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Editor: **Bruce Freeman**

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FIRST DEPARTMENT

CONSUMER LAW, FRAUD.

GENERAL BUSINESS LAW § 349 (DECEPTIVE BUSINESS PRACTICES) CAUSE OF ACTION PROPERLY SURVIVED THE MOTION TO DISMISS AND THE GENERAL BUSINESS LAW § 340 (RESTRAINT OF TRADE) CAUSE OF ACTION SHOULD HAVE SURVIVED IN THIS FRAUD ACTION INVOLVING DIAMOND APPRAISALS.

The First Department, reversing (modifying) Supreme Court, determined the General Business Law § 349 (deceptive business practices) cause of action properly survived a motion to dismiss and the General Business Law § 340 (restraint of trade) cause of action should have survived in this fraud action involving diamond appraisals: "Plaintiff has alleged that IGI Defendants engaged in deceptive 'consumer-oriented' conduct, as the alleged fraud scheme, which involved the issuance of false appraisal certificates for over-graded diamonds, were ultimately directed at misleading consumers into buying diamonds at artificially inflated prices. Indeed, the gravamen of the amended complaint is harm to the public interest ... . Plaintiff has standing to bring a claim despite not being a consumer, as courts have permitted business competitors to bring claims under GBL 349 so long as there has been harm done to the public at large ... . * * * Plaintiff has demonstrated a per se restraint of trade by pleading a conspiracy in the form of horizontal price-fixing. As alleged, the conspiracy permits diamond dealers and jewelry manufacturers who participate in the scheme to buy over-graded diamonds at lower prices, and then re-sell them to retailers and consumers at artificially inflated prices. At the same time, dealers and manufacturers who are not part of the conspiracy can only purchase accurately graded stones, or over-grades stones, at a higher price, preventing them from competing with the conspirators. The complaint also alleged an unreasonable restraint of trade under the 'rule of reason' standard. Plaintiff has pleaded a conspiracy among [the defendants] and others, and facts showing that the conspirators possessed market power to produce a market-wide anticompetitive effect ...". ***KS Trade LLC v. International Gemological Inst., Inc.*, 2021 N.Y. Slip Op. 00259, First Dept 1-19-21**

CRIMINAL LAW, EVIDENCE.

THE SUPPRESSION HEARING SHOULD NOT HAVE BEEN REOPENED; EVIDENCE OF UNCHARGED DRUG TRAFFICKING AS BACKGROUND FOR POSSESSION OF A WEAPON SHOULD NOT HAVE BEEN ADMITTED.

The First Department, reversing defendant's conviction, determined the suppression hearing should not have been reopened and (*Molineux*) evidence of uncharged drug-trafficking as background for possession of a weapon was too prejudicial: "The People's Voluntary Disclosure Form notified defendant of the People's intent to offer evidence of two statements he made while in custody following his arrest. In each instance, he was overheard urging a codefendant, who was his girlfriend, to tell the authorities that she was the possessor of a pistol recovered at the apartment where they were arrested. The first such statement was overheard by a special agent while defendant and the codefendant were in a holding cell. The second such statement was overheard by a detective while defendant and the codefendant were being driven to Central Booking. At the initial Huntley hearing, the People called the special agent as a witness, but not the detective. The court ruled that the statement overheard by the special agent was admissible. No evidence was presented regarding the later statement overheard by the detective. At a pretrial conference 16 months later, the prosecutor, explaining that the special agent was unavailable to testify because he had been transferred to an assignment outside the United States, asked the court to reopen the suppression hearing to allow the detective to testify to the statement he allegedly overheard. ... The court should not have reopened the hearing. The prosecution had a full and fair opportunity to present both of its witnesses and seek admission of both statements, but chose not to ... , and the court had issued a ruling on the suppression motion ... . This is not a case in which the omission of evidence at the initial hearing resulted from 'a flaw in the proceeding' ...". ***People v. Nunez*, 2021 N.Y. Slip Op. 00266, First Dept 1-19-21**

CRIMINAL LAW, EVIDENCE, APPEALS.

THE THREAT MADE BY DEFENDANT WAS PERSONAL IN NATURE AND WAS NOT DIRECTED AT THE CIVILIAN POPULATION WITHIN THE MEANING OF THE TERRORISM STATUTE (PENAL LAW § 490.20); THE CONVICTION WAS NOT SUPPORTED BY LEGALLY SUFFICIENT EVIDENCE AND WAS AGAINST THE WEIGHT OF THE EVIDENCE.

The First Department, reversing defendant's "terrorism" conviction, determined the evidence was legally insufficient and the conviction was against the weight of the evidence. The defendant threatened to shoot "you guys," but the threat was personal in nature and was not directed at a "civilian population:" "The evidence of defendant's 'intent to intimidate or coerce a civilian population' (Penal Law § 490.20[1]) was legally insufficient to support the conviction ... . We also find that the verdict was against the weight of the evidence in that respect ... . At the end of an altercation, defendant, a Muslim, threatened to shoot 'you guys,' referring to several Bangladeshi worshippers at defendant's mosque. Although there was evidence presented at trial that defendant bore animus toward Bangladeshi people, the threat mentioned no group or population and instead appears to have been based on a personal dispute defendant had with one or more of his fellow worshippers over money or a missing phone. Accordingly, this threat was not directed at a 'civilian population' as that term was explained by the Court of Appeals in *People v Morales* (20 NY3d 240, 247 [2012]). To find that defendant's act amounted to a terroristic threat would trivialize the definition of terrorism by applying it 'loosely in situations that do not match our collective understanding of what constitutes a terrorist act' ...". ***People v. DeBlasio*, 2021 N.Y. Slip Op. 00376, First Dept 1-21-21**

LABOR LAW-CONSTRUCTION LAW. PERSONAL INJURY.

THERE IS A QUESTION OF FACT WHETHER PLAINTIFF'S WORK ON A BOILER WAS ROUTINE MAINTENANCE OR PART OF A LARGER COVERED ACTIVITY IN THIS LABOR LAW §§ 240(1) AND 241(6) ACTION; DEFENDANTS DID NOT SUPERVISE OR CONTROL PLAINTIFF'S WORK REQUIRING DISMISSAL OF THE LABOR LAW § 200 AND NEGLIGENCE CAUSES OF ACTIONS.

The First Department, reversing Supreme Court, determined there was a question of fact whether plaintiff was engaged in a covered activity and not routine maintenance of a boiler. In addition, the First Department held that the defendant did not supervise of control the plaintiff's work and therefore the Labor Law § 200 and common law negligence causes of action should have been dismissed: "Labor Law §§ 240(1) and 241(6) do not cover workers engaged in routine maintenance ... . The determination of whether a worker was engaged in a covered activity is not made at the moment of injury, but in the context of the entire project ... . While plaintiff here was engaged in replacing a boiler steam valve, an activity some courts have deemed routine maintenance ... , it was part of a larger project that included removing portions of the boilers via blowtorches and installation of new components by welding, thus raising an issue of fact whether it falls within covered activity ... . Plaintiff's accident arose from the means and methods of the work, not a defective condition ... , and the record is clear that defendants neither supervised nor controlled the work being performed by plaintiff and his coworkers at the time of the accident. Thus, this Court, upon a search of the record, dismisses plaintiff's Labor Law § 200 and common-law claims ...". ***Gaston v. Trustees of Columbia Univ. in the City of N.Y.*, 2021 N.Y. Slip Op. 00254, First Dept 1-19-21**

PERSONAL INJURY, EVIDENCE.

PLAINTIFF'S INCONSISTENT DEPOSITION TESTIMONY IN THIS STAIRWAY SLIP AND FALL CASE RAISED A CREDIBILITY QUESTION BUT DID NOT REQUIRE SUMMARY JUDGMENT IN DEFENDANT'S FAVOR; PLAINTIFF'S TESTIMONY SHE DID NOT USE THE HANDRAILS REQUIRED DISMISSAL OF THE CLAIM ALLEGING THE HANDRAILS WERE DEFECTIVE.

The First Department, reversing (modifying) Supreme Court in this stairway slip and fall case, determined the plaintiff's inconsistent deposition testimony raised an issue of credibility but did not warrant summary judgment dismissing the action. However the claim relating to the handrails should have been dismissed because plaintiff testified she did not use the handrails: "While plaintiff's initial deposition testimony was later contradicted by the affidavit she submitted in opposition to defendant's motion, after a break in the deposition, she testified that she had misspoken, and changed her testimony significantly as to how her fall on defendant's staircase occurred. Plaintiff's latter version of the accident is, in the main, consistent with her affidavit. Thus, while the change of testimony mid-deposition presents an issue of credibility for the jury, the affidavit does not present the kind of feigned issue of fact that requires the court to disregard the affidavit ... . Since plaintiff's expert relied upon the version of the accident described in plaintiff's affidavit, his affidavit was properly considered ... . Plaintiff's inability to identify uneven riser heights as the cause of her fall is not fatal to her claim, as her post-break deposition testimony permits the inference that her fall was caused by uneven riser heights ... . However, plaintiff's affidavit presents a feigned issue of fact as to whether her fall was caused by any defect of the staircase handrails and must be disregarded with respect thereto ... . Plaintiff testified consistently through the entirety of her deposition that she was not holding the handrail, that it was her custom and practice not to use handrails on short flights of steps, and that at no time during her fall did she attempt, or even think of attempting, to put her hand on the handrail." ***Dixon v. Sum Realty, Co.*, 2021 N.Y. Slip Op. 00367, First Dept 1-21-21**

SECOND DEPARTMENT

CIVIL PROCEDURE.

THE CPLR 3215 REQUIREMENT THAT PROCEEDINGS TO TAKE A DEFAULT JUDGMENT BE COMMENCED WITHIN ONE YEAR OF THE DEFAULT APPLIES TO COUNTERCLAIMS; COUNTERCLAIM DISMISSED AS ABANDONED.

The Second Department noted that the CPLR 3215 requirement that a proceedings to take a default judgment be taken within one year of the default applies to a counterclaim and held that the counterclaim here must therefore be dismissed as abandoned: "CPLR 3215(c) provides that if the plaintiff fails to take proceedings for the entry of judgment within one year after the default, the court shall not enter judgment but shall dismiss the complaint as abandoned, upon its own initiative or on motion, unless sufficient cause is shown why the complaint should not be dismissed. While counterclaims are not specifically mentioned in CPLR 3215, the statute applies to claims asserted as counterclaims in addition to those set forth in complaints ... . 'The language of CPLR 3215(c) is not, in the first instance, discretionary, but mandatory, inasmuch as courts 'shall' dismiss claims (CPLR 3215[c]) for which default judgments are not sought within the requisite one-year period, as those claims are then deemed abandoned' ... . 'The failure to timely seek a default may be excused if 'sufficient cause is shown why the complaint should not be dismissed' (CPLR 3215[c]), which requires the party to proffer a reasonable excuse for the delay in timely moving for a default judgment and to demonstrate that the cause of action is potentially meritorious' ... . Where, as here, a party moving for a default judgment beyond one year from the date of default fails to address any reasonable excuse for its untimeliness, courts may not excuse the lateness and 'shall' dismiss the claim pursuant to CPLR 3215(c) ...". ***Bazile v. Saleh*, 2021 N.Y. Slip Op. 00286, Second Dept 1-20-21**

FORECLOSURE, EVIDENCE.

THE AFFIDAVITS SUBMITTED TO PROVE DEFENDANTS' DEFAULT IN THIS FORECLOSURE ACTION WERE NOT BASED UPON PERSONAL KNOWLEDGE AND DID NOT ATTACH THE BUSINESS RECORDS RELIED UPON.

The Second Department, reversing Supreme Court, determined the plaintiff bank did not submit admissible proof of defendants' default: " 'There is no requirement that a plaintiff in a foreclosure action rely on any particular set of business records to establish a prima facie case, so long as the plaintiff satisfies the admissibility requirements of CPLR 4518(a), and the records themselves actually evince the facts for which they are relied upon' ... . Here, neither Joanne Orelli, a senior vice president of Flushing Bank, who verified the complaint, nor Mark Levin, the managing member of the plaintiff, who submitted an affidavit in support of the motion, stated that they had personal knowledge of the default. Moreover, to the extent their knowledge was based on their review of business records, they did not identify what records they relied on and did not attach them to the verified complaint or the affidavit ...". ***Flatbush Two, LLC v. Morales*, 2021 N.Y. Slip Op. 00294, Second Dept 1-20-21**

FORECLOSURE, EVIDENCE, CIVIL PROCEDURE.

THE REFEREE'S REPORT IN THIS FORECLOSURE ACTION WAS BASED UPON BUSINESS RECORDS WHICH WERE NOT PRODUCED AND SHOULD NOT HAVE BEEN CONFIRMED; ALTHOUGH DEFENDANTS DEFAULTED, THE REFEREE'S REPORT FUNCTIONS AS AN INQUEST ON DAMAGES WHICH THE DEFENDANTS CAN CONTEST.

The Second Department, reversing Supreme Court, determined the referee's report in this foreclosure action should not have been confirmed because it was based upon business records that were not produced. The court noted that the fact that defendants had defaulted did not preclude them from contesting the amount owed: "... [T]he referee's report should not have been confirmed because it was based upon unproduced business records ... . The fact that the defendants defaulted in appearing did not mean that they were precluded from contesting the amount owed ... . The referee's report served the function of an inquest on damages, which must be based upon admissible evidence ...". ***Wilmington Sav. Fund Socy., FSB v. Moriarty-Gentile*, 2021 N.Y. Slip Op. 00328, Second Dept 1-20-21**

PERSONAL INJURY, EVIDENCE.

BECAUSE THERE WAS NO PROOF WHEN THE STAIRWAY IN THIS SLIP AND FALL CASE WAS CONSTRUCTED, THE JURY SHOULD NOT HAVE BEEN INSTRUCTED ON THE BUILDING CODE PROVISION; DEFENSE VERDICT REVERSED AND NEW TRIAL ORDERED.

The Second Department, reversing the defendant's judgment after trial in this slip and fall case, determined the jury should not have been instructed to consider a building code provision because there was not proof when the stairway was constructed: "We agree with the defendant that the Supreme Court should not have charged the jury with regard to certain provisions of the 1925 Administrative Code of the City of New York (hereinafter the Building Code). The plaintiffs failed to submit sufficient proof to establish when the subject stairway was constructed. Thus, the plaintiffs failed to establish which version of the Building Code was applicable ... . Since a general verdict sheet was submitted to the jury, we cannot ascertain whether the jury's verdict was predicated on a finding that the defendant violated the 1925 Building Code. Accordingly,

the judgment must be reversed, and the matter remitted to the Supreme Court, Kings County, for a new trial on the issue of liability." ***Coreano v. 983 Tenants Corp.*, 2021 N.Y. Slip Op. 00290, Second Dept 1-20-21**

PERSONAL INJURY, EVIDENCE.

PROOF OF A REGULAR SNOW REMOVAL ROUTINE IS NOT ENOUGH TO DEMONSTRATE A LACK OF ACTUAL OR CONSTRUCTIVE NOTICE OF THE CONDITION OF THE SIDEWALK AT THE TIME OF THE SLIP AND FALL.

The Second Department, reversing Supreme Court, determined defendant lessee (E & Z) failed to demonstrate it did not have actual or constructive notice of the alleged ice and snow on the sidewalk in this slip and fall action. Once again, it was not enough to offer proof of routine snow removal procedures as opposed to specific evidence inspection or cleaning close in time to the fall: "... [T]here was no statute or ordinance which imposed tort liability on E & Z for the failure to maintain the sidewalk abutting the subject property. However, E & Z's principal, Hikmatullah Rasul, testified at his deposition that E & Z was required to remove snow and ice from the sidewalk outside the subject property to the curb on both the Jamaica Avenue side and the 104th Street side. Rasul explained that when it snowed either he, his brother, or a restaurant employee would shovel snow, break up any ice, and apply salt. E & Z did not clean at the bottom of the train staircase as that was not its property. In support of its motion for summary judgment, E & Z failed to establish its prima facie entitlement to judgment as a matter of law dismissing the complaint and all cross claims insofar as asserted against it by demonstrating that it was free from negligence ... . Specifically, E & Z failed to eliminate triable issues of fact as to whether it undertook snow and ice removal efforts to clear the sidewalk on the night of the plaintiff's fall, or whether any snow and ice removal efforts undertaken by it created or exacerbated the icy condition which allegedly caused the plaintiff's fall ... . Since E & Z failed to establish its prima facie entitlement to judgment as a matter of law, the Supreme Court should have denied E & Z's motion for summary judgment dismissing the complaint and all cross claims insofar as asserted against it." ***Zamora v. David Caccavo, LLC*, 2021 N.Y. Slip Op. 00329, Second Dept 1-20-21**

PERSONAL INJURY, EVIDENCE.

RARE CASE WHERE EVIDENCE OF A ROUTINE PROCEDURE FOR KEEPING A PARKING LOT FREE OF ICE AND SNOW, COMBINED WITH PLAINTIFF'S TESTIMONY, SUPPORTED SUMMARY JUDGMENT IN DEFENDANTS' FAVOR IN THIS SLIP AND FALL CASE.

The Second Department held that evidence of a routine procedure for keeping the parking lot free of ice and snow, together with the plaintiff's testimony she did not see any ice on the parking lot when she arrived at work on the day of the fall, supported summary judgment in defendants' favor in this slip and fall case: "The plaintiff testified that she worked at the premises five days a week, typically from 9:00 a.m. to 5:00 p.m., and that she either came to the premises by car pool or driving herself. The plaintiff indicated that she had not seen any runoff of melting snow or ice from snow piles in the parking lot to the area where she allegedly fell prior to or on the date of the accident. The plaintiff further testified that during the morning of January 20, 2011, she parked her car at the premises and did not notice any ice on the parking lot surface at that time. The plaintiff indicated that when she left work shortly after 6:00 p.m., she 'look[ed] down at the ground' while walking to her car, and she did not see the ice on which she slipped, which she described as being clear, until after she fell. Further, Mauricio Pacheco, a maintenance worker for [defendant] RXR, testified that he checked the parking lot every morning, and if any ice was present, he would have salted the area. Pacheco indicated that if the temperature dropped below freezing or there was any precipitation later in the day, he would have again checked the parking lot for ice. Pacheco also testified that lighting for the parking lot turned on automatically at 6:00 p.m., and that he checked to make sure the lighting was working every morning." ***Zimmer v. County of Suffolk*, 2021 N.Y. Slip Op. 00331, Second Dept 1-20-21**

PERSONAL INJURY, MUNICIPAL LAW.

ALTHOUGH THE VILLAGE CODE MADE THE ABUTTING PROPERTY OWNER RESPONSIBLE FOR MAINTAINING THE SIDEWALK, THE CODE DID NOT IMPOSE TORT LIABILITY ON THE ABUTTING PROPERTY OWNER; THE PROPERTY OWNER'S MOTION TO DISMISS THIS SIDEWALK SLIP AND FALL ACTION SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined the abutting property owner (Khadu) was not liable in this sidewalk slip and fall case. Although the village code made the abutting property owner responsible for maintenance of the sidewalk, it did not impose tort liability on the property owner: " 'Generally, liability for injuries sustained as a result of negligent maintenance of or the existence of dangerous [or] defective conditions to public sidewalks is placed on the municipality and not the abutting landowner' ... . 'An abutting landowner will be liable to a pedestrian injured by a defect in a public sidewalk only when the owner either created the condition or caused the defect to occur because of a special use, or when a statute or ordinance places an obligation to maintain the sidewalk on the owner and expressly makes the owner liable for injuries caused by a breach of that duty' ... . Here, the evidentiary material submitted by Khadu in support of his motion established as a matter of law that the plaintiffs had no cause of action against him. Khadu demonstrated that he did not create the alleged condition or cause the condition through a special use of the sidewalk. Additionally, although section

180-2 of the Code of the Village of Freeport requires an abutting landowner to keep a sidewalk in good and safe repair, it does not specifically impose tort liability for a breach of that duty ...". ***Daniel v. Khadu*, 2021 N.Y. Slip Op. 00291, Second Dept 1-20-21**

THIRD DEPARTMENT

CIVIL PROCEDURE, APPEALS.

CPLR 205(a), WHICH ALLOWS AN ACTION TO BE REFILED WITHIN SIX MONTHS OF DISMISSAL. DOES NOT APPLY TO MOTIONS; THE DEFENDANTS WERE AGGRIEVED BY AN ORDER WHICH STAYED THE PROCEEDINGS FOR FURTHER SUBMISSIONS AND THEREFORE COULD APPEAL THE ORDER.

The Third Department, reversing Supreme Court, over a dissent, determined CPLR 205(a), which allows an action to be refiled within six months of dismissal under certain conditions, does not apply to motions. Here the plaintiff sought to bring a second motion for a deficiency judgment pursuant to Real Property Actions and Proceedings Law (RPAPL) 1371 after the first was deemed untimely because it was not served within the 90-day time-frame. The dissenter argued the defendants were not aggrieved by the lower court's order which stayed the proceedings for further submissions and therefore could not appeal: "As an initial matter, plaintiff contends that, because Supreme Court did not ultimately rule on the relief sought — namely a deficiency judgment — and instead issued a stay to allow further submissions from the parties, defendants are not aggrieved by the ruling and the appeal should be dismissed. ... We disagree. A party is aggrieved when the court denies the relief it requested or grants relief, in whole or in part, against a party who had opposed the relief ... . Here, defendants opposed plaintiff's second motion for a deficiency judgment as untimely. Had Supreme Court agreed, the case would have been dismissed outright, and defendants would have been relieved of any deficiency judgment. Instead, they continue to be involved in litigation and remain exposed to the potential of said judgment and the financial consequences attendant thereto. Defendants are therefore clearly aggrieved by the finding of timeliness by Supreme Court. * * * ... [P]laintiff urges this Court to find the second motion timely by applying CPLR 205 (a), allowing it to file the second motion six months after the denial of the first motion. ... Here, the statute provides that '[i]f an action is timely commenced and is terminated in any other manner than by a voluntary discontinuance, a failure to obtain personal jurisdiction over the defendant, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits, the plaintiff . . . may commence a new action upon the same transaction or occurrence or series of transactions or occurrences within six months after the termination provided that the new action would have been timely commenced at the time of commencement of the prior action' ... . An action is defined as 'a civil or criminal judicial proceeding' ... . CPLR 105 defines an action to include a special proceeding, whereas a motion is defined as 'an application for an order' (CPLR 2211). RPAPL 1371 (2) and (3) expressly direct that a motion for a deficiency judgment be made. Motions are not subject to the tolling provision of CPLR 205 (a). Had the Legislature intended to include motions in CPLR 205 (a), it could have done so and its failure to do so, is presumed to be intentional ...". ***Trustco Bank v. The Preserve Dev. Group Co., LLC*, 2021 N.Y. Slip Op. 00350, Third Dept 1-21-21**

CRIMINAL LAW.

THE 2020 AMENDMENT TO CPL § 30.30 WHICH ALLOWS AN APPEAL ALLEGING A VIOLATION OF THE SPEEDY TRIAL STATUTE AFTER A GUILTY PLEA DOES NOT APPLY RETROACTIVELY.

The Third Department, in a full-fledged opinion by Justice Mulvey, determined the 2020 amendment to Criminal Procedure Law § 30.30 which allows an appeal alleging the violation of the speedy trial statute after a guilty plea does not apply retroactively: "At the time of defendant's plea in November 2017 and his sentencing in April 2018, it was settled law that a guilty plea forfeited a defendant's right to claim that the trial court erred in denying his or her CPL 30.30 speedy trial motion ... . However, CPL 30.30 (6), which was enacted as part of an omnibus budget bill in April 2019 and became effective on January 1, 2020 ... , provides that '[a]n order finally denying a motion to dismiss pursuant to [CPL 30.30 (1)] shall be reviewable upon an appeal from an ensuing judgment of conviction notwithstanding the fact that such judgment is entered upon a plea of guilty.' * * * '... [I]t is a bedrock rule of law that, absent an unambiguous statement of legislative intent, statutes that revive time-barred claims if applied retroactively will not be construed to have that effect ...". ***People v. Duggins*, 2021 N.Y. Slip Op. 00336, Third Dept 1-21-21**

FAMILY LAW, CIVIL PROCEDURE, JUDGES, APPEALS.

FAMILY COURT SHOULD NOT HAVE REFUSED JURISDICTION OVER THIS CUSTODY AND NEGLECT PROCEEDING STEMMING FROM AN INCIDENT DURING A BRIEF VISIT TO TENNESSEE.

The Third Department, reversing Family Court and ordering new proceedings in front of a different judge, in a full-fledged opinion by Justice Clark, determined Family Court completely mishandled this custody matter which involved neglect proceedings in Tennessee stemming from an incident during the family's brief visit there. Family Court had refused to exercise jurisdiction over the matter on inconvenient-forum grounds: "... [T]here was no dispute that the children and their respec-

tive parents/custodian had lived in New York for at least six consecutive months prior to the April 2019 commencement of the neglect proceeding in Tennessee, thereby making New York the children's home state ... . Thus, pursuant to the UCCJEA, Family Court had jurisdiction over the neglect proceeding commenced in Tennessee ... . * * * The record irrefutably reflects that the children came into emergency care in Tennessee during a brief visit to the state and that, prior to entering care, they had not resided in Tennessee. The children's respective parents/legal custodian reside in New York, as does a half sibling of one of the children. Roughly 850 miles separate the Tennessee court and Chemung County, and the parties have limited financial means to travel to Tennessee to participate in court proceedings or to visit with the children. Additionally, with the exception of DSS, which did not provide an appropriate basis in law for its objection, all parties and the Tennessee court agreed that Family Court should exercise jurisdiction over the dispositional phase of the neglect proceeding. Significantly, evidence regarding the children's best interests and the feasibility of reunifying them with their respective parents and/or petitioner is in New York, including proof relating to any remedial and rehabilitative services offered to and engaged in by the mother and Jamie A. Any testimony required from witnesses located in Tennessee can be taken by phone." ***Matter of Diana XX v. Nicole YY*, 2021 N.Y. Slip Op. 00352, Third Dept 1-21-21**

FAMILY LAW, EVIDENCE.

THE EVIDENCE DID NOT SUPPORT THE FINDING OF NEGLECT ON MOTHER'S PART.

The Third Department, reversing Family Court, determined the evidence did not support a finding of neglect on the part of mother (respondent). Although mother's husband (Bradley CC.) had been violent on two occasions, the children did not witness the incidents: "Respondent's handling of the domestic abuse and Bradley CC.'s alcohol and substance misuse gave petitioner reasonable cause for concern. Indeed, the evidence established that respondent — a recovering heroin addict — was aware that Bradley CC. had a substance and alcohol abuse problem but failed to acknowledge — or minimized — the impact that such problem was having or could have on her and the children. Respondent admitted to coping with the circumstances by habitually using marihuana, but was resistant to treatment and mental health counseling and failed to recognize the problematic nature of her chosen coping mechanism, particularly given her history of addiction. Despite the concern that respondent was not dealing with the circumstances in a healthy manner, there was no evidence that she used marihuana in the presence of the children or that her usage had ever rendered her unable to care for the children ... . While engaged with preventative services with petitioner, respondent seemingly understood the potential impact that Bradley CC.'s drinking could have on the children and agreed to a safety plan stating that he was not to be left alone to care for the children. ... * * * Respondent's failings ... do not rise to such a level to support the conclusion that her actions and inactions actually impaired the children's physical, mental or emotional conditions or placed the children at imminent risk of such impairment ...". ***Matter of Lexie CC. (Liane CC.)*, 2021 N.Y. Slip Op. 00342, Third Dept 1-21-21**

LANDLORD-TENANT, CONTRACT LAW.

THE EXECUTIVE ORDERS AND LEGISLATION PROHIBITING EVICTIONS DURING THE PANDEMIC APPLIED TO A HOLDOVER TENANT WHO HAD ENTERED AN AGREEMENT TO VACATE THE APARTMENT.

The Third Department, reversing Supreme Court, in a full-fledged opinion by Justice Mulvey, determined the Executive Orders and legislation prohibiting evictions during the COVID pandemic precluded the eviction of a holdover tenant based upon an agreement by the tenant to vacate the apartment: "On August 27, 2020, petitioner commenced a summary eviction proceeding seeking a warrant of eviction to remove respondents from the premises (see RPAPL 711 [1]). At an appearance before Supreme Court on September 17, 2020, the parties, with the assistance of counsel, reached an agreement in which respondents agreed to vacate the premises on or before October 2, 2020. Pursuant to the agreement, the court issued a warrant of eviction, effective October 3, 2020, to be executed if respondents failed to vacate. Respondents remained on the premises and, on October 5, 2020, the Sullivan County Sheriff's Office, in accordance with the warrant, served respondents a 14-day notice indicating that the eviction would take place on October 21, 2020. After counsel for respondent Kaia Humphrey (hereinafter respondent) contacted the County Attorney's office regarding the suspension of evictions via a new executive order issued by Governor Andrew Cuomo, petitioner moved for an order seeking, among other things, enforcement of the parties' agreement to vacate and of the warrant of eviction. Following a virtual appearance on October 20, 2020, Supreme Court granted petitioner's motion and ordered enforcement of the warrant of eviction. Respondent appeals. * * * Because these executive orders prohibit enforcement of residential evictions, without any exceptions for holdover proceedings or warrants issued based on stipulations, Supreme Court was precluded from ordering enforcement of the warrant to evict respondents. Further executive orders have extended the stay on enforcements to December 3, 2020 ... . Furthermore, on December 28, 2020, the Legislature passed, and the Governor signed, the COVID-19 Emergency Eviction and Foreclosure Prevention Act of 2020 ... . That act, which was effective immediately ... , allows tenants to file a hardship declaration, which will prevent an eviction until at least May 1, 2021 ...". ***Matter of Cabrera v. Humphrey*, 2021 N.Y. Slip Op. 00358, Third Dept 1-21-21**

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