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FIRST DEPARTMENT

ARBITRATION, CIVIL PROCEDURE, DEBTOR-CREDITOR, APPEALS, ATTORNEYS, CONTRACT LAW.

THE ARBITRATION AWARD IS VALID EVEN IF BASED ON AN ERROR OF LAW OR FACT; THE FAILURE TO PROVIDE A LETTER OF ENGAGEMENT DID NOT PRECLUDE THE ATTORNEY'S ACTION FOR BREACH OF CONTRACT; CPLR 5225 DOES NOT REQUIRE A SPECIAL PROCEEDING TO ENFORCE THE JUDGMENT.

The First Department, reversing Supreme Court, determined (1) the arbitrator's award was valid even if an error of law or fact was made; (2) the failure to provide a letter of engagement did not preclude the petitioner-attorney's action for breach of contract; (3) petitioner was not required to commence a special proceeding to enforce the judgment; (4) the motions to enforce the judgement do not violate the Commercial Division rules: "... [E]ven if the arbitrator had made an error of law or fact in concluding that respondents had breached the retainer agreements, this alone would not justify vacating the award ... . [T]he court improperly denied the motions [to enforce the judgment] based upon its finding that petitioner had failed to commence a separate special proceeding to enforce the judgment. The language of CPLR 5225 clarifies that the court had jurisdiction to resolve the turnover motion. While CPLR 5225(a) provides that a judgment creditor seeking turnover of money or personal property 'in possession or custody' of the judgment debtor does so '[u]pon motion of the judgment creditor,' CPLR 5225(b) provides that a judgment creditor seeking turnover of money or personal property in a third party's possession or custody does so '[u]pon a special proceeding commenced by the judgment creditor' ... Given that petitioner brought the motions against the judgment debtor as opposed to a third party, it was not required to commence a separate proceeding." ***Matter of Gibson, Dunn & Crutcher LLP v. World Class Capital Group, LLC*, 2021 N.Y. Slip Op. 03252, First Dept 5-20-21**

CIVIL PROCEDURE, JUDGES, APPEALS.

THE JUDGE SHOULD NOT HAVE, SUA SPONTE, DISMISSED THE COMPLAINT BECAUSE PLAINTIFF MISSED A STATUS CONFERENCE; THE SUA SPONTE ORDER IS NOT APPEALABLE; PLAINTIFF CORRECTLY MOVED TO VACATE THE ORDER AND APPEALED THE DENIAL.

The First Department, reversing Supreme Court, determined the judge should not have, sua sponte, dismissed the complaint because plaintiff missed a status conference. The First Department noted that the sua sponte dismissal order was not appealable as of right. Therefore plaintiff correctly moved to vacate the order and then appealed the denial of that order: "Contrary to defendant Hudson's argument, the status conference order sua sponte dismissing the complaint was not appealable as of right (CPLR 5701[a][2] ...). Plaintiff followed proper procedure by 'apply[ing] to vacate the order and then appeal[ing] from the denial of that motion so that a suitable record [could] be made and counsel afforded the opportunity to be heard on the issues' ... . The court improvidently exercised its discretion in imposing the extreme penalty of dismissal without giving plaintiff notice that such a sanction might be imminent ... . Further, the sanction of dismissal was not warranted, and would not have been warranted even upon a motion on notice, based on plaintiff's noncompliance with one order ...". ***MJC Elec., Inc v. Hudson Meridian Constr. Group, LLC*, 2021 N.Y. Slip Op. 03258, First Dept 5-20-21**

CRIMINAL LAW, CONSTITUTIONAL LAW.

THE RECORDING AND DISCLOSURE OF INMATE PHONE CALLS DO NOT VIOLATE THE INMATES' RIGHT TO EQUAL PROTECTION.

The First Department reiterated that the recording and disclosure of inmate phone calls do not violate the inmate's constitutional right to equal protection: "... [O]nce an inmate implicitly consents to the recording of his calls, the inmate retains no reasonable expectation of privacy that would prevent the correctional facility from disclosing the recording. '[W]here detainees are aware that their phone calls are being monitored and recorded all reasonable expectation of privacy in the content of those phone calls is lost, and there is no legitimate reason to think that the recordings, like any other evidence lawfully discovered, would not be admissible' (*People v Diaz*, 33 NY3d 92, 100 [2019] …). Indeed, at the heart of defendant's argument is the contradictory proposition that the warrant requirement should be applied to a statement in which he has no privacy interest at all. The principle stated in Diaz applies to any person, incarcerated or not, who waives his or her privacy interest in a conversation, whether by consenting to have it recorded or otherwise. To this extent, defendant was similarly

situated to defendants awaiting trial while at liberty. While defendant was treated disparately from such defendants in that he was required to either consent to recording or go without telephone use, this differential treatment did not run afoul of the equal protection clause. Furthermore, defendant fails to show that the government action at issue burdens a fundamental right ...". ***People v. Jennings*, 2021 N.Y. Slip Op. 03262, First Dept 5-20-21**

SECOND DEPARTMENT

CIVIL PROCEDURE, FORECLOSURE, REAL PROPERTY LAW.

APPELLANT PURCHASED THE PROPERTY WHILE THE FORECLOSURE ACTION WAS PENDING; APPELLANT'S MOTION TO INTERVENE SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined appellant's motion to intervene in this foreclosure action should have been granted: "The plaintiff commenced this action to foreclose a mortgage given by the defendant Kathleen O. Nocella. Nocella defaulted in appearing in the action. During the pendency of the action, nonparty Henry Irving, LLC (hereinafter the appellant), acquired title to the subject property. In September 2017, the plaintiff moved, inter alia, for leave to enter a default judgment and for an order of reference. The appellant cross-moved, inter alia, for leave to intervene in the action. ... The appellant was entitled to intervene as of right pursuant to CPLR 1012(a) since it established that the representation of its interest by the parties would be inadequate, that the action involved the disposition of title to real property, and that it would be bound and adversely affected by a judgment of foreclosure and sale (see CPLR 1012[a][2], [3]; 6501 ...). Contrary to the court's determination, neither the fact that the appellant obtained its interest in the subject property after this action was commenced and the notice of pendency was filed, nor the fact that the defendants defaulted in answering or appearing, definitively bars intervention ... . Moreover, since the appellant's cross motion, inter alia, for leave to intervene was made before an order of reference or judgment of foreclosure and sale was issued, the plaintiff was not prejudiced by the timing of the cross motion ...". ***Bank of Am., NA v. Nocella*, 2021 N.Y. Slip Op. 03159, Second Dept 5-19-21**

CIVIL PROCEDURE, JUDGES, CONTRACT LAW.

A GENERAL RELEASE AND WAIVER WHICH IS CONTRADICTED BY ACTIONS WHICH POST-DATE THE DOCUMENT CANNOT BE CONSTRUED AS A RELEASE; THE JUDGE DID NOT HAVE THE POWER, SUA SPONTE, PURSUANT TO CPLR 5019, TO VACATE THE COURT'S OWN ORDER.

The Second Department, reversing (modifying) Supreme Court, determined (1) actions which post-date a release and waiver which conflict with the terms of the release and waiver indicate the document cannot be construed as a release, and (2) the judge did not have the authority, sua sponte, to vacate the court's own order: " 'Where a waiver form purports to acknowledge that no further payments are owed, but the parties' conduct indicates otherwise, the instrument will not be construed as a release' ... . The Supreme Court erred in, sua sponte, vacating the December 2016 order. 'Pursuant to CPLR 5019(a), a trial court has the discretion to correct an order or judgment which contains a mistake, defect, or irregularity not affecting a substantial right of a party, or is inconsistent with the decision upon which it is based. However, a trial court has no revisory or appellate jurisdiction, sua sponte, to vacate its own order or judgment' ... . Additionally, '[p]ursuant to CPLR 5015(a), a court may relieve a party from an order or judgment, but only 'on motion of [an] interested person' and 'with such notice as the court may direct' ... . Here, to the extent that the Supreme Court was acting pursuant to CPLR 5019(a), the court erred, since that statute cannot be used by courts to vacate prior orders or judgments or 'reconsider[ ] the merits of summary judgment' ...". ***United Airconditioning Corp. v. Axis Piping, Inc.*, 2021 N.Y. Slip Op. 03210, Second Dept 5-19-21**

CRIMINAL LAW, APPEALS.

DEFENDANT WAS ENTITLED TO A HEARING ON WHETHER HE SHOULD BE OFFERED ALCOHOL AND SUBSTANCE ABUSE TREATMENT AS AN ELEMENT OF HIS SENTENCE; THE ISSUE SURVIVED DEFENDANT'S GUILTY PLEA.

The Second Department, reversing Supreme Court, determined defendant was entitled to a hearing on whether he is eligible for judicial diversion, i.e., alcohol or substance abuse treatment as an element of sentencing: "... '[A]ppellate review of the defendant's claim that his application for judicial diversion was improperly denied is not foreclosed by his plea of guilty' ... . Pursuant to CPL 216.05(3)(a), upon receipt of a completed alcohol and substance abuse evaluation report ... either the People or an 'eligible defendant' ... , may request a hearing on the issue of whether the eligible defendant should be offered alcohol or substance abuse treatment ... . [T]he Supreme Court improvidently exercised its discretion in denying the defendant's motion without first conducting a hearing pursuant to CPL 216.05(3)(a) on the issue of whether the defendant should be offered alcohol or substance abuse treatment. It is undisputed that the defendant is an 'eligible defendant' as defined in CPL 216.00(1), and that an 'alcohol and substance abuse evaluation' as defined in CPL 216.00(2) was completed. Based upon the conclusions contained in that evaluation, the court should have granted that branch of the defendant's motion which was for a hearing on the issue of whether he should be offered alcohol or substance abuse treatment ...". ***People v. Commissiong*, 2021 N.Y. Slip Op. 03193, Second Dept 5-19-21**

CRIMINAL LAW, ATTORNEYS, EVIDENCE.

DEFENSE COUNSEL DID NOT INVESTIGATE ALIBI EVIDENCE, DID NOT OBJECT TO EVIDENCE WHICH HAD BEEN RULED OFF LIMITS, AND DID NOT IMPEACH THE COMPLAINANT WITH INCONSISTENT TESTIMONY, CONVICTION REVERSED.

The Second Department, reversing defendant's conviction, determined defense counsel's failure to investigate alibi evidence, failure to object to evidence which had been ruled off limits, and failure to impeach the complainant constituted ineffective assistance: "Under the circumstances of this case, where the determination of guilt hinged on sharp issues of credibility, we find that trial counsel lacked a strategic or legitimate justification for the failure to investigate the defendant's alleged alibi defense ... , and to present evidence to impeach the complainant's testimony as to the duration and frequency of the alleged abuse ... . Further, trial counsel failed to impeach the complainant with her sworn testimony given in the grand jury, which contradicted her trial testimony in various respects ... . Notwithstanding a pretrial ruling by the court precluding the People from eliciting testimony regarding an early 2010 conversation about the alleged abuse between the complainant and her friend, trial counsel failed to object when such testimony was elicited at the trial. As such, counsel failed in his duty to protect the defendant's interests by objecting to the People's introduction of inadmissible evidence ...". ***People v. Ramos*, 2021 N.Y. Slip Op. 03200, Second Dept 5-19-21**

CRIMINAL LAW, EVIDENCE.

THE POLICE WERE JUSTIFIED IN STOPPING A BICYCLIST WHO WAS WEAVING AND HOLDING A BULKY OBJECT IN HIS WAISTBAND; DEFENDANT'S MOTION TO SUPPRESS PROPERLY DENIED.

The Second Department determined Supreme Court properly denied defendant's motion to suppress a gun and statements based upon a street stop. The court noted that defendant was riding a bicycle and the street stop rules which apply to pedestrians, not vehicles, apply: "The Court of Appeals has held that an officer's instruction to a pedestrian to 'stop' requires only a common-law right of inquiry and does not constitute a seizure ... . Supreme Court properly determined that the officer's statements to the defendant to 'hold up' constituted a level two encounter under De Bour, and that the officers were justified in making a common-law inquiry based upon their observations of the manner in which the defendant was riding his bicycle, as well as their observation of a 'bulky' object that the defendant was holding at his waistband ... . [T]he defendant stopped in response to the commands and ... the officers did not block his path or otherwise signal that he was not free to leave ... . The unobtrusive manner in which the police followed the defendant did not elevate the pursuit itself to a seizure ... . The officers were justified in frisking the defendant based on Officer Schnell's observation of the bulky object in the defendant's waistband together with the defendant's statements that he had a gun ...". ***People v. Rodriguez*, 2021 N.Y. Slip Op. 03202, Second Dept 5-19-21**

CRIMINAL LAW, EVIDENCE, APPEALS.

THE EVIDENCE IDENTIFYING DEFENDANT AS ONE OF THE ROBBERS WAS LEGALLY SUFFICIENT BUT DEFENDANT'S CONVICTION WAS AGAINST THE WEIGHT OF THE EVIDENCE.

The Second Department, reversing defendant's conviction, determined the evidence identifying defendant as one of the robbers was legally sufficient but the conviction was against the weight of the evidence: "... [T]he police officer who spoke with the complainant outside the deli testified that the only description given of the perpetrators was four male Hispanics, one with a bleach-blond beard, and that the complainant never mentioned that one of the perpetrators was wearing a bandana. After speaking with the complainant, the officer, accompanied by the complainant, crossed the street and entered the park where the robbery had occurred. The defendant, who was wearing a black shirt and sitting on a bench approximately 100 feet from where the crime took place, was the only person in the park. The officer walked up to the defendant, who did not flee or offer any resistance, told him to stand, and placed him in handcuffs. Upon searching the defendant, the officer found a bandana depicting the Mexican flag in his pocket. According to the arresting officer, upon seeing the bandana, the complainant told the officer for the first time that one of the perpetrators had been wearing a similar bandana. The complainant's wallet and its contents were never recovered. * * * In this single-witness identification case, an acquittal would not have been unreasonable. While the defendant was found in possession of a distinctive-looking bandana in close spatial and temporal proximity to the scene of the robbery, none of the police witnesses testified that the complainant had mentioned the existence of such a bandana prior to the defendant's arrest. Moreover, the record evidence does not explain why the police would have expected to find one of the suspects in the park, when the complainant himself testified that the four suspects left together after the robbery. We also find it significant that the complainant testified that he had seen the man with the bandana on two occasions prior to the night of the robbery, yet he also testified that he had never seen the defendant before the night of the robbery, and in fact identified one of the codefendants in court as the man with the bandana." ***People v. Garcia*, 2021 N.Y. Slip Op. 03196, Second Dept 5-19-21**

FORECLOSURE, EVIDENCE.

PROOF OF DEFENDANTS' DEFAULT WAS INADMISSIBLE HEARSAY BECAUSE THE UNDERLYING BUSINESS RECORDS WERE NOT SUBMITTED WITH THE SUMMARY JUDGMENT MOTION.

The Second Department, reversing Supreme Court, determined defendants' default in this foreclosure action was not demonstrated because the relevant business were described but not submitted. The description was therefore hearsay: "... [T]he plaintiff submitted copies of the note and mortgage, and an affidavit of Sherry Benight, an officer of Select Portfolio Servicing, Inc. (hereinafter SPS), the servicer for the loan. Based on her review of business records in the possession of SPS, Benight averred that the defendants defaulted in payment in August 2014. However, the only business records annexed to and incorporated in the affidavit with regard to the default was a notice of default dated March 3, 2015 ... . Although Benight established that she was familiar with SPS's record-keeping practices and procedures, no payment records were proffered with the motion. '[W]hile a witness may read into the record from the contents of a document which has been admitted into evidence, a witness's description of a document not admitted into evidence is hearsay' ... . '[I]t is the business record itself, not the foundational affidavit, that serves as proof of the matter asserted' ...". ***U.S. Bank N.A. v. Rowe*, 2021 N.Y. Slip Op. 03209, Second Dept 5-19-21**

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

THE BANK'S PROOF OF COMPLIANCE WITH THE NOTICE REQUIREMENTS OF RPAPL 1304 WAS INSUFFICIENT.

The Second Department, reversing Supreme Court, determined the proof of the bank's compliance with the notice requirements of RPAPL 1304 in this foreclosure action was insufficient: "... [T]he plaintiff relied on an affidavit of James Green, a vice president of loan documentation for Wells Fargo, who averred that, based on his review of Wells Fargo's business records, the required notice was sent by both certified mail and first-class mail. Green attached evidence of a certified article number, but did not attach any evidence of a first-class mailing. He did not aver that he had personal knowledge of the mailing, did not describe any standard office procedure designed to ensure that the notices are mailed, and did not attach domestic return receipts for the mailing ...". ***Deutsche Bank Natl. Trust Co. v. Ezeji*, 2021 N.Y. Slip Op. 03164, Second Dept 5-19-2021**

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

THE BANK IN THIS FORECLOSURE ACTION DID NOT PROVIDE SUFFICIENT PROOF OF COMPLIANCE WITH THE NOTICE REQUIREMENTS OF RPAPL 1304 AND THE MORTGAGE.

The Second Department, reversing Supreme Court, determined the bank in this foreclosure action did not submit sufficient proof of compliance with the notice requirements of RPAPL 1304 and the mortgage: "Although the plaintiff submitted copies of the 90-day notices purportedly sent to [defendant] Jimenez, the plaintiff failed to demonstrate, prima facie, that the notices were actually mailed, either through an affidavit of service, other proof of mailing by the post office, or evidence of a standard office mailing procedure designed to ensure that items are properly addressed and mailed, sworn to by someone with personal knowledge of the procedure ... . The unsubstantiated and conclusory assertion in an affidavit of a representative of the plaintiff's loan servicer that the 90-day notice was sent in accordance with RPAPL 1304 is insufficient to establish that the notice was actually mailed to Jimenez by first-class and certified mail ... . Moreover, the affiant based her assertions upon her review of unspecified business records without attaching any such business records to her affidavit ... . 'It is the business record itself, not the foundational affidavit, that serves as proof of the matter asserted' ... . Similarly, the plaintiff failed to demonstrate, prima facie, that it complied with the notice of default provisions of the consolidated mortgage, which required the plaintiff to send a notice of default to Jimenez at the notice address by first-class mail and to provide a 30-day cure period. Copies of the notice without proof of mailing, along with the affidavit of a representative of the loan servicer averring, based upon her review of unspecified business records which were not attached to the affidavit, that such a notice of default was sent on an unspecified date, was insufficient to satisfy the plaintiff's prima facie burden ...". ***Wilmington Trust, N.A. v. Jimenez*, 2021 N.Y. Slip Op. 03212, Second Dept 5-19-21**

JUDGES, CIVIL PROCEDURE, CRIMINAL LAW.

MANDAMUS PETITION TO COMPEL JUDGES TO ISSUE A WRITTEN ORDER DECIDING PETITIONER'S MOTION TO REARGUE HIS MOTION TO VACATE HIS CONVICTION GRANTED.

The Second Department, reversing Supreme Court, granted the petition to compel judges to issue a written order denying petitioner's motion to reargue a motion to vacate his conviction: "Under the circumstances of this case, the petitioner demonstrated a clear legal right to a written order determining his motion for leave to reargue his prior motion pursuant to CPL 440.10, in the action entitled People v Cruz ... and mandamus properly lies to compel the respondents to issue that written order, as well as an order determining the petitioner's motion to reargue the 'bench decision' ...". ***Matter of Cruz v. D'Emic*, 2021 N.Y. Slip Op. 03175, Second Dept 5-19-21**

PERSONAL INJURY, MUNICIPAL LAW, EMPLOYMENT LAW.

MUNICIPAL DEFENDANTS NOT LIABLE FOR INJURY CAUSED BY BICYCLE-RIDING IN PUBLIC PARK, DESPITE REGULATIONS PROHIBITING BICYCLE-RIDING; QUESTION OF FACT WHETHER THE DEFENDANT HIRED TO CARE FOR THE CHILD WHO STRUCK INFANT PLAINTIFF WAS AN EMPLOYEE OF THE CHILD'S FATHER (RESPONDEAT SUPERIOR) OR AN INDEPENDENT CONTRACTOR; QUESTIONS OF FACT WHETHER THE DEFENDANT CARE-GIVER WAS NEGLIGENT IN SUPERVISING THE CHILD.

The Second Department, reversing (modifying) Supreme Court determined: (1) the municipal defendants were not liable for injuries to infant plaintiff caused when infant plaintiff was struck by another child (defendant Tully's son) riding a bicycle in a municipal park where bicycle-riding was prohibited; (2) there was a question of fact whether defendant Bhawanie, who was employed by defendant Tully to care for Tully's son, was defendant Tully's employee or an independent contractor; (3) there were questions of fact whether Bhawanie was negligent: "... '[B]icycle riding in a playground . . . constitutes neither an ultrahazardous nor a criminal activity' ... . [T]he municipal defendants are not accountable to the infant plaintiff for their alleged failure to enforce their regulations prohibiting bicycle riding in the playground, since the promulgation and enforcement of such regulations do not constitute the assumption of a special relationship with the infant plaintiff such that a special duty was owed to him ... . [T]he evidence demonstrated that Bhawanie had worked for Tully and his wife continuously from 2007 through 2016, Tully and his wife dictated Bhawanie's work schedule, and Bhawanie had to receive permission from Tully and his wife before engaging in certain activities with their children. Under the circumstances, a triable issue of fact exists on the issue of whether Bhawanie was an employee of Tully, such that vicarious liability may be imposed, or whether she was an independent contractor. ... 'While a person caring for entrusted children is not cast in the role of an insurer, such an individual is obliged to provide adequate supervision and may be held liable for foreseeable injuries proximately resulting from the negligent failure to do so' ...". ***C.B. v. Incorporated Vil. of Garden City*, 2021 N.Y. Slip Op. 03158, Second Dept 5-19-21**

THIRD DEPARTMENT

CRIMINAL LAW, EVIDENCE, APPEALS.

UNDER THE CIRCUMSTANCES OF THE TRAFFIC STOP, THE CORRECT STANDARD TO APPLY TO THE CANINE SNIFF OF DEFENDANT'S PERSON WAS REASONABLE SUSPICION, NOT PROBABLE CAUSE; THE SUPPRESSION MOTION WAS PROPERLY DENIED; THE DISSENT DISAGREED.

The Third Department, over a concurrence and a dissent, determined the canine sniff after a traffic stop was justified by reasonable suspicion. The concurrence argued the court could not reach the proper standard for the canine sniff because the motion court did not rule on it. The dissent argued the probable cause standard should apply: "Defendant correctly asserts that the canine's contact sniff of his person intruded upon his personal privacy as secured under both the Fourth Amendment of the US Constitution and article 1, § 12 of the NY Constitution ... . The question presented is whether the search ran afoul of either constitutional provision and what standard applies to make that assessment — an issue of first impression for this Court. Considering the context of a vehicle traffic stop and how events unfolded, we conclude that a reasonable suspicion standard should apply, not one of probable cause ... . A canine sniff is a minimal intrusion compared to a full-blown search of a person, intended only to detect the possession of narcotics ... . Without prompting from [officer] Bracco, the canine twice was 'in odor' of its own accord, providing a reasonable and articulable basis for Bracco to suspect that defendant possessed narcotics on his person. Given the necessity for prompt action, it was not unreasonable for Bracco to allow the canine to approach defendant. There was contact between the canine and defendant's person, but the record suggests that contact was brief and the canine quickly alerted. In these circumstances, we conclude that the search was valid and the suppression motion properly denied." ***People v. Butler*, 2021 N.Y. Slip Op. 03222, Third Dept 5-20-21**

TRUSTS AND ESTATES, FIDUCIARY DUTY, CIVIL PROCEDURE.

THE FIDUCIARY TOLLING RULE TOLLED THE STATUTE OF LIMITATIONS IN THIS CONSTRUCTIVE TRUST ACTION AGAINST AN EXECUTOR (WHO WAS REMOVED BY THE COURT) UNTIL THE SUCESSOR FIDUCIARY WAS APPOINTED.

The Third Department, reversing Surrogate's Court, determined the constructive trust action based upon alleged self-dealing by an executor who was removed by the court was not time-barred. The fiduciary tolling rule applied: "Under the fiduciary tolling rule, a claim alleging wrongful conduct by an individual in his or her fiduciary capacity does not accrue until there is an open repudiation of the fiduciary obligation or a judicial settlement of the fiduciary's account ... . This rule tolls the statute of limitations 'for all misconduct committed by the fiduciary prior to repudiation of its obligation or termination of the [fiduciary] relationship' ... since, absent either repudiation or removal, the aggrieved parties 'were entitled to assume that the [fiduciary] would perform his [or her fiduciary] responsibilities' ... , and it is highly unlikely that a sitting fiduciary

would assert a constructive trust claim against himself or herself. ... Under this rule, the toll continues until a successor fiduciary is appointed ...". ***Matter of George*, 2021 N.Y. Slip Op. 03231, Third Dept 5-20-21**

FOURTH DEPARTMENT

ELECTION LAW.

THE FAILURE TO INCLUDE THE DATE OF THE PRIMARY ELECTION IN THE CERTIFICATE OF AUTHORIZATION DID NOT INVALIDATE IT.

The Fourth Department, reversing Supreme Court, determined the fact that the date of the primary election was not stated on the certificate of authorization did not invalidate it: "... [T]he statute at issue here, Election Law § 6-120 (3), does not specifically prescribe that the date of the primary election be specified in the certificate of authorization ... . We therefore conclude that there was substantial compliance with section 6-120 (3) inasmuch as the omission of the date of the primary election was 'neither a defect invalidating the certificate nor a matter presenting an opportunity for prejudice or possibility of fraud' ... . Further, '[t]here is no question that the objectives of Election Law § 6-120 (3) were met here, as no issue was raised as to whether the subject authorization expressed the will of the party committee of the political subdivision involved' ...". ***Matter of Kowal v. Bargnesi*, 2021 N.Y. Slip Op. 03014, Fourth Dept 5-11-21**

ELECTION LAW, FRAUD.

THE DESIGNATING PETITION WAS PERMEATED BY FRAUD AND SHOULD HAVE BEEN INVALIDATED.

The Fourth Department, reversing Supreme Court, determined the designating petition was permeated by fraud and should have been invalidated: "... [P]etitioner submitted clear and convincing evidence demonstrating that several subscribing witnesses attested to many signatures on the designating petition that they had not actually witnessed, and thus we agree with petitioner that the candidate's designating petition is permeated with fraud. The parties correctly agree that the candidate was required to obtain signatures from 600 voters registered in the Democratic Party ... . Numerous subscribing witnesses, acting on the candidate's behalf, gathered 1,657 signatures, approximately 700 of which the Board invalidated. Petitioner challenged the signatures collected by five subscribing witnesses, who collected the overwhelming majority of the signatures on the designating petition; indeed, only slightly less than 200 valid signatures were collected by all of the other people who circulated petitions for the candidate. Supreme Court concluded that numerous signatures collected by those five subscribing witnesses were fraudulently procured for various reasons, including that there was no such voter, the voter had died, the voter had signed the designating petition more than once, or the voter was not the person who signed the designating petition. ... It is well settled that, 'where the court finds misrepresentations in numerous instances, as it finds here, and nothing is [established] in rebuttal, it may well indulge in the presumption that there were many other misrepresentations and irregularities which time did not permit to be uncovered' ...". ***Matter of Saunders v. Mansouri*, 2021 N.Y. Slip Op. 03157, Fourth Dept 5-18-21**

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