March 12, 2021

CasePrepPlus

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

Editor: **Bruce Freeman**

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

FIRST DEPARTMENT

CIVIL PROCEDURE, EMPLOYMENT LAW, NEGLIGENCE, VICTIMS OF GENDER-MOTIVATED VIOLENCE PROTECTION LAW (VGM). MUNICIPAL LAW, CORPORATION LAW.

THE SEVEN-YEAR STATUTE OF LIMITATIONS IN NYC'S VICTIMS OF GENDER-MOTIVATED VIOLENCE PROTECTION LAW (VGM) IS NOT PREEMPTED BY THE ONE-YEAR OR THREE-YEAR CPLR STATUTES OF LIMITATIONS; ALTHOUGH DEFENDANT AND DEFENDANT S CORPORATION MAY BE ONE AND THE SAME, THERE WAS ENOUGH EVIDENTIARY SUPPORT FOR THE NEGLIGENT HIRING AND SUPERVISION CAUSE OF ACTION TO SURVIVE THE MOTION TO DISMISS.

The First Department, in a full-fledged opinion by Justice Acosta, reversing Supreme Court, determined the seven-year statute of limitations in NYC's Victims of Gender-Motivated Violence Protection Law (VGM) was not preempted by the one-year statute of limitations for assault in the CPLR and the negligent hiring and supervision cause of action should have survived the motion to dismiss even though the S corporation (PDR) and the defendant (Rofe) may be one and the same. The complaint alleged plaintiffs were subjected to unwanted sexual touching by defendant Rofe during voice-over coaching sessions offered by defendant S corporation (PDR): "... [W]e find that the legislative intent of the VGM was to create a civil rights remedy or cause of action such as in VAWA, rather than to extend the statute of limitations for a particular class of assaults. Since the nature of the claim is for a civil rights violation (providing a remedy for those subjected to violence because of their gender), the seven-year limitations period provided in the Administrative Code is not preempted by the CPLR statute of limitations for assault claims. * * * To be sure, defendants may be correct that PDR essentially has no corporate structure separate from Rofe. Plaintiffs themselves do not appear to distinguish between Rofe and PDR in their brief. Nevertheless, plaintiffs have sufficiently alleged that Rofe was an employee of PDR and, through the submission of additional evidence in opposition to the motion to dismiss, have also sufficiently alleged that there may have been other employees of PDR who either hired, or supervised Rofe or whom Rofe hired or supervised. The acts of a corporation's agent and the knowledge acquired by the agent are presumptively imputed to the corporation ... . Thus, Rofe's knowledge (as an alleged agent of PDR) that an employee was potentially violent or prone to sexual assaults would normally be imputed to PDR, potentially requiring PDR to supervise that employee, and the cause of action for negligent hiring and supervision should be reinstated as against PDR ...". ***Engelman v. Rofe*, 2021 N.Y. Slip Op. 01321, First Dept 3-2-21**

ZONING, LAND USE, APPEALS, ADMINISTRATIVE LAW, ENVIRONMENTAL LAW.

SUPREME COURT SHOULD HAVE DEFERRED TO THE NYC BOARD OF STANDARDS AND APPEALS' INTERPRETATION OF AN AMBIGUOUS ZONING RESOLUTION WHICH ALLOWED THE CONSTRUCTION OF A 55-STORY CONDOMINIUM BUILDING; THE BUILDING IS COMPLETE AND THE DOCTRINE OF MOOTNESS APPLIES TO PRECLUDE THE APPEAL.

The First Department, in a full-fledged opinion by Justice Singh, reversing Supreme Court, determined Supreme Court should have deferred o the judgment of the NYC Board of Standards and Appeals (BSA) which allowed the construction of a 55-story condominium building. At issue was an ambiguous Zoning Resolution and the relationship between zoning lots and tax lots. The First Department held that the BSA had the necessary expertise to interpret the relevant statute and Supreme Court should have allowed the BSA's interpretation to stand. In addition, the First Department found that the mootness doctrine had not been waived and the doctrine applied to the appeal because the building was fully completed and so steps to halt construction had been taken during the lengthy litigation: "The BSA's interpretation of the relevant subdivision was 'neither irrational, unreasonable nor inconsistent with the governing statutes' ... . It rationally interpreted the resolution and properly considered Amsterdam's reliance on the DOB's [NYC Department of Building's] longstanding Minkin Memo and the history of the block, as several other buildings on the block were issued certificates of occupancy, even though they also include partial tax lots. 'When an agency adopts a construction which is then followed for 'a long period of time,' such interpretation 'is entitled to great weight and may not be ignored' ... . '[T]he doctrine of mootness is invoked where a change in circumstances prevents a court from rendering a decision that would effectively determine an actual controversy'... . In the construction context, 'several factors [are] significant in evaluating claims of mootness[,] [c]hief among them [being] a challenger's failure to seek preliminary injunctive relief or otherwise preserve the status quo to

prevent construction from commencing or continuing during the pendency of the litigation' ...". ***Matter of Committee for Environmentally Sound Dev. v. Amsterdam Ave. Redevelopment Assoc. LLC*, 2021 N.Y. Slip Op. 01228, First Dept 3-2-21**

SECOND DEPARTMENT

ADMINISTRATIVE LAW, CIVIL PROCEDURE, JUDGES.

FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES IS AN AFFIRMATIVE DEFENSE WHICH CAN BE WAIVED; THE JUDGE, THEREFORE, SHOULD NOT HAVE, SUA SPONTE, DISMISSED THE ARTICLE 78 PETITION ON THAT GROUND; PETITION REINSTATED.

The Second Department, reversing Supreme Court, determined the Article 78 proceeding should not have been dismissed, sua sponte, on the ground petitioner had not exhausted his administrative remedies, which is an affirmative defense to be raised by the respondent, not the judge: "The Supreme Court's sua sponte dismissal of the proceeding for the petitioner's failure to exhaust his administrative remedies was error. 'Failure to exhaust administrative remedies is not an element of an article 78 claim for relief, but an affirmative defense which must be raised by respondent either in an answer or by preanswer motion or else be deemed waived' ...". ***Matter of Bobar v. Transit Adjudication Bur.*, 2021 N.Y. Slip Op. 01255, Second Dept 3-3-21**

AGENCY, INSURANCE LAW, REAL PROPERTY LAW.

DEFENDANT TITLE INSURANCE COMPANY WAS ABLE TO DEMONSTRATE DEFENDANT AGENCY DID NOT HAVE ACTUAL AUTHORITY TO ISSUE THE TITLE INSURANCE POLICY TO PLAINTIFF; HOWEVER IT DID NOT DEMONSTRATE THE AGENCY DID NOT HAVE APPARENT AUTHORITY TO ISSUE THE POLICY; THEREFORE THE TITLE INSURANCE COMPANY'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined defendant WFG, a title insurance company, should not have been granted summary judgment on the "apparent authority" cause of action. WFG had terminated its agency relationship with NMR and had served a temporary restraining order on NMR prohibiting NMR from issuing any title insurance underwritten by WFG. The day after the restraining order was served, NMR issued a policy to plaintiff on property which turned out to have been encumbered with millions of dollars of liens. WFG was able to prove NMR did not have actual authority to issue the policy, but did not demonstrate NMR did not have apparent authority to issue the policy: "In the absence of actual authority, a principal may still be bound by the actions of a person who has apparent authority ... . 'Essential to the creation of apparent authority are words or conduct of the principal, communicated to a third party, that give rise to the appearance and belief that the agent possesses authority to enter into a transaction' ... . The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact ... . Failure to make such a showing requires a denial of the motion, regardless of the sufficiency of the opposing papers ... . Here, WFG failed to establish, prima facie, that NMR Realty lacked apparent authority to issue the policy. WFG merely pointed to gaps in the plaintiff's proof, which was insufficient to meet its prima facie burden as the party moving for summary judgment ...". ***Schwartz v. WFG Natl. Tit. Ins. Co.*, 2021 N.Y. Slip Op. 01279, Second Dept 3-3-21**

CIVIL PROCEDURE, FORECLOSURE.

BECAUSE THE ORDER DISMISSING THE INITIAL COMPLAINT DID NOT SPECIFY CONDUCT CONSTITUTING NEGLECT TO PROSECUTE, THE SIX-MONTH TOLL OF THE STATUTE OF LIMITATIONS PURSUANT TO CPLR 205(a) APPLIED AND THE ACTION WAS TIMELY; THE DISSENT DISAGREED.

The Second Department, over a strong dissent, determined that the foreclosure was timely commenced pursuant to CPLR 205(a) within six months of the dismissal of the initial complaint. The six-month toll of the statute of limitations pursuant to CPLR 205(a) does not apply to a dismissal for neglect to prosecute. However, the order dismissing the action for neglect to prosecute must specify the conduct constituting neglect. The majority concluded the order did not include any specific findings of neglect. The dissent disagreed: "Contrary to the defendant's contention and the finding of our dissenting colleague, the 2010 action was not dismissed for neglect to prosecute, a category of dismissal that renders CPLR 205(a) inapplicable. 'Where a dismissal is one for neglect to prosecute the action . . . , the judge shall set forth on the record the specific conduct constituting the neglect, which conduct shall demonstrate a general pattern of delay in proceeding with the litigation' (CPLR 205[a]). Here, the order dated April 6, 2017, 'did not include any findings of specific conduct demonstrating 'a general pattern of delay in proceeding' ... . Moreover, by dismissing the 2010 action without prejudice, the Supreme Court 'permitted the plaintiff to avail itself of CPLR 205(a) to recommence the foreclosure action' ...". ***Deutsche Bank Natl. Trust Co. v. Baquero*, 2021 N.Y. Slip Op. 01246, Second Dept 3-3-21**

CRIMINAL LAW, ATTORNEYS.

DEFENSE COUNSEL'S STATING TO THE COURT THAT DEFENDANT'S MOTION TO WITHDRAW HIS GUILTY PLEA WAS FRIVOLOUS DEPRIVED DEFENDANT OF HIS RIGHT TO EFFECTIVE COUNSEL.

The Second Department, remitting the matter for a report on defendant's motion to withdraw his guilty plea, determined defense counsel, by stating to the court that defendant's motion was frivolous, had taken a position adverse to the client: "The defendant pleaded guilty to assault in the first degree, but at sentencing, the defendant stated that he wished to withdraw his plea, which he claimed had been coerced by his counsel. The County Court relieved defense counsel, and assigned new counsel to represent the defendant. Subsequently, the defendant's new counsel advised the court that after evaluating the evidence, the defendant's allocution, and after speaking to the defendant and his prior attorney, a motion to withdraw the plea of guilty would be frivolous. The court granted the defendant a number of adjournments to permit him to retain private counsel to pursue his motion to withdraw his plea, but when the defendant failed to do so, the court ultimately sentenced him, while he was still represented by the second assigned counsel. ... We agree with the defendant that his right to counsel was adversely affected, and he received ineffective assistance of counsel, when his counsel took a position adverse to his ... . The County Court should have appointed new counsel to represent the defendant with respect to the motion to withdraw his plea of guilty ...". ***People v. Fellows*, 2021 N.Y. Slip Op. 01269, Second Dept 3-3-21**

CRIMINAL LAW, IMMIGRATION LAW.

ALTHOUGH THE CO-DEFENDANT WAS SO INFORMED IN DEFENDANT'S PRESENCE, DEFENDANT WAS NOT DIRECTLY INFORMED OF THE POSSIBILITY OF DEPORTATION BY THE JUDGE; MATTER REMITTED TO GIVE DEFENDANT THE OPPORTUNITY TO MOVE TO WITHDRAW HIS GUILTY PLEA.

The Second Department, remitting the matter to allow defendant to move to withdraw his guilty plea, determined, although the co-defendant, in defendant's presence, was informed of the possibility of deportation based upon the plea, the defendant, who did not speak English, was not directly so informed by the judge: "During that proceeding, the court posed a question directly to 'Mr. Vidalis,' asking if the codefendant understood that he could be deported if he entered a plea of guilty, to which the codefendant answered in the affirmative. The court then stated to the defendant, 'Mr. Tapia; do you understand that?' The defendant answered in the affirmative. The court then individually asked the codefendant and the defendant if they had fully discussed 'the immigration consequences of this case with your attorney,' to which the defendant answered in the affirmative. However, the court did not specifically instruct the defendant, who required a Spanish interpreter to understand the court and had only a sixth-grade education, that he could be deported if he entered a plea of guilty, nor did the court use the words 'deported' or 'deportation' in any statement posed directly to the defendant. * * * ... [W]hile the plea record demonstrates that the Supreme Court specifically advised the codefendant of the possibility that he could be deported as a consequence of his plea, the court, in addressing the defendant, simply asked, 'Mr. Tapia; do you understand that?' ... . In light of the defendant's limited education and need for a Spanish interpreter to understand the court's remarks, the court's limited inquiry as to whether the defendant understood 'that' did not ensure the defendant's understanding that he could be deported as a consequence of his own plea, as opposed to his mere recognition that the codefendant faced deportation consequences ...". ***People v. Tapia*, 2021 N.Y. Slip Op. 01274, Second Dept 3-3-21**

FAMILY LAW, EVIDENCE, ATTORNEYS, PRIVILEGE.

PLAINTIFF HUSBAND IN THIS DIVORCE ACTION INSTALLED SPYWARE WHICH INTERCEPTED DEFENDANT WIFE'S PHONE CALLS AND THEN DESTROYED THE CONTENTS OF THE INTERCEPTION; THE INTERCEPTION VIOLATED DEFENDANT WIFE'S ATTORNEY-CLIENT PRIVILEGE; SANCTIONS FOR SPOLIATION OF EVIDENCE PROPERLY INCLUDED STRIKING THE CAUSES OF ACTION FOR SPOUSAL SUPPORT, EQUITABLE DISTRIBUTION AND ATTORNEY'S FEES.

The Second Department determined plaintiff husband in this divorce action was properly sanctioned for spoliation of evidence by striking from the complaint the causes of action seeking spousal support, equitable distribution and attorney's fees. The husband had installed spyware which allowed interception of defendant wife's phone calls. Evidence of what was intercepted was destroyed. It was assumed that the interceptions violated defendant wife's attorney-client privilege: "... Supreme Court properly drew the presumption of relevance in connection with the interception by the plaintiff of privileged communications between the defendant and her attorney in view of the plaintiff's invocation of his Fifth Amendment privilege against self-incrimination when questioned about it at his deposition, his intentional destruction of electronic records, and the evidence that he had utilized spyware to record the defendant's conversations when she was in the vicinity of her attorney's office. Although this presumption is rebuttable ... the plaintiff did not provide any evidence to rebut it. Further, while the striking of pleadings is a drastic remedy, the court did not improvidently exercise its discretion in striking the causes of action in the plaintiff's complaint seeking financial relief other than child support. 'Under the common-law doctrine of spoliation, a party may be sanctioned where it negligently loses or intentionally destroys key evidence' ... . ' ... Where appropriate, a court can impose the ultimate sanction of dismissing the action or striking responsive pleadings,

thereby rendering a judgment by default against the offending party' ...". ***C.C. v. A.R.*, 2021 N.Y. Slip Op. 01243, Second Dept 3-3-21**

INDIAN LAW, CIVIL PROCEDURE. IMMUNITY, REAL PROPERTY LAW.

SUPREME COURT DID NOT HAVE SUBJECT MATTER JURISDICTION OVER AN ACTION TAKEN BY THE UNKECHAUG INDIAN NATION TO EXCLUDE A MEMBER OF THE NATION FROM A PARCEL OF NATION LAND.

The Second Department determined Supreme Court properly ruled it did not have subject matter jurisdiction over a land-possession dispute within the Unkechaug Indian Nation. The Nation first sought a Supreme Court ruling on the rightful possessor of the land (claimed to be Curtis Treadwell), thereby waiving sovereign immunity on that issue. Then the Nation, pursuant to its own internal Tribal Rules, determined Danielle Treadwell, who occupied a portion of the land, was an "undesirable person" and, based on that finding, could no longer occupy the property. The Supreme Court did not have subject matter jurisdiction over the "undesirable person" action taken by the Nation: "... [B]y bringing the April 2018 determination that Curtis was the rightful possessor of the subject property before the state Supreme Court, and seeking a declaration and enforcement, the Nation waived its sovereign immunity, though only as to that determination and its enforcement ... . Accordingly, so long as the Nation relied on the April 2018 determination as its basis for excluding Danielle from the disputed portion of the subject property, the defendants' counterclaims seeking inverse declarations could proceed along with the Nation's action for declaratory relief. However, once the Nation proceeded to take the undesirability vote in September 2019 and issue the tribal resolution and directives based upon the membership's vote, the Nation, pursuant to its own Tribal Rules, created a new and independent basis, under its sovereign authority, for excluding Danielle from the disputed portion of the subject property. The Supreme Court properly recognized that once it was informed of the 2019 undesirability determination, it could not take any action with respect thereto, as this was a sovereign act of the Nation outside the court's subject matter jurisdiction ...". ***Unkechaug Indian Nation v. Treadwell*, 2021 N.Y. Slip Op. 01286, Second Dept 3-3-21**

MEDICAL MALPRACTICE, PERSONAL INJURY, EVIDENCE.

PLAINTIFF'S EXPERT AFFIDAVIT IN THIS MEDICAL MALPRACTICE ACTION DID NOT LAY A FOUNDATION FOR AN OPINION OUTSIDE THE EXPERT'S FIELD AND DID NOT REBUT THE OPINIONS OF DEFENDANT'S EXPERT; DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined defendant's motion for summary judgment in this medical malpractice case should have been granted. Plaintiff's expert's affidavit did not raise a question of fact because there was no foundation for the expert's opining outside the expert's field of emergency medicine: "The affirmation of the plaintiff's expert, a physician with training in emergency medicine, lacked probative value as it failed to specify that the expert had any specific training or expertise in neurology or in the diagnosis and treatment of strokes, or how she became familiar with the applicable standards of care ... . Moreover, the plaintiff's expert failed to rebut the opinions of the defendant's expert or articulate how the defendant's alleged deviations from the accepted standard of care were a proximate cause of the plaintiff's injuries ...". ***Laughtman v. Long Is. Jewish Val. Stream*, 2021 N.Y. Slip Op. 01251, Second Dept 3-3-21**

PERSONAL INJURY, EVIDENCE, MUNICIPAL LAW.

PLAINTIFF'S EXPERT SHOULD HAVE BEEN ALLOWED TO TESTIFY IN THIS SLIP AND FALL CASE; NEW TRIAL ORDERED.

The Second Department, reversing the defendants' verdict in this slip and fall case, determined plaintiff's expert should have been allowed to testify: "The plaintiff Wendy Robins (hereinafter the injured plaintiff) fell after stepping onto a curb adjacent to an unfinished driveway apron leading to an underground parking garage in a condominium building that was under construction ... . '[E]xpert opinion is proper when it would help to clarify an issue calling for professional or technical knowledge, possessed by the expert and beyond the ken of the typical juror' ... . The admissibility and scope of expert testimony is a determination within the discretion of the trial court ... . Here, the Supreme Court improvidently exercised its discretion in precluding the testimony of the plaintiffs' proposed expert witness as to industry safety standards relating to the construction of sidewalks ... . Contrary to the defendants' contention, the record shows no appreciable difference between the unfinished driveway apron where the injured plaintiff fell, which was left open to pedestrians, and the adjoining unfinished sidewalks, which were barricaded by a fence and barrels. Moreover, the absence of a violation of a specific code or ordinance is not dispositive of the plaintiffs' allegations based on common-law negligence principles ... . Had the plaintiffs' expert been permitted to testify, he could have addressed whether, under the circumstances presented, the defendants' failure to barricade the driveway apron or otherwise warn pedestrians of its unfinished condition was a departure from generally accepted customs and practices and whether the defendants were negligent in failing to do so ...". ***Robins v. City of Long Beach*, 2021 N.Y. Slip Op. 01277, Second Dept 3-3-21**

PERSONAL INJURY, MUNICIPAL LAW.

DESPITE A SMALL HOME OFFICE, DEFENDANT WAS ENTITLED TO THE LIABILITY EXEMPTION FOR OWNER-OCCUPIED RESIDENCES IN THIS SIDEWALK SLIP AND FALL CASE.

The Second Department, reversing Supreme Court, determined defendant property owner's motion for summary judgment in this sidewalk slip and fall case should have been granted. The NYC Administrative Code exempts abutting owner-occupied residential properties from liability. The fact that defendant had a small office where he edited photos did not change the purely residential nature of the property: "In 2003, the New York City Council enacted section 7-210 of the Administrative Code of the City of New York to shift tort liability for injuries resulting from defective sidewalks from the City to abutting property owners ... . This liability shifting provision does not, however, apply to 'one-, two- or three-family residential real property that is (i) in whole or in part, owner occupied, and (ii) used exclusively for residential purposes' ... . 'The purpose of the exception in the Code is to recognize the inappropriateness of exposing small-property owners in residence, who have limited resources, to exclusive liability with respect to sidewalk maintenance and repair' ... . Here, the appellant established, prima facie, that he was exempt from liability pursuant to the subject Code exception, and no triable issue of fact was raised in opposition. The appellant's partial use of a room in his single-family home as an office to edit some photos in relation to his infrequent paid photography ventures was merely incidental to his residential use of the property ... . The appellant was a retired photographer, and on occasion he would edit photos on his home computer in relation to two or three paid party photography jobs he did per year. The appellant did not claim a 'home office' tax deduction, nor did he use this space in his home to edit these photos with any regularity." ***Zak v. City of New York*, 2021 N.Y. Slip Op. 01287, Second Dept 3-3-21**

PRODUCTS LIABILTY, PERSONAL INJURY, EVIDENCE, CIVIL PROCEDURE.

THE DEFENSE EXPERT SHOULD NOT HAVE BEEN ALLOWED TO OFFER A SPECULATIVE CONCLUSION ABOUT HOW PLAINTIFF WAS INJURED WHICH WAS NOT SUPPORTED BY ANY EVIDENCE IN THE RECORD; PLANTIFF ALLEGED THE STEP STOOL SHE WAS STANDING ON COLLAPSED; THE DEFENSE EXPERT TESTIFIED SHE COULD HAVE FALLEN ONTO THE STOOL; THE DEFENSE VERDICT SHOULD HAVE BEEN SET ASIDE.

The Second Department, reversing Supreme Court, determined the verdict in this products liability case should have been set aside. Plaintiff alleged she was injured when a step stool collapsed as she stood on it. The defendant's expert testified she could have fallen onto the stool. There was no evidence in the record to support the expert's opinion, which was objected to by plaintiff. The defense verdict, therefore, should have been set aside: "Following the accident, one of the injured plaintiff's coworkers discarded the step stool in the trash. At the trial on the issue of liability, the defendant's expert testified, over the plaintiffs' objection, that the injured plaintiff's accident may have occurred because she slipped and fell onto the step stool. Over the plaintiffs' objection, the jury was asked the question: 'Did the subject step stool collapse under the [injured] plaintiff while she was standing on it on October 22, 2013, causing the [injured] plaintiff's accident?' The jury answered 'No,' thereby finding in favor of the defendant on the ground that the accident did not occur as the injured plaintiff said it did. * * * We agree with the plaintiffs that the evidence so preponderates in favor of the plaintiffs on the issue of whether the subject step stool collapsed as the injured plaintiff stood on it causing her accident, that the jury could not have reached the verdict it did by any fair interpretation of the evidence ... . Moreover, the testimony of the defendant's expert that the accident may have happened because the injured plaintiff fell onto the step stool was speculative, lacked support in the record, and should not have been admitted in evidence ...". ***Montesione v. Newell Rubbermaid, Inc.*, 2021 N.Y. Slip Op. 01253, Second Dept 3-3-21**

THIRD DEPARTMENT

CRIMINAL LAW.

COUNTY COURT'S TELLING DEFENDANT HIS SENTENCE WOULD BE ENHANCED IF HE DID NOT COOPERATE WITH THE PROBATION DEPARTMENT DID NOT ADEQUATELY INFORM DEFENDANT HIS STATEMENT IN THE PROBATION INTERVIEW THAT HE DID NOT REMEMBER THE BURGLARY WOULD TRIGGER AN ENHANCED SENTENCE; SENTENCE VACATED.

The Third Department, vacating defendant's sentence, determined that County Court's telling defendant he would enhance defendant's sentence if defendant did not cooperate with the Probation Department did not adequately inform defendant his sentence would be enhanced if he told the Probation Department he did not remember the burglary to which he entered a plea: "Prior to adjourning the matter for sentencing, County Court stated to defendant, 'It's important that you cooperate with the Probation Department . . ., because if you . . . didn't cooperate with the presentence investigation report, then I could enhance the sentence and sentence you to more time.' County Court did not, however, expressly advise defendant (and defendant, in turn, did not agree) that he must provide truthful answers to the Probation Department, refrain from making statements that were inconsistent with his sworn statements during the plea colloquy and/or avoid any attempt to

minimize his conduct in the underlying burglary ... . Further, County Court summarily denied defendant's oral motion to withdraw his plea upon this ground and, despite defendant's request for a hearing, County Court made no further inquiry as to defendant's allegedly inconsistent statements; rather, County Court simply concluded that defendant's stated inability to recall the burglary at the time of his interview with the Probation Department constituted a failure to 'cooperate' in the preparation of the presentence investigation report. Given the subjective nature of the court's requirement that defendant 'cooperate' with the Probation Department and the court's corresponding lack of further inquiry, County Court erred in imposing an enhanced sentence without first affording defendant an opportunity to withdraw his plea ...". ***People v. Ackley*, 2021 N.Y. Slip Op. 01293, Third Dept 3-4-21**

FAMILY LAW.

THE PETITION SEEKING TO TERMINATE FATHER'S PARENTAL RIGHTS, WITH THE GOAL OF FREEING THE CHILD FOR ADOPTION, AND THE CONCURRENT PERMANENCY PLAN TO RETURN THE CHILD TO THE CUSTODY OF MOTHER, HAD CONFLICTING END GOALS; THE PETITION TO TERMINATE FATHER'S PARENTAL RIGHTS SHOULD THEREFORE HAVE BEEN DIMSISSED.

The Third Department, reversing Family Court, determined the end goals of two concurrent proceedings were contradictory and therefore the petition to terminate father's parental rights should have been dismissed. The abandonment/termination of parental rights petition, which sought to free the child for adoption, was brought in the face of a permanency plan which sought to return the child to the custody of mother: "Respondent [father] contends that the abandonment proceeding, seeking to terminate his parental rights, was improperly brought against him as the permanency plan in place at the time of the hearing with respect to the mother was to return the child to the mother. We agree. ... The statutory purpose of an abandonment proceeding is to free the child for adoption by terminating the parents' rights to the child. Because this proceeding sought to terminate the rights of one parent in the face of an existent permanency plan that sought to reunite the child with the other parent, it did not serve that purpose. In circumstances such as this, dismissal of the petition is mandated ...". ***Matter of Xavier XX. (Godfrey YY.)*, 2021 N.Y. Slip Op. 01295, Third Dept 3-4-21**

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

THE DEFAULT NOTIFICATION LETTER DID NOT ACCELERATE THE DEBT BECAUSE IT DID NOT STATE THE DEBT WAS DUE AND PAYABLE IMMEDIATELY; THE BANK DID NOT DEMONSTRATE THE PROPER MAILING OF THE RPAPL 1304 NOTICE.

The Third Department, reversing Supreme Court, determined plaintiff bank was not entitled to summary judgment in this foreclosure action. The court held the action had never been dismissed pursuant to CPLR 3216 because no 90-day notice requiring the filing of a note of issue had been given. The foreclosure action was timely because the letter which defendants argued had accelerated the debt did not unambiguously state that the full mortgage debt had become due and payable immediately. However proof of the mailing of the the RPAPL 1304 notice was not sufficient: "The December 28, 2009 letter advised Mausler [defendant] that he was in default and that he could cure this default by making a payment 'within thirty days from the date of this letter.' The letter further stated that '[i]f you do not cure this default within the specified time period, your obligation for payment of the entire unpaid balance of the loan will be accelerated and become due and payable immediately' … . Additionally, the letter provided that if the amount due was not paid, 'foreclosure proceedings may commence to acquire the [p]roperty by foreclosure and sale' … . The Court of Appeals, however, recently explained that such language does not evince an intent by the noteholder to 'seek immediate payment of the entire, outstanding loan, but referred to acceleration only as a future event'... . Accordingly, contrary to defendants' contention, the December 2009 letter did not constitute a valid acceleration of the debt so as to trigger the applicable statute of limitations. ... Plaintiff relies on the affidavit from the loan servicing associate to demonstrate compliance with RPAPL 1304. The associate, however, 'did not attest to familiarity with or provide any proof of the mailing procedures utilized by the party that allegedly mailed the RPAPL 1304 notice' ...". ***Wilmington Trust, Natl. Assn. v. Mausler*, 2021 N.Y. Slip Op. 01296, Third Dept 3-4-21**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

WHETHER PLAINTIFF USED ONE OR BOTH HANDS TO MANIPULATE A HOSE WHILE STANDING ON A LADDER WHICH COLLAPSED OR SLIPPED WAS RELEVANT ONLY TO COMPARATIVE NEGLIGENCE, WHICH IS NOT A BAR TO RECOVERY PURSUANT TO LABOR LAW § 240(1).

The Third Department, over a dissent, determined plaintiff was entitled to summary judgment on his Labor Law § 240(1) cause of action. Plaintiff alleged he fell from an A-frame ladder which collapsed, slipped or otherwise failed to support him. Plaintiff was using a hose to insert insulation and was supposed to keep one hand on the ladder at all times. Defendant argued plaintiff demonstrated at his deposition that he had both hands on the hose. The majority held, even if plaintiff used both hands to manipulate the hose, that would constitute comparative negligence which is not a bar to recovery: "... [D]efendant relied upon plaintiff's deposition testimony, in which he averred that he chose a wooden, A-frame ladder, which he described as 'sturdy,' and placed so it was steady and free from 'wiggling.' Plaintiff testified that, while standing

on the steps of the ladder, he maintained a three-point safety stance, with his feet and one arm in contact with the ladder, and his other hand holding the hose that fed the insulation into the building's overhang. Plaintiff indicated that the ladder began to move forward, causing him to fall and sustain injuries. Defendant argued that this testimony established that the ladder 'was adequate and properly placed' ... , and that the testimony about plaintiff keeping one hand in contact with the ladder contradicted gestures he made during the deposition, where he seemed to indicate that 'both [of his] hands [were] cupped around an imaginary hose,' thus posing issues of fact. As Supreme Court found, the deposition testimony is not clear as to whether plaintiff maintained the three-point safety stance while on the ladder. Nonetheless, even if this disputed issue was resolved against plaintiff, this would merely present a factual question as to his potential comparative negligence, which 'does not relieve defendant[] of liability under Labor Law § 240 (1)' ...". ***Bennett v. Savage*, 2021 N.Y. Slip Op. 01306, Third Dept 3-4-21**

JUDGES, ATTORNEYS, TRUSTS AND ESTATES.

THE FORMER SURROGATE, NOW IN PRIVATE PRACTICE, CANNOT REPRESENT A CLIENT IN A CASE WHICH WAS BEFORE HER AS SURROGATE.

The Third Department, reversing Surrogate's Court, over a two-justice dissent, determined the former Surrogate, who is now in private practice, cannot represent a client in a proceeding which was before her as Surrogate: "Respondent contends that Surrogate's Court erred in not granting her motion to disqualify petitioner's counsel. We agree. Just as a judge may not preside over a case that he or she was previously involved in as an attorney (see Judiciary Law § 14; 22 NYCRR 100.3 [E] [1] [b] [i]), an attorney may not appear for a client in a case that he or she previously presided over as a judge (see Judiciary Law § 17; ... see also Rules of Professional Conduct [22 NYCRR 1200.0] rule 1.12 [a]). To that end, Judiciary Law § 17 provides that a 'former judge or surrogate 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.' This prohibition is 'absolute' and 'establishes a bright-line disqualification rule' ... . By our reading, this statute clearly operates to disqualify petitioner's counsel — who previously presided as the Surrogate over the probate of decedent's will and the issuance of letters testamentary and letters of trusteeship to respondent — from now representing petitioner in his claims against respondent involving the same estate and the same trust ... . To the extent that Surrogate's Court determined that Rules of Professional Conduct (22 NYCRR 1200.00) rule 1.12 (a) would permit the former Surrogate to represent petitioner in this matter — a finding with which we do not agree — this rule cannot be relied upon to permit a representation agreement that is otherwise precluded by Judiciary Law § 17." ***Matter of Gordon*, 2021 N.Y. Slip Op. 01294, Third Dept 3-4-21**

TRUSTS AND ESTATES, DEBTOR-CREDITOR, CIVIL PROCEDURE.

A STIPULATION OF SETTLEMENT FOR WHICH A JUDGMENT WAS ENTERED AFTER DECEDENT'S DEATH MAY NOT BE ENTERED IN DECEDENT'S NAME PURSUANT TO CPLR 5016(d); THEREFORE THE JUDGMENT IS NOT ENTITLED TO PRIORITY IN SETTLING THE ESTATE.

The Third Department, over a dissent, determined a stipulation of settlement in favor of decedent which was the basis of a judgment entered after decedent's death cannot, pursuant to CPLR 5016(d), be entered in his or her own name, and therefore is not entitled to priority in settling the estate: "An 'accepted offer to compromise pursuant to [CPLR] 3221' (CPLR 5016 [d]) refers to a precise mechanism, which allows a party against whom a claim is asserted, 10 days before trial, to 'serve upon the claimant a written offer to allow judgment to be taken against him [or her] for a sum or property or to the effect therein specified, with costs then accrued. If within [10] days thereafter the claimant serves a written notice that he [or she] accepts the offer, either party may file the summons, complaint and offer, with proof of acceptance, and thereupon the clerk shall enter judgment accordingly' (CPLR 3221). Here, there was no written offer or written acceptance; rather, the stipulation occurred on the record before Supreme Court, and the filing in the Clerk's Office occurred after petitioner secured the judgment and order from Supreme Court ... . We decline to adopt the broad interpretation of CPLR 5016 (d), as petitioner urges ... . The Legislature, in creating CPLR 5016 (d), set forth three distinct situations where a post-mortem judgment may be entered against the decedent in his or her own name, thus bestowing priority to the creditor. None of these three provisions was met here." ***Matter of Uccellini*, 2021 N.Y. Slip Op. 01303, Third Dept 3-4-21**

To view archived issues of CasePrepPlus,
visit www.nysba.org/caseprepplus.