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CasePrepPlus

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COURT OF APPEALS

BANKRUPTCY, FORECLOSURE, TORTIOUS INTERFERENCE WITH CONTRACT, DEBTOR-CREDITOR.

PLAINTIFFS SOUGHT TO FORECLOSE ON LOANS TO THE BORROWERS WHO THEN STARTED BANKRUPTCY PROCEEDINGS; PLAINTIFFS THEN SUED DEFENDANTS, WHO ARE NOT PARTIES TO THE FORECLOSURE/BANKRUPTCY ACTIONS, FOR TORTIOUS INTERFERENCE WITH THE LOAN AGREEMENTS; THE TORTIOUS INTERFERENCE WITH CONTRACT ACTIONS ARE NOT PREEMPTED BY FEDERAL BANKRUPTCY LAW.

The Court of Appeals, in a full-fledged opinion by Judge Stein, over a three-judge dissent, determined the tortious interference with contract claims, against defendants who are not parties in the foreclosure/bankruptcy proceedings, were not preempted by federal law. Plaintiff sought to foreclose on a loan and the borrowers commenced bankruptcy proceedings. Plaintiff then sued defendants, who are not parties to the foreclosure, alleging tortious interference with the loan agreements. The opinion focuses on the law of preemption: "It is not disputed that valid contracts existed between plaintiff and the borrowers. Plaintiff's claims arising out of the borrowers' breach of those contracts as asserted against the borrowers were resolved by the bankruptcy proceeding. Here, plaintiff alleges that defendants knew of the relevant contractual terms and deliberately induced the borrowers' violations of those terms prior to the bankruptcy proceedings. In other words, plaintiff's allegations state a claim for tortious interference with contract, and the remedy for that tort will not affect the debtor's estate. As such, these claims will not encroach upon the province of the bankruptcy court. Stated simply, plaintiff's claims 'do[] not require the adjudication of rights and duties of creditors and debtors under the Bankruptcy Code' ...". ***Sutton 58 Assoc. LLC v. Pilevsky*, 2020 N.Y. Slip Op. 06939, Ct App 11-24-20**

CRIMINAL LAW, CORRECTION LAW, SEX OFFENDER REGISTRATION ACT (SORA).

SEX OFFENDERS SUBJECT TO POSTRELEASE SUPERVISION MAY BE HOUSED IN A RESIDENTIAL TREATMENT FACILITY BEYOND THE SIX-MONTH STATUTORY PERIOD BEFORE COMPLIANT HOUSING HAS BEEN FOUND.

The Court of Appeals, in a full-fledged opinion by Judge Stein, over a three-judge dissent, determined that sex offenders under a period of postrelease supervision (PRS) maybe housed in a residential treatment facility (RTF) after the statutory six-month period has expired and before compliant housing has been found: "This appeal presents us with a question of statutory interpretation. Penal Law § 70.45 (3) provides that, 'notwithstanding any other provision of law, the board of parole may impose as a condition of postrelease supervision (PRS) that for a period not exceeding six months immediately following release from the underlying term of imprisonment the person be transferred to and participate in the programs of a residential treatment facility (RTF).' Correction Law § 73 (10), in turn, authorizes the Department of Corrections and Community Supervision (DOCCS) 'to use any [RTF] as a residence for persons who are on community supervision,' which includes those on PRS (see Correction Law § 2 [31]). The question before us is whether Correction Law § 73 (10) authorizes DOCCS to provide temporary housing in an RTF to sex offenders subject to the mandatory condition set forth in the Sexual Assault Reform Act (SARA) (see Executive Law § 259—c [14]) after the six-month period specified in Penal Law § 70.45 (3) has expired but before the offender on PRS has located compliant housing. We conclude that it does." ***People ex rel. McCurdy v. Warden, Westchester County Corr. Facility*, 2020 N.Y. Slip Op. 06933, Ct App 11-23-20**

CRIMINAL LAW, EVIDENCE, APPEALS.

CONVERSATIONS ABOUT AND PLANNING OF THE MURDER OF DEFENDANT'S WIFE AND MOTHER-IN-LAW DID NOT CONSTITUTE LEGALLY SUFFICIENT EVIDENCE OF ATTEMPTED MURDER.

The Court of Appeals, in a full-fledged opinion by Judge Feinman, over a three-judge dissent, determined the evidence of attempted first and second degree murder was legally insufficient. Defendant's conversations and planning with a feigned confederate did not constitute an "actual step" toward killing his wife and mother-in-law: "... [T]he only conduct to be considered is defendant's own acts because his purported accomplice [MS], who was working with the authorities, did not take any steps toward furthering the planned murders other than listening to defendant's scheme. MS did not, for example, acquire the instrumentality for the crimes (such as drugs or poison), verify the existence of the keys and obtain them from the stated location, or stake out the address supplied by defendant to make sure that the wife and mother-in-law were present at the location specified. Nevertheless, the People, mostly by parsing defendant's communications with MS, argue that

defendant engaged in sufficient conduct by: (1) promising to provide a house to MS; (2) giving MS the purported address of the targets; (3) instructing MS when to carry out the murders; (4) providing MS with a hand-drawn map of the location of the third party's house, where MS was to drop off the children after the murders; (5) handing MS a detailed plan of how to carry out the murders; (6) telling MS the location of the keys to the house; (7) calling MS's girlfriend to arrange for MS to visit the jail; (8) writing a fake suicide note; (9) showing MS the suicide note; and (10) creating a prearranged code to discuss the postmortem over the recorded jail phone. Not only are these acts 'preparatory in a dictionary sense' ... , they are also limited to the planning stages of committing the offense: they specify the who, what, where, when, and how of defendant's murder plans. Notably absent are any acts that can be deemed to bring the crimes dangerously close to completion." ***People v. Lendof-Gonzalez*, 2020 N.Y. Slip Op. 06940, CtApp 11-24-20**

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA).

IN THESE THREE CASES, CONFINING LEVEL THREE SEX OFFENDERS WHO ARE ELIGIBLE FOR RELEASE FROM PRISON UNTIL COMPLIANT HOUSING IS AVAILABLE WAS NOT A CONSTITUTIONAL VIOLATION.

The Court of Appeals, in a full-fledged opinion by Judge Fahey, over two separate dissenting opinions, determined, in the three cases before the court, confining level three sex offenders who are eligible for release from prison until compliant housing is available was not a constitutional violation: "In these appeals, we consider constitutional challenges to the practice of temporarily confining level three sex offenders in correctional facilities, after the time they would otherwise be released to parole or postrelease supervision (PRS), while they remain on a waiting list for accommodation at a shelter compliant with Executive Law § 259-c (14). In each case, we conclude that there was no constitutional violation." ***People ex rel. Johnson v. Superintendent, Adirondack Corr. Facility*, 2020 N.Y. Slip Op. 06934, CtApp 11-23-20**

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA).

THE EXECUTIVE LAW PROVISION PROHIBITING LEVEL THREE SEX OFFENDERS FROM LIVING WITHIN 1000 FEET OF A SCHOOL DOES NOT APPLY TO A PREVIOUSLY ADJUDICATED LEVEL THREE OFFENDER RELEASED FROM PRISON AFTER A SUBSEQUENT BURGLARY CONVICTION.

The Court of Appeals, in a full-fledged opinion by Judge Garcia, over a two-judge dissent. determined that Executive Law § 259-c, which prohibits level three sex offenders from residing within 1000 feet of a school, does not apply to a previously adjudicated level three sex offender released from prison after a subsequent burglary conviction: "This appeal concerns the scope of a provision of the Sexual Assault Reform Act (SARA) which mandates that the Board of Parole (the Board) impose a condition restricting entry upon school grounds on certain offenders (see Executive Law § 259-c [14]). The issue is whether that condition is mandatory for any parolee who has been designated a level three sex offender under the Sex Offender Registration Act (SORA) or only for those level three offenders who are serving a sentence for an offense enumerated in the statute. We hold that the condition is mandatory only for those level three sex offenders serving a sentence for an enumerated offense ...". ***People ex rel. Negron v. Superintendent, Woodbourne Corr. Facility*, 2020 N.Y. Slip Op. 06935, Ct App 11-23-20**

FAMILY LAW.

DOMESTIC RELATIONS LAW 111 GIVES A COURT THE DISCRETION TO DISPENSE WITH AN ADULT ADOPTEE'S CONSENT TO ADOPTION; HERE PETITIONERS WERE PROPERLY ALLOWED TO ADOPT MARION T., A 66-YEAR-OLD NON-VERBAL WOMAN WITH A SIGNIFICANT DEVELOPMENTAL DISABILITY.

The Court of Appeals, in a full-fledged opinion by Judge DiFiore, over a concurrence and an extensive dissent, determined that the lower court rulings that Domestic Relations Law § 111(1)(a) gives a court the discretion to dispense with the adoptee's consent to an adoption. Here the petitioners sought to adopt Marion T, a non-verbal 66-year-old women with a significant developmental disability. "[The} issue turns on the proper interpretation of Domestic Relations Law (DRL) § 111(1)(a), which generally requires the consent of an 'adoptive child' who is over 14 years old but gives the court discretion to dispense with that consent. We agree with the Appellate Division that, in appropriate circumstances, the statute permits a court to approve an adoption even absent the consent of an adult adoptee. Because that discretion was not abused here and there is record support for the affirmed best interests finding, we affirm." ***Matter of Marian T. (Lauren R.)*, 2020 N.Y. Slip Op. 06932, CtApp 11-23-20**

INSURANCE LAW, CONTRACT LAW.

BASED UPON THE LANGUAGE OF THE INSURANCE POLICIES AT ISSUE, THE EXCESS INSURER WAS NOT LIABLE FOR THE PREJUDGMENT INTEREST ON THE PERSONAL INJURY JUDGMENT AFTER THE PRIMARY POLICY WAS VOIDED.

The Court of Appeals, in a full-fledged opinion by Judge DiFiore, over two dissenting opinions, interpreted the insurance policies at issue such that the excess insurer was not obligated to pay interest on the underlying personal injury judgment after the primary policy was voided: "This appeal involves a dispute concerning an excess insurer's obligation to pay interest on an underlying personal injury judgment after the primary policy was voided. Like the courts below, we are unpersuaded by the injured plaintiff's argument that the excess policy provided overlapping coverage for certain interest

payments covered in the primary policy ... . Plaintiff Jin Ming Chen was injured at a construction site and sued the general contractor Kam Cheung Construction, Inc. (Kam Cheung). At the time, Kam Cheung maintained both primary and excess liability insurance policies: a primary policy with a liability limit of $1 million per occurrence from Arch Specialty Insurance Company (Arch) and an excess policy with $4 million per occurrence in coverage from defendant Insurance Company of the State of Pennsylvania (ICSOP). In December 2011, Supreme Court granted partial summary judgment to plaintiff in that action, and, in October 2013, the court entered a personal injury judgment awarding plaintiff $2,330,000 plus $396,933.70 in prejudgment interest. During that time, Arch commenced a declaratory judgment action seeking rescission of the primary policy due to material misrepresentations made by Kam Cheung in its application, securing a judgment declaring that the Arch Policy was void ab initio. Thus, Arch provided no coverage relating to the personal injury judgment. * * * Plaintiff effectively asks us to treat interest payments on the underlying award as falling within or reducing the Arch Policy's $1 million liability limit, which is contrary to the plain language of the Arch Supplementary Payments provision and the ICSOP Policy's Coverage, Ultimate Net Loss, and Maintenance of Underlying Insurance provisions. To do so would be inconsistent with the language chosen by the parties to the insurance contracts, rendering several clauses forceless—a result that should be avoided .... Arch agreed to expand its coverage of pre- and post-judgment interest beyond its liability limits, and ICSOP agreed to provide coverage only for losses in excess of Arch's coverage—including both the $1 million Arch policy limit and its Supplementary Payments." ***Jin Ming Chen v. Insurance Co. of the State of Pa.*, 2020 N.Y. Slip Op. 06938, Ct App 11-24-20**

LANDLORD-TENANT, CONTRACT LAW.

UNDER THE TERMS OF THE SURRENDER AGREEMENT THE TENANT OWED THE LANDLORD AN ADDITIONAL $175,000; UPON DEFENDANT'S DEFAULT, THE PLAINTIFF SUED FOR THE CONTRACTUAL LIQUIDATED DAMAGES OF OVER $1,000,000; THE JUDGMENT FOR $175,000 WAS UPHELD; THE LIQUIDATED DAMAGES OF OVER $1,000,000 VIOLATED THE PUBLIC POLICY AGAINST NON-STATUTORY PENALTIES AND FORFEITURES.

The Court of Appeals, in a full-fledged opinion by Judge Rivera, over a three-judge dissent, determined the liquidated damages provision of the landlord-tenant surrender agreement violated the public policy against penalties or forfeitures for which there is no statutory penalty. Defendant-tenant, a grocery store chain, entered a surrender agreement with plaintiff-landlord which allowed defendant to get out from under the lease by making certain installment payments. Defendant defaulted on some of the payments (approximately $175,000) and plaintiff sought to recover liquidated damages of over $1,000,000. Defendant had timely surrendered the premises and it had been relet. Supreme Court had denied plaintiff's motion for summary judgment and granted defendant's cross-motion agreeing to pay $175,000: "Under our well-established rules of contract, the Surrender Agreement's liquidated damages provision does not fairly compensate plaintiff for defendant's delayed installment payments. The provision calls for a sum more than sevenfold the amount due if defendant had complied fully with the Surrender Agreement. We cannot enforce such an obviously and grossly disproportionate award without offending our State's public policy against 'the imposition of penalties or forfeitures for which there is no statutory authority' ... . Accordingly, there was no error in rejecting plaintiff's liquidated damages provision." ***Trustees of Columbia Univ. in the City of N.Y. v. D'Agostino Supermarkets, Inc.*, 2020 N.Y. Slip Op. 06937, Ct App 11-24-20**

FIRST DEPARTMENT

LABOR LAW-CONSTRUCTION LAW, EVIDENCE, PERSONAL INJURY.

PLAINTIFF FELL FROM A SCAFFOLD AFTER TOUCHING A LIVE ELECTRIC WIRE; FAILURE TO TURN OFF THE ELECTRICITY MAY BE COMPARATIVE NEGLIGENCE WHICH DOES NOT DEFEAT A LABOR LAW § 240(1) CAUSE OF ACTION; PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED.

The First Department, reversing Supreme Court, determined plaintiff's motion for summary judgment on his Labor Law § 240 (1) cause of action should have been granted. Plaintiff was standing on a scaffold installing an exit sign when he touched a live wire and fell. Failure to turn off the electricity was at most comparative negligence which does not defeat the action: "The undisputed evidence in the record shows that plaintiff was attempting to install an exit sign in a building under construction while standing about 12 feet above the floor on a scaffold platform, without using any safety harness or safety lines, when he touched a live wire to a component of the sign, causing him to receive an electrical shock and then fall off the scaffold and onto the floor. Plaintiff made a prima facie showing that his accident was proximately caused by the inadequacy of the safety devices he was using or the absence of other safety devices necessary to protect him from the risks posed by working at a significant elevation above the floor ... . Defendants did not raise issues of fact by pointing to evidence that plaintiff checked the scaffold before using it and did not find it to be defective, and that the scaffold had safety railings on all four sides, or by asserting that no other devices such as a safety harness or safety line would have prevented his fall ... . Defendants failed to raise an issue of fact as to whether 'plaintiff knew that he was supposed to use a harness' or safety line, 'or that he disregarded specific instructions to do so' ... . Plaintiff's failure to turn off the power supply before working

with a live wire was at most comparative negligence, which is not a defense to a Labor Law § 240(1) claim ...". ***Goundan v. Pav-Lak Contr. Inc.*, 2020 N.Y. Slip Op. 06950, First Dept 11-24-20**

MEDICAL MALPRACTICE, PERSONAL INJURY, EVIDENCE.

PLAINTIFF'S EXPERT'S AFFIDAVIT DID NOT RAISE A QUESTION OF FACT IN THIS MEDICAL MALPRACTICE ACTION; DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED.

The First Department, reversing Supreme Court, determined the defendants' motion for summary judgment in this medical malpractice action should have been granted. Plaintiff's expert's affidavit did not raise a question of fact: "... [P]laintiff alleges that due to defendants' negligence in diagnosing a skull fracture during an emergency room visit ..., he sustained permanent and disabling neurological damage. ... Defendants' expert opined that defendants did not depart from good and accepted practice by not ordering a CT head scan based on plaintiff's initial clinical presentation in the emergency room. Defendants' expert opined that plaintiff did not meet any of the criteria of the Canadian CT Head Rule (CCHR) used in the emergency room setting to determine which head injuries warrant CT imaging. [P]laintiff did not exhibit any neurological deficits, such as loss of consciousness, vomiting, headaches, or dizziness, and he was alert and mobile. In opposition, plaintiff submitted a conclusory affirmation that failed to specifically address the criteria relied upon by defendants' expert in opining that plaintiff's presentation did not warrant further investigation of a possible skull fracture. Rather, without support from the medical record, plaintiff's expert opined that the injury occurred in the pterion region of the skull, and, moreover, defendants negligently failed to elicit the "mechanism" of injury, i.e., that plaintiff was stabbed, which, when taken together with the location of the wound, would have indicated a likelihood that plaintiff had sustained a skull fracture. Plaintiff's expert further opined, without elaboration, that plaintiff must have had evidence of injury during his initial ER visit since he was diagnosed with a days-old skull fracture less than a week later, and therefore defendants' examination of him was cursory and deficient. These opinions, which rely on hindsight and are both speculative and conclusory, are insufficient to raise a triable issue of fact ...". ***Cruz v. New York City Health & Hosps. Corp.*, 2020 N.Y. Slip Op. 06946, First Dept 11-24-**20

PERSONAL INJURY, EVIDENCE.

PLAINTIFF'S DECEDENT FELL FROM AN UNGUARDED TOP BUNK AT A TEMPORARY SHELTER AND WAS RENDERED A QUADRIPLEGIC; THE SHELTER'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED; THERE WAS EVIDENCE THE SHELTER HAD INSTALLED GUARDRAILS ON OTHER TOP BUNKS.

The First Department, reversing (modifying) Supreme Court, determined the negligence cause of action against defendant temporary housing shelter (CAFLF) should not have been dismissed. Plaintiff's decedent (Philips) was rendered a quadriplegic and later died after falling from an unguarded top bunk. The shelter's maintenance director testified it was dangerous for anyone to sleep in an unguarded top bunk and that the shelter had installed guardrails on other top bunks: "Summary judgment should be denied to CAFLF. An unguarded top bunk is not an inherently dangerous instrumentality, and a property owner or manager has no duty to install guardrails absent notice that an unguarded top bunk presents a dangerous condition. However, Ida Morris, Philip's late wife, testified that she and Philip had complained to a CAFLF social worker about the lack of guardrails before Philip's accident. CAFLF's maintenance director testified that he and his staff knew it was dangerous for anyone to sleep in an unguarded top bunk and that they installed guardrails on top bunks that were going to be slept in. While the breach of an internal policy that transcends the duty of reasonable care cannot be considered evidence of negligence ... , this testimony raises an issue of fact as to whether CAFLF knew or should have known that the unguarded top bunk from which Philip fell was dangerous and, if so, whether CAFLF breached its duty to exercise reasonable care by failing to install a guardrail on the top bunk before Philip's accident." ***Slaughter v. City of New York*, 2020 N.Y. Slip Op. 06972, First Dept 11-24-20**

PERSONAL INJURY, EVIDENCE.

THE DRY BUT ALLEGEDLY SLIPPERY FLOOR WAS NOT ACTIONABLE IN THIS SLIP AND FALL CASE.

The First Department, reversing Supreme Court, determined defendants' motion for summary judgment in this slip and fall case should have been granted. Plaintiff alleged slipped on a dry but slippery floor: "Plaintiff testified that he slipped while working in the kitchen of a hotel, due to slippery flooring material that had just been installed. He stated that the floor was dry, but the flooring did not "grip," and the layers were not properly installed. ... Absent competent evidence of a defect in the surface or some deviation from an applicable industry standard, liability is not imposed for a slippery floor ... . Here, all of the experts stated that the flooring was at least in the 'acceptable' range for slip resistance using industry standards. Moreover, plaintiff failed to present any evidence raising an issue of fact concerning improper installation or defective materials. Evidence of subsequent repairs or remediation is not admissible, unless there is an issue of control or an alleged defect in manufacture, not present here, and does not create an issue of fact as to prior negligence ...". ***Arias v. Stonhard, Inc.*, 2020 N.Y. Slip Op. 06944, First Dept 11-24-20**

SECOND DEPARTMENT

CIVIL PROCEDURE.

ALTHOUGH AN ORDER DISMISSING THE COMPLAINT HAD BEEN ISSUED, NO JUDGMENT DISMISSING THE COMPLAINT WAS ENTERED; THEREFORE THE ACTION WAS STILL VIABLE AND PLAINTIFFS COULD MOVE TO EXTEND THE TIME TO SERVE; THE MOTION SHOULD HAVE BEEN GRANTED IN THE INTEREST OF JUSTICE.

The Second Department, reversing Supreme Court, determined the motion to extend time to serve the defendants in the interest of justice should have been granted. Although defendants' motion to dismiss the complaint for lack of personal jurisdiction had been granted, no judgment dismissing the complaint had been entered. Therefore the action was still viable with plaintiff moved to extend time: "The defendants ... moved, ... pursuant to CPLR 5015(a) to vacate the order and judgment entered upon their default, and pursuant to CPLR 3211(a)(8) to dismiss the complaint insofar as asserted against them for lack of personal jurisdiction. After a hearing to determine the validity of service of process, the Supreme Court, by order entered March 5, 2018, granted those branches of the defendants' motion. However, no judgment dismissing the complaint on the ground of lack of personal jurisdiction was entered. The plaintiff thereafter moved pursuant to CPLR 306-b to extend the time to serve the summons and complaint upon the defendant ... . * * * ... [A]n extension of time was warranted in the interest of justice. The plaintiff demonstrated that a potentially meritorious cause of action existed, that while it timely commenced this action, the statute of limitations had expired by the time it moved to extend the time for service, and that there was no demonstrable prejudice to the defendants as a consequence of the delay in service ... . Moreover, as the interest of justice standard permits consideration of 'any other relevant factor' ... , this Court may consider the fact that the process server failed to comply with a subpoena to appear and give testimony at the hearing to determine the validity of service of process, thereby hampering the plaintiff's ability to meet its burden of proof at that hearing ...". ***Bayview Loan Servicing, LLC v. Tanvir H. Chaudhury*, 2020 N.Y. Slip Op. 07021, Second Dept 11-25-20**

CIVIL PROCEDURE, DEBTOR-CREDITOR, CIVIL FORFEITURE.

NONPARTY BANK SHOULD NOT HAVE BEEN AWARDED POSSESSION OF A CAR SUBJECT TO CIVIL FORFEITURE PROCEEDINGS BROUGHT BY THE PLAINTIFF.

The Second Department, reversing Supreme Court, determined the nonparty banks should not have been awarded possession of cars subject to civil forfeiture proceedings brought by plaintiff: "The plaintiff commenced this civil forfeiture action pursuant to chapter 420, article II of the Code of Suffolk County, seeking forfeiture of a vehicle owned by the defendant Mary A. Nolie, and operated by an individual who was under the influence of an illegal substance. Thereafter, nonparty Santander Consumer USA, Inc. (hereinafter Santander), which held a lien on the vehicle, moved for summary judgment declaring that it was entitled to take possession of the vehicle, free and clear of any claims, and the plaintiff cross-moved for summary judgment awarding civil forfeiture of the vehicle. ... In a judgment ... , the court directed that the vehicle be released to Santander, upon demand, free and clear of any claims. ... Contrary to Santander's contention, it was not named in this action as a noncriminal defendant against whom the County sought to "recover" seized property ... . Thus, the plaintiff was not required to establish that Santander "engaged in affirmative acts which aided, abetted or facilitated the conduct of [a] criminal defendant" in order to obtain forfeiture of the subject property ... . Further, an innocent lienholder is not entitled to immediate possession of a vehicle which is the subject of a civil forfeiture action, but rather is merely entitled to "satisfy its lien from the proceeds of the property after the forfeiture ha[s] been adjudicated against the guilty party" and to seek any deficiency from the debtor ... . Thus, Santander failed to establish its prima facie entitlement to judgment as a matter of law, and the Supreme Court should have denied its motion for summary judgment declaring that it is entitled to take possession of the vehicle, free and clear of any claims. ***Brown v. A 2014 Honda, Vin No. 5J6RM4H74EL039078*, 2020 N.Y. Slip Op. 07024, Second Dept 11-25-20**

Similar issues and result in ***Brown v. A 2007 Chevrolet, Vin No. 1GNET13M372223303*, 2020 N.Y. Slip Op. 07023, Second Dept 11-25-20**

CIVIL PROCEDURE, FORECLOSURE.

THE FAILURE TO RAISE THE LACK OF STANDING DEFENSE IN A FORECLOSURE ACTION CAN BE REMEDIED BY A MOTION TO AMEND THE ANSWER AND BY RAISING THE DEFENSE IN OPPOSITION TO A MOTION FOR SUMMARY JUDGMENT.

The Second Department, in a comprehensive opinion by Justice Miller, explained the relationship between the waiver provisions in CPLR 3211(e) and Real Property Actions and Proceedings Law (RPAPL) 1302-a in foreclosure proceedings. The opinion includes a detailed discussion of when defenses are waived by the failure to include them in the answer and when and how such omissions can be remedied by a motion to amend or in a summary judgment motion. The opinion is much too detailed to be summarized here and should be consulted as authoritative on these issues. The narrow issue addressed by the opinion is the effect of failing to raise the defense of a lack of standing in the answer to a foreclosure complaint:

"... [W]e now reaffirm that a waiver of the defense of standing pursuant to CPLR 3211(e) should be given the same force and effect as a waiver of the affirmative defenses specifically enumerated in CPLR 3211(a)(3) and (5) ... . Accordingly, a waiver of the affirmative defense of standing pursuant to CPLR 3211(e) may be retracted through the amendment of a pleading pursuant to CPLR 3025 ... . Case law from this Court should not be read to hold otherwise ... . * * * Where applicable, RPAPL 1302-a places the defense of standing on a footing comparable with the other defenses that are exempt from the waiver provisions of CPLR 3211(e), to wit, those defenses listed in subdivisions CPLR 3211(a)(2), (7), and (10), which may be raised by motion 'at any time' ... , or by amendment to a pleading, 'if one is permitted' (CPLR 3211[e]; see CPL 3025[b]). Even where the defense of standing is omitted from a defendant's answer in violation of CPLR 3018(b), the defense may be raised for the first time in opposition to a plaintiff's motion for summary judgment ...". ***GMAC Mtge., LLC v. Coombs*, 2020 N.Y. Slip Op. 07039, Second Dept 11-25-20**

CIVIL RIGHTS LAW, EVIDENCE, IMMUNITY, CRIMINAL LAW.

UNDER THE AGUILAR-SPINELLI ANALYSIS, THERE ARE QUESTIONS OF FACT ABOUT WHETHER THERE WAS PROBABLE CAUSE FOR PLAINTIFF'S ARREST; THE CITY'S MOTION FOR SUMMARY JUDGMENT ON THE 42 U.S.C. § 1983, FALSE ARREST, ASSAULT AND BATTERY CAUSES OF ACTION SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined the city's motion for summary judgment on the 42 U.S.C. § 1983, false arrest, assault and battery causes of action should not have been granted. Under the Aguilar-Spinelli analysis, there were questions of fact about the existence of probable cause for plaintiff's arrest: " 'The existence of probable cause constitutes a complete defense to a cause of action alleging false arrest, including a cause of action asserted pursuant to 42 USC § 1983 to recover damages for the deprivation of Fourth Amendment rights under color of state law that is the federal-law equivalent of a state common-law false arrest cause of action' ... . 'However, [w]hen an arrest is made without a warrant, as here, a presumption arises that it was unlawful, and the burden of proving justification is cast upon the defendant' ... . Where the arrest was made without a prior judicial determination of probable cause, and where the arresting officer's alleged probable cause is based on hearsay, probable cause is properly evaluated under the Aguilar-Spinelli test ... . Under the Aguilar-Spinelli rule, where, as here, probable cause is predicated upon the hearsay statement of an informant, the proponent of the hearsay statement 'must demonstrate that the informant is reliable and that the informant had a sufficient basis for his or her knowledge' ... . Here the defendants failed to eliminate triable issues of fact as to the existence of probable cause for the arrest. The existence of triable issues of fact with respect to whether the police evaluations at issue, such as the evaluation of probable cause to arrest and requisite suspicion to perform a strip search, were objectively reasonable precludes an award of summary judgment ... on the ground of qualified immunity ... . 'To sustain a cause of action to recover damages for assault, there must be proof of physical conduct placing the plaintiff in imminent apprehension of harmful contact' ... . 'To recover damages for battery, a plaintiff must prove that there was bodily contact, made with intent, and offensive in nature' ... . A claim predicated on assault and battery may be based upon contact during an unlawful arrest ... . Here, the defendants' failure to establish, prima facie, that the plaintiff's arrest was lawful precluded an award of summary judgment dismissing the sixth cause of action, which alleged assault and battery ...". ***Cayruth v. City of Mount Vernon*, 2020 N.Y. Slip Op. 07027, Second Dept 11-25-20**

CRIMINAL LAW, EVIDENCE.

EVIDENCE OF A 1990 ROBBERY AND SEXUAL ASSAULT TO PROVE IDENTITY SHOULD NOT HAVE BEEN ADMITTED; THE SIMILARITIES WERE NOT STRONG ENOUGH.

The Second Department, reversing defendant's attempted rape conviction, determined the evidence of a 1990 robbery and sexual assault should not have been admitted as evidence of the identity of the perpetrator. But the burglary, robbery and sexual abuse convictions, apparently stemming from the same incident, were not disturbed: "... [T]he similarities between the alleged 1990 robbery and sexual assault and the attack on the complainant were not sufficiently unique or unusual and did not establish a distinctive modus operandi relevant to establishing the defendant's identity as the perpetrator in this case. While both incidents involved robberies and sexual assaults of unaccompanied Caucasian women, during daytime hours, in the lobbies of residential buildings, these similarities were not so unique as to give rise to an inference that the perpetrator of each crime was the same individual ... . Accordingly, the Supreme Court erred in permitting the People to present evidence regarding the 1990 robbery and assault in order to establish the defendant's identity ... . The error was harmless as to all of the charges except the attempted rape in the first degree since the proof of the defendant's guilt, without reference to the erroneously admitted Molineux evidence, was overwhelming as to those other charges, and there was no reasonable possibility that the jury would have acquitted the defendant on those charges had it not been for the error ... . Furthermore, the erroneous admission of the Molineux evidence did not deprive the defendant of a fair trial ... . We reach a different conclusion with respect to the defendant's conviction of attempted rape in the first degree. Because the evidence of the defendant's guilt of that charge was not overwhelming, the error cannot be deemed harmless, and the defendant's conviction of that charge must be vacated and a new trial ordered as to that charge ...". ***People v. Duncan*, 2020 N.Y. Slip Op. 07090, Second Dept 11-25-20**

CRIMINAL LAW, EVIDENCE.

CRIMINAL POSSESSION OF A WEAPON THIRD DEGREE IS NOT AN ARMED FELONY; MATTER REMITTED FOR A NEW YOUTHFUL OFFENDER STATUS DETERMINATION.

The Second Department determined defendant was eligible for youthful offender status because criminal possession of a weapon third degree is not an armed felony: "The Supreme Court denied the defendant's application for youthful offender status based upon its mistaken belief that he had been convicted of an armed felony, which required the court to find either mitigating circumstances that bear directly upon the manner in which the crime was committed or that the defendant was only a minor participant in the crime (see CPL 720.10[3]). The People correctly concede that the court erred in finding that the defendant had been convicted of an armed felony, since criminal possession of a weapon in the third degree pursuant to Penal Law 265.02(7) does not require proof that the firearm was loaded (see CPL 1.20[41] ...). Thus, the defendant was eligible for youthful offender treatment without any finding of mitigation (see CPL 720.10[2]). Accordingly, we remit the matter ... for a new determination of the defendant's application for youthful offender status and resentencing thereafter." ***People v. Javon L.*, 2020 N.Y. Slip Op. 07094, Second Dept 11-25-20**

CRIMINAL LAW, EVIDENCE.

THE APPLICATION FOR A WARRANT FOR THE SEARCH OF DEFENDANT'S CELL PHONE DID NOT PROVIDE PROBABLE CAUSE FOR THE SEARCH; THE MOTION TO SUPPRESS SHOULD HAVE BEEN GRANTED; NEW TRIAL ORDERED.

The Second Department, ordering a new trial, determined the application for a warrant to search defendant's cell phone did not provide probable cause for the search: "At the time of the arrest, a cell phone was recovered from the defendant's person. Shortly thereafter, the arresting officer submitted an affidavit in support of an application for a warrant to search the cell phone. In relevant part, the officer averred that individuals involved in robberies and other crimes 'utilize mobile telephones to facilitate their illegal activities,' and opined, without further elaboration or factual support, that the cell phone recovered on the defendant's person 'possesses information concerning the communications related to the instant robbery,' 'had been utilized to speak with co-conspirators, suppliers and/or customers in furthering illegal activities,' and contained 'information that would lead to further apprehensions.' ... [T]he arresting officer's conclusory statement that the cell phone contained information relevant to the robbery was bereft of any supporting factual allegations—hearsay or otherwise—and, therefore, plainly insufficient to establish probable cause ... . Although the arresting officer later testified, at trial, that he had observed photographs of a gun on the cell phone at the time of the defendant's arrest, such information—which arguably could have established probable cause provided it had been lawfully obtained ... —was never included in the officer's supporting affidavit. Under these circumstances, the warrant application did not provide a reasonable factual basis for the issuance of the warrant ...". ***People v. Boothe*, 2020 N.Y. Slip Op. 07084, Second Dept 11-25-20**

CRIMINAL LAW, EVIDENCE, APPEALS.

THE EVIDENCE OF PHYSICAL INJURY WAS LEGALLY INSUFFICIENT; ASSAULT SECOND CONVICTION VACATED; UNPRESERVED ISSUE CONSIDERED ON APPEAL IN THE INTEREST OF JUSTICE.

The Second Department, vacating the assault second conviction, considering the issue in the interest of justice, determined the evidence of physical injury was legally insufficient: "Viewing the evidence in the light most favorable to the prosecution ... , it was legally insufficient to establish, beyond a reasonable doubt, that the child complainant sustained a 'physical injury' within the meaning of Penal Law § 10.00(9). Physical injury is defined as 'impairment of physical condition or substantial pain'... . The several witnesses described only a minor injury, stated variously that they saw 'a redness' on the child's cheek, or a slight swelling under his eye and cheek, or a bruise to the right cheek, which was treated with a cold pack. Nor did the record support a finding that the child complainant experienced substantial pain because he experienced only tenderness for one to two hours after the incident. Accordingly, there was insufficient evidence that the child complainant suffered a 'physical injury' within the meaning of Penal Law § 10.00(9) ...". ***People v. Bernazard*, 2020 N.Y. Slip Op. 07083, Second Dept 11-25-20**

CRIMINAL LAW, EVIDENCE, VEHICLE AND TRAFFIC LAW.

AN ALLEGED CONTROLLED SUBSTANCE WAS NOT IN PLAIN VIEW IN THE VEHICLE; THEREFORE THE WARRANTLESS SEARCH OF A CLOSED CONTAINER IN THE VEHICLE, WHICH REVEALED A WEAPON, WAS NOT JUSTIFIED; WEAPONS CHARGES DISMISSED.

The Second Department, dismissing the weapons charges, determined the search of defendant's vehicle was not justified. The officer (Chowdhury) saw the top of a prescription bottle, pulled the bottle out of a pouch, determined it contained a controlled substance, a searched a closed container to find the weapon: "Chowdhury observed 'two clear cups of brown liquid, alcohol' in the cup holders in the vehicle's front console and smelled an odor of alcohol emanating from the vehicle. Chowdhury asked the defendant and an individual in the front passenger seat to exit the vehicle, and they complied. Chowdhury further testified that the rear passenger side door was open and that, with the aid of a flashlight, he observed

the 'white top' of a prescription bottle sticking out of the pouch on the back of the front passenger seat. Chowdhury then entered the vehicle, pulled the bottle out, and observed that it was clear, with no prescription label, and had unlabeled white pills inside that Chowdhury and [officer] Carrieri identified as Oxycodone. Carrieri then began searching the vehicle for any weapons or other contraband and found a handgun inside of a closed compartment under the rug behind the driver's seat. The defendant was arrested, and later made a statement to the police regarding the gun. ... The Supreme Court should have granted that branch of the defendant's omnibus motion which was to suppress the gun and his statement. The officers' observations of the brown liquid in the cups in the front console and the smell emanating from the vehicle gave them probable cause to suspect a violation of Vehicle and Traffic Law § 1227, which prohibits the possession of open containers containing alcohol in a vehicle located upon a public highway, and would have justified their entry into the vehicle to seize the cups of liquid and search for additional open containers ... . However, since there was nothing from Officer Chowdhury's observation of the top of the prescription bottle located in the seat pocket that indicated that the bottle contained contraband, there was no justification for his removal of the bottle and detailed inspection of it and its contents or for the subsequent search of the car for weapons or other contraband. Chowdhury testified that it was only after he pulled the bottle out of the pouch and pulled upward on the top of it that he was able to see that it was unlabeled and contained what he identified as Oxycodone. Thus, contrary to the People's contention, it cannot be said that a suspected controlled substance was in plain sight ...". ***People v. Boykin*, 2020 N.Y. Slip Op. 07085, Second Dept 11-25-20**

CRIMINAL LAW, IMMIGRATION LAW.

THE SENTENCING JUDGE DID NOT INFORM DEFENDANT OF THE IMMIGRATION CONSEQUENCES FOR NONCITIZENS; MATTER REMITTED TO GIVE THE DEFENDANT THE OPPORTUNITY TO MOVE TO VACATE HER GUILTY PLEA, DESPITE THE FACT DEFENSE COUNSEL TOLD THE JUDGE THAT DEFENDANT SAID SHE WAS A CITIZEN.

The Second Department remitted the matter to allow defendant the opportunity to move to vacate her plea of guilty based upon the sentencing court's failure to inform the defendant of the immigration consequences for noncitizens. Defense counsel had informed the court that defendant had informed him she was a citizen: "... [D]efense counsel's statement during the plea proceeding that the defendant had informed him that she was a citizen of the United States did not absolve the court of its obligations pursuant to Peque [22 NY3d 168]. As we explained in People v. Williams, 'a trial court should not ask a defendant whether he or she is a United States citizen and decide whether to advise the defendant of the plea's deportation consequence based on the defendant's answer. Instead, a trial court should advise all defendants pleading guilty to felonies that, if they are not United States citizens, their felony guilty plea may expose them to deportation' ... . [I]n the present case ... the presentence investigation report explained that an 'immigration record check' had revealed, among other things, that the defendant was not in the United States 'legally.' The defendant's due process claim is thus properly presented on the defendant's direct appeal, and in the absence of the warning required under Peque, we remit the matter to the Supreme Court, Kings County, to afford the defendant an opportunity to move to vacate her plea, and for a report by the Supreme Court thereafter ...". ***People v. Ulanov*, 2020 N.Y. Slip Op. 07108, Second Dept 11-25-20**

ENVIRONMENTAL LAW, ADMINISTRATIVE LAW.

THE GROUNDS FOR THE DEPARTMENT OF ENVIRONMENTAL CONSERVATION'S DENIAL OF PETITIONER PROPERTY OWNER'S APPLICATION TO PARTICIPATE IN THE BROWNFIELD CLEANUP PLAN WERE IRRATIONAL AND UNREASONABLE.

The Second Department, reversing Supreme Court, determined the petitioner property owner's application to participate in the Brownfield Cleanup Plan (BCP) should not have been denied by the Department of Environmental Conservation (DEP) on the grounds that; (1) the petitioner had already entered an agreement to clean up the property; and (2) an additional financial burden would be imposed on the state. Both grounds were deemed irrational and unreasonable: "... [T]he DEC's determination that the public interest would not be served by granting the petitioner's application because National Grid had already agreed to remediate the site pursuant to the consent order was irrational and unreasonable. We hold, consistent with the determinations reached by several other courts, that a 'brownfield site' is not ineligible for acceptance into the BCP 'on the ground that it would have been remediated in any event' ... . [A]ny 'financial misgivings' … concerning the fiscal impact of a property being accepted into the BCP on the state is irrelevant to the question of whether the public interest would be served by the granting of an application to participate in the BCP. The DEC is not tasked with acting as 'a fiscal watchdog' ... . [T]he DEC's determination that the site was ineligible for acceptance into the BCP on the ground that it is was 'subject to [an] on-going state . . . environmental enforcement action related to the contamination which is at or emanating from the site' is also irrational and unreasonable ... . There is no support in the language of the statute ECL 27-1405(2)(e) or in its legislative history for the DEC's conclusion that the consent order constituted an ongoing enforcement action ...". ***Matter of Wythe Berry, LLC v. New York State Dept. of Envtl. Conservation*, 2020 N.Y. Slip Op. 07076, Second Dept 11-25-20**

FAMILY LAW, EVIDENCE.

THE CHILD'S HEARSAY STATEMENTS CLAIMING HE WAS PUNCHED IN THE STOMACH WERE NOT CORROBORATED AND THEREFORE COULD NOT SUPPORT A FINDING OF NEGLECT BY THE INFLICTION OF EXCESSIVE CORPORAL PUNISHMENT.

The Second Department, reversing (modifying) Family Court, determined the child's hearsay statements claiming Manuel R. punched him in the stomach were not corroborated. Therefore the finding that Manuel R. neglected the child by inflicting excessive corporal punishment: "... [G]enerally a petitioner must present nonhearsay, relevant evidence to reliably corroborate the out-of-court disclosures ... . Moreover, 'repetition of an accusation by a child does not corroborate the child's prior account of it' ... . Here, where there was no physical evidence of neglect, the child's out-of-court statements that Manuel R. disciplined him by punching him in the stomach were not sufficiently corroborated by nonhearsay, relevant evidence tending to support the reliability of the statements. While the child did say 'ow, ow it hurt' when a case worker touched his stomach, this occurred after the caseworker told the child that she did not see bruises on his stomach. Moreover, although the child made a fist to demonstrate to the caseworker what Manuel R. allegedly did when he punched him, he did this at the same time he made his verbal accusation that Manuel R. punched him. Under these circumstances, the child's reaction to the caseworker's touch and his gesture in making a fist were simply a repetition of his verbal accusation, which did not serve to corroborate his out-of-court statements ... . As there was no other evidence tending to corroborate the child's out-of-court statement, the Family Court's finding that Manuel R. inflicted excessive corporal punishment on the child was not supported by a preponderance of the evidence." ***Matter of Treyvone A. (Manuel R.)*, 2020 N.Y. Slip Op. 07049, Second Dept 11-25-20**

INSURANCE LAW, ARBITRATION, NEGLIGENCE.

THERE WAS A QUESTION OF FACT WHETHER THE VEHICLE WHICH STRUCK PETITIONER WAS THE VEHICLE INSURED BY GEICO; ARBITRATION OF PETITIONER'S DEMAND FOR UNINSURED MOTORIST BENEFITS FROM ALLSTATE, HER INSURER, SHOULD HAVE BEEN STAYED AND A FRAMED ISSUE HEARING SHOULD HAVE BEEN ORDERED.

The Second Department, reversing Supreme Court, determined a stay of arbitration should have been granted and a framed issue hearing granted. Respondent, Michelle Robinson, was struck from behind the driver, Randall, gave Robinson her contact information but left the scene before the police arrived. GEICO, the insurer of the offending vehicle, denied Robinson's claim stating that Lewis, not Randall, was their insured. Robinson then demanded arbitration for uninsured motorist benefits from Allstate, her insurer. Allstate moved to stay arbitration and requested a framed issue hearing: " 'The party seeking a stay of arbitration has the burden of showing the existence of sufficient evidentiary facts to establish a preliminary issue which would justify the stay' ... . 'Thereafter, the burden shifts to the party opposing the stay to rebut the prima facie showing' ... . 'Where a triable issue of fact is raised, the Supreme Court, not the arbitrator, must determine it in a framed-issue hearing, and the appropriate procedure under such circumstances is to temporarily stay arbitration pending a determination of the issue' ... . Here, the documents submitted by Allstate in support of the petition demonstrated the existence of sufficient evidentiary facts to establish a preliminary issue justifying a temporary stay ... . By submitting the MV-104 motor vehicle accident report and the MVR vehicle record report with the results of the license plate search for the plate number provided by Robinson, Allstate made a prima facie showing that the offending vehicle involved in the subject accident had insurance coverage with GEICO at the time of the accident ... . In opposition, Robinson and the GEICO respondents raised questions of fact as to whether the offending vehicle was involved in the subject accident ...". ***Matter of Allstate Ins. Co. v. Robinson*, 2020 N.Y. Slip Op. 07051, Second Dept 11-25-20**

PERSONAL INJURY, EVIDENCE.

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT IN THIS REAR-END TRAFFIC ACCIDENT CASE SHOULD HAVE BEEN GRANTED; THE DEFENDANT'S ALLEGATION PLAINTIFFS' CAR STOPPED SUDDENLY DID NOT RAISE A QUESTION OF FACT.

The Second Department, reversing Supreme Court, determined defendant's allegation plaintiffs' vehicle came to a sudden stop did not raise a question of fact about defendant's negligence in this rear-end collision case: "... [T]he defendants failed to raise a triable issue of fact as to whether there was a nonnegligent explanation for the happening of the accident, or whether the emergency doctrine applied to this case ... . '[T]he emergency doctrine does not apply to typical accidents involving rear-end collisions because trailing drivers are required to leave a reasonable distance between their vehicles and vehicles ahead' ... . Although the defendants submitted a police accident report and the affidavit of Miller, both of which contained statements that the plaintiffs' vehicle made a sudden stop behind a vehicle that came to an abrupt stop in front of them, Miller testified at his deposition that he could not recall the speed at which he was traveling, or when he first observed the plaintiffs' vehicle, prior to the accident. 'Without such evidence, the assertion that the [plaintiffs'] vehicle came to a sudden stop was insufficient to rebut the inference that [Miller] was negligent' ... , and failed to demonstrate that the emergency doctrine was applicable to this case ...". ***Capuozzo v. Miller*, 2020 N.Y. Slip Op. 07026, Second Dept 11-25-20**

SOCIAL SERVICES LAW, CIVIL RIGHTS LAW, PERSONAL INJURY.

SOCIAL SERVICES LAW ARTICLE 11 DOES NOT CREATE A PRIVATE RIGHT OF ACTION FOR THE INAPPROPRIATE USE OF PHYSICAL RESTRAINTS.

The Second Department, in a full-fledged opinion by Justice Leventhal, determined the Social Services Law did not create a private right of actions for the inappropriate use of physical restraints. The complaint alleged infant plaintiff, a person with special needs, was injured by the hospital defendants: "[The] causes of action alleged assault, battery, false imprisonment, negligent hiring, supervision, and retention, violation of a section of Social Services Law article 11, violation of Civil Rights Law § 79-n, and negligence. The two causes of action alleging violation of Social Services Law article 11 were the fifth and sixth causes of action. In these causes of action, the plaintiffs alleged that the defendants committed physical abuse and deliberate inappropriate use of physical restraints as defined in Social Services Law § 493(4)(b). * * * A legislative intent to create a private right of action for alleged violation of article 11 of the Social Services Law is not fairly implied in these statutory provisions and their legislative history. Finding such a private right of action would be inconsistent with the legislative scheme. The Protection of People with Special Needs Act, generally, and article 11 of the Social Services Law, specifically, 'already contain[ ] substantial enforcement mechanisms'... . These mechanisms in the Act include the creation of the Justice Center, the 'central agency responsible for managing and overseeing the incident reporting system, and for imposing or delegating corrective action' ... . These mechanisms in article 11 include the maintenance of a statewide vulnerable persons' central register to accept, investigate, and respond to allegations of abuse or neglect; the delineation of possible findings and consequences in connection with an investigation of abuse or neglect allegations, along with procedures for amending and appealing substantiated abuse or neglect reports; and the maintenance of a register of subjects found to have a substantiated category one abuse or neglect case. The substantial enforcement mechanisms 'indicat[e] that the legislature considered how best to effectuate its intent and provided the avenues for relief it deemed warranted' ...". ***Joseph v. Nyack Hosp.*, 2020 N.Y. Slip Op. 07042, Second Dept 11-25-20**

THIRD DEPARTMENT

ATTORNEYS, JUDGES, CRIMINAL LAW.

THE DISTRICT ATTORNEY SHOULD NOT HAVE BEEN DISQUALIFIED FROM PROSECUTING THE DEFENDANT FOR ALLEGED SEX OFFENSES ON THE GROUND THAT, AS A FAMILY COURT JUDGE, THE DISTRICT ATTORNEY HAD PRESIDED OVER FAMILY COURT PROCEEDINGS INVOLVING THE DEFENDANT AND THE ALLEGED VICTIM OF THE CHARGED SEX OFFENSES.

The Third Department, reversing County Court, determined petitioner, the county district attorney, should not have been disqualified from prosecuting Jamel Brandow for sex offense charges on the ground that, as a Family Court judge, the district attorney had presided over Family Court proceedings against Brandow which also involved the alleged victim of the current charges: "Pursuant to Judiciary Law § 17, a former judge 'shall not act as attorney or counsellor in any action, claim, matter, motion or proceeding, which has been before him [or her] in his [or her] official character' … . Here, contrary to respondent's determination, the underlying criminal matter was not in any way before petitioner in his former judicial capacity. Although petitioner presided over proceedings brought against Brandow in Family Court in 2008, the matters litigated in those proceedings bear no similarity to the allegations of sexual misconduct charged in the indictment ... . Further, although petitioner determined that Brandow violated an order of protection issued in favor of the victim and others, the violation did not arise out of any contact between Brandow and the victim. Accordingly, as the underlying criminal matter was not previously before petitioner in his judicial capacity, Judiciary Law § 17 does not prohibit petitioner's prosecution of the subject criminal charges ...". ***Matter of Czajka v. Koweek*, 2020 N.Y. Slip Op. 07009, Third Dept 11-25-20**

CIVIL PROCEDURE, EDUCATION-SCHOOL LAW, ADMINISTRATIVE LAW.

PETITIONER IS ENTITLED TO DISCOVERY IN THE ARTICLE 78 PROCEEDING CONTESTING SUNY ALBANY'S FINDING PETITIONER VIOLATED THE CODE OF CONDUCT BY HAVING NONCONSENSUAL SEX; THE ALLEGED VICTIM HAS NO MEMORY OF THE INCIDENT; PETITIONER ALLEGED BIAS ON THE PART OF THE SCHOOL'S TITLE IX INVESTIGATOR.

The Third Department, reversing Supreme Court, over a dissent, determined petitioner was entitled to discovery in petitioner's Article 78 proceeding contesting SUNY Albany's finding petitioner violated the school's code of conduct. The student was accused of sexual misconduct, but the alleged victim had no memory of the incident. The investigation was conducted by respondent Chantelle Cleary, the Title IX coordinator at the school: "We agree with petitioner that Supreme Court erred in denying his motion for discovery. In a special proceeding such as this, discovery is available only by leave of court (see CPLR 408 ...). 'Among the factors weighed are whether the party seeking disclosure has established that the requested information is material and necessary, whether the request is carefully tailored to obtain the necessary information and whether undue delay will result from the request' ... . Petitioner's motion requested the disclosure of, among other things,

'[r]ecordings of all meetings and interviews' between petitioner and the Title IX investigators, as well as '[r]ecordings of all interviews of all witnesses' conducted in furtherance of the investigation. Petitioner cited the alleged bias of Cleary, and the attendant bias on his guarantee of an impartial investigation, as the reason the requested discovery was 'material and necessary'; respondents did not argue that the requested discovery was overbroad or would cause undue delay. Thus, we find that petitioner met the requirements for discovery ... . Here, where the nonconsensual nature of the sexual activity was not predicated on the reporting individual's verbal and physical manifestation of nonconsent — but on her ability to knowingly consent due to excessive inebriation — and the reporting individual avers no memory of the activity, the Board's determination was necessarily heavily reliant on that part of the referral report that contained a summary of statements of persons who had observed the reporting individual during Friday evening, prior to her sexual encounter with petitioner. Notably, these are not sworn affidavits of the witnesses, but rather statements collected and compiled by the Title IX investigators." ***Matter of Alexander M. v. Cleary*, 2020 N.Y. Slip Op. 06987, Third Dept 11-25-20**

CIVIL PROCEDURE, FORECLOSURE.

SUPREME COURT PROPERLY DENIED PLAINTIFF BANK'S MOTION TO EXTEND THE TIME TO SERVE DEFENDANT IN THIS FORECLOSURE ACTION, TWO-JUSTICE DISSENT.

The Third Department, over a two-justice dissent, determined Supreme Court properly denied plaintiff bank's motion to extend the time to serve defendant in the interest of justice: "... [A] court may, in the interest of justice, extend the time in which a plaintiff may effectuate proper service upon a defendant (see CPLR 306-b) ... . Whether to grant an extension of time for service in the interest of justice is a discretionary determination, requiring the trial court to engage in 'a careful judicial analysis of the factual setting of the case' and balance competing interests ... . The trial court's determination is guided by various factors and circumstances that may be taken into consideration, including the plaintiff's diligence (or lack thereof), the expiration of the statute of limitations, whether the underlying cause of action is meritorious, the length in delay of service, whether the plaintiff promptly sought the extension of time and any prejudice that may be borne by the defendant ... . This Court should not disturb the trial court's discretionary determination unless such determination constitutes an abuse of discretion ... . The statute of limitations had expired prior to plaintiff making its extension motion — a factor that weighs in favor of granting the extension motion. However, plaintiff engaged in a pattern of dilatory conduct throughout the action's pendency over nearly a decade. Indeed, it took plaintiff roughly three years after commencing the action to file a request for judicial intervention and the case was administratively closed by Supreme Court on at least one occasion. Additionally, despite having been made aware of the service issue in April 2016, plaintiff did not ultimately move for an extension to serve the complaint until November 2018, roughly 2½ years later. Further, as Supreme Court recognized, the mortgage contains a significant error, which raises real concerns as to plaintiff's ability to prevail upon the merits. In our view, Supreme Court weighed the appropriate factors and reasonably concluded that they did not militate in favor of plaintiff ...". ***JPMorgan Chase Bank N.A. v. Kelleher*, 2020 N.Y. Slip Op. 06990, Third Dept 11-25-20**

CIVIL PROCEDURE, MEDICAL MALPRACTICE, NEGLIGENCE.

PLAINTIFF IN THIS MEDICAL MALPRACTICE, WRONGFUL DEATH ACTION SHOULD NOT HAVE BEEN ALLOWED TO AMEND THE COMPLAINT BY ADDING A PARTY AFTER THE STATUTE OF LIMITATIONS HAD RUN; TWO OF THE THREE PRONGS OF THE RELATION BACK DOCTRINE WERE NOT DEMONSTRATED.

The Third Department, reversing Supreme Court, determined the relation back doctrine did not apply and plaintiff's motion to amend the complaint to add a party after the statute of limitations had run should not have been granted. Initially plaintiff named two individuals as defendants, Smithem and Dey, in this medical malpractice, wrongful death action. After the statute had run plaintiff's attorney realized Smithem and Dey were not the right parties and sought to amend the complaint to add Crystal Run Healthcare. Plaintiff acknowledged that Crystal Run employees Smithem and Dey never performed the conduct alleged in the complaint, so Crystal Run was not united in interest with the named defendants. In addition plaintiff failed to demonstrate the correct parties could not have been identified before the statute of limitations ran: "The relation back doctrine allows a plaintiff to amend the complaint to add a party even though the statute of limitations has expired if the plaintiff satisfies three conditions: (1) both claims must arise out of the same occurrence; (2) the proposed defendant must be united in interest with the original defendants; and (3) the proposed defendant must have known or should have known that, but for a mistake by the plaintiff as to the proposed defendant's identity, the action would have been also brought against it ... . Supreme Court found that Crystal Run was united in interest with both Smithen and Dey by virtue of an employer-employee relationship and principles of vicarious liability. Although such circumstances can lead to a finding of unity in interest ... , plaintiff has candidly admitted that Smithen and Dey are free from any and all liability because they never performed the conduct that is the basis of the complaint. As such, plaintiff has vitiated any claim of vicarious liability. ... Although plaintiff alleged that Smithen and Dey were employed by Catskill Regional Medical Center in the complaint, the answers of both the hospital and Smithem denied said allegation. Additionally, plaintiff served Smithem (and attempted to serve Dey) at Crystal Run. Plaintiff's failure to act on this knowledge prior to the expiration of the statute of limitations is not the type of mistake contemplated under the relation back doctrine ...". ***Fasce v. Smithem*, 2020 N.Y. Slip Op. 07010, Third Dept 11-25-20**

CRIMINAL LAW.

A DEFENDANT MAY PLEAD GUILTY TO A CRIME WHICH IS A LEGAL IMPOSSIBILITY OR FOR WHICH THERE IS NO FACTUAL BASIS AS LONG AS IT IS SUBJECT TO A LESSER PENALTY THAN THE CHARGED OFFENSE(S).

The Third Department noted that a defendant may plead guilty to a crime which is a legal impossibility and for which there is no factual basis, as long as it is a reduced charge: "Assuming without deciding that defendant is correct in claiming that his incarceration rendered any attempt to possess the pills recovered from his residence a legal impossibility, that was no bar to him 'plead[ing] guilty to a nonexistent crime in satisfaction of an [accusatory instrument] charging a crime for which a greater penalty may be imposed' ... . To the extent that defendant's argument may also be construed as a claim that it was factually impossible for him to commit the crime, and assuming that such an argument survives his appeal waiver ... , a factual basis is not required for a guilty plea to a reduced charge ...". ***People v. Bonacci*, 2020 N.Y. Slip Op. 06980, Third Dept 11-25-20**

CRIMINAL LAW.

THE DE BOUR STREET STOP REQUIREMENTS, NOT THE TRAFFIC STOP REQUIREMENTS, APPLY TO THE APPROACH OF A PERSON IN A STATIONARY CAR WITH THE ENGINE RUNNING.

The Third Department noted that a police officer (Meskill) approaching a person in a parked car is subject to the De Bour requirements for a street stop, not a traffic stop: "With respect to the initial encounter, unlike a stop of a moving vehicle — which must be based upon reasonable suspicion of criminal activity ... or probable cause to believe that a traffic violation has occurred ... — '[a] police approach to an occupied, stationary vehicle is subject to the first level of the De Bour analysis' and is justified if 'supported by an objective, credible reason, not necessarily indicative of criminality' ... . There is no dispute here that Meskill was authorized to approach defendant's vehicle in response to a citizen-requested welfare check upon observing him slumped over with the engine running." ***People v. Spradlin*, 2020 N.Y. Slip Op. 06982, Third Dept 11-25-20**

FAMILY LAW, CIVIL PROCEDURE, JUDGES.

AS NO PETITION WAS BEFORE THE COURT, FAMILY COURT LACKED SUBJECT MATTER JURISDICTION AND THEREFORE DID NOT HAVE THE AUTHORITY TO ORDER A FORENSIC EVALUATION.

The Third Department, reversing Family Court, determined Family Court did not have subject matter jurisdiction when it issued a forensic evaluation because no petition was before the court: "Petitioner (hereinafter the father) and respondent (hereinafter the mother) are the parents of two children (born in 2004 and 2006). In July 2018, the parties stipulated in open court to a settlement of the father's modification of custody petition and violation petitions then pending in Family Court. The parties stipulated to, among other things, suspension of the collection of accrued child support arrears and, as relevant here, agreed to engage in family counseling and to a protocol for the selection of a therapist. The transcript of the parties' stipulation of settlement was incorporated by reference into a consent order entered in March 2019. Thereafter, the parties failed to agree on the selection of a therapist, prompting the father to request that the court appoint as a therapist a licensed psychiatrist versed in parental alienation. In June 2019, the court appointed a psychologist, but the psychologist declined to provide counseling services. By letter, the father then, among other things, requested that the court order a forensic evaluation by a different licensed psychologist. After converting the father's request to an application for a court-ordered forensic evaluation, the court ordered a forensic evaluation over the mother's objection. The mother appealed from that order, and we granted the mother's subsequent motion for a stay of Family Court's order pending resolution of this appeal ... . * * * Less than one year after the stipulation was incorporated by reference into a consent order, Family Court ... ordered a forensic evaluation, citing the 'unusual situation' whereby the parties stipulated to — and the court ordered — counseling and all efforts failed. This was error, as no petition had been filed by the father since the March 2019 consent order was entered, and no proceedings were therefore pending to provide Family Court with jurisdiction to render the appealed-from order directing a forensic evaluation (see Family Ct Act §§ 154-a, 251 [a] ...). Indeed, as is the case here, an expectation of finality derives from a stipulation of settlement entered into by those with legal capacity to negotiate ... . Accordingly, we find that Family Court lacked subject matter jurisdiction to order a forensic evaluation." ***Matter of James R. v. Jennifer S.*, 2020 N.Y. Slip Op. 06997, Third Dept 11-25-20**

FAMILY LAW, JUDGES.

FATHER HAD BROUGHT HIS CHILD SUPPORT PAYMENTS CURRENT; FAMILY COURT DID NOT HAVE THE AUTHORITY TO IMPOSE A SUSPENDED JAIL SENTENCE CONDITIONED ON PAYMENT OF FUTURE CHILD SUPPORT.

The Third Department, reversing Family Court, determined that once father had paid the child support arrears the court did not have the authority to impose a suspended jail sentence: "... [T]he father ... is aggrieved by ... the order suspending [the jail] sentence upon the condition that he comply with the support order for three years. A jail sentence imposed for a

party's civil contempt in failing to comply with an order — such as the father's willful failure to pay support as ordered — is not punitive and only serves 'the remedial purpose of compelling compliance' with the order ... . There was 'no remedial purpose to be served by continued confinement' or the threat thereof once the father had brought his support payments current ... and, indeed, the order of commitment should not have been issued because the father had already 'complie[d] completely with the underlying support order' ... . Family Court accordingly erred in suspending the sentence and was obliged to discharge it without condition." ***Matter of Dupuis v. Costello*, 2020 N.Y. Slip Op. 06992, Third Dept 11-25-20**

FREEDOM OF INFORMATION LAW (FOIL); ENVIRONMENTAL LAW.

FOIL REQUEST FOR THE "COMPREHENSIVE STUDY" RE NEW YORK'S TRANSITION TO 100% RENEWABLE ENERGY WAS PROPERLY INTERPRETED TO BE A DEMAND FOR THE COMPLETED REPORT, WHICH THE DEPARTMENT OF ENVIRONMENTAL CONSERVATION (DEC) CERTIFIED HAD NOT BEEN YET BEEN CREATED.

The Third Department, reversing Supreme Court, over a two-justice dissent, determined petitioner's FOIL request was properly denied because the Department of Environmental Conservation (DEC) certified that the document did not exist because it had not been completed. Petitioner had requested "an electronic copy of the 'comprehensive study' ordered by Gov. Andrew Cuomo 'to determine the most rapid, cost-effective, and responsible pathway to reach 100[%] renewable energy statewide' as detailed in [the] January 10, 2017 press release and as completed prior to revisions mentioned publicly by NYSERDA [New York State Energy and Research Development Authority] in February 2019." The majority held the DEC properly interpreted the request as a demand for the completed report, which the DEC certified had not been created. The dissenters argued the request should not have been interpreted as a demand for the completed study, but rather as a request for any relevant documents: "Where, as here, an agency maintains that it does not possess a requested record, the agency is required to certify as much (see Public Officers Law § 89 [3]). Here, respondents submitted affidavits from Alicia Barton, the president and chief executive officer of NYSERDA, and Carl Mas, the Director of the Energy and Environmental Analysis Department of NYSERDA, as well as an affirmation from Daniella Keller, an attorney who served as DEC's records access officer at the relevant time. In their sworn affidavits, Barton and Mas attested that the study referenced in Governor Cuomo's January 2017 press release had yet to be completed at the time of petitioner's FOIL request. Keller stated, in her affirmation, that DEC records custodians had conducted a search of relevant files and advised her that the requested record did not exist because the study 'had not been drafted.' Such sworn attestations amply satisfy respondents' obligations under Public Officers Law § 89 (3) ... . Where an agency properly certifies that it does not possess a requested record, a petitioner may be entitled to a hearing on the issue if it can 'articulate a demonstrable factual basis to support [the] contention that the requested document[] existed and [was] within the [agency's] control'... [S]peculation and conjecture does not warrant a hearing or a rejection of the sworn statements of Barton and Mas — individuals with personal knowledge of the study and its status — and Keller ...". ***Matter of Empire Ctr. for Pub. Policy v. New York State Energy & Research Dev. Auth.*, 2020 N.Y. Slip Op. 07126, Third Dept 11-25-20**

MUNICIPAL LAW, NEGLIGENCE, NUISANCE, TRESPASS, IMMUNITY.

MUNICIPALITIES AND FIRE DEPARTMENTS PROTECTED BY GOVERNMENTAL IMMUNITY IN THIS WATER-DAMAGE LAWSUIT STEMMING FROM EXTINGUISHING A FIRE; NUISANCE AND TRESPASS ALSO PROPERLY DISMISSED.

The Third Department determined the negligence, nuisance and trespass action against the municipalities and the municipal fire departments were properly dismissed. A fire in defendant paper mill was probably the result of arson. In the course of putting out the fire, the fire department returned water to a canal using a deck gun which shot a stream of water over plaintiff's building. Apparently water seeped into the building causing damage. The negligence cause of action was precluded by governmental immunity, the nuisance action was precluded by the lack of evidence of intent, and firefighters doing their jobs are not deemed trespassers. With regard to governmental immunity, the court wrote: "To address the claims against the fire department defendants first, even accepting that questions of fact exist as to whether they had a special relationship with plaintiff that would give rise to a claim for negligence ... , they are nevertheless protected by the governmental immunity doctrine, which 'shield[s] public entities from liability for discretionary actions taken during the performance of governmental functions' ... . Under the doctrine, '[g]overnment action, if discretionary, may not be a basis for liability, while ministerial actions may be, but only if they violate a special duty owed to the plaintiff, apart from any duty to the public in general' ... . There is no question that fire protection, and obtaining the water necessary to provide it, is a purely governmental function ... . The key issue is therefore whether the fire department defendants' purportedly negligent acts — choosing to use the deck gun and aim it in a direction that caused a rain to fall around the powerhouse — were discretionary in that they arose from 'the exercise of reasoned judgment which could typically produce different acceptable results' ...". ***Stevens & Thompson Paper Co. Inc. v. Middle Falls Fire Dept., Inc.*, 2020 N.Y. Slip Op. 06996, Third Dept 11-25-20**

ZONING, LAND USE, ENVIRONMENTAL LAW.

TOWN PLANNING BOARD PROPERLY ISSUED A SPECIAL USE PERMIT FOR THE INSTALLATION OF A MAJOR SOLAR SYSTEM; DENIAL OF A SPECIAL USE PERMIT CANNOT BE BASED SOLELY UPON COMMUNITY OPPOSITION.

The Third Department determined the town planning board properly issued the special use permit for a major solar energy system. Petitioners objected to the project alleging "negative visual impact and negative impact on adjoining property values." The court found that the planning board had complied with the State Environmental Quality Review Act (SEQRA), the relevant Local Law and the relevant zoning ordinance. The court noted a special use permit cannot be denied solely based upon community opposition: "A Planning Board may not deny a special use permit based "solely on community objection" ... . Petitioners and the community objected to the project due to potential concerns of negative visual impact and negative impact upon adjoining property values. The Planning Board had ample evidence to support its determination that these impacts would be minimal. The visual assessment survey determined that, between the existing vegetation and the topography, the completed project would not be readily visible to the surrounding area. The Planning Board further found that the property owner's concern about potential reflected glare from the solar panels was adequately addressed through Eden's use of anti-glare coating. To further shield the community's view of the project and to allow adjoining property owners to cut down their own trees if they so choose, the Planning Board required a 1,600-foot evergreen barrier. This evergreen screen, the property's continued use of the land for beekeeping and sheep grazing and the determination that the project will not affect any historic resources all provide a rational basis for the Planning Board's determination that the character of the neighborhood and property values would be reasonably safeguarded." ***Matter of Biggs v. Eden Renewables LLC*, 2020 N.Y. Slip Op. 07011, Third Dept 11-25-20**

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