclude that the court erred in denying defendant's motion with respect to those claims, and we modify the order accordingly." ***Bristol v. Bunn*, 2020 N.Y. Slip Op. 07773, Fourth Dept 12-23-20**

MEDICAL MALPRACTICE, PERSONAL INJURY, EVIDENCE.

PLAINTIFF'S EXPERT'S AFFIDAVIT DID NOT ADDRESS DEFENDANT'S EXPERT'S OPINION THAT NERVE DAMAGE WAS NOT THE RESULT OF DEVIATION FROM THE STANDARD OF CARE; THEREFORE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED.

The Fourth Department, reversing Supreme Court, determined plaintiff's expert's affidavit did not raise a question of fact in this medical malpractice case: "Although plaintiff submitted a physician's affidavit in opposition to defendant's motion, '[g]eneral allegations of medical malpractice, merely conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice, are insufficient to defeat [a] defendant physician's summary judgment motion' ... . Where 'the expert's ultimate assertions are . . . unsupported by any evidentiary foundation, . . . [his or her] opinion should be given no probative force and is insufficient to withstand summary judgment' ... . Here, plaintiff's expert did not rebut the opinion in defendant's affidavit that defendant's surgical technique was appropriate to the situation in light of the fact that decedent's lung was adherent to the heart, nor did plaintiff's expert rebut defendant's opinion that any possible phrenic nerve damage was the result of stretching caused by traction sutures and did not constitute a deviation from the standard of care." ***Campbell v. Bell-Thomson*, 2020 N.Y. Slip Op. 07807, Fourth Dept 12-23-20**

MUNICIPAL LAW, NEGLIGENCE.

THERE IS NO CAUSE OF ACTION FOR NEGLIGENT INVESTIGATION IN NEW YORK; PLAINTIFF'S DECEDENT, A CHILD, WAS MURDERED BY MOTHER'S BOYFRIEND: THE SUIT ALLEGING THE COUNTY DID NOT ADEQUATELY INVESTIGATE PRIOR REPORTS OF CHILD ABUSE SHOULD HAVE BEEN DISMISSED.

The Fourth Department, reversing Supreme Court and dismissing the complaint, determined there is no cause of action for negligent investigation in New York: "At the age of five, plaintiff's decedent was brutally murdered by his mother's boyfriend ... . Plaintiff thereafter commenced this wrongful death action, alleging that the County of Erie (defendant), through its Child Protective Services office, had inadequately investigated multiple prior reports of child abuse and neglect concerning the decedent child. ... As defendant correctly contends, 'New York does not recognize a cause of action sounding in negligent investigation' of child abuse and neglect ... . 'Moreover, 'a claim for negligent training in investigative procedures is akin to a claim for negligent investigation or prosecution, which is not actionable in New York' ...". ***Hart v. County of Erie*, 2020 N.Y. Slip Op. 07779, Fourth Dept 12-23-20**

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