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FIRST DEPARTMENT

CIVIL PROCEDURE, FORECLOSURE.

THE ONE-YEAR PERIOD FOR TAKING A JUDGMENT RUNS FROM THE DEFAULT AFTER THE FILING AND SERVING OF THE ORIGINAL COMPLAINT, NOT A SUBSEQUENT AMENDED COMPLAINT.

The First Department, reversing Supreme Court, determined the one-year period for taking a judgment after a default runs from the default after the filing and serving of the original complaint, not the amended complaint: "The mortgage foreclosure action should have been dismissed as against original borrower Melissa Eaton, pursuant to CPLR 3215(c), because plaintiff failed to 'take proceedings for the entry of judgment' within one year of Eaton's default. The time to seek a default judgment should be measured from the default in responding to the original, not the amended, complaint ... . Although an amended complaint supersedes the original complaint, and therefore requires a new responsive pleading to avoid default ... , allowing the filing of an amended complaint to effectively cure a failure to timely move for a default in responding to the original complaint would create an exception that swallows the rule. Because plaintiff did not move for a default judgment until well after one year after Eaton's default in responding to the original complaint, and because plaintiff fails to offer any excuse for this delay ... , dismissal was appropriate under CPLR 3215(c) — notwithstanding plaintiff's inability to bring a new action due to expiration of the statute of limitations ...". ***MTGLQ Invs., L.P. v. Shay*, 2021 N.Y. Slip Op. 00237, First Dept 1-14-21**

CRIMINAL LAW, EVIDENCE.

DEFENDANT'S MOTION TO SEVER THE TWO OFFENSES, WHICH OCCURRED ON DIFFERENT DATES AND WERE UNRELATED, SHOULD HAVE BEEN GRANTED.

The First Department, reversing defendant's convictions, determined the two separate crimes which occurred on different dates should not have been joined for a single trial. Defendant was charged with leaving the scene of an accident on September 4, 2011, and DWI on January 15, 2012. The officer who arrested defendant in January 2012 for DWI testified he recognized the vehicle and driver from the video and stills taken during the September 2011 incident: "Offenses are joinable even though they are based on different criminal transactions if proof of one offense would be material and admissible as evidence in chief upon a trial of the other offense or the offenses are defined by the same or similar statutory provisions ... . Severance of counts contained in a single indictment should be granted when a defendant shows that the counts were not joinable under the statutory criteria ... . [N]one of the proof necessary for each offense was material to the other. The facts underlying defendant's conviction for leaving the scene of an accident stemmed from a September 4, 2011 incident. The victim was lying on the road of the Henry Hudson Parkway. After other drivers stopped to try and pull the victim out of the road, a dark Acura ran him over and continued driving without stopping. ... There was video footage and still pictures from the toll plaza that showed the cars of the drivers who stopped to help, followed immediately by the dark Acura. ... Defendant was the registered owner of the dark Acura. The DWI conviction was based on an incident that occurred four months later, on January 15, 2012. At that time, defendant was observed by police officers weaving in and out of his lane and driving 85 mph in a 50-mph zone. The officer who arrested defendant for the DWI was permitted to testify relative to the charge of leaving the scene that he recognized the vehicle and driver in the video and stills taken on September 4, 2011 as the same vehicle and person he stopped on January 15, 2012." ***People v. Santiago*, 2021 N.Y. Slip Op. 00130, First Dept 1-12-21**

EMPLOYMENT LAW, LABOR LAW, CIVIL PROCEDURE.

CLAIMS BY CORRECTIONS OFFICERS SEEKING TO REQUIRE THE DEPARTMENT OF CORRECTIONS TO PROVIDE TRAINING AND EQUIPMENT FOR DEALING WITH VIOLENT PRISONERS WERE NOT JUSTICIABLE.

The First Department, reversing Supreme Court, determined the allegations by the plaintiff corrections officers concerning training and equipment for dealing with violent prisoners were not justiciable: "These claims are not justiciable. In seeking an order that would require the Department of Correction (DOC) to make specific decisions on staffing, training, and equipment, plaintiffs would have the courts involved in the management of DOC policy, thereby interfering with the discretion granted to DOC under the New York City Charter ... . Unlike the claims brought in *Center for Independence of the Disabled v Metropolitan Transp. Auth.* (184 AD3d 197 [1st Dept 2020]), plaintiffs' claims, that DOC's current training/equipment scheme

for correction officers fails to satisfy the statutory safe workplace requirement, are not well suited for judicial review, because they do not involve the protection of a fundamental right to be free from discrimination but would instead embroil the judiciary in extensive consideration of policy, and the remedy sought would require the courts to take on the improper task of mandating the specifics of DOC's plans and operations." ***Correction Officers' Benevolent Assn., Inc. v. City of New York*, 2021 N.Y. Slip Op. 00109, First Dept 1-12-21**

FREEDOM OF INFORMATION LAW (FOIL).

FOIL REQUEST FOR TRAFFIC VIOLATIONS BUREAU (TVB) RECORDS RELEVANT TO A TRAFFIC ACCIDENT SHOULD HAVE BEEN GRANTED.

The First Department, reversing Supreme Court, determined petitioner's FOIL request for the records relevant to a traffic accident from the Traffic Violations Bureau (TVB) should have been granted: "The only FOIL exemption at issue in this case applies to records that 'are compiled for law enforcement purposes and which, if disclosed, would . . . interfere with . . . judicial proceedings' (Public Officers Law § 87[2][e][i]). ... [W]e find that Traffic Violations Bureau (TVB) hearings are 'judicial proceedings' ... . The TVB of the New York State Department of Motor Vehicles, an administrative agency that was legislatively created to adjudicate traffic violation charges for the purpose of reducing caseloads of courts in New York City ... . At a TVB hearing, the accused motorist has a right to be represented by counsel ... and the administrative law judge presiding over the hearing must determine whether the police officer has established the charges by clear and convincing evidence ... . Although the CPL and the CPLR are generally 'not binding on' TVB ... , it has been held that the motorist 'is entitled to the issuance of a properly worded judicial subpoena duces tecum under CPLR 2307 requiring the production of relevant records' ... . NYPD asserts that any release of documents would somehow tip the hand of the TVB's prosecuting attorney or prevent the prosecutor from testing the recollection of witnesses. Yet, NYPD concedes that these documents would be released to the motorist who would not be under any legal admonition not to release the documents to others." ***Matter of Jewish Press, Inc. v. New York City Police Dept.*, 2021 N.Y. Slip Op. 00119, First Dept 1-12-21**

PERSONAL INJURY.

THE PROPERTY OWNERS AND THE SECURITY COMPANY WERE PROPERLY FOUND LIABLE FOR PLAINTIFF'S SEVERE INJURIES CAUSED BY TWELVE-YEAR-OLD BOYS WHO THREW A SHOPPING CART OVER A FOURTH FLOOR RAILING STRIKING PLAINTIFF ON THE GROUND BELOW.

The First Department, ordering a new trial on damages if the plaintiffs do not stipulate to a reduction from $14.5 to $10 million, determined the defendant property owners and the security company (PSS) were properly found liable for the injuries caused by two twelve-year-old boys who threw a shopping cart over a fourth floor railing onto plaintiff on the ground below. There had been prior incidents where items were thrown over the railing and down an escalator: "... [T]he jury heard evidence that the Owner Defendants had notice of a recurring hazardous condition at the premises, namely, that youngsters frequented the location and threw various items off the elevated structure. According to witnesses and security log entries, young people threw such items as candy, food, rocks, glass bottles and garbage. Additionally, there was documentary evidence that 20 days before plaintiff's accident, several youths had thrown a shopping cart down the escalator. Yet, according to testimony by one of defendant's managers, the Owner Defendants did not put into place any remedial measures, such as raising the height of the rails, increasing the number of security guards or putting up warning signs, despite having notice of the recurring dangerous condition. Thus, we decline to disturb the jury's findings apportioning liability 65% against Owner Defendants and 25% against defendant PSS." ***Hedges v. Planned Sec. Serv. Inc.*, 2021 N.Y. Slip Op. 00117, First Dept 1-12-21**

PERSONAL INJURY, MUNICIPAL LAW.

THE TREE WELL COULD HAVE CONTRIBUTED TO PLAINTIFF'S SLIP AND FALL; THE CITY'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The First Department, reversing Supreme Court, determined the city's motion for summary judgment in this slip and fall case should not have been granted. Plaintiff alleged he fell into a hole between a tree well and the sidewalk. The city is responsible for maintaining tree wells: "The City's motion for summary judgment was improperly granted in this action where plaintiff was injured when he tripped and fell in a hole between a tree well and the sidewalk. According to plaintiff, the dirt in the tree well was lower than the sidewalk. The City had the obligation to maintain the tree well located in the sidewalk in a safe condition ... . The size, shape, configuration and location of the Big Apple Map's line markings in the same area of the sunken tree well, which indicate a raised or uneven portion of the sidewalk, 'raise an issue of fact as to whether the City had prior written notice of the particular defect' ... . Although plaintiff's testimony and averments in regard to the precise precipitating cause of his fall are somewhat inconsistent, his consistent statements that a hole in an area between the sidewalk and tree well was a factor in causing him to fall raise triable issues as to whether a tree well defect contributed to his fall." ***Castro v. 243 E. 138th St., LLC*, 2021 N.Y. Slip Op. 00107, First Dept 1-12-21**

SECOND DEPARTMENT

APPEALS, CIVIL PROCEDURE, FREEDOM OF INFORMATION LAW (FOIL).

THE PRIOR APPELLATE DECISION DIRECTING THE COLLECTION OF MORE EVIDENCE IS THE LAW OF THE CASE; THE DIRECTION WAS NOT COMPLIED WITH BY SUPREME COURT UPON REMITTAL.

The Second Department, reversing Supreme Court, determined the decision in the prior appeal was the law of the case and Supreme Court did not follow the instruction to collect additional evidence: "In our prior decision and order, we noted that the issue of the burden that would be imposed upon the DOE [Department of Education] to comply with the petitioner's FOIL request and whether the DOE is able to engage an outside professional service to cull the records sought was not addressed by the Supreme Court and could not be resolved on the record before us ... . We noted that '[a]mong other things, it is unclear as to how much time would be involved for an employee at each school to review the relevant files. Further, although the petitioner has expressed its willingness to reimburse the [DOE] for reasonable costs involved in having the [DOE's] employees, or an appropriate third party, review and copy the [DOE's] records, there is no information in the record as to what that cost would be or whether the petitioner would in fact be willing to reimburse the [DOE] for the full amount of those costs, once those costs are determined' … . Accordingly, we remitted the matter to the Supreme Court for further proceedings, including additional submissions by the parties ... . Our prior decision and order was law of the case and binding on the Supreme Court ... . However, the court failed to conduct further proceedings, including the taking of additional submissions on the issues of burden, cost and reimbursement, in accordance with our decision and order. Accordingly, we reverse the judgment and remit the matter for further proceedings in accordance with our decision and order in *Matter of Jewish Press, Inc. v New York City Dept. of Educ.* (183 AD3d 731)." ***Matter of Jewish Press, Inc. v. New York City Dept. of Educ.*, 2021 N.Y. Slip Op. 00173, Second Dept 1-13-21**

CRIMINAL LAW, EVIDENCE.

THE JURY WAS ERRONEOUSLY ALLOWED TO CONSIDER A THEORY OF BURGLARY WITH WHICH DEFENDANT WAS NOT CHARGED; BURGLARY CONVICTIONS REVERSED.

The Second Department, reversing defendant's burglary convictions, determined the jury should not have been instructed to consider a theory of burglary (intent to assault versus intent to damage property) with which defendant was not charged: "A defendant has a right to be tried only for the crimes charged in the indictment ... . 'Where the prosecution is limited by the indictment or bill of particulars to a certain theory or theories, the court must hold the prosecution to such narrower theory or theories' ... . This rule applies in cases charging burglary, where it is not normally necessary for the People to demonstrate the exact crime which the defendant intended to commit while inside the building ... . Here, we agree with the defendant that the People limited their theory of burglary in their bill of particulars, which incorporated the allegations of the criminal complaint, to the intent to commit property damage and/or theft ... . Therefore, the Supreme Court erred in permitting the prosecutor to argue, during summation, and in permitting the jury to consider, the uncharged theory that the defendant intended to assault the complainant ...". ***People v. Petersen*, 2021 N.Y. Slip Op. 00193, Second Dept 1-13-21**

DENTAL MALPRACTICE, EVIDENCE PERSONAL INJURY.

PLAINTIFFS' EXPERT'S AFFIDAVIT WAS NOT SPECULATIVE OR CONCLUSORY; DEFENDANT'S MOTION FOR SUMMARY JUDGMENT IN THIS DENTAL MALPRACTICE AND LACK OF INFORMED CONSENT ACTION SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined defendant's motion for summary judgment in this dental malpractice and lack of informed consent should not have been granted. Plaintiff's expert's affidavits raised questions of fact: " 'In order not to be considered speculative or conclusory, expert opinions in opposition should address specific assertions made by the movant's experts, setting forth an explanation of the reasoning and relying on specifically cited evidence in the record' ... . In determining a motion for summary judgment, the court must view the evidence in the light most favorable to the nonmoving party ... , and 'all reasonable inferences must be resolved in favor of the nonmoving party' ... . * * * Summary judgment is not appropriate in a dental malpractice action where, as here, the parties adduce conflicting medical expert opinions, since conflicting expert opinions raise credibility issues which are to be resolved by the factfinder ... . '[L]ack of informed consent is a distinct cause of action requiring proof of facts not contemplated by an action based merely on allegations of negligence' ... . 'To establish a cause of action to recover damages based on lack of informed consent, a plaintiff must prove (1) that the person providing the professional treatment failed to disclose alternatives thereto and failed to inform the patient of reasonably foreseeable risks associated with the treatment, and the alternatives, that a reasonable medical practitioner would have disclosed in the same circumstances, (2) that a reasonably prudent patient in the same position would not have undergone the treatment if he or she had been fully informed, and (3) that the lack of informed consent is a proximate cause of the injury' ...". ***Many v. Lossef*, 2021 N.Y. Slip Op. 00165, Second Dept 1-13-21**

FAMILY LAW, CRIMINAL LAW, EVIDENCE, APPEALS.

THE EVIDENCE DID NOT SUPPORT FINDING THE APPELLANT IN THIS JUVENILE DELINQUENCY PROCEEDING MADE A TERRORISTIC THREAT IN VIOLATION OF PENAL LAW § 490.20; THERE WAS NO EVIDENCE OF AN INTENT TO INTIMIDATE THE CIVILIAN POPULATION.

The Second Department, reversing Family Court, determined the evidence in this juvenile delinquency proceeding did not support finding the appellant student made a terroristic threat. The issue was not preserved but the appeal was considered in the interest of justice: "The student testified that one morning during class some of the students were joking and talking when the appellant and another student got into 'a little argument,' and the appellant told that student that he '[was] going to be 14 years old, chopped up in somebody's backyard, and he's going to get a white person to shoot up the school.' * * * 'Penal Law article 490 was enacted shortly after the attacks on September 11, 2001, to ensure that terrorists are prosecuted and punished in state courts with appropriate severity' ... . 'In construing the statute, courts must be cognizant that 'the concept of terrorism has a unique meaning and its implications risk being trivialized if the terminology is applied loosely in situations that do not match our collective understanding of what constitutes a terrorist act' ... . As relevant here, Penal Law § 490.20 (1) provides that a person is guilty of making a terroristic threat when 'with intent to intimidate . . . a civilian population . . . he or she threatens to commit or cause to be committed a specified offense and thereby causes a reasonable expectation or fear of the imminent commission of such offense.' We agree with the appellant that the presentment agency presented no evidence of an intent by the appellant to intimidate a civilian population with his statements ...". ***Matter of Jaydin R.*, 2021 N.Y. Slip Op. 00176, Second Dept 1-13-21**

FAMILY LAW, IMMIGRATION LAW.

FAMILY COURT SHOULD HAVE MADE FINDINGS WHICH WOULD ALLOW THE CHILDREN TO APPLY FOR SPECIAL IMMIGRANT JUVENILE STATUS.

The Second Department, reversing Supreme Court, determined Family Court should have made findings which would allow the children to petition for special immigrant juvenile state (SIJS): "... [B]ased upon our independent factual review, the record supports a finding that reunification of the children with their father is not viable due to the father's abandonment of the children ...., and educational neglect of the child ... . Further, the record supports a finding that it would not be in the best interests of the children to return to Guatemala, their previous country of nationality or country of last habitual residence ...". ***Matter of Briceyda M. A. X. (Hugo R. A. O.--Maria H. X. C.)*, 2021 N.Y. Slip Op. 00180, Second Dept 1-13-21**

FORECLOSURE, EVIDENCE.

THE REFEREE'S REPORT IN THIS FORECLOSURE ACTION WAS BASED UPON INADMISSBILE HEARSAY AND THEREFORE SHOULD NOT HAVE BEEN CONFIRMED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the referee's report should not have been confirmed because it was based on inadmissible hearsay: "... [T]he affidavit of an assistant vice president of Rushmore Loan Management Services, LLC, submitted for the purpose of establishing the amount due and owing under the subject mortgage loan, 'constituted inadmissible hearsay and lacked probative value because the affiant did not produce any of the business records he purportedly relied upon in making his calculations' ... . Thus, the referee's findings with respect to the total amount due upon the mortgage were not substantially supported by the record ... . Accordingly, the Supreme Court should have denied the plaintiff's motion to confirm the referee's report ...". ***Wilmington Sav. Fund Socy., FSB v. Isom*, 2021 N.Y. Slip Op. 00203, Second Dept 1-13-21**

LIMITED LIABILITY COMPANY LAW.

THE LIMITED RELIEF AVAILABLE TO A DISSENTING MEMBER AFTER THE MERGER OF TWO LIMITED LIABILITY COMPANIES.

The Second Department, reversing (modifying) Supreme Court, addressed the relief available to a dissenting member after the merger of two limited liability companies: "Limited Liability Company Law § 1002(f) provides that, subsequent to a merger, a dissenting member possesses no interest in the surviving or resulting business entity, but is instead entitled only to a cash payment of the fair value of his or her membership as of the close of the business day prior to the merger. Moreover, Limited Liability Company Law § 1005 provides for the payment of the value of that interest or, in the event of a dispute, sets forth the procedure for determining the value of that interest. ... Farro's [plaintiff's] membership in the subject businesses was terminated by the merger, and he subsequently sought appraisal of the value of his interest in order to be fairly compensated therefor. Under these circumstances, his exclusive remedy was appraisal and payment, and he was precluded from maintaining any derivative claims on behalf of the subject businesses ... . [A] member of a merged company who has a right to demand payment for his membership interest 'shall not have any right at law or in equity . . . to attack the validity of the merger . . . or to have the merger . . . set aside or rescinded.' Moreover, the language of the statute makes

clear that an appraisal proceeding is the member's 'sole remedy,' and no exception exists for alleged fraud or illegality in the procurement of the merger ...". ***Farro v. Schochet*, 2021 N.Y. Slip Op. 00150, Second Dept 1-13-21**

PERSONAL INJURY.

THE JURY VERDICT FINDING THAT PLAINTIFF'S NEGLIGENCE WAS NOT THE PROXIMATE CAUSE OF HER INJURIES WAS NOT INCONSISTENT AND SHOULD NOT HAVE BEEN SET ASIDE.

The Second Department, reversing Supreme Court, determined the defendants' motion to set aside the jury verdict in this slip and fall case should not have been granted. Plaintiff had double-parked. Her granddaughter ran toward traffic after getting out of the car. Plaintiff ran to stop her granddaughter and tripped over a piece of wood used as shoring by defendants who were installing a gas line. The jury found plaintiff negligent, but found her negligence was not a proximate cause of her injuries: " 'A jury's finding that a party was at fault but that such fault was not a proximate cause of the accident is inconsistent and against the weight of the evidence only when the issues are so inextricably interwoven as to make it logically impossible to find negligence without also finding proximate cause' ... . '[W]here there is a reasonable view of the evidence under which it is not logically impossible to reconcile a finding of negligence but no proximate cause, it will be presumed that, in returning such a verdict, the jury adopted that view' ... . Here, the jury reasonably could have concluded that the plaintiff was negligent, but that such negligence was not a proximate cause of her falling over the piece of wood bracing that was supporting the stack of wood planking. The jury could have adopted the view that the defendants' failure to maintain the wood they were storing in the roadway in a safe condition was the sole proximate cause of the accident ...". ***Cruz-Rivera v. National Grid Energy Mgt., LLC*, 2021 N.Y. Slip Op. 00149, Second Dept 1-13-21**

PERSONAL INJURY, MUNICIPAL LAW, VEHICLE AND TRAFFIC LAW.

THE SNOWPLOW DRIVER DID NOT VIOLATE THE "RECKLESS DISREGARD" STANDARD IN THIS TRAFFIC ACCIDENT CASE.

The Second Department, reversing Supreme Court, determined the reckless disregard standard applied in this traffic accident case involving a municipal snowplow: " 'A snowplow operator 'actually engaged in work on a highway' is exempt from the rules of the road and may be held liable only for damages caused by an act done in 'reckless disregard for the safety of others'... . Reckless disregard requires more than a momentary lapse in judgment ... . 'This requires a showing that the operator acted in conscious disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow' ... . Oviedo-Mejia [the snowplow driver] testified that he was traveling in reverse at a speed of five to seven miles per hour with the lights and beeping alert of the snowplow vehicle activated. Oviedo-Mejia testified that he kept looking in the mirrors as the snowplow vehicle was moving in reverse, but he did not see the plaintiff prior to the alleged impact. Under the circumstances, the defendants demonstrated, prima facie, that Oviedo-Mejia did not act with reckless disregard for the safety of others ...". ***Kaffash v. Village of Great Neck Estates*, 2021 N.Y. Slip Op. 00159, Second Dept 1-13-21**

REAL ESTATE, CONTRACT LAW.

THE TIME-OF-THE-ESSENCE DATE WAS PROPERLY SET; THE BUYER WAS NOT ABLE TO CLOSE ON THAT DATE: DEFENDANTS-SELLERS ENTITLED TO KEEP THE DOWNPAYMENT.

The Second Department determined defendants-sellers were entitled to retain the downpayment after the buyer was not ready, willing and able to close on the time-of-the-essence date: "... [T]he defendants established, prima facie, that they effectively made September 3, 2014, a time of the essence closing date, and that, although they were ready, willing, and able to close on September 3, 2014, the plaintiff was not ready, willing, and able to close on that date ... . The defendants also established, prima facie, that the plaintiff was in default by demonstrating that the plaintiff did not appear at the closing and admitted that he did not have the funds to close ... . In opposition, the plaintiff failed to raise a triable issue of fact. Accordingly, we agree with the Supreme Court's determination to grant those branches of the defendants' motion which were for summary judgment dismissing the complaint and to cancel the notice of pendency. A buyer 'who defaults on a real estate contract without lawful excuse, cannot recover the down payment,' at least where, as here, that down payment represents 10% or less of the contract price ...". ***Ashkenazi v. Miller*, 2021 N.Y. Slip Op. 00140, Second Dept 1-13-21**

THIRD DEPARTMENT

CRIMINAL LAW, EVIDENCE, APPEALS.

THE EVIDENCE DID NOT SUPPORT THE GROUND FOR SUPPRESSION OF A SHOTGUN AND SHOTGUN SHELL RELIED ON BY COUNTY COURT; ALTHOUGH THE PEOPLE RAISED OTHER GROUNDS FOR JUSTIFICATION OF THE SEARCH AND SEIZURE, THOSE GROUNDS CANNOT BE ADDRESSED ON APPEAL BECAUSE COUNTY COURT DID NOT RULE ON THEM; MATTER REMITTED FOR CONSIDERATION OF THE PEOPLE'S OTHER ARGUMENTS.

The Third Department determined the motion to suppress the shotgun and shotgun shell should have been granted on the ground raised on appeal. The People raised other grounds for suppression on appeal. The Third Department noted it cannot consider grounds for suppression on which the motion court did not rule on and remitted the matter for consideration of the other grounds for suppression raised by the People: "County Court found that the shotgun shell was discovered on defendant's person during a limited protective pat-down search of defendant, which then provided law enforcement with probable cause to search the vehicle. However, this finding is not supported by the evidence presented at the suppression hearing, which demonstrated that the search of the vehicle actually preceded the search of defendant's person and discovery of the shotgun shell. Although the People raised other arguments that could potentially justify the search of the vehicle and defendant's person, this Court is statutorily restricted from considering issues not ruled upon by the trial court ... . We are therefore constrained to reverse the denial of defendant's suppression motion. Accordingly, we will hold the appeal in abeyance and remit the matter to County Court to review the evidence presented at the suppression hearing, consider any alternate bases to suppress the physical evidence and render a new determination on defendant's motion ...". ***People v. Kabia*, 2021 N.Y. Slip Op. 00209, Third Dept 1-14-21**

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