CasePrepPlus

May 7, 2021

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FIRST DEPARTMENT

CIVIL PROCEDURE, CONTRACT LAW, SECURITIES.

THE CONTINUING WRONG DOCTRINE APPLIES TO THIS COMPLEX BREACH OF CONTRACT ACTION SUCH THAT EACH BREACH WAS AN ACTIONABLE EVENT; THEREFORE THE STATUTE OF LIMITATIONS DID NOT START RUNNING FOR ALL SUBSEQUENT BREACHES WHEN THE FIRST BREACH OCCURRED.

The First Department, in a full-fledged opinion by Justice Mazzarelli, over a two-justice dissent, reversing Supreme Court, determined the continuing wrong doctrine applied to this breach of contract action such that each breach was actionable and, therefore, the statute of limitations for all subsequent breaches was not triggered by the first breach. The subjects of the contracts were commercial mortgage-backed securities (CMBS). The complaint alleged defendant CWCI breached a collateral management agreement (CMA): "Generally speaking, a claim accrues for statute of limitations purposes when 'all of the factual circumstances necessary to establish a right of action have occurred, so that the plaintiff would be entitled to relief' ... . However, the mere fact that a claim has accrued and the time to bring an action on it has commenced to run does not mean that a new claim, with a new limitations period, may not arise out of a new set of facts that forms part of a series with the original wrong. [Plaintiff] maintains that the allegations against CWCI comprise such a series of individual wrongs. Thus, it relies on cases such as *Bulova Watch Co. v Celotex Corp*. (46 NY2d 606 [1979]). There, a new claim, with a new limitations period, was held to have accrued each time the plaintiff, the obligee under a bond that guaranteed that the defendant roofer would make repairs necessary to ensure the watertightness of the plaintiff's roof over the 20-year life of the bond, asked the defendant, to no avail, to repair a leak. Accordingly, the plaintiff's failure to commence suit within the limitations period based on the initial leak did not bar the action. * * * We find that the continuing wrong doctrine does apply to this case." ***CWCapital Cobalt VR Ltd. v. CWCapital Invs. LLC*, 2021 N.Y. Slip Op. 02487, First Dept 4-27-21**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

PLAINTIFF WAS STRUCK BY A PIECE OF SHEETROCK, THE LADDER HE WAS STANDING ON SHOOK, AND PLAINTIFF FELL TO THE GROUND; THERE WAS NO NEED TO PROVE THE LADDER WAS DEFECTIVE; PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON HIS LABOR LAW § 240(1) CAUSE OF ACTION SHOULD HAVE BEEN GRANTED.

The First Department, reversing Supreme Court, determined plaintiff's motion for summary judgment on his Labor Law § 240(1) cause of action should have been granted, Plaintiff stood on an A-frame ladder while attempting to put up a piece of sheetrock on the ceiling. His arm which was holding up the sheetrock became tired, the sheetrock fell striking plaintiff's head and then the ladder shook and moved and he fell to the ground. There was no need to prove the ladder was defective: "The undisputed facts establish that defendants violated Labor Law § 240(1) by failing to properly secure the ladder against movement or slippage and to ensure that it remained steady and erect ... . Defendants failed to guard against plaintiff's risk of falling from a ladder while using one hand over his head to hold the sheetrock in place and the other hand over his head to operate a drill ... . Because we find that the ladder did not provide adequate protection, it is irrelevant that it appeared 'very sturdy' to plaintiff. A plaintiff is not required to demonstrate that a ladder is defective in order to establish prima facie entitlement to summary judgment under Labor Law § 240 (1) ...". ***Ping Lin v. 100 Wall St. Prop. L.L.C.*, 2021 N.Y. Slip Op. 02605, First Dept 4-29-21**

PERSONAL INJURY, LANDLORD-TENANT.

PLAINTIFF WAS RAPED IN DEFENDANTS' BAR/RESTAURANT AND RAISED QUESTIONS OF FACT ABOUT THE ADEQUACY OF SECURITY AND THE FORESEEABILITY OF THE THIRD-PARTY ASSAULT; DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The First Department, reversing Supreme Court, determined plaintiff's third-party-assault-negligence action alleging inadequate security at defendant bar/restaurant should not have been dismissed. The building was owned by Harvard Agency and leased to Turnmill. Plaintiff was raped in a basement restroom. Plaintiff raised questions of fact by evidence a rape had occurred at a nearby bar owned by the same family, the bar was in a high crime area, and there were no security cameras in the basement: "Our courts have long held that 'New York landowners owe people on their property a duty of reasonable

care under the circumstances to maintain their property in a safe condition' ... . 'Although landlords . . . have a common-law duty to minimize foreseeable dangers on their property, including the criminal acts of third parties, they are not the insurers of a visitor's safety ... .'. ... [P]laintiff raised an issue of fact by pointing to evidence that Harvard was aware of another assault at a bar owned by the same family and located only a few blocks from Turnmill (... [... '[t]here is no requirement . . . that the past experience relied on to establish foreseeability be of criminal activity at the exact location where plaintiff was harmed or that it be of the same type of criminal conduct to which plaintiff was subjected']). ... [P]laintiff submitted a detailed expert affidavit indicating that the bar/restaurant was in a high crime area, and that the security employed was inadequate and a deviation from reasonable security standards ...". ***Jane Doe v. Turnmill LLC*, 2021 N.Y. Slip Op. 02495, First Dept 4-27-21**

REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL).

PETITIONER'S APPLICATION FOR ACCESS TO RESPONDENT'S NEIGHBORING PROPERTY PURSUANT TO RPAPL 881 SHOIULD NOT HAVE BEEN GRANTED; MATTER REMITTED TO DETERMINE WHETHER LESS INTRUSIVE METHODS FOR ROOF PROTECTION OF RESPONDENT'S PROPERTY COULD BE USED TO FACILITATE FACADE WORK ON PETITIONER'S BUILDING.

The First Department, reversing Supreme Court, determined all the relevant factors had not been considered when granting petitioner's application for access to respondent's neighboring property to install roof and terrace protection related to work on the facade of petitioner's building. The matter was remitted for a determination whether less intrusive methods of roof protection could be used: "Supreme Court improvidently granted petitioner's application for access to respondent's neighboring property in order to effectuate repairs to petitioner's property pursuant to RPAPL 881. 'Although the determination of whether to award a license fee is discretionary, in that RPAPL 881 provides that a 'license shall be granted by the court in an appropriate case upon such terms as justice requires,' the grant of licenses pursuant to RPAPL 881 often warrants the award of contemporaneous license fees' ... . This is because 'the respondent to an 881 petition has not sought out the intrusion and does not derive any benefit from it. . .Equity requires that the owner compelled to grant access should not have to bear any costs resulting from the access' … . Furthermore, '[c]ourts are required to balance the interests of the parties and should issue a license when necessary, under reasonable conditions, and where the inconvenience to the adjacent property owner is relatively slight compared to the hardship of his neighbor if the license is refused' ... . In granting access, Supreme Court permitted petitioner to designate a controlled access zone and to place roof protection on respondent's terraces. The roof protection petitioner seeks to install is placed directly on top of the floors of respondent's terraces and according to respondent would completely prohibit the tenants of the terraced apartments from using any portion of their terraces. Prior to the granting petitioner's application, Supreme Court must consider and resolve the issue as to whether there are less intrusive and equally effective methods of roof protection ...". ***Matter of 400 E57 Fee Owner LLC v. 405 E. 56th St. LLC*, 2021 N.Y. Slip Op. 02587, First Dept 4-29-21**

SECOND DEPARTMENT

ATTORNEYS, FRAUD.

ALTHOUGH THE COMPLAINT STATED CAUSES OF ACTION FOR NEGLIGENT MISREPRESENTATION AND FRAUD, THE JUDICIARY LAW § 487 CAUSE OF ACTION SHOULD HAVE BEEN DISMISSED BECAUSE IT WAS NOT ALLEGED THE DECEIT OCCURRED DURING A JUDICIAL PROCEEDING.

The Second Department, reversing Supreme Court, determined defendant-attorney's motion to dismiss the Judiciary Law § 487 cause of action should have been granted because the deceit or fraud was not alleged to have occurred during a judicial proceeding. Plaintiff alleged the misrepresentation concerned a guaranty for payment on a note related to the sale of plaintiff's business: "Supreme Court should have granted that branch of the defendant's motion which was to dismiss the fourth cause of action. '[A] Judiciary Law § 487 cause of action requires that the alleged deceit occurred during a judicial proceeding in which the plaintiff was a party' ... . Here, the complaint failed to allege that the deceit occurred during a judicial proceeding or before any court ...". ***Pszeniczny v. Horn*, 2021 N.Y. Slip Op. 02553, Second Dept 4-28-21**

CRIMINAL LAW.

SENTENCE VACATED AND MATTER REMITTED FOR AN ON-THE-RECORD DETERMINATION WHETHER DEFENDANT IS ELIGIBLE FOR YOUTHFUL OFFENDER STATUS; MANDATORY SURCHARGES AND FEES WAIVED WITH PEOPLE'S CONSENT.

The Second Department, vacating defendant's sentence and the imposition of mandatory surcharges and fees, held Supreme Court failed to determine on the record whether defendant was eligible for youthful offender status: "CPL 720.20(1) requires 'that there be a youthful offender determination in every case where the defendant is eligible, even where the defendant fails to request it, or agrees to forego it as part of a plea bargain' ... . The Supreme Court was required to determine on the record, with respect to the conviction of attempted assault in the first degree, which constituted an armed felony ... ,

whether the defendant was an eligible youth by considering the presence or absence of the factors set forth in CPL 720.10(3) and, if so, whether he should be afforded youthful offender status ... . The defendant was convicted before the enactment of CPL 420.35(2-a), which permits the waiver of surcharges and fees for persons who, like the defendant, were less than 21 years old at the time of the subject crime. However, based on the People's consent, and pursuant to the exercise of our interest of justice jurisdiction, we waive the surcharge and fees imposed on the defendant at sentencing ...". ***People v. Johnson*, 2021 N.Y. Slip Op. 02544, Second Dept 4-28-21**

CRIMINAL LAW, IMMIGRATION LAW, APPEALS.

APPEAL DISMISSED BECAUSE DEFENDANT WAS DEPORTED.

The Second Department dismissed defendant's appeal because he has been deported. The appeal can be reinstated if defendant returns to the court's jurisdiction: "In *People v Harrison* (27 NY3d 281), the Court of Appeals reaffirmed its ruling that an intermediate appellate court retains its discretion to dismiss a pending permissive appeal due to a defendant's involuntary deportation. Here, if this Court were to reverse the order appealed from, the defendant would be required to attend and participate in further proceedings in the Supreme Court, which he can no longer do. Accordingly, we grant the People's motion and dismiss the appeal, without prejudice to a motion to reinstate the appeal should the defendant return to this Court's jurisdiction ...". ***People v. Lopez*, 2021 N.Y. Slip Op. 02546, Second Dept 4-28-21**

CRIMINAL LAW, JUDGES, APPEALS.

DEFENDANT'S PLEA ALLOCUTION NEGATED AN ELEMENT OF THE OFFENSE; PRESERVATION OF THE ERROR NOT REQUIRED BECAUSE THE JUDGE FAILED TO INQUIRE FURTHER AT THE TIME OF THE ALLOCUTION.

The Second Department, vacating defendant's guilty plea, determined the plea allocution negated the intent-to-sell element of criminal possession of a controlled substance. Preservation of the error for appeal was not required because the judge did not make a sufficient inquiry at the time of the allocution: "As charged here, criminal possession of a controlled substance in the third degree requires 'knowingly and unlawfully' possessing 'a narcotic drug with intent to sell it' (Penal Law § 220.16[1]). The defendant denied during his plea allocution that he intended to sell the drugs he possessed. This is 'that rare case . . . where the defendant's recitation of the facts underlying the crime pleaded to clearly casts significant doubt upon the defendant's guilt or otherwise calls into question the voluntariness of the plea' ... . '[W]here a defendant's factual recitation negates an essential element of the crime pleaded to, the court may not accept the plea without making further inquiry to ensure that defendant understands the nature of the charge and that the plea is intelligently entered' … . When a defendant makes remarks during the plea allocution that cast significant doubt on his guilt concerning an element of the crime, the court has a duty to conduct further inquiry to ensure that the plea was knowingly and voluntarily made ... . Where, as here, the court fails in its duty to inquire further, a defendant may raise a claim regarding the validity of the plea even without having moved to withdraw the plea ...". ***People v. Gause*, 2021 N.Y. Slip Op. 02543, Second Dept 4-28-21**

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

INFECTING A VICTIM WITH HIV CONSTITUTES "PHYSICAL INJURY" WITHIN THE MEANING OF RISK FACTOR 1 RE: THE SEX OFFENDER REGISTRATION ACT; HOWEVER THE FINDING THAT DEFENDANT IN FACT INFECTED THE VICTIM WITH HIV WAS NOT SUPPORTED BY CLEAR AND CONVINCING EVIDENCE.

The Second Department, reversing Supreme Court, determined a defendant's infecting a victim with HIV constitutes "physical injury" within the meaning of risk factor 1 re: the Sex Offender Registration Act (SORA). However the evidence that the victim was in fact infected with HIV by the defendant was not clear and convincing and the related 15 points should not have been assessed: "... [W]e conclude that infection with HIV constitutes a physical injury. ... A defendant's statements as to his or her medical condition—unsupported by any records or evidence from a medical or health professional—have been rejected ... , and there is no reason why the same rule should not apply to the People, who are held to a higher standard of proof. Points may be assessed at a SORA hearing based upon physical injury to the victim, based on 'clear and convincing evidence in the record, including medical evaluations' ... . However, here, no medical evaluations of the victim were in evidence, and the alleged impairment would not be apparent to a layperson." ***People v. Alay*, 2021 N.Y. Slip Op. 02551, Second Dept 4-28-21**

FAMILY LAW, EVIDENCE.

SUPREME COURT DID NOT CONDUCT A HEARING OR FOLLOW THE CHILD SUPPORT STANDARDS ACT FORMULA FOR CHILD SUPPORT CALCULATIONS; IN ADDITION THE COURT DID NOT CONSIDER THE STRONG PUBLIC POLICY AGAINST RESTITUTION OR RECOUPMENT OF CHIILD SUPPORT ALREADY PAID; MATTER REMITTED.

The Second Department, reversing Supreme Court, determined the court did not conduct a hearing, did not follow the child support formula of the Child Support Standards Act (CSSA) and did not consider the public policy against recoupment or restitution of child support already paid. The matter was remitted for a hearing and a new determination:

"... [T]he Supreme Court did not calculate the basic child support obligation for the children, which is done by (1) determining the combined parental income and (2) multiplying the amount of combined parental income up to the statutory cap by the appropriate child support percentage (see Domestic Relations Law § 240[1-b][c]). The court did not determine the combined parental income or identify the applicable statutory cap. It further failed to determine each parent's pro rata share of the basic child support obligation based on his or her income in proportion to the combined parental income ... . Rather, the court incorrectly determined the amount of child support owed to the custodial parent based solely on the noncustodial parent's income multiplied by the appropriate child support percentage, which the court determined to be 25% of the plaintiff's income. However, the appropriate basic child support figure for the parties' two children was 25% of the combined parental income, as prorated between the parties in accordance with the statute (see Domestic Relations Law § 240[1-b][b][3][ii]). ... [T]here is no indication that the court considered '[t]he financial resources of the custodial and non-custodial parent' or whether 'the gross income of one parent is substantially less than the other parent's gross income' ...". ***Park v. Park*, 2021 N.Y. Slip Op. 02536, Second Dept 4-28-21**

FORECLOSURE, CIVIL PROCEDURE.

IN A FORECLOSURE ACTION A DISMISSAL FOR LACK OF STANDING IS NOT A DISMISSAL ON THE MERITS RE: RES JUDICATA; A SECOND DISCONTINUANCE WHICH IS NOT ON NOTICE IS NOT A DISCONTINUANCE WITH PREJUDICE RE: CPLR 3217 (C).

The Second Department noted that a foreclosure action dismissed for lack of standing is not a dismissal on the merits. The court further noted that a second discontinuance is not with prejudice, i.e., on the merits, unless it is on notice : " 'Under the doctrine of res judicata, a final disposition on the merits bars litigation between the same parties of all other claims arising out of the same transaction or out of the same or related facts, even if based upon a different theory involving materially different elements of proof' ... . However, 'a dismissal premised on lack of standing is not a dismissal on the merits for res judicata purposes' ... .. Here, the instant action was not barred by the doctrine of res judicata because the 2014 action was dismissed for, inter alia, lack of standing, and that does not qualify as a dismissal on the merits for res judicata purposes ... . CPLR 3217(c) provides that '[u]nless otherwise stated in the notice, stipulation or order of discontinuance, the discontinuance is without prejudice, except that a discontinuance by means of notice operates as an adjudication on the merits if the party has once before discontinued by any method an action based on or including the same cause of action.' The dismissal of the second action after a previous discontinuance only operates as an adjudication on the merits if that second discontinuance is achieved by means of notice ... . Here, after the 2010 action was discontinued by means of notice, the 2014 action was dismissed after the defendant's motion to dismiss was granted. Since the 2014 action was not discontinued by means of notice, CPLR 3217(c) is inapplicable to this instant action." ***US Bank Trust, N.A. v. Loring*, 2021 N.Y. Slip Op. 02559, Second Dept 4-28-21**

FORECLOSURE, CIVIL PROCEDURE.

THE PROCESS SERVER IN THIS FORECLOSURE ACTION MET THE DUE DILIGENCE REQUIREMENTS OF CPLR 308(4); THE COMPLAINT SHOULD NOT HAVE BEEN DISMISSED FOR LACK OF PERSONAL JURISDICTION.

The Second Department, reversing Supreme Court, determined defendants' motion to dismiss for lack of personal jurisdiction should not have been granted. The process server for the bank in this foreclosure action satisfied the due diligence requirement for service pursuant to CPLR 308(4): "There were four attempts to serve the defendants at their residence at times when they could reasonably have been expected to be found there, including attempts on a late weekday evening, an early weekday morning, a weekend evening, and a weekday afternoon ... . As the plaintiff established by a preponderance of the credible evidence that personal jurisdiction was acquired over the defendants, the Supreme Court should have denied the defendants' motion to dismiss the complaint insofar as asserted against them ... and decided the plaintiff's motion, inter alia, for summary judgment on the merits instead of, in effect, denying it as academic." ***Wilmington Trust Co. v. Gewirtz*, 2021 N.Y. Slip Op. 02562, Second Dept 4-28-21**

FORECLOSURE, CIVIL PROCEDURE, JUDGES.

SUPREME COURT SHOULD NOT HAVE, SUA SPONTE, DETERMINED DEFENDANT IN THIS FORECLOSURE ACTION WAIVED DISMISSAL FOR FAILURE TO TIMELY MOVE FOR A DEFAULT JUDGMENT BECAUSE THE ISSUE WAS DISPOSITIVE AND NEVER LITIGATED; THE BANK'S FAILURE TO TIMELY MOVE FOR A DEFAULT JUDGMENT PURSUANT TO CPLR 3215(c) REQUIRED DISMISSAL OF THE BANK'S ACTION.

The Second Department, reversing Supreme Court, determined plaintiff-bank's failure to move for a default judgment within one year required dismissal of the complaint pursuant to CPLR 3215(c). The court noted that Supreme Court should not have, sua sponte, held defendant waived dismissal pursuant to CPLR 3215(c) because the issue had never been litigated: "Although the Supreme Court keenly observed that the defendants had filed a notice of appearance in the first action in October 2014, it should not have, sua sponte, determined that such notice of appearance constituted a waiver of their right to seek dismissal of the complaint pursuant to CPLR 3215(c), as the parties never litigated the issue of waiver. Since that

branch of the defendants' cross motion which was pursuant to CPLR 3215(c) to dismiss the complaint had 'dispositive import' ... , the court should have notified the parties of the waiver issue and afforded them an opportunity to be heard prior to determining the cross motion on a ground neither side argued. ... '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' ... . 'Failure to take proceedings for entry of judgment may be excused, however, upon a showing of sufficient cause,' which requires the plaintiff to 'demonstrate that it had a reasonable excuse for the delay in taking proceedings for entry of a default judgment and that it has a potentially meritorious action' ...". ***Wells Fargo Bank v. Aucapina*, 2021 N.Y. Slip Op. 02561, Second Dept 4-28-21**

PERSONAL INJURY.

PLAINTIFF, A SWIMMING OFFICIAL, SLIPPED ON WATER ON A POOL DECK AT AN INDOOR SWIMMING FACILITY; THE WATER ON THE POOL DECK CAME FROM AN OVERHEAD DEHUMIDIFICATION SYSTEM, NOT FROM SPLASHES FROM THE POOL; THE WATER WAS NOT NECESSARILY INCIDENTAL TO THE USE OF THE POOL AND THE ASSUMPTION OF THE RISK DOCTRINE DID NOT APPLY; THEREFORE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT WAS PROPERLY DENIED.

The Second Department determined defendant's motion for summary judgment in this slip and fall case was properly denied. Plaintiff, a swimming official, slipped on water on a pool deck at an indoor swimming facility. The water did not come from the pool, but rather was condensation from a dehumidification system: "... [T]he defendant cannot obtain summary judgment by relying on the cases in which courts have dismissed personal injury claims arising out of slipping on water around pools based on the reasoning that such water was necessarily incidental to the use of the area ... . [Re: assumption of the risk:] ... '[P]articipants are not deemed to have assumed risks that are concealed or unreasonably increased over and above the usual dangers that are inherent in the sport' ... . Here, the hazardous condition of an indoor pool deck wet from condensation that had formed and dripped was not open and obvious and created a risk beyond that inherent in the sport of swimming in an indoor swimming facility ... .. Further, 'the doctrine of assumption of risk does not exculpate a landowner from liability for ordinary negligence in maintaining a premises' ...". ***O'Brien v. Asphalt Green, Inc.*, 2021 N.Y. Slip Op. 02534, Second Dept 4-28-21**

PERSONAL INJURY, LANDLORD-TENANT.

AFTER WALKING OVER A TRAP DOOR, PLAINTIFF STEPPED BACK AND FELL THROUGH THE OPEN DOOR; DEFENDANT OUT-OF-POSSESSION LANDLORD DEMONSTRATED IT DID NOT HAVE ACTUAL OR CONSTRUCTIVE NOTICE OF THE DANGEROUS CONDITION.

The Second Department, reversing Supreme Court, determined that, although the lease did not unambiguously insulate the out-of-possession landlord from liability for plaintiff's fall through an open trap door in a deli, the landlord demonstrated it did not have actual or constructive notice of the dangerous condition. Apparently, plaintiff walked over the closed trap door but then stepped back and fell through the open door: "... [T]he owner failed to demonstrate, prima facie, that it was an out-of-possession landlord that did not have a contractual duty under the lease to maintain and repair the subject trapdoor ... . '[W]hile the meaning of a contract is ordinarily a question of law, when a term or clause is ambiguous and the determination of the parties' intent depends upon the credibility of extrinsic evidence or a choice among inferences to be drawn from extrinsic evidence, then the issue is one of fact' ... . Although paragraph 46 of the rider to the lease effectively limits the owner's responsibility to 'structural portions' of the deli, that phrase is only partially described in the lease, and is not so clear and unambiguous as to be subject only to the interpretation that it excludes the trapdoor ... . However, the owner established, prima facie, that it did not create the allegedly dangerous condition or have actual or constructive notice of its existence ... . At his deposition, the plaintiff testified that he walked over the trapdoor, and then 'seconds' later when he stepped back, he fell through a hole caused by the open trapdoor. Accordingly, even though the owner did not present evidence of the last time it inspected the trapdoor, the plaintiff's testimony establishes lack of constructive notice as a matter of law ... . In opposition, the plaintiff failed to raise a triable issue of fact. Although the owner's representative testified at his deposition that he was aware of the existence and location of the trapdoor and went into the deli once a month to collect rent, a general awareness that customers could fall through an open trapdoor in the aisle of the deli is legally insufficient to constitute constructive notice of the particular condition that caused the plaintiff's accident ...". ***Vaughan v. Triumphant Church of Jesus Christ*, 2021 N.Y. Slip Op. 02560, Second Dept 4-28-21**

PERSONAL INJURY, VEHICLE AND TRAFFIC LAW.

THE EVIDENCE DEMONSTRATED DEFENDANT DID NOT STOP FOR A RED LIGHT AND STRUCK PLAINTIFF'S CAR AS PLAINTIFF WAS PASSING THROUGH THE INTERSECTION; FAILING TO STOP FOR A RED LIGHT VIOLATES THE VEHICLE AND TRAFFIC LAW AND CONSTITUTES NEGLIGENCE PER SE; PLAINTIFF'S SUMMARY JUDGMENT MOTION SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined the evidence that defendant Glennon ran a red light and struck plaintiff's car as plaintiff was passing through the intersection warranted summary judgment in plaintiff's favor. Running a red light is a violation of the Vehicle and Traffic Law which constitutes negligence per se: " '[A] violation of a standard of care imposed by the Vehicle and Traffic Law constitutes negligence per se' ... . Pursuant to Vehicle and Traffic Law § 1111(d)(1), a driver when 'facing a steady circular red signal, . . . shall stop at a clearly marked stop line, but if none, then shall stop before entering the crosswalk on the near side of the intersection, or in the event there is no crosswalk, at the point nearest the intersecting roadway where the driver has a view of the approaching traffic on the intersecting roadway before entering the intersection.' ... [Steedman, a witness, testified the] first two vehicles passed through the intersection without incident, but then the plaintiff, who was driving the third vehicle, was struck by Glennon's vehicle. Steedman ... testified that he observed Glennon looking down into her lap at the time of the accident. Thus, the evidence submitted by the plaintiff demonstrated, prima facie, that Glennon entered the subject intersection against a red light, in violation of Vehicle and Traffic Law § 1111(d)(1) ...". ***Callahan v. Glennon*, 2021 N.Y. Slip Op. 02509, Second Dept 4-28-21**

TAX LAW, REAL ESTATE.

MORTGAGES ISSUED BY NYS FEDERAL CREDIT UNIONS ARE NOT EXEMPT FROM NYS MORTGAGE RECORDING TAX.

The Second Department, reversing Supreme Court, determined that mortgages issued by NYS federal credit unions are not exempt from the NYS mortgage recording tax: "This precise question was decided in *Hudson Val. Fed. Credit Union v New York State Dept. of Taxation & Fin.* (20 NY3d 1, 13), where the Court of Appeals held that, based on principles of statutory interpretation and the legislative history of the Federal Credit Union Act, mortgages issued by New York State federal credit unions are not exempt from the imposition of the New York State mortgage recording tax. This Court is bound by the Court of Appeals' decision in Hudson Val. Fed. Credit Union, despite conflicting federal intermediate court decisions which postdate it (*see People v Jackson*, 46 AD3d 1110)." ***O'Donnell & Sons, Inc. v. New York State Dept. of Taxation & Fin.*, 2021 N.Y. Slip Op. 02535, Second Dept 4-28-21**

THIRD DEPARTMENT

CIVIL PROCEDURE.

THE PROCESS SERVER DID NOT TIMELY FILE PROOF OF SERVICE; THEREFORE SERVICE ON DEFENDANT WAS NEVER COMPLETE AND THE DEFAULT JUDGMENT IS A NULLITY; SUPREME COURT CAN CURE THE NONJURISDICTIONAL DEFECT BY ORDERING DEFENDANT TO BE SERVED AND THE DEFENDANT MAY THEN INTERPOSE AN ANSWER.

The Third Department, reversing Supreme Court, determined the default judgment was a nullity because the process server did not timely file the affidavit of service. The defect is not jurisdictional and can be cured. But the default judgment cannot be reinstated retroactively. Once properly served the defendant may submit an answer: "... [P]laintiff's process server effectuated service by delivery and mail (see CPLR 308 [2]) on November 17, 2017. Plaintiff's proof of service, however, was not filed with the clerk of the court until December 11, 2017, more than 20 days after the delivery and mailing. Accordingly, the filing was untimely and, as such, service of process was never completed (see CPLR 308 [2] ...). ... [F]ailure to timely file proof of service is only a procedural irregularity, as opposed to a jurisdictional defect, and a court may, sua sponte, issue an order curing said irregularity (see CPLR 2001, 2004 ...). 'A court may not, however, make that relief retroactive to a defendant's prejudice by placing the defendant in default as of a date prior to the order, nor may a court give effect to a default judgment that, prior to the curing of the irregularity, was a nullity requiring vacatur' ... . Here, no such curative order was ever sought from or issued by Supreme Court and, therefore, defendant's time to answer never began to run such that the resulting default judgment was a nullity requiring vacatur ...". ***Miller Greenberg Mgt. Group, LLC v. Couture*, 2021 N.Y. Slip Op. 02566, Third Dept 4-29-21**

CORPORATION LAW, CIVIL PROCEDURE.

THE ACTION CONTESTING THE AMENDMENT TO THE BY-LAWS OF A NOT-FOR-PROFIT CORPORATION WHICH OWNS RECREATIONAL LAND AND COLLECTS DUES FROM LOT OWNERS MUST BE BROUGHT AS AN ARTICLE 78 PROCEEDING, NOT AN ACTION FOR A DECLARATORY JUDGMENT; THE ACTION IS THEREFORE TIME-BARRED.

The Third Department, reversing Supreme Court, determined the amendment to the by-laws defendant not-for-profit corporation which owns land underneath a man-made lake must be contested in an Article 78 action, not a declaratory judg-

ment action. Therefore the four-month Article 78 statute of limitations applied and the action was time-barred. The underlying dispute involved the assessment of annual dues for lots which had been exempt from dues. Plaintiffs are the owners of those lots: "Supreme Court concluded that the action being challenged was a legislative act, which cannot be challenged in a CPLR article 78 proceeding but must be maintained in a declaratory judgment action. However, the cases addressing legislative acts deal with challenges to 'governmental activity,' rather than the activity of nonpublic corporations ... . This is an important distinction as the rule prohibiting the use of CPLR article 78 proceedings to challenge acts of legislative bodies 'is derived from the separation-of-powers doctrine,' and so 'has no application to the quasi-legislative acts of administrative agencies' ... . Similarly, it does not apply to the actions or decisions of nonpublic corporations. * * * Whether defendant's alleged interest in plaintiffs' property is based on the imposition of restrictive covenants or the possibility of a lien if plaintiffs fail to pay dues on multiple lots, any such alleged interest would be based on the amended bylaws. Accordingly, though all of plaintiffs' causes of action are couched in declaratory judgment language, they can be distilled to challenges to defendant's enactment of the amended bylaws that could have been raised in a CPLR article 78 proceeding and are therefore subject to a four-month statute of limitations ... . Indeed, other courts have held that a challenge to a corporation's amendment of its bylaws must be raised via a CPLR article 78 proceeding commenced within four months of such amendment ...". ***Doyle v. Goodnow Flow Assn., Inc.*, 2021 N.Y. Slip Op. 02580, Third Dept 4-29-21**

CRIMINAL LAW.

VEHICULAR MANSLAUGHTER AND ASSAULT CONVICTIONS DISMISSED AS INCLUSORY CONCURRENT COUNTS OF AGGRAVATED VEHICULAR HOMICIDE AND AGGRAVATED VEHICULAR ASSAULT.

The Third Department determined several counts should have been dismissed as inclusory concurrent counts in this vehicular homicide prosecution: "... [D]efendant's convictions for vehicular manslaughter in the first degree, reckless driving and driving while intoxicated under counts 7, 12, 13 and 14 of the indictment must be dismissed as inclusory concurrent counts of his convictions for aggravated vehicular homicide (see CPL 300.30 [4]; 300.40 [3] [b]; Penal Law §§ 125.13 [3]; 125.14 [3], [5]; Vehicle and Traffic Law §§ 1212, 1192 [2], [3] ...). Similarly, defendant's conviction for vehicular assault in the first degree under count 9 of the indictment must be dismissed as an inclusory concurrent count of aggravated vehicular assault (see CPL 300.30 [4]; 300.40 [3] [b]; Penal Law §§ 120.04 [3]; 120.04-a [3] ...)." ***People v. Ferguson*, 2021 N.Y. Slip Op. 02563, Third Dept 4-29-21**

CRIMINAL LAW, EVIDENCE.

ALTHOUGH THE VICTIM WAS SHOT AND THE BULLET PASSED THROUGH HIS LEG, THE PROOF REQUIREMENTS FOR SERIOUS PHYSICAL INJURY WERE NOT MET; ASSAULT SECOND CONVICTIONS REDUCED TO ASSAULT THIRD.

The Third Department determined that although the victim had been shot, the evidence of serious physical injury was insufficient. The court reduced the assault second convictions to assault third: " 'The victim asserted that the bullet entered through the back of the leg just below the kneecap and exited through the front of the leg just above the kneecap. * * * There was no evidence that the victim lost consciousness after being shot or that a vital organ was damaged. Nor was there any proof, lay or medical, indicating that the victim's injuries caused a substantial risk of death or were life threatening' ... . Similarly, the evidence failed to show 'that the victim suffered from a protracted impairment of health or protracted loss or impairment of the function of a bodily organ' ... . Although there was testimony regarding the long-term effects of the gunshot wound, no corresponding medical documentation was submitted as proof of the link between the impairment and the initial injury ... . Further, although the victim testified that he had two circular scars from the bullet, this testimony alone is not sufficient to support a finding of serious disfigurement ... . To prove that the victim's scars were a serious disfigurement would have required the People to make a record of it, via either a photograph or a detailed description; here, however, the testimony establishes 'no more than that the victim had two scars' ... . Although the evidence 'falls short of satisfying the statutory definition of serious 'physical injury' ... , there is no dispute that the victim sustained a 'physical injury' (Penal Law § 10.00 [9])." ***People v. Smith*, 2021 N.Y. Slip Op. 02564, Third Dept 4-29-21**

EMPLOYMENT LAW, ARBITRATION.

THE MILD PENALTY IMPOSED BY THE ARBITRATOR ON AN EMPLOYEE WHO SEXUALLY HARASSED A FELLOW EMPLOYEE VIOLATED PUBLIC POLICY; MATTER REMITTED FOR IMPOSITION OF A PENALTY BY A NEW ARBITRATOR.

The Third Department determined the mild penalty imposed by the arbitrator in this place-of-employment sexual harassment case violated public policy. The matter was remitted for imposition of a penalty by a different arbitrator. The employee, Dominie, committed several egregious acts of sexual harassment targeting another employee which led to his pleading guilty to harassment second degree. The arbitrator reinstated Dominie's employment without conditions: "... [T]he situation here does not involve a single act of misconduct as in Barnard College. In defined contrast, we have a series of four separate, escalating and outrageous sexual harassment incidents. The events are particularly troublesome considering that Dominie engaged in annual sexual harassment training since 2013 and, when confronted by his supervisors after the two

January 2017 incidents, promised not to re-offend. The events that followed were even more egregious and rise to the level of criminal conduct, as memorialized in Dominie's guilty plea to the harassment charge. Given the extremely inappropriate nature of Dominie's conduct, we conclude that the arbitrator's decision violates public policy. The award fails to account for the rights of other employees to a non-hostile work environment and conflicts with the employer's obligation to eliminate sexual harassment in the workplace ... . The fact that the victimized coworker no longer worked in the office is hardly a mitigating factor. Nor is the penalty consistent with the arbitrator's 'significant concern' that Dominie failed to acknowledge his own wrongdoing. As such, we find that Supreme Court properly vacated the award as violative of the public policy prohibiting sexual harassment. We also conclude that the court was authorized to remit the matter to a different arbitrator for the imposition of a new penalty (see CPLR 7511 [d])." ***Matter of New York Off. for People with Dev.al Disabilities (Civil Serv. Empls. Assn., Inc., Local 1000, AFSCME, AFL-CIO)*, 2021 N.Y. Slip Op. 02579, Third Dept 4-29-21**

INSURANCE LAW, ADMINISTRATIVE LAW, CONSTITUTIONAL LAW.

THE DEPARTMENT OF FINANCIAL SERVICES' AMENDMENT TO AN INSURANCE REGULATION DESIGNED TO PROTECT CONSUMERS OF LIFE INSURANCE AND ANNUITY PRODUCTS IS VOID FOR VAGUENESS.

The Third Department, in a full-fledged opinion by Justice Egan, reversing Supreme Court, determined the Department of Financial Services' (DFS's) amendment to an Insurance Regulation was void for vagueness: "The amendment was promulgated to address concerns with respect to the growing complexities involved with life insurance and annuity products, the corresponding need for consumers to increasingly rely on the advice of professionals in order to comprehend the widening market of products available and to mitigate abuses with respect to the compensation of agents and brokers (hereinafter collectively referred to as producers [see 11 NYCRR 224.3 (c)]) who have incentive to manipulate consumers into purchasing financial products that result in higher commissions but ultimately fail to meet their needs. * * * ... [W]hile the consumer protection goals underlying promulgation of the amendment are laudable, as written, the amendment fails to provide sufficient concrete, practical guidance for producers to know whether their conduct, on a day-to-day basis, comports with the amendment's corresponding requirements for making recommendations and compiling and evaluating the relevant suitability information of the consumer ... . Although the amendment provides certain examples of what a recommendation does not include (i.e., 'general factual information to consumers, such as advertisements, marketing materials, general education information' and 'use of . . . interactive tool[s]' (11 NYCRR 224.3 [e] [2]), the remaining definitional language is so broad that it is difficult to discern what statements producers could potentially make that would not be reasonably interpreted by the consumer to constitute advice regarding a potential sales transaction and therefore fall within the purview of the amendment (see 11 NYCRR 224.3 [e] [1], [2])." ***Matter of Independent Ins. Agents & Brokers of N.Y., Inc. v. New York State Dept. of Fin. Servs.*, 2021 N.Y. Slip Op. 02574, Third Dept 4-29-21**

REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL).

QUESTION OF FACT WHETHER DEFENDANT HAD A GOOD FAITH BELIEF THAT HE OWNED THE LAND WHERE TREES WERE HARVESTED; THEREFORE THE ISSUE WHETHER THE TREBLE DAMAGES ASPECT OF RPAPL 861 APPLIES MUST BE DETERMINED AT TRIAL.

The Third Department determined there was a question of fact whether defendant had a good faith belief that the land on which trees were harvested was his own property. Therefore whether plaintiff was entitled to treble damages pursuant to Real Property Actions and Proceedings Law (RPAPL) 861 must be determined at trial: " '[T]he current version of RPAPL 861 was enacted . . . in an effort to deter the illegal taking of timber by increasing the potential damages for that activity' ... . If a person violates RPAPL 861 by cutting another person's trees without the other's consent, or by causing such cutting to occur, 'an action may be maintained against such person for treble the stumpage value of the tree or timber or [$250] per tree, or both and for any permanent and substantial damage caused to the land or the improvements thereon as a result of such violation' ... . However, if a defendant in such an action 'establishes[,] by clear and convincing evidence, that when the defendant committed the violation, he or she had cause to believe the land was his or her own, . . . then he or she shall be liable for the stumpage value or [$250] per tree, or both' ... . Thus, 'a trespasser's good faith belief in a legal right to harvest timber does not insulate that person from the imposition of statutory damages, but merely saves him or her from having to pay the plaintiff treble damages' ... . 'Whether treble damages pursuant to RPAPL 861 are warranted is generally a factual determination' ... . Although Gregory Miller testified that he intended to remove trees only from his own property, the record reflects that he did not have a survey of the property and relied on a determination of the boundary lines based on his own measurements. We conclude that a factual question exists, as Gregory Miller has failed at this stage of the proceedings to prove by clear and convincing evidence that he had a good faith belief that he owned the land at issue ...". ***Holser v. Geerholt*, 2021 N.Y. Slip Op. 02578, Third Dept 4-29-21**

FOURTH DEPARTMENT

EDUCATION-SCHOOL LAW, PERSONAL INJURY.

PLAINTIFF WAS INJURED DURING A WATER POLO GAME IN GYM CLASS; HIS NEGLIGENT SUPERVISION ACTION AGAINST THE SCHOOL DISTRICT PROPERLY SURVIVED SUMMARY JUDGMENT.

The Fourth Department determined a student's negligent supervision cause of action against the school district stemming from injuries during a water polo game in gym class properly survived summary judgment. Plaintiff alleged his head hit the bottom of the pool: "... [D]efendants failed to meet their initial burden inasmuch as their own submissions on the motion raise triable issues of fact whether they engaged in negligent supervision and whether that negligence was a proximate cause of plaintiff's injuries. While defendants' submissions established that the physical education teacher who supervised water polo had modified the typical rules thereof to prevent contact, defendants' papers raise issues of fact whether those rules were enforced, the water polo game as modified was safe and age-appropriate, and the supervision of the game was reasonable under the circumstances. Among other things, defendants submitted the deposition of the physical education teacher, wherein he provided conflicting testimony as to whether he actually allowed contact during the water polo game and whether he allowed students to take the ball from each other. His testimony therefore created an issue of fact whether defendants had notice of students engaging in dangerous conduct similar to the conduct that caused plaintiff's injuries and, thus, whether such conduct was preventable ...". ***Zalewski v. East Rochester Bd. of Educ.*, 2021 N.Y. Slip Op. 02700, Fourth Dept 4-30-21**

EMPLOYMENT LAW, MUNCIPAL LAW, ADMINISTRATIVE LAW, EVIDENCE.

PETITIONER, WHO HAD WORKED FOR THE TOWN FOR 32 YEARS, TOOK $181 FROM PETTY CASH AND LEFT A NOTE INDICATING SHE OWED MONEY TO THE FUND; THE LARCENY AND THEFT CHARGES WERE ANNULLED; TERMINATION WAS TOO SEVERE A PUNISHMENT; MATTER REMITTED.

The Fourth Department, over a two-justice dissent, determined the theft and larceny charges against petitioner should be annulled and termination of petitioner's employment with the town was too severe a penalty. Petitioner took $181 from petty cash but left a note indicating she owed money to the fund: "We agree with petitioner that the determination of guilt on charges 1 and 2, which charged her respectively with theft and larceny, is not supported by substantial evidence. A person 'commits larceny when, with intent to deprive another of property or to appropriate the same to him[- or her]self or to a third person, he [or she] wrongfully takes, obtains or withholds such property from an owner thereof' (Penal Law § 155.05 [1]). 'Theft' is a synonym of 'larceny' (Black's Law Dictionary 1780 [11th ed 2019]). We conclude that petitioner's actions, particularly the creation and placement of the note, are inconsistent with an intent to deprive or appropriate (see § 155.00 [3], [4] ...). ... [I]n light of petitioner's 32 years of service to the Town, her impending retirement, and the absence of grave moral turpitude ... , we conclude that the penalty of termination is 'so disproportionate to the offense, in the light of all the circumstances, as to be shocking to one's sense of fairness' ...". ***Matter of Gray v. LaFountain*, 2021 N.Y. Slip Op. 02624, Fourth Dept 4-30-21**

FALSE ARREST, CIVIL RIGHTS LAW, MUNICIPAL LAW.

THERE WAS PROBABLE CAUSE TO ARREST PLANTIFF FOR TRESPASS AFTER SHE WAS ASKED TO LEAVE THE RESTAURANT BY RESTAURANT STAFF; THEREFORE PLAINTIFF'S FALSE ARREST CAUSE OF ACTION SHOULD HAVE BEEN DISMISSED.

The Fourth Department determined plaintiff's cause of action for false arrest should have been dismissed in this excessive-force, civil-rights-violation action against two police officers. Plaintiff got into an argument with restaurant staff and was asked to leave by the staff, who then called the police. The police broke plaintiff's arm when attempting to handcuff her. The excessive force, civil-rights-violation causes of action properly survived defendants' summary judgment motions. But there was probable cause to arrest plaintiff for trespass, requiring dismissal of the false arrest cause of action: " '[T]he existence of probable cause is an absolute defense to a false arrest claim' ... . This is so even if probable cause exists with respect to an offense other than the one actually invoked at the time of arrest ... . Here, although plaintiff lawfully entered the restaurant premises as a customer, her license to remain was revoked when she was asked to leave after she began arguing with the staff. When plaintiff refused to leave the restaurant property at the request of its staff, she committed a trespass ... . Inasmuch as plaintiff committed an ongoing trespass in defendants' presence (see CPL 140.10 [1] [a]), defendants had probable cause to arrest plaintiff for that violation ...". ***Snow v. Rochester Police Officer Christopher Schreier*, 2021 N.Y. Slip Op. 02638, Fourth Dept 4-30-21**

FAMILY LAW, JUDGES, EVIDENCE.

THE JUDGE'S MAINTENANCE AWARD MAY NOT HAVE BEEN PROPERLY BASED UPON THE FACTORS ENUMERATED IN DOMESTIC RELATIONS LAW 236; MATTER REMITTED.

The Fourth Department, vacating the maintenance award and remitting for recalculation, determined Supreme Court did not set forth the factors for the maintenance calculation as required by Domestic Relations Law 236: "Defendant husband appeals from a judgment of divorce that, inter alia, directed him to pay plaintiff wife $750 a week in maintenance for a period of 17 years. On appeal, he contends that Supreme Court erred in awarding maintenance for a period of time in excess of the recommendation set forth in the advisory schedule in Domestic Relations Law § 236 (B) (6) (f) (1) without adequately demonstrating its reliance on the relevant statutory factors enumerated in section 236 (B) (6) (e) (see § 236 [B] [6] [f] [2]). We agree and further conclude that the court erred in awarding plaintiff maintenance without sufficiently setting forth the relevant factors enumerated in section 236 (B) (6) (e) that it relied on in reaching its determination. Although the court need not specifically cite the factors enumerated in that section, its analysis must show that it at least considered the relevant factors in making its determination ... . The determination must also 'reflect[] an appropriate balancing of [the wife's] needs and [the husband's] ability to pay' ... . [T]he court stated that it awarded plaintiff $750 per week—an amount deviating from the statutory guidelines—for a duration in excess of the statutory guidelines based on the length of the marriage, the parties' disproportionate earning capacities, and defendant's tax debt. However, although the statutory guidelines use the length of the marriage to calculate the duration of the maintenance award ... , the length of the parties' marriage is not a factor enumerated in section 236 (B) (6) (e). Further, the court did not state what factors it considered, in addition to actual earnings, in determining the parties' earning capacities ... . Moreover, the court did not determine whether defendant's substantial tax debt would impede his ability to pay plaintiff's maintenance award ... . Thus, the court failed to show that it considered any of the factors enumerated in section 236 (B) (6) (e) (1) in making its determination of both the amount and duration of the maintenance award." ***Gutierrez v. Gutierrez*, 2021 N.Y. Slip Op. 02662, Fourth Dept 4-30-21**

INSURANCE LAW, CONTRACT LAW.

QUESTIONS OF FACT ABOUT WHETHER THE INSURER IS ESTOPPED FROM DENYING COVERAGE TO A PARTY LISTED AS AN ADDITIONAL INSURED IN A CERTIFICATE OF INSURANCE.

The Fourth Department, reversing Supreme Court, determined there were questions of fact about plaintiff's reliance on a certificate of insurance and whether the certificate was issued by the carrier or its agent. Although a certificate of insurance is not a contract, the carrier may be estopped from denying coverage if the party named as an additional insured in the certificate relied on the certificate and the certificate was issued by the insurer or its agent: " 'It is well established that a certificate of insurance, by itself, does not confer insurance coverage, particularly [where, as here,] the certificate expressly provides that it is issued as a matter of information only and confers no rights upon the certificate holder [and] does not amend, extend or alter the coverage afforded by the policies' ... . 'A certificate of insurance is only evidence of a carrier's intent to provide coverage but is not a contract to insure the designated party nor is it conclusive proof, standing alone, that such a contract exists' ... . 'Nevertheless, an insurance company that issues a certificate of insurance naming a particular party as an additional insured may be estopped from denying coverage to that party where the party reasonably relies on the certificate of insurance to its detriment' ... 'For estoppel based upon the issuance of a certificate of insurance to apply, however, the certificate must have been issued by the insurer itself or by an agent of the insurer' ...". ***County of Erie v. Gateway-Longview, Inc.*, 2021 N.Y. Slip Op. 02631, Fourth Dept 4-30-21**

LIEN LAW.

IN THIS LIEN LAW DISPUTE OVER PAYMENT PURSUANT TO CONSTRUCTION CONTRACTS, DEFENDANTS DID NOT DEMONSTRATE AS A MATTER OF LAW THAT THE RESTORATION OF IMPROPERLY DIVERTED TRUST ASSETS WITH NON-TRUST ASSETS LIMITED DEFENDANTS' DAMAGES.

The Fourth Department, reversing (modifying) Supreme Court in this Lien-Law construction-contract action, over a dissent, determined defendants did not demonstrate as a matter of law that the improper diversion of trust assets was cured by the restoration of trust assets with non-trust assets: " '[T]he primary purpose of [Lien Law] article 3-A and its predecessors . . . [is] to ensure that those who have directly expended labor and materials to improve real property [or a public improvement] at the direction of the owner or a general contractor receive payment for the work actually performed' ... . 'Use of trust assets for any purpose other than the expenditures authorized in Lien Law § 71 before all trust claims have been paid or discharged constitutes an improper diversion of trust assets, regardless of the propriety of the trustee's intentions' ... . Under Lien Law article 3-A, a trust beneficiary may maintain an action 'to recover trust assets from anyone to whom they have been diverted with notice of their trust status' ... . * * * ... [T]he court erred in granting defendants' motion in part by limiting the potential damages in the diversion causes of action to a maximum of $104,205.99 based on Top Capital's [defendant's] alleged restoration of trust assets through payments made with non-trust assets ... . Plaintiffs allege that approximately $1.4 million in trust assets was improperly diverted by defendants. The court, in limiting the potential recovery on the diversion

causes of action, credited not just Top Capital but all defendants for the approximately $1.3 million Top Capital paid DiMarco [plaintiff] from non-trust assets after the trust fund was depleted. That was error because defendants failed to establish their entitlement to a restoration defense as a matter of law. Contrary to defendants' assertion, the Court of Appeals has rejected the argument that a defendant can cure an improper diversion of trust assets, and therefore avoid liability for that diversion, by a subsequent payment from non-trust assets ...". ***DiMarco Constructors, LLC v. Top Capital of N.Y. Brockport, LLC*, 2021 N.Y. Slip Op. 02680, Fourth Dept 4-30-21**

MENTAL HYGIENE LAW, ATTORNEYS, CRIMINAL LAW.

SUPREME COURT SHOULD NOT HAVE DENIED PETITIONER-SEX-OFFENDER'S REQUEST TO REPRESENT HIMSELF IN THE MENTAL HYGIENE LAW ARTICLE 10 CIVIL COMMITMENT PROCEEDING.

The Fourth Department, reversing the Mental Hygiene Law article 10 civil commitment of petitioner as a dangerous sex offender, determined Supreme Court should not have denied petitioner's request to represent himself: "We have recognized that a respondent in a Mental Hygiene Law article 10 proceeding 'can effectively waive his or her statutory right to counsel' once the court 'conducts a searching inquiry to ensure that the waiver is unequivocal, voluntary, and intelligent' ... . In the instant case, respondent made a timely and unequivocal request to proceed pro se, the court conducted the requisite searching inquiry, and respondent repeatedly evinced an understanding of each of the court's warnings to him regarding the possible consequences of proceeding pro se ... . The court, however, denied the request because it believed that respondent '[had] a good chance of prevailing' but did not believe that respondent '[had] a chance . . . of prevailing if [the court] let [respondent] go pro se.' On the record before us, we conclude that the court's sole rationale for denying the request was its belief that respondent lacked legal training and an understanding of the law, but that is not an appropriate basis on which to deny a request to proceed pro se ... . '[M]ere ignorance of the law cannot vitiate an effective waiver of counsel as long as the defendant was cognizant of the dangers of waiving counsel at the time it was made' ...". ***Matter of State of New York v. Michael M.*, 2021 N.Y. Slip Op. 02636, Fourth Dept 4-30-21**

PERSONAL INJURY.

QUESTION OF FACT WHETHER AN UNGUARDED, UNILLUMINATED SEAWALL AT THE BACK OF DEFENDANTS' YARD CONSTITUTED AN ACTIONABLE DANGEROUS CONDITION; PLAINTIFF, AT NIGHT, FELL OVER THE WALL DOWN TO THE BEACH BELOW.

The Fourth Department determined there was a question of fact whether the unguarded seawall in defendants' backyard constituted a dangerous condition. Plaintiff was at defendants' party and walked to the back of the yard to relieve himself when he fell over the wall, which was 20 feet above the lake: "Defendants' backyard is approximately 20 feet above the lake, separated by a natural cliff that runs along the shoreline. Built into the face of the cliff is the 15-foot-high seawall, which consists of two levels, with an upper and a lower platform, and a cement staircase built into the center of the seawall that permits access from the backyard to the lower platform. Defendants' backyard includes a cement sidewalk that leads to the top of the seawall's staircase. Plaintiff fell off the seawall down to the beach below and sustained various injuries. * * * ... [D]efendants failed to eliminate all triable issues of fact whether the alleged hazard posed by the cliff and seawall, given the lighting conditions at the time of the accident, 'was visible and obvious or presented a latent, dangerous condition' ...". ***Stempien v. Walls*, 2021 N.Y. Slip Op. 02683, Fourth Dept 4-30-21**

PERSONAL INJURY.

DEFENDANT'S ALLEGED FAILURE TO MAINTAIN ITS TRUCK LED TO AN ACCIDENT IN WHICH A VAN DRIVEN BY PLAINTIFF'S EMPLOYEE STRUCK DEFENDANT'S EMPLOYEE; A LAWSUIT BY DEFENDANT'S EMPLOYEE AGAINST PLAINTIFF CULMINATED IN A $900,000 SETTLEMENT; PLAINTIFF ALLEGED THE RESULTING INCREASED INSURANCE PREMIUMS FORCED PLAINTIFF OUT OF BUSINESS; THE LOSS OF PLAINTIFF'S BUSINESS WAS NOT A FORESEEABLE CONSEQUENCE OF DEFENDANT'S ALLEGED FAILURE TO MAINTAIN ITS TRUCK.

The Fourth Department, reversing Supreme Court, determined the defendant's negligence was not a proximate cause of the damages suffered by plaintiff. Two wheels fell off defendant's dump truck. Plaintiff's (Able Medical's) employee struck one of the wheels and then struck defendant's employee, the truck driver. Defendant's employee sued the plaintiff and the matter was settled for $900,000. Plaintiff alleged the increase in insurance premiums resulting from the accident and settlement forced plaintiff to go out of business: "... [P]laintiffs' theory of causation is based on a lengthy chain of events spanning the course of two and a half years. In their complaint, plaintiffs alleged that defendant failed to maintain its truck, that rear wheels fell off of the truck causing a motor vehicle accident, that the accident resulted in a lawsuit, and that the settlement of the lawsuit ultimately resulted in an increase in insurance premiums for plaintiffs, which caused plaintiffs to close their business. On its motion, defendant established that those alleged economic injuries were not a foreseeable consequence of defendant's alleged negligent maintenance of its truck and, thus, the connection between defendant's activities and plaintiffs' economic losses is too tenuous and remote to permit recovery ...". ***Able Med. Transp., Inc. v. Paragon Envtl. Constr., Inc.*, 2021 N.Y. Slip Op. 02687, Fourth Dept 4-30-21**

PERSONAL INJURY.

DEFENDANT DID NOT DEMONSTRATE WHEN THE AREA WHERE PLAINTIFF FELL WAS LAST CLEANED OR INSPECTED; THEREFORE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT IN THIS SLIP AND FALL CASE SHOULD NOT HAVE BEEN GRANTED.

The Fourth Department, reversing Supreme Court, determined defendant in this slip and fall case did not demonstrate it lacked constructive notice of the water on the floor as a matter of law. Defendant did not submit any proof demonstrating when the area was last cleaned or inspected: " 'To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it' ... . A 'defendant cannot satisfy its burden merely by pointing out gaps in the plaintiff's case, and instead must submit evidence concerning when the area was last cleaned and inspected prior to the accident' ... . While defendant submitted evidence that it hired a contractor who was generally expected to clean up any hazards, such as water on the floor, it did not submit evidence establishing when the area of plaintiff's fall was last inspected ... . As a result, '[a] triable issue of fact exists as to when the [area of plaintiff's fall] was last inspected in relation to the accident and, thus, whether the alleged hazardous condition . . . existed for a sufficient length of time prior to the incident to permit . . . defendant to remedy that condition' ... . Furthermore, '[t]he fact that plaintiff did not notice water on the floor before [s]he fell does not establish defendant['s] entitlement to judgment as a matter of law on the issue whether that condition was visible and apparent' ...". ***Arghittu-Atmekjian v. TJX Cos., Inc.*, 2021 N.Y. Slip Op. 02689, Fourth Dept 4-30-21**

REAL PROPERTY TAX LAW, REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL), MUNICIPAL LAW, CIVIL PROCEDURE.

NON-OWNER DID NOT HAVE STANDING TO MOVE TO VACATE A TAX FORECLOSURE SALE; THE RIGHT TO PAY THE DELINQUENT TAXES HAD BEEN EXTINGUISHED.

The Fourth Department, reversing County Court, determined the tax foreclosure sale of property owned by Black Rock to appellant should not have been vacated. Respondent, Fedder, moved to vacate the sale. After County Court granted Fedder's motion, the delinquent taxes were paid, the County issued a certificate of redemption to Black Rock, which then sold the property to Fedder: "... [T]his is not a mortgage foreclosure action, where the 'equity of redemption' permits property owners 'to redeem their property by tendering the full sum' owed before a valid sale is effectuated ... . Here, instead, the right to pay the delinquent taxes by virtue of the equity of redemption was extinguished several months prior to Fedder's motion by order to show cause, according to the ECTA [Erie County Tax Act], the public notice of foreclosure, and the terms of the judgment of foreclosure (see ECTA §§ 11-10.0, 11-12.0; see also RPTL art 11 ...). ... [T]he purported redemption, the issuance of the certificate of redemption, and the purported sale and transfer of title from Black Rock to Fedder are nullities ... . Fedder did not have standing to seek equitable relief in this case. Pursuant to ECTA § 7-10.0, the court could not set aside the sale to appellant 'except upon a proceeding brought therefor by the owner of such real property within three months from the date of such sale.' Here, no such proceeding was brought. Instead, Fedder, a nonowner, filed a motion by order to show cause in this foreclosure action, and Black Rock, the owner, was not a party to the motion. In light of the 'clear legislative intent' of section 7-10.0 ..., Fedder did not have standing to seek rescission of the sale." ***Matter of Foreclosure of Tax Liens*, 2021 N.Y. Slip Op. 02681, Fourth Dept 4-30-21**

REAL PROPERTY TAX LAW, REAL PROPERTY ACTIONS AND PROCEEDINGS LAW, MUNICIPAL LAW, CIVIL PROCEDURE, TRUSTS AND ESTATES.

A TAX FORECLOSURE PROCEEDING IS AN IN REM ACTION AGAINST THE PROPERTY, NOT THE PROPERTY OWNER; THEREFORE THE ACTION WAS NOT A NULLITY DESPITE THE DEATH OF THE OWNER.

The Fourth Department, reversing Supreme Court, determined the tax foreclosure proceeding was not a nullity and did not violate due process. The foreclosed restaurant belonged to plaintiff's husband, who died in 2006. The treasurer of Ontario County followed all the proper procedures for notification of the tax foreclosure proceedings. Tax foreclosure is an in rem action to which there are no parties. So the argument that the action could not be brought against the deceased owner of the restaurant was rejected: "... [B]y statute, mortgagors are necessary party defendants to mortgage foreclosure actions (see RPAPL 1311 [1]). In contrast, a petition in a tax foreclosure proceeding relates only to the property and not any particular person (see RPTL 1123 [2] [a]). The distinction between in rem tax foreclosure proceedings and mortgage foreclosure actions with respect to the 'parties' is critical. While an action or proceeding cannot be commenced against a dead person who, by necessity, is a named party to the action ... , a tax foreclosure proceeding is not commenced against any person; it is commenced against the property itself. The owners are not necessary 'parties' to the tax foreclosure proceeding; they are only '[p]arties entitled to notice' of the proceeding (RPTL 1125 [1] [a]; see RPTL 1123 [1], [2] [a]; cf. RPAPL 1131). As a result, the tax foreclosure proceeding was properly commenced even though decedent had died … , and there was no need

to substitute someone for the dead owner (see CPLR 1015)." ***Hetelekides v. County of Ontario*, 2021 N.Y. Slip Op. 02697, Fourth Dept 4-30-21**

TRUSTS AND ESTATES, CONTRACT LAW.

THE COMPLAINT STATED CAUSES OF ACTION FOR CONSTRUCTIVE TRUST AND PROMISSORY ESTOPPEL; THE UNJUST ENRICHMENT ELEMENT OF THE CONSTRUCTIVE TRUST WAS NOT PRECLUDED BY A CONTRACT SIGNED BY PLAINTIFF AS A TRUSTEE.

The Fourth Department, reversing (modifying) Supreme Court, over a partial dissent, determined the complaint stated a cause of action for a constructive trust, the unjust enrichment element of the constructive trust was not precluded by a contract, and the alleged promise to take care of plaintiff in return for an interest in an LLC was clear and unambiguous enough to support a cause of action for promissory estoppel: "According to plaintiff, defendant [plaintiff's daughter] had promised that, if plaintiff created the LLC and gave her a 90% membership interest in the LLC and control as sole manager, she would 'help [plaintiff] manage his businesses and real property interests, help take care of [plaintiff and his wife], help ensure their financial well-being, and visit them often.' After plaintiff's wife died, defendant allegedly ended all direct communication with plaintiff and gave 'sporadic and cursory' attention to plaintiff's business and real property interests, prompting him to commence this action. * * * Inasmuch as the amended complaint alleged a confidential or fiduciary relation, a promise, and a transfer made in reliance on that promise, the issue concerning the [constructive trust] cause of action is whether the amended complaint adequately alleged unjust enrichment. '[I]n order to sustain an unjust enrichment claim, '[a] plaintiff must show that (1) the other party was enriched, (2) at [the plaintiff's] expense, and (3) that it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered' ... . Where the parties executed a valid and enforceable written contract governing a particular subject matter, recovery on a theory of unjust enrichment for events arising out of that subject matter is ordinarily precluded' ... . Here, there is a written contract that covers the particular subject matter, i.e., the LLC's operating agreement. That agreement, however, was executed by defendant and plaintiff in his role as trustee. ... Inasmuch as plaintiff, individually, was not a party to the operating agreement, his first cause of action, insofar as it was asserted by him, individually, is not precluded by the written contract ...". ***Van Scoter v. Porter*, 2021 N.Y. Slip Op. 02692, Fourth Dept 4-30-21**

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