CasePrepPlus

December 18, 2020

An advance sheet service summarizing recent and significant New York appellate cases

Editor: **Bruce Freeman**

NEW YORK STATE BAR ASSOCIATION
Serving the legal profession and the community since 1876

FIRST DEPARTMENT

CIVIL PROCEDURE, TRUSTS AND ESTATES, JUDGES.

PLAINTIFF'S REQUEST FOR A 30-DAY ADJOURNMENT TO SEEK THE APPOINTMENT OF THE PUBLIC ADMINISTRATOR TO REPRESENT A DECEASED DEFENDANT SHOULD HAVE BEEN GRANTED; THE MOTION TO DISMISS THE COMPLAINT FOR FAILURE TO SUBSTITUTE A REPRESENTATIVE SHOULD HAVE BEEN DENIED.

The First Department, reversing Supreme Court, determined plaintiff's request for a 30-day adjournment to petition or move to have the public administrator appointed for a deceased defendant's (Conrad's) estate should have been granted. Supreme Court had granted the motion to dismiss the complaint for failure to substitute a representative of the deceased defendant pursuant to CPLR 1021: "A motion to substitute a party 'may be made by the successors or representatives of a party or by any party' and is to be made within a reasonable time after the death of the party (CPLR 1021). '[I]f the event requiring substitution is the death of a party and timely substitution has not been made, the court, before proceeding further, shall, on such notice as it may in its discretion direct, order the persons interested in the decedent's estate to show cause why the action or appeal should not be dismissed.' (id). CPLR 1015(a) provides that '[i]f a party dies and the claim for or against him is not thereby extinguished the court shall order substitution of the proper parties.' … . Moreover, '[i]t is well settled that the death of a party divests the court of jurisdiction to render a judgment until a proper substitution has been made, so that any step taken without it may be deemed void, including an appellate decision' ... . In light of the relatively short passage of time between Conrad's death and the time defendants' motion was made, the allegation in plaintiff's complaint that the reverse mortgage upon which this case is premised was obtained fraudulently and is null and void, and the fact that the defendant banks had not even moved for substitution in the related foreclosure action, it was an abuse of discretion for the motion court not to allow plaintiff, at a minimum, the additional 30 days requested to seek to have the public administrator appointed so that the case could move forward and be decided on the merits." ***Dugger v. Conrad*, 2020 N.Y. Slip Op. 07313, First Dept 12-8-20**

CRIMINAL LAW, JUDGES.

DEFENDANT WAS REPEATEDLY WARNED HE COULD BE SENTENCED TO 45 YEARS AFTER TRIAL WHEN, IN FACT, HIS SENTENCE WOULD BE CAPPED AT 20 YEARS; DEFENDANT WAS NOT AWARE OF THIS GROUND FOR AN ATTACK ON HIS SENTENCE AND THEREFORE DID NOT NEED TO PRESERVE THE ISSUE FOR APPEAL BY MOVING TO WITHDRAW THE PLEA; PLEA VACATED.

The First Department, in a full-fledged opinion by Justice Renwick, determined defendant's guilty plea should be vacated because he was under the impression he was avoiding a 45-year sentence when, in fact, he could have been sentenced to a maximum of 20 years. Although defendant did not move to withdraw his plea which is usually required to preserve the issue for appeal, here the defendant had no knowledge of the ground for a motion to withdraw: "... [T]he court repeatedly told defendant that he faced a possible sentence of 45 years, but not that defendant's sentence would ultimately be reduced to 20 years. ... The Court of Appeals ... has carved out an exception to the preservation doctrine, in certain instances. 'because of the 'actual or practical unavailability of either a motion to withdraw the plea' or a 'motion to vacate the judgment of conviction,' reasoning that 'a defendant can hardly be expected to move to withdraw his plea on a ground of which he has no knowledge' ... . Here, the court's misinformation had great significance. The court repeatedly warned defendant that he could face 45 years in prison if he proceeded to trial on all three of his open burglary cases, and neither the prosecutor nor defense counsel corrected the record. Moreover, defendant, who had already had a failed allocution, did not plead guilty until just before jury selection was to begin, and after the court had repeatedly warned him that he could face as much as 45 years in jail if he proceeded to trial and was convicted." ***People of the State of New York v. Joseph*, 2020 N.Y. Slip Op. 07472, First Dept 12-10-20**

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA).

DEFENDANT WAS ENTITLED TO A DOWNWARD DEPARTURE FROM LEVEL TWO TO LEVEL ONE IN THIS CHILD PORNOGRAPHY CASE.

The First Department, reversing Supreme Court, determined defendant was entitled to a downward departure reducing his risk level from two to one. Defendant was convicted of possession of child pornography. The Court of Appeals has warned that over assessment of the risk should be avoided in child pornography cases: "... A preponderance of the evidence established that scoring under factors three and seven overassessed the risk posed by defendant, and that he should receive a downward departure (see Gillotti, 23 NY3d at 863-64). As the transcript of the federal plea proceeding makes clear, the federal prosecutor characterized defendant's case as being on the very low end of the child pornography possession spectrum and did not contest a nonincarceratory disposition notwithstanding that the federal guidelines recommended a sentence of 33 to 41 months. The federal district court provided a long explanation on the record of why defendant was deserving of a nonincarceratory disposition, including his lifetime of hard work, his dedication to family, the many character letters provided, and the limited time period in which defendant was actually viewing child pornography. The Probation Department also recommended a nonincarceratory disposition in its presentencing report. An independent psychological evaluation of defendant found no cognitive impairment or compulsion that would suggest that defendant was likely to reoffend. In sum, this is the kind of case that Gillotti envisioned warranting a downward departure in order to avoid overassessing risk by rote application of factors three and seven." ***People v. Gonzalez*, 2020 N.Y. Slip Op. 07468, First Dept 12-10-20**

INSURANCE LAW, FRAUD, CIVIL PROCEDURE.

THE QUI TAM COMPLAINT ALLEGING INSURERS FAILED TO ACCURATELY REPORT UNCLAIMED LIFE INSURANCE PROCEEDS, TO WHICH THE STATE IS ENTITLED, IN VIOLATION OF THE NEW YORK FALSE CLAIMS ACT SHOULD NOT HAVE BEEN DISMISSED AND THE MOTION TO AMEND THE COMPLAINT TO SPECIFY THE FRAUD ALLEGATIONS SHOULD HAVE BEEN GRANTED.

The First Department, reversing Supreme Court, determined plaintiff in this qui tam action should have been allowed to amend the complaint to specify the allegations of fraud against the defendant insurance companies. Unclaimed life insurance proceeds are supposed to escheat to the state. The lawsuit alleged the insurance companies had submitted false statements to the state to conceal the existence of life insurance proceeds to which the state is entitled, a violation of the New York False Claims Act (NYFCA). The First Department, in allowing the complaint to be amended to specify the fraud allegations, held that the 10-year statute of limitations applied to the filing of the alleged false reports: "... [P]laintiff adequately alleged that defendants knowingly filed false reports with the State which failed to identify escheatable life insurance proceeds. The complaint alleges that defendants' recordkeeping was so haphazard — such as listing incorrect names, dates of birth, and Social Security numbers, or omitting one or more of those pieces of information altogether — that it amounted to reckless disregard for the truth or falsity of the reports that they submitted to the State (see State Finance Law § 188[3][a][iii]). In other circumstances, according to the complaint, defendants had actual knowledge that a policyholder was deceased, as evidenced by returned mail, customer call service logs, or demutualization payments separately escheated to the State, yet defendants nevertheless failed to disclose or escheat the deceased policyholder's life insurance proceeds to the State (see State Finance Law § 188[3][a][i]). These allegations, if true, demonstrate that defendants 'deliberately turn[ed] a blind eye to reporting errors and then attest[ed] that, to [their] knowledge, they d[id] not exist' ...". ***Total Asset Recovery Servs. LLC v. Metlife, Inc.*, 2020 N.Y. Slip Op. 07480, First Dept 12-10-20**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

QUESTION OF FACT WHETHER THE TWO BY FOUR PLAINTIFF TRIPPED OVER WAS DEBRIS, WHICH WOULD CONSTITUTE A VIABLE LABOR LAW § 241(6) CAUSE OF ACTION, OR PART OF A SAFETY BARRICADE, WHICH WOULD NOT.

The First Department determined there was a question of fact whether the two by four plaintiff tripped over was debris, which would constitute a viable Labor Law § 241(6) cause of action, or part of a safety barricade, which would not: "Plaintiff's motion for partial summary judgment on the Labor Law § 241(6) claim based on Industrial Code (12 NYCRR) § 23-1.7(e)(2) should be denied. This Industrial Code provision requires work areas to be kept free of debris and scattered tools and materials 'insofar as may be consistent with the work being performed,' and thus is not violated when the condition that caused the plaintiff to trip or slip was integral to the work being performed, such as the presence of materials placed in the work area intentionally ... . The staircase that plaintiff was approaching was installed by the ironworkers, and there is testimony that it was not opened for use until days after plaintiff's accident. Plaintiff acknowledged that the staircase had not been completed at the time of his accident, that a barricade remained in place around three sides of the opening in the floor, and that an ironworker was working on the fourth side at the top of the stairs where the barricade had been removed. Under the circumstances, issues of fact exist as to whether the two-by-four over which plaintiff tripped was part of the barricade blocking the staircase opening in the floor and therefore integral to the work at the time of his accident, even if the barricade

had been pulled back or removed from the front of the stairs where an iron worker was working ...". ***Rudnitsky v. Macy's Real Estate, LLC*, 2020 N.Y. Slip Op. 07325, First Dept 12-8-20**

PERSONAL INJURY, CONTRACT LAW.

THE BUILDING OWNER HAD, BY CONTRACT, RELINQUISHED ALL RESPONSIBILITY FOR ELEVATOR MAINTENANCE TO DEFENDANT AMERICAN ELEVATOR AND WAS THEREFORE NOT LIABLE FOR THE ALLEGED ELEVATOR MALFUNCTION; THE PLAINTIFF ALLEGED THE INNER GATE CLOSED ON HER SHOULDER, PINNING HER, AND THE ELEVATOR THEN DESCENDED; A QUESTION OF FACT PURSUANT TO THE RES IPSA LOQUITUR DOCTRINE WAS RAISED.

The First Department determined that the building owner, 1067 Fifth Avenue Corp. had, by contract, relinquished the responsibility to maintain the elevator to defendant American Elevator. Plaintiff alleged the elevator inner gate closed on her shoulder and then the elevator descended. Plaintiff alleged she injured her shoulder, neck and back pulling her arm free. Although the defendants demonstrated they did not have actual or constructive notice of the defect, a question of fact was raised pursuant to the res ipsa loquitur doctrine. Based on its maintenance contract with American, the action against the building owner should have been dismissed: "... [U]nder the terms of its contract with 1067 Fifth, American was responsible for providing 'full comprehensive maintenance and repair services' for the elevators, which included maintaining '[t]he entire vertical transportation system,' including 'all engineering, material, labor, testing, and inspections needed to achieve work specified by the contract.' Further, under the terms of the contract, maintenance 'include[s], but is not limited to, preventive services, emergency callback services, inspection and testing services, repair and/or direct replacement component renewal procedures.' The contract also provided for American to 'schedule [ ] systematic examinations, adjustments, cleaning and lubrication of all machinery, machinery spaces, hoistways and pits,' and to do all 'repairs, renewals, and replacements . . . as soon as scheduled or other examinations reveal the necessity of the same.' Further, American agreed to provide emergency call-back service 24 hours a day, 7 days a week. Given such broad contractual responsibilities, American's contract can be said to have 'entirely displaced' the responsibility of 1067 Fifth and Elliman to maintain the safety of the building's elevators, which gave rise to a duty owed directly to plaintiff by America ...". ***Sanchez v. 1067 Fifth Ave. Corp.*, 2020 N.Y. Slip Op. 07326, First Dept 12-8-20**

PERSONAL INJURY, EVIDENCE.

DEFENDANTS FAILED TO DEMONSTRATE A LACK OF ACTUAL OR CONSTRUCTIVE NOTICE OF THE CONDITION WHICH CAUSED PLAINTIFF TO SLIP AND FALL; PLAINTIFF ADEQUATELY IDENTIFIED THE CAUSE OF HER FALL; DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The First Department, reversing Supreme Court, determined defendants' motion for summary judgment in this slip and fall case should not have been granted because they failed to establish they lacked actual or constructive notice of the alleged hump in a runner over which plaintiff tripped. The First Department noted that plaintiff had adequately identified the cause of her fall: "Defendants' failure to establish prima facie entitlement to judgment as a matter of law requires the denial of the motion regardless of the strength of plaintiff's opposition ... . They failed to offer evidence of their inspection routines, including evidence regarding the last time the accident site was inspected ... . In any event, plaintiff raises factual issues. Although plaintiff did not actually observe what caused her to trip and fall over an inclement weather runner in the lobby of defendants' building, her evidence, together with reasonable inferences drawn therefrom, including that she felt the toebox of her right foot slide under what felt to be a hump in the runner, causing her foot to get caught, and her to lose her balance and fall, sufficiently identified the cause of her fall ...". ***Mandel v. 340 Owners Corp.*, 2020 N.Y. Slip Op. 07316, First Dept 12-8-20**

TRUSTS AND ESTATES, FAMILY LAW, REAL PROPERTY, FRAUD.

PLAINTIFF, WHO WAS BORN TWO YEARS BEFORE HIS MOTHER AND FATHER WERE MARRIED, WAS A DISTRIBUTEE OF HIS FATHER'S ESTATE; IT HAS YET TO BE DETERMINED WHETHER DEFENDANT YOUSEF FRAUDULENTLY REPRESENTED HE WAS THE SOLE HEIR WHEN HE TRANSFERRED REAL PROPERTY TO DEFENDANT BASMANOV.

The First Department determined plaintiff demonstrated he was a distributee of his father's estate. Plaintiff was born two years before his parents married and both his father's and mother's names were on plaintiff's birth certificate. The court noted that it has yet to be established whether defendant Yousef fraudulently represented himself as the sole heir of the estate when he transferred real property to defendant Basmanov: "Pursuant to Domestic Relations Law § 24, if a mother and father enter into a civil or religious marriage after the birth of their child, the child is legitimated for all purposes of New York law, even if the marriage is void or voidable (§ 24[1]). Therefore, such child automatically becomes a distributee of both birth parents, without any need to satisfy one of the paternity tests set forth in Section 4-1.2(a)(2) of the EPTL ... . Plaintiff was born in 1973, nearly two years before his parents subsequently married. At some point, the decedent-father's name was placed on the plaintiff's birth certificate, which, pursuant to Public Health Law § 4135(2) in effect at the time, required 'the consent in writing of both the mother and putative father, duly verified, and filed with the record of the birth.' Pursuant to

Public Health Law § 4103(2), 'a certification of birth is prima facie evidence of the facts therein.' ... Defendant Basmanov's argument that plaintiff failed to establish fraud necessary to warrant voiding the deeds by which defendant Yosef purported to transfer the decedent's real property to himself, and then to her, is unavailing. Absent proof of fraud, a deed that purports to transfer more than the party owns is valid to the extent of transferring that party's interest ... ; however, it has yet to be established whether Yosef committed a fraudulent transfer by representing himself as the sole heir of the decedent's estate in order to effectuate the transfer." ***Tiwary v. Tiwary*, 2020 N.Y. Slip Op. 07479, First Dept 12-10-20**

SECOND DEPARTMENT

CIVIL PROCEDURE, FORECLOSURE, EVIDENCE.

THE SECOND MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN DENIED; SUCCESSIVE SUMMARY JUDGMENT MOTIONS ARE GENERALLY PROHIBITED.

The Second Department, reversing Supreme Court, determined the prohibition against successive summary judgment motions applied and the second motion should have been denied: " 'Generally, successive motions for summary judgment should not be entertained, absent a showing of newly discovered evidence or other sufficient cause' ... . 'Evidence is not newly discovered simply because it was not submitted on the previous motion' ... . 'Rather, the evidence that was not submitted in support of the previous summary judgment motion must be used to establish facts that were not available to the party at the time it made its initial motion for summary judgment and which could not have been established through alternative evidentiary means' ... . 'Successive motions for summary judgment should not be made based upon facts or arguments which could have been submitted on the original motion for summary judgment' ...". ***Wells Fargo Bank, NA v. Carpenter*, 2020 N.Y. Slip Op. 07426, Second Dept 12-9-20**

CRIMINAL LAW.

CRIMINAL POSSESSION OF A WEAPON SECOND DEGREE AND CRIMINAL POSSESSION OF A FIREARM ARE INCLUSORY CONCURRENT COUNTS.

The Second Department determined criminal possession of a weapon in the second degree and criminal possession of a firearm are inclusory concurrent counts: "... [B]ecause the charge of criminal possession of a weapon in the second degree and the charge of criminal possession of firearm are inclusory concurrent counts, the conviction of criminal possession of a firearm, as well as the sentence imposed thereon, must be vacated, and that count of the indictment must be dismissed ...". **People v. Nicoletti, 2020 N.Y. Slip Op. 07401, Second Dept 12-9-20**

CRIMINAL LAW, EVIDENCE, APPEALS.

THE WAIVER OF APPEAL WAS INVALID BECAUSE THE JUDGE SUGGESTED THE WAIVER WAS AN ABSOLUTE BAR TO APPEAL; THE OFFICER WHO APPROACHED DEFENDANT ON THE STREET WAS NOT JUSTIFIED IN REACHING FOR AN OBJECT IN DEFENDANT'S SWEATSHIRT POCKET; DEFENDANT'S FLIGHT AND DISCARDING OF THE WEAPON WAS NOT INDEPENDENT OF THE OFFICER'S UNJUSTIFIED ACTIONS; THE GUN SHOULD HAVE BEEN SUPPRESSED.

The Second Department, finding the waiver of appeal invalid, granted defendant's suppression motion and dismissed the indictment. The officer who approached defendant saw the shape of something heavy in defendant's sweatshirt pocket, said "what's this" and reached for it. At that point defendant ran and discarded a weapon: "When explaining the waiver of the right to appeal, the Supreme Court stated, inter alia, that as a result of the waiver, the defendant was 'giving up [his] independent right to appeal [his] case to a higher court,' and that the case 'ends here' upon sentencing. These statements incorrectly suggested that the waiver may be an absolute bar to the taking of an appeal ... . The officer was justified in conducting a common-law inquiry, and the officer was permitted to ask the defendant if he was carrying a weapon ... . However, the officer was not justified in attempting to touch the defendant's sweatshirt pocket as a minimally intrusive self-protective measure, since the defendant did not engage in any conduct justifying such an intrusion ... . The defendant's response of fleeing and discarding the gun was not 'an independent act involving a calculated risk attenuated from the underlying [illegal] police conduct' ...". ***People v. Soler*, 2020 N.Y. Slip Op. 07404, Second Dept 12-9-20**

CRIMINAL LAW, EVIDENCE, APPEALS, JUDGES.

SUPREME COURT SHOULD NOT HAVE DENIED SUPPRESSION ON A GROUND NOT RAISED BY THE PARTIES; THE APPELLATE COURT IS POWERLESS TO REVIEW THAT ISSUE; THE APPELLATE COURT IS ALSO POWERLESS TO REVIEW THE SECOND GROUND FOR SUPPRESSION ARGUED BY THE PEOPLE ON APPEAL BECAUSE THAT SECOND ISSUE WAS RESOLVED BELOW IN DEFENDANT'S FAVOR; MATTER SENT BACK TO SUPREME COURT FOR REVIEW OF THE SECOND ISSUE SHOULD THE PEOPLE BE SO ADVISED.

The Second Department determined: (1) the motion court should not have decided the suppression motion on a ground not raised by the parties and the appellate court is powerless to review that issue (search valid pursuant to the automobile exception); (2) the other ground for upholding suppression argued by the People on appeal was decided in defendant's favor and therefore the appellate court cannot review it (search valid as an inventory search). The denial of the suppression motion was reversed and the matter was sent back for review of the inventory search issue should the People be so advised: "The People's current contention that the search of the defendant's SUV was proper under the automobile exception to the warrant requirement because the police had probable cause to believe that the SUV contained a weapon is improperly raised for the first time on appeal ... . [T]he hearing record reveals ... the People were relying solely on the theory that the gun was recovered pursuant to a lawful inventory search after the SUV was removed from the location. This Court 'cannot uphold conduct of the police, and thereby affirm a trial court's denial of suppression of evidence obtained pursuant to such conduct, on a factual theory not argued by the People before the trial court' ... . As an alternative ground for upholding the suppression ruling, the People argue, as they did in the Supreme Court, that the recovery of the gun was lawful pursuant to a valid inventory search. However, because the Supreme Court decided the inventory search issue in the defendant's favor, this Court is precluded from reviewing that issue on the defendant's appeal ... . Under the circumstances presented here, where we lack statutory authority to review an issue resolved in the appellant's favor at a suppression hearing, the Court of Appeals has instructed that the required remedy is to 'reverse the denial of suppression and remit the case to [the] Supreme Court for further proceedings' with respect to that issue ...". ***People v. Tates*, 2020 N.Y. Slip Op. 07405, Second Dept 12-9-20**

CRIMINAL LAW, JUDGES.

SENTENCE IMPOSED AFTER THE SECOND TRIAL SHOULD NOT HAVE BEEN HIGHER THAN THE SENTENCE IMPOSED AFTER THE FIRST TRIAL.

The Second Department, reducing defendant's sentence imposed after a second trial, determined the sentence imposed after the first trial should not have been "enhanced:" " 'Under the Due Process Clause of the New York State Constitution, a presumption of vindictiveness applies where a defendant successfully appeals an initial conviction, and is re-tried, convicted, and given a greater sentence than that imposed after the initial conviction' ... . '[C]riminal defendants should not be penalized for exercising their right to appeal' ... . Where, as here, the defendant is convicted of the same count at a new trial following a successful appeal, the sentencing court may not impose a higher sentence unless its reasons for doing so affirmatively appear on the record, and are 'based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding' ... . Inasmuch as the prosecutor asserted that the defendant demonstrated no remorse for his crimes, the record reflects only that the defendant pleaded not guilty to the charges and exercised his constitutional right to remain silent ... . In addition, the ongoing impact of the crime on the complainant does not constitute 'identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding' ... . Accordingly, the court should not have imposed the higher sentence." ***People v. Diaz*, 2020 N.Y. Slip Op. 07392, Second Dept 12-9-20**

DEBTOR-CREDITOR, CIVIL PROCEDURE, CONTRACT LAW.

THE CRITERIA FOR THE HARSH REMEDY OF ATTACHMENT WERE NOT MET.

The Second Department determined the criteria for an order of attachment were not met. The court noted that suspicion of an intent to defraud and the removal, assignment or disposition of property is not enough to warrant the harsh remedy of attachment: "CPLR 6212(a) provides that, on a motion for an order of attachment, 'the plaintiff shall show, by affidavit and such other written evidence as may be submitted, that there is a cause of action, that it is probable that the plaintiff will succeed on the merits, that one or more grounds for attachment provided in section 6201 exist, and that the amount demanded from the defendant exceeds all counterclaims known to the plaintiff.' 'Attachment is considered a harsh remedy and CPLR 6201 is strictly construed in favor of those against whom it may be employed' ... . The plaintiffs failed to make an adequate evidentiary showing that each of the defendants is a nondomiciliary residing without the state (see CPLR 6201[1]; see also General Construction Law § 35). Moreover, the plaintiffs' contention that the defendants were attempting to defraud creditors or frustrate enforcement of a possible judgment against them (see CPLR 6201[3]) 'was devoid of evidentiary support' ... . 'The fact that the affidavits in support of an attachment contain allegations raising a suspicion of an intent to defraud is not enough. It must appear that such fraudulent intent really existed in the defendant's mind' ... , and 'the mere removal,

assignment or other disposition of property is not grounds for attachment' ...". ***651 Bay St., LLC v. Discenza*, 2020 N.Y. Slip Op. 07331, Second Dept 12-9-20**

EMPLOYMENT LAW, CORPORATION LAW.

THE NOT-FOR-PROFIT CORPORATION LAW CREATES A PRIVATE RIGHT OF ACTION AGAINST AN EMPLOYER FOR RETALIATION FOR WHISTLEBLOWING.

The Second Department, reversing Supreme Court, determined plaintiff had stated a cause of action pursuant to Not-For-Profit Corporation Law § 715-b alleging her employer retaliated against her for reporting two instances of improper fund-raising by her employer. The question on appeal was whether Not-For-Profit Corporation Law § 725-b gave rise to a private right of action: "This inquiry involves three factors: '(1) whether the plaintiff is one of the class for whose particular benefit the statute was enacted; (2) whether recognition of a private right of action would promote the legislative purpose; and (3) whether creation of such a right would be consistent with the legislative scheme' ... . Not-For-Profit Corporation Law § 715-b is intended to protect, among others, employees who in good faith report any action or suspected action taken by or within the corporation that is illegal, fraudulent, or in violation of any adopted policy of the corporation from retaliation or adverse employment consequences. Here, the plaintiff is one of the class for whose particular benefit the statute was enacted ... . Moreover, the legislative purpose is promoted by holding corporations accountable by allowing whistleblowers to commence civil actions to recover damages for retaliation or adverse employment consequence ... . [W]here there is no regulatory agency to otherwise enforce compliance with a statute, 'the recognition of a private right of action would do no harm' ... . [T]here is no regulatory agency to enforce compliance with Not-For-Profit Corporation Law § 715-b on behalf of an employee ...". ***Ferris v. Lustgarten Found.*, 2020 N.Y. Slip Op. 07357, Second Dept 12-9-20**

FAMILY LAW, CIVIL PROCEDURE, EVIDENCE.

MOTHER HAD FLED TO ARGENTINA WITH THE CHILD WHILE CUSTODY PROCEEDINGS WERE PENDING; FAMILY COURT SHOULD NOT HAVE DENIED THE MATERNAL GRANDMOTHER'S PETITION SEEKING VISITATION ON THE GROUND SHE DID NOT HAVE STANDING; MATTER REMITTED FOR A BEST INTERESTS HEARING.

The Second Department, reversing Family Court, determined the court erred in finding the maternal grandmother did not have standing to seek visitation and remitted the matter for a best interests hearing. Mother had fled to Argentina with the child when custody proceedings were pending: " 'When a grandparent seeks visitation pursuant to Domestic Relations Law § 72(1), the court must make a two-part inquiry' ... . The court must first determine if the grandparent has standing, based on death or equitable circumstances, and if it determines that the grandparent has established standing, it must then determine whether visitation is in the best interests of the child (see Domestic Relations Law § 72[1] ...). 'Standing [based upon equitable circumstances] should be conferred by the court, in its discretion, only after it has examined all the relevant facts' ... . '[A]n essential part of the inquiry is the nature and extent of the grandparent-grandchild relationship' ... . 'It is not sufficient that the grandparents allege love and affection for their grandchild' ... . 'They must establish a sufficient existing relationship with their grandchild, or in cases where that has been frustrated by the parents, a sufficient effort to establish one, so that the court perceives it as one deserving the court's intervention' ... . Here, the Family Court's determination that the grandmother lacked standing to seek visitation was not supported by a sound and substantial basis in the record ... . The evidence demonstrated that the grandmother developed a relationship with the child early on in his life and thereafter made repeated efforts to continue that relationship ...". ***Matter of Noguera v. Busto*, 2020 N.Y. Slip Op. 07385, Second Dept 12-9-20**

FAMILY LAW, CONTRACT LAW.

THE WIFE'S COUNTERCLAIM FOR ADULTERY IN THIS DIVORCE ACTION, WHICH, IF PROVEN, WOULD HAVE HAD SUBSTANTIAL FINANCIAL CONSEQUENCES FOR THE HUSBAND, SHOULD HAVE BEEN DISMISSED; THE HUSBAND AND THE WOMEN WHO WAS THE SUBJECT OF THE WIFE'S ALLEGATIONS SUBMITTED AFFIDAVITS DENYING ANY SEXUAL RELATIONSHIP; THE WIFE'S AFFIDAVIT WAS BASED ENTIRELY ON PROXIMITY--THE WOMAN WAS THE FAMILY'S BABYSITTER--AND WAS OTHERWISE UNSUPPORTED.

The Second Department, reversing Supreme Court, in a full-fledged opinion by Justice Dillon, determined the husband's motion for summary judgment dismissing the wife's adultery counterclaim should have been granted in this divorce action. Whether the husband committed adultery was an important issue because of the significant financial consequences agreed to in the post-nuptial agreement, including the award to the wife of 80% of the husband's future gross income and 80% of all marital assets. The wife alleged the husband committed adultery with the family's babysitter, R.I. The husband and R.I. submitted affidavits denying any sexual relationship: "... [T]he wife's focus on the husband's 'opportunity' to commit adultery amounts to the husband's mere proximity to R.L. at various times and places. Clearly, R.L. was the family babysitter and, in that capacity, could be expected to be in the husband's presence on many occasions, including occasional overnight stays. The wife offers no facts or evidence — whether objective, inferential, or otherwise — of any adulterous conduct between the husband and R.L. beyond their mere physical proximity to one another. The wife's affidavit provides no dates, describes

no suspicious circumstance with any detail or particularity, identifies no particular relevant social event, and identifies no witness who observed conduct or heard comments between the husband and R.L. that might inferentially support a claim of adultery against the husband. There is no investigator, no photograph, and no suspicious documents, texts, emails, or social media posts. Put another way, the wife's opposition to summary judgment amounts to mere unilateral speculation, conjecture, guess, and surmise stemming from the husband's and R.L.'s mere proximity to one another, without anything more. The wife's conclusory affidavit cannot substitute for admissible evidence even recognizing, as we do, that the adultery counterclaim is premised upon circumstantial evidence and the court's role in determining summary judgment is that of issue-finding ...". ***Agulnick v. Agulnick*, 2020 N.Y. Slip Op. 07335, Second Dept 12-9-20**

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

THE BANK DID NOT DEMONSTRATE THE NOTICE REQUIREMENTS OF RPAPL 1304 WERE COMPLIED WITH; SUMMARY JUDGMENT IN FAVOR OF THE BANK SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined the notice requirements of RPAPL 1304 were not demonstrated and, therefore, the bank's motion for summary judgment in this foreclosure action should not have been granted: "Since the plaintiff failed to provide evidence of the actual mailing by either certified mail or first-class mail, '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' ... , it failed to establish, prima facie, that it complied with RPAPL 1304. Since the plaintiff failed to satisfy its prima facie burden with respect to RPAPL 1304, those branches of its motion which were for summary judgment on the complaint insofar as asserted against the defendants, to strike their answer, and for an order of reference should have been denied, regardless of the sufficiency of the defendants' opposition papers ...". ***US Bank N.A. v. McQueen*, 2020 N.Y. Slip Op. 07423, Second Dept 12-9-20**

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

THE BANK DID NOT DEMONSTRATE COMPLIANCE WITH THE NOTICE REQUIREMENTS OF RPAPL 1304; THE BANK'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined the bank's summary judgment motion should not have been granted because the bank did not demonstrate compliance with the notice requirements of RPAPL 1304: " 'In a residential foreclosure action, a plaintiff moving for summary judgment must tender sufficient evidence demonstrating the absence of material issues as to its strict compliance with RPAPL 1304' ... . RPAPL 1304(1) provides that 'at least ninety days before a lender, an assignee or a mortgage loan servicer commences legal action against the borrower . . . , including mortgage foreclosure, such lender, assignee or mortgage loan servicer shall give notice to the borrower.' 'The statute further provides the required content for the notice and provides that the notice must be sent by registered or certified mail and also by first-class mail to the last known address of the borrower' ... . Strict compliance with RPAPL 1304 is a condition precedent to the commencement of a foreclosure action ... . Proof of the requisite mailings 'can be 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' ... . [W]ith respect to the mailing by first-class mail, '[t]he presence of 20-digit numbers on the copies of the 90-day notices submitted by the plaintiff, standing alone, did not suffice to establish, prima facie, proper mailing under RPAPL 1304' ... . As to Babik's [the loan servicer's employee's] affidavit, not only did Babik 'not attest to personal knowledge of the mailing [or] set forth any details regarding ... [the loan servicer's] mailing practices or procedures' ... , she did not aver that a 90-day notice was sent in accordance with the statute ...". ***Wilmington Sav. Fund Socy., FSB v. Hershkowitz*, 2020 N.Y. Slip Op. 07427, Second Dept 12-9-20**

FORECLOSURE, TRUSTS AND ESTATES, CIVIL PROCEDURE.

THE ESTATE WAS A NECESSARY PARTY IN THIS FORECLOSURE ACTION BECAUSE OF THE POTENTIAL FOR A DEFICIENCY JUDGMENT AGAINST THE DECEDENT; DEFENDANT'S CROSS MOTION FOR LEAVE TO SUBSTITUTE HERSELF AS ADMINISTRATOR OF THE ESTATE SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined decedent's estate was a necessary party in this foreclosure action and defendant's cross motion pursuant to CPLR 1015 for leave to substitute herself as administrator should have been granted: "In a mortgage foreclosure action, '[t]he rule is that a mortgagor who has made an absolute conveyance of all his [or her] interest in the mortgaged premises, including his equity of redemption, is not a necessary party to foreclosure, unless a deficiency judgment is sought' ... . Here, the judgment of foreclosure and sale contains language providing for a potential deficiency judgment against the decedent if the sale of the property does not cover the amount due to the plaintiff. Consequently, the decedent's estate was a necessary party to the action ...". ***Specialized Loan Servicing, LLC v. Kalinin*, 2020 N.Y. Slip Op. 07417, Second Dept 12-9-20**

FORECLOSURE, UNIFORM COMMERCIAL CODE.

THE LOST NOTE AFFIDAVITS SUBMITTED BY THE PLAINTIFF IN THIS FORECLOSURE ACTION WERE INVALID; PLAINTIFF'S MOTION FOR LEAVE TO ENTER A DEFAULT JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined the plaintiff bank's motion to leave to enter a default judgment in this foreclosure action should not have been granted. The lost note affidavits were invalid: "Pursuant to UCC 3-804, '[t]he owner of an instrument which is lost, whether by destruction, theft or otherwise, may maintain an action in his [or her] own name and recover from any party liable thereon upon due proof of his [or her] ownership, the facts which prevent his [or her] production of the instrument and its terms.' Here, although the plaintiff submitted sufficient evidence establishing that it was the owner and holder of the note and establishing the note's terms, the lost note affidavits submitted by the plaintiff failed to establish the facts that prevent the production of the original note ... . Neither affidavit identifies who conducted the search for the lost note or explains 'when or how the note was lost' ...". ***Capital One, N.A. v. Gokhberg*, 2020 N.Y. Slip Op. 07345, Second Dept 12-9-20**

INSURANCE LAW, CONTRACT LAW, CORPORATION LAW.

THE PROFESSIONAL LIABILITY INSURANCE POLICYHOLDERS (DOCTORS), NOT THE POLICYHOLDERS' EMPLOYER WHICH PAID THE PREMIUMS, ARE ENTITLED TO THE PAYMENTS ASSOCIATED WITH THE CONVERSION OF THE MUTUAL INSURANCE COMPANY TO A STOCK INSURANCE COMPANY.

The Second Department, in a full-fledged decision by Justice Scheinkman, reversing Supreme Court, determined the policyholders (doctors), not the policyholders' employer which paid the professional liability insurance premiums, were entitled the payments associated with the conversion of a mutual insurance company to a stock insurance company. The Second Department further held that the doctors were not unjustly enriched from the standpoint of their employer because the payments to the doctors were not being made by the employer: "We agree with the Third and Fourth Departments that Insurance Law § 7307 makes clear that the policyholder is entitled to the consideration ... . Thus, the defendants [doctors] are 'legally entitled to receive the cash consideration' ... . In reaching this conclusion, we also note that the First Department ... did not express any contrary views as to the import of the statute, the conversion plan, and the DFS [New York Department of Financial Services] approval decision. Rather, the First Department's determination to award the cash consideration to the employer medical group was predicated entirely upon the theory of unjust enrichment ...". ***Maple Med., LLP v. Scott*, 2020 N.Y. Slip Op. 07366, Second Dept 12-9-20**

MEDICAL MALPRACTICE, PERSONAL INJURY, AGENCY, EMPLOYMENT LAW, EVIDENCE.

THE NEGLIGENT SUPERVISION ACTION AGAINST PHYSICAL-THERAPY DEFENDANTS SOUNDED IN MEDICAL MALPRACTICE REQUIRING EXPERT OPINION EVIDENCE; THE DOCTRINE OF OSTENSIBLE OR APPARENT AGENCY RAISED A QUESTION OF FACT WHETHER THE PHYSICAL-THERAPY FACILITY WAS VICARIOUSLY LIABLE FOR THE ALLEGED NEGLIGENCE OF THE THERAPIST, WHO WAS AN INDEPENDENT CONTRACTOR.

The Second Department, reversing (modifying) Supreme Court, determined: (1) the negligent supervision cause of action against defendants' physical therapy services sounded in medical malpractice and therefore required expert opinion evidence; and (2) the defendant physical therapist (Gonikman) was an independent contractor but the doctrine of ostensible or apparent agency raised a question of fact about the facility's (KCM's) vicarious liability for Gonikman's alleged negligence. Plaintiff's infant daughter, who was receiving physical therapy, fell off a scooter and was injured: "Though a medical facility can be held liable for the negligence or malpractice of its employees, it is not generally held liable when the treatment is provided by an independent contractor, even if the facility affiliates itself with that independent contractor ... . However, the facility may be held vicariously liable under a theory of apparent or ostensible agency by estoppel ... . 'In order to create such apparent agency, there must be words or conduct of the principal, communicated to a third party, which give rise to the appearance and belief that the agent possesses the authority to act on behalf of the principal' ... . 'The third party must reasonably rely on the appearance of authority, based on some misleading words or conduct by the principal, not the agent' ... . 'Moreover, the third party must accept the services of the agent in reliance upon the perceived relationship between the agent and the principal, and not in reliance on the agent's skill' ... . [S]ince the conduct at issue in the complaint stems from Gonikman's generalized treatment plan and alleged negligent supervision of the infant daughter during her physical therapy session, the allegation sounds in medical malpractice, not ordinary negligence, because Gonikman's duty towards the infant daughter derived from the physical therapist-patient relationship ... . In support of his cross motion, Gonikman merely submitted a conclusory statement that his therapy plan of activities was consistent with the accepted standard of care, and he failed to submit an expert's affidavit to establish that he did not deviate from the accepted standard of care for physical therapy ...". ***Weiszberger v. KCM Therapy*, 2020 N.Y. Slip Op. 07425, Second Dept 12-9-20**

THIRD DEPARTMENT

FREEDOM OF INFORMATION LAW (FOIL), ENVIRONMENTAL LAW, ADMINISTRATIVE LAW.

SUPREME COURT WENT BEYOND THE PERMISSIBLE REVIEW OF THE DEPARTMENT OF ENVIRONMENTAL CONSERVATION'S DETERMINATION UNION CARBIDE'S FOIL REQUESTS WERE MOOT BECAUSE THE REQUESTED DOCUMENTS HAD BEEN PROVIDED; ONCE SUPREME COURT FOUND THAT THE FOIL REQUEST WAS NOT MOOT BECAUSE THERE WERE ADDITIONAL DOCUMENTS, IT SHOULD NOT HAVE GONE ON TO CONSIDER WHETHER THE ADDITIONAL DOCUMENTS WERE EXEMPT FROM DISCLOSURE.

The Third Department, reversing (modifying) Supreme Court and remitting the matter to the Department of Environmental Conservation (DEP), determined Supreme Court exceeded its review powers with respect to DEP's response to petitioner's (Union Carbide's) FOIL requests. Union Carbide sought documents relating to a study which determined the radioactive slag found at sites owned by Union Carbide was not the same as the radioactive slag produced by Union Carbide's predecessor. The DEP had determined the FOIL requests were moot because the requested documents had been produced. Supreme Court properly held that the requests were not moot, but then improperly went on to consider whether the additional requested documents were protected from disclosure: "... [T]he administrative determination was that the first two FOIL requests were closed and that the administrative appeal with respect to the third FOIL request was moot given the production of responsive records prior to and following the filing of the appeal. As such, Supreme Court's review was limited to whether the appeal was moot on the basis offered by the FOIL Appeals Officer, that being, whether all responsive records had been provided. By virtue of respondent's in camera submission of additional documents to the court, it was evident that all responsive records had not been provided, and the administrative determination should have been annulled. However, in reviewing the subject documents and finding that those documents, with the exception of the site classification report, were statutorily exempted from disclosure, Supreme Court went beyond its mandate to 'judge the propriety of [the agency's] action solely by the grounds invoked by the agency' ... . Accordingly, there was no basis for the court to determine that any exemption justified the withholding or redacting of the additional documents submitted to the court ... . Inasmuch as the record demonstrates that additional documents responsive to petitioners' FOIL requests exist and were not yet produced or examined by respondent's FOIL Appeals Officer, we remit to Supreme Court to direct respondent to respond to petitioners' FOIL requests by reviewing the additional subject documents and to determine in the first instance whether they are statutorily exempted from disclosure under the Public Officers Law." ***Matter of Union Carbide Corp. v. New York State Dept. of Envtl. Conservation*, 2020 N.Y. Slip Op. 07445, Second Dept 12-10-20**

WORKERS' COMPENSATION, IMMIGRATION LAW.

CLAIMANT, AN UNDOCUMENTED IMMIGRANT WITHOUT A SOCIAL SECURITY NUMBER, DEMONSTRATED DILIGENT EFFORTS TO FIND WORK AFTER HE WAS INJURED; THE WORKERS' COMPENSATION BOARD SHOULD NOT HAVE DENIED HIS CLAIM FOR BENEFITS.

The Third Department, reversing the Workers' Compensation Board's denial of benefits to claimant, an undocumented immigrant, over a two-justice dissent, determined claimant had made a sufficient showing of diligent efforts to find work (labor market attachment) after he was injured: "... '[T]he status of an injured worker as an undocumented alien does not, in and of itself, prohibit an award of workers' compensation benefits' ... , unless the worker cannot satisfy statutory requirements ... . Likewise, the Board has recognized that an injured worker's undocumented status 'does not eliminate his [or her] need to make a reasonable search for work' ... . The evidence at the hearing established that claimant attended school through the ninth grade in his country of birth and has exclusively worked in construction, both before coming to the United States at age 23 and for the eight years thereafter, until sustaining the subject injuries while performing heavy lifting at the employer's construction site. With respect to his attachment to the labor market, claimant submitted completed forms listing 62 businesses to which he applied for work between April and December 2018 as a prep cook, dishwasher, restaurant helper and ironing worker. He identified potential employers by walking around two boroughs of New York City two or three days per week, seeking work that would not require a Social Security number, which he lacked due to his undocumented status. He applied for both non-construction jobs, for which he lacked experience and language skills, and construction jobs, for which he had limited physical abilities due to his injuries. Potential employers informed claimant that (1) they were not hiring, (2) he lacked the requisite experience or (3) they could not hire him without a Social Security number. Claimant produced documentation establishing that he sought assistance from Workforce1, a job location service, which aided him in the preparation of a work-history résumé in English; however, despite his willingness to use this service, Workforce1 ultimately advised him that he was unable to use its services for his job search because he lacked a Social Security number. Claimant registered at an adult learning center in order to take English language courses, but was placed on a wait list and, as of the time of the hearing, had yet to be contacted regarding an opening." ***Matter of Policarpio v. Rally Restoration Corp.*, 2020 N.Y. Slip Op. 07442, Third Dept 12-10-20**