CasePrepPlus

June 11, 2021

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

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COURT OF APPEALS

CONSUMER LAW, CONTRACT LAW.

PLAINTIFFS, ATTORNEYS PRACTICING LANDLORD-TENANT LAW, ALLEGED DEFENDANT PUBLISHER OF "NEW YORK LANDLORD-TENANT LAW" OMITTED OR INACCURATELY PRESENTED SOME OF THE RELEVANT STATUTES AND REGULATIONS AND THEREFORE VIOLATED GENERAL BUSINESS LAW § 349 (DECEPTIVE BUSINESS PRACTICES); THE COMPLAINT FAILED TO ADEQUATELY ALLEGE DEFENDANT'S ACT OR PRACTICE WAS MATERIALLY MISLEADING.

The Court of Appeals, in a full-fledged opinion by Judge Rivera, over a dissent, determined the defendant-publisher of a legal resource book, "New York Landlord-Tenant Law" (commonly called the "Tanbook"), did not state a cause of action for deceptive business practices prohibited by General Business Law (GBL) § 349. Plaintiffs, attorneys who practice landlord-tenant law, alleged the Tanbook, which is published annually, purported to include all the relevant statutes and regulations but, in fact, omitted or inaccurately presented some statutes and regulations. The Court of Appeals found that the complaint adequately alleged a cause of action that was consumer-oriented, but did not adequately allege defendant's act or practice was misleading in a material way: "... [P]laintiffs' cause of action is based on purchases of yearly editions of the Tanbook, under a sales agreement that charged extra for any updates of the year's materials contained in the corresponding edition. Plaintiffs' allegations are limited to omissions and inaccuracies in a section of the Tanbook they knew was subject to legislative amendment, which they concede were corrected in the 2017 edition after the errors were brought to defendant's attention, and which were specifically contemplated by defendant's express disclaimer of the currentness of the Tanbook's contents. Under the circumstances, plaintiffs, or any reasonable consumer, could not have been materially misled to believe that defendant guaranteed Part III of the Tanbook was complete and accurate at any given time. Thus, because plaintiffs failed to adequately plead this element, their GBL § 349 cause of action was properly dismissed." ***Himmelstein, McConnell, Gribben, Donoghue & Joseph, LLP v. Matthew Bender & Co., Inc .*, 2021 N.Y. Slip Op. 03485, CtApp 6-3-21**

CIVIL PROCEDURE, MUNICIPAL LAW.

PURSUANT TO NEW YORK CITY CIVIL COURT ACT § 1808, COLLATERAL ESTOPPEL OR ISSUE PRECLUSION DOES NOT APPLY TO SMALL CLAIMS ACTIONS, BUT RES JUDICATA OR CLAIM PRECLUSION DOES APPLY TO SMALL CLAIMS ACTIONS.

The Court of Appeals, in a full-fledged opinion by Judge Stein, over an extensive dissent, interpreting New York Civil Court Act section 1808, determined a judgment in a small claims action is subject to the transactional approach to claim preclusion. Plaintiff won a small claims case seeking overtime wages. Then plaintiff brought another action in federal court seeking additional damages for the failure to pay overtime wages under federal and state law. The Second Circuit asked for clarification of the meaning of section 1808, which could be interpreted to prohibit the application of both issue preclusion and claim preclusion to small claims actions. Under the statute, collateral estoppel or issue preclusion does not apply to small claims actions, but res judicata or claim preclusion does: "We now conclude that, under NY City Civ Ct Act § 1808, small claims judgments do not have collateral estoppel or issue preclusive effect (with one exception), but such judgments may have the traditional res judicata or claim preclusive effect in a subsequent action involving a claim between the same adversaries arising out of the same transaction or series of transactions at issue in a prior small claims court action. * * * ... [T]he claim preclusion rule extends beyond attempts to relitigate identical claims. We have consistently applied a 'transactional analysis approach' in determining whether an earlier judgment has claim preclusive effect, such that 'once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy' ... . * * * Collateral estoppel, or issue preclusion, is related to, but distinct from, the doctrine of res judicata. Collateral estoppel prevents 'a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party . . . whether or not the . . . causes of action are the same' ...". ***Simmons v. Trans Express Inc.*, 2021 N.Y. Slip Op. 03484, CtApp 6-3-21**

CRIMINAL LAW, EVIDENCE.

KINGS COUNTY SUPREME COURT HAD JURISDICTION TO ISSUE EAVESDROPPING WARRANTS FOR DEFENDANT'S CELL PHONES BASED UPON WHERE THE INTERCEPTION WAS TO BE MADE (NEW YORK); THE CELL PHONES NEED NOT BE (AND WERE NOT) LOCATED IN NEW YORK.

The Court of Appeals, in a full-fledged opinion by Judge DiFiore, over a two-judge dissent, determined that Kings County Supreme Court had jurisdiction to issue eavesdropping warrants for defendant's cell phones based up where the interception was to be made (New York). The cell phones need not be (and were not) located in New York: "The issue raised on defendant's appeal is whether a Kings County Supreme Court Justice had jurisdiction to issue eavesdropping warrants for defendant's cell phones, which were not physically present in New York, for the purpose of gathering evidence in an investigation of enterprise corruption and gambling offenses committed in Kings County. To resolve defendant's jurisdictional challenge, we must decide whether the eavesdropping warrants were 'executed' in Kings County within the meaning of Criminal Procedure Law § 700.05 (4). We hold that eavesdropping warrants are executed in the geographical jurisdiction where the communications are intentionally intercepted by authorized law enforcement officers within the meaning of CPL article 700." ***People v. Schneider*, 2021 N.Y. Slip Op. 03486, CtApp 6-3-21**

FIRST DEPARTMENT

ATTORNEYS, CONTRACT LAW, EMPLOYMENT LAW.

THE PORTION OF THE NONCOMPETE AGREEMENT WHICH PROHIBITED ENGAGING IN A SIMILAR PRACTICE OF LAW WITHIN 90 MILES OF NYC FOR 36 MONTHS WAS NULL AND VOID; HOWEVER THE PORTION WHICH PROHIBITED THE SOLICITATION OF CLIENTS WAS ENFORCEABLE AND SURVIVED SUMMARY JUDGMENT.

The First Department determined that, although part of the noncompete agreement was null and void, the prohibition of soliciting plaintiff's clients was enforceable. Therefore defendants' motion for summary judgment was properly denied. "Plaintiff Feiner & Lavy, P.C., is a law firm that specializes in immigration law. Defendant Gadi Zohar, Esq. was a former associate attorney with plaintiff, and defendant Jihan Asli was its office manager for several years before joining Zohar's law firm, Zohar Law PLLC. ... According to plaintiff, the employment agreement prohibited Zohar from engaging in any business that conducts the same or similar business as plaintiff for a period of 36 months, within 90 miles of New York City or in the Israeli community. The agreement also purported to prohibit Zohar from directly or indirectly soliciting any business from customers or clients of plaintiff for a period of 36 months within 90 miles of New York City or in the Israeli community; or advertise on Israeli/Hebrew websites, TV or newspaper ads. * * * Rule 5.6(a)(1) of the Rules of Professional Conduct ... bars lawyers from 'participat[ing] in offering or making a partnership, shareholder, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship,' except under limited circumstances that are not relevant to this appeal. To the extent the noncompete provision in the employment agreement that Zohar executed with plaintiff seeks to prevent him from 'conducting business activities that are the same or similar to those of [plaintiff]' within 90 miles of New York City or in the Israeli community, it is void and unenforceable ... . However, the noncompete clause here may be enforceable to the extent that it prohibits Zohar from soliciting plaintiff's clients ...". ***Feiner & Lavy, P.C. v. Zohar*, 2021 N.Y. Slip Op. 03407, First Dept 6-1-21**

CIVIL PROCEDURE.

SUBPOENAS RELATING TO CROSS CLAIMS SHOULD NOT HAVE BEEN QUASHED.

The First Department, reversing Supreme Court, determined subpoenas that related to cross claims should not have quashed: "[Defendant's] motion to quash the nonparty subpoenas ... to obtain information related to ... cross claims ... (CPLR 3101[a][4]) should have been denied. Although the subpoenaed information was unrelated to the interpleader action, in New York, cross claims 'may be asserted between defendants for any cause of action at all, whether or not related to the plaintiff's main claim' (... CPLR 3019[b]). As the requested information is relevant to the pending cross claims, they could be properly subpoenaed. Thus, we remand the matter for discovery to the extent the requested information is 'material and necessary' to the cross claims (CPLR 3101[a][4] ...)." ***Feiger v. Ray Enters., LLC*, 2021 N.Y. Slip Op. 03525, First Dept 6-3-21**

CIVIL PROCEDURE, CONSTITUTIONAL LAW, PERSONAL INJURY.

THE RECENT US SUPREME COURT CASE HOLDING THAT A STATE MUST CONSENT TO SUIT AGAINST IT IN A SISTER STATE DID NOT AFFECT THE DOCTRINE OF "WAIVER OF SOVEREIGN IMMUNITY;" HERE NEW JERSEY WAIVED THE DOCTRINE BY PARTICIPATING IN THE FIRST TRIAL OF THIS TRAFFIC ACCIDENT CASE.

The First Department, in a full-fledged opinion by Justice Oing, in a comprehensive discussion which cannot be fairly summarized here, determined the defendant, New Jersey Transit, had waived sovereign immunity by participating in the first trial of this traffic accident case. The fact that, since the first trial, the US Supreme Court (the *Hyatt* case) held a state may not be sued in a sister state without consent (the "consent to the jurisdiction of a sister state" issue) did not require a different result on the "waiver of sovereign immunity" issue: "There is no dispute that New Jersey Transit did not make a voluntary

appearance in this action. It then argues that it made no clear statement by its litigation conduct that it was submitting to the jurisdiction of the courts of this state, pointing out that it has taken a defensive posture from this action's inception because it had no legitimate legal basis for objecting to New York's jurisdiction until seven years after the action was commenced, when *Hyatt* was decided, in 2019. These arguments are an oversimplification of this substantive constitutional issue. The issue is whether New Jersey Transit undertook a litigation strategy that can be deemed a voluntary waiver of its sovereign immunity. * * * We reject New Jersey Transit's argument that the sovereign immunity defense was not available at the time it served its answer in this action. The doctrine of sovereign immunity as it applies to states has been available at least since ... 1979. The *Hyatt* Court dramatically altered the sovereign immunity analysis ... . *Hyatt* did not, however, give birth to the doctrine. We cannot help but see the obvious unfair tactical advantage of conceding liability and losing at the first trial on damages and then seeking dismissal of the second trial on damages several years later, based not on the merits of the action but on an alleged 'new' defense of sovereign immunity." ***Belfand v. Petosa*, 2021 N.Y. Slip Op. 03522, First Dept 6-3-21**

INSURANCE LAW, CIVIL PROCEDURE.

THE EXAMINATION UNDER OATH (EUO) WAS SCHEDULED BEFORE THE INSURER RECEIVED A CLAIM FORM; THEREFORE THE INSURER DID NOT HAVE TO DEMONSTRATE COMPLIANCE WITH THE NOTICE REQUIREMENTS OF 11 N.Y.C.R.R. § 65-3.5 TO BE ENTITLED TO A DEFAULT DECLARATORY JUDGMENT; THE UNDERLYING TRAFFIC ACCIDENT WAS FOUND TO HAVE BEEN STAGED AND CLAIMANT FAILED TO APPEAR AT SCHEDULED EOU'S.

The First Department noted that where an examination under oath (EUO) is scheduled before the insurance company of a claim form, the insurer need not submit the proof of mailing in compliance with 11 NYCRR 65-3.5 to obtain a default declaratory judgment. It was determined the underlying traffic accident was staged and claimant did not appear at scheduled EOU's: "As to claimant Ronald Marcellus, plaintiff additionally provided sufficient proof that he failed to appear for an examination under oath (EUO) despite receiving proper notice, which vitiates the policy ... . Generally, an insurer must provide proof that the EUO requests were timely mailed, within 15 business days of receipt of the prescribed verification forms, in compliance with 11 NYCRR 65-3.5 in order to obtain a default declaratory judgment ... . However, that requirement does not apply where, as here, the EUOs are scheduled prior to the insurance company's receipt of a claim form ... . Since Marcellus failed to appear on two or more occasions and the EUO requests were sent prior to plaintiff's receipt of a claim form, plaintiff did not need to demonstrate compliance for the verification requests under 11 NYCRR 65-3.5." ***State Farm Mut. Auto. Ins. Co. v. Surgicore of Jersey City, LLC*, 2021 N.Y. Slip Op. 03536, First Dept 6-3-21**

PERSONAL INJURY.

THE CONTRACTOR HIRED TO CLEAN THE HOTEL LOBBY LAUNCHED AN INSTRUMENT OF HARM BY POURING CLEANING SOLUTION ON THE FLOOR AND FAILING TO PUT DOWN MATS OR POST WARNINGS; PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AGAINST THE CONTRACTOR IN THIS SLIP AND FALL CASE SHOULD HAVE BEEN GRANTED.

The First Department, reversing (modifying) Supreme Court, determined the defendant cleaning contractor launched an instrument of harm by pouring cleaning solution on the floor in this slip and fall case. Therefore plaintiff was entitled to summary judgment against the contractor: "Plaintiff alleged [the cleaning contractor] poured a large amount of cleaning solution onto the lobby's floor without barricading the location to prevent hotel guests from entering the area while he was cleaning, failed to place down safety mats to provide people with a safe passage through the area while the floor was wet, and failed to post appropriate warning signs. There is video surveillance footage of the accident; no party disputes that the floor was dry when plaintiff first walked through the area to enter the restroom and that it was wet when he returned about five minutes later. Plaintiff is entitled to partial summary judgment as against Town House, the outside cleaning contractor, since the evidence showed that Town House's employee launched a force or instrument of harm by negligently mopping or leaving a puddle of water near the guest elevators in the lobby before plaintiff's fall ...". ***Tobola v. 123 Wash., LLC*, 2021 N.Y. Slip Op. 03537, First Dept 6-3-21**

PERSONAL INJURY, EVIDENCE, JUDGES.

THE JURY'S FINDING THAT PLAINTIFF IN THIS SLIP AND FALL CASE WAS NEGLIGENT BUT THAT DEFENDANT WAS 100% RESPONSIBLE WAS AGAINST THE WEIGHT OF THE EVIDENCE; ALLOWING PLAINTIFF'S DOCTOR TO TESTIFY DEFENDANT'S DOCTOR WAS HIRED BY AN INSURANCE COMPANY, WITHOUT GIVING A CURATIVE INSTRUCTION, WAS REVERSIBLE ERROR.

The First Department, ordering a new trial on liability and damages in this slip and fall case, determined the finding that plaintiff was negligent, but that defendant was 100% responsible was against the weight of the evidence. In addition, allowing plaintiff's physician to mention that defendant's physician was hired by an insurance company was reversible error. Both parties had requested Pattern Jury Instruction (PJI) 2:36 on comparative fault. The judge denied that request and instructed the jury with PJI 2:90 which addresses comparative fault. The First Department did not find the denial of the request for PJI 2-36 was error, but noted that the jury clearly misunderstood the concept of comparative fault. Plaintiff

alleged she tripped over a stool which was two-feet high: "It is clear that the jury's verdict, finding that plaintiff was negligent, but that her]negligence was not a substantial factor in causing the accident was against the weight of the evidence, and indicates that the jury had a fundamental misunderstanding of the concept of comparative negligence. In this case, 'the issues of negligence and proximate cause are so inextricably interwoven as to make it logically impossible to find negligence without also finding proximate cause.' * * * Evidence that a defendant carries liability insurance is generally inadmissible, as it is both collateral and prejudicial ... . The passing reference to insurance or similar benefits will not necessarily result in reversal ... . However, if the testimony goes beyond mere mention of insurance, then a mistrial may be warranted ... . Here, plaintiff's doctor's testimony, together with the court's failure to immediately give a curative instruction was prejudicial, and constituted reversible error, further warranting a new trial." ***Campbell v. St. Barnabas Hosp.*, 2021 N.Y. Slip Op. 03404, First Dept 6-1-21**

SEPULCHER.

ALLEGED MISHANDLING OF DECEDENT'S BODY BEFORE PLAINTIFF TOOK CUSTODY OF IT SUPPORTED THE RIGHT OF SEPULCHER CLAIM.

The First Department, over a dissent, determined the "right of sepulcher" cause of action properly survived summary judgment: "The record demonstrates that there are factual issues as to whether defendant improperly dealt with the decedent's body. In his deposition testimony, plaintiff described viewing the body of the decedent, his father, in a closet-like room where supplies were kept. Plaintiff testified that his father's hands and feet were bound, his stomach had become bloated, he was dirty and unshaven, and a tube was placed down his throat. The decedent's longtime companion further testified that the area where the body was kept 'seemed like [a] garbage dump.' This alleged mishandling and presentation of the body is, contrary to our dissenting colleague's view, sufficient to raise a factual issue requiring resolution at trial ... . * * * … [T]he right of sepulcher safeguards the surviving next of kin's right to find 'solace and comfort in the ritual of burial' ... . Burial rituals involve more than simply placing a body in its final resting place. Indeed, one need only consider the Catholic practice of holding a wake or vigil, or the ritual cleansing of a body following death by Jews and Muslims, as examples of the ways in which human tradition has shown respect to the dead in the moments preceding burial itself... . That plaintiff ultimately took custody of the decedent's body in a timely fashion does not assuage the harm caused by defendant's having allegedly improperly dealt with it." ***Almeyda v. Concourse Rehabilitation & Nursing Ctr., Inc.*, 2021 N.Y. Slip Op. 03521, First Dept 6-3-21**

SECOND DEPARTMENT

APPEALS, CIVIL PROCEDURE.

THE EXECUTIVE ORDERS SUSPENDING OR MODIFYING THE LAW IN RESPONSE TO COVID-19 TOLLED THE TIME-LIMIT FOR FILING AN APPEAL UNTIL WITHIN 30 DAYS OF NOVEMBER 2, 2020.

The Second Department determined the Executive Orders suspending or modifying laws to accommodate the disruption caused by COVID-19 tolled the time limitation for the taking of an appeal until within 30 days of November 2, 2020: "The respondents contend that even though Executive Order (A. Cuomo) No. 202.8 ... purported to toll the limitations periods, Governor Cuomo did not have the statutory authority to do so, as Executive Law § 29-a, while expressly granting the Governor the authority to suspend statutes, does not expressly grant the Governor the authority to 'toll' them. This contention is unpersuasive. ... Executive Law § 29-a(2)(d) provides that an order issued pursuant thereto 'may provide for the alteration or modification of the requirements of such statute, local law, ordinance, order, rule or regulation suspended, and may include other terms and conditions.' This language in Executive Law § 29-a(2)(d) indicates that the Governor is authorized to do more than just 'suspend' statutes during a state disaster emergency; he or she may 'alter[ ]' or 'modif[y]' the requirements of a statute, and a tolling of time limitations contained in such statute is within that authority ... . Furthermore, although the seven executive orders issued after Executive Order (A. Cuomo) No. 202.8 ... did not use the word 'toll,' those executive orders all either stated that the Governor 'hereby continue[s] the suspensions, and modifications of law, and any directives, not superseded by a subsequent directive,' made in the prior executive orders ... or contained nearly identical language to that effect ... . Since the tolling of a time limitation contained in a statute constitutes a modification of the requirements of such statute within the meaning of Executive Law § 29-a(2)(d), these subsequent executive orders continued the toll that was put in place by Executive Order (A. Cuomo) No. 202.8 (9 NYCRR 8.202.8)." ***Brash v. Richards*, 2021 N.Y. Slip Op. 03436, Second Dept 6-2-21**

CIVIL PROCEDURE.

PLAINTIFF'S LETTER TO THE COURT REQUESTING SANCTIONS WAS NOT SUFFICIENT TO NOTIFY DEFENDANTS OF THEIR ALLEGED FRIVOLOUS CONDUCT; MONETARY SANCTIONS REVERSED; MATTER REMITTED FOR PLAINTIFF TO MAKE A MOTION TO WHICH DEFENDANTS MAY RESPOND.

The Second Department, reversing Supreme Court, determined sanctions for allegedly frivolous conduct should not have be imposed without a motion on notice and an opportunity to respond: "Pursuant to 22 NYCRR 130-1.1, a court, in its discretion, after a reasonable opportunity to be heard, may impose sanctions against a party or the attorney for a party, or both, for frivolous conduct ... . 'The form of the hearing shall depend [on] the nature of the conduct and the circumstances of the case' ... . Conduct may be deemed frivolous if it is 'undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another,' or 'asserts material factual statements that are false' ... . In determining if sanctions are appropriate, the court looks at the broad pattern of conduct by the offending attorneys or parties ... . Here, the appellants contend, inter alia, that the Supreme Court improvidently exercised its discretion in imposing a sanction upon them without affording them an opportunity to be heard. We agree. Under the particular circumstances of this case, the appellants should have received notice of their alleged offending conduct by way of a motion made on notice containing allegations of fact, and should have been given an opportunity to respond. The letter to the court from the plaintiff ... , in which sanctions were requested, was insufficient to provide the defendants with notice of their alleged offending conduct." ***Muhametaj v. Town of Orangetown*, 2021 N.Y. Slip Op. 03460, Second Dept 6-2-21**

CIVIL PROCEDURE, ATTORNEYS, FORECLOSURE.

DEFENDANT NEVER CONSENTED TO THE SUBSTITUTION OF COUNSEL IN THIS FORECLOSURE ACTION; THE MOTION FOR SUMMARY JUDGMENT, SERVED ON THE PURPORTED SUBSTITUTE COUNSEL, WAS NEVER SERVED UPON DEFENDANT AND WAS THEREFORE NULLIFIED.

The Second Department, reversing (modifying) Supreme Court, determine the plaintiff's motion for a default judgment in this foreclosure action was not properly served and therefore must be reversed. The papers were served on an attorney but defendant had not consented to the substitution of that attorney: "... [T]he record demonstrates that the plaintiff served its motion, inter alia, for an order of reference and its motion for a judgment of foreclosure and sale, on [attorney] Elo, not [defendant] Nakash or CAMBA [legal services]. Nakash retained CAMBA in July 2011 to appear on her behalf at the settlement conferences. Although in April 2013, CAMBA and Elo signed a substitution of counsel, Nakash never acknowledged or signed this substitution, nor was a substitution ordered by the Supreme Court. Moreover, Nakash attested that she did not know Elo, never authorized him to represent her, and never received the plaintiff's motion papers or any orders from the court. Since the substitution was improper under CPLR 321(b), CAMBA, not Elo, was Nakash's attorney of record when the plaintiff made its motions, and thus, the plaintiff failed to properly serve Nakash with these motions, depriving the Supreme Court of jurisdiction to entertain these motions and rendering so much of the resulting order dated March 17, 2014, and the order and judgment of foreclosure and sale as are in favor of the plaintiff and against Nakash nullities that must be vacated ...". ***U.S. Bank N.A. v. Nakash*, 2021 N.Y. Slip Op. 03479, Second Dept 6-2-21**

CIVIL PROCEDURE, CONTRACT LAW.

COLLATERAL ESTOPPEL PRECLUDED THE GENERAL CONTRACTOR'S INDEMNIFICATION ACTION AGAINST A SUBCONTRACTOR BECAUSE THE SUBCONTRACTOR HAD BEEN GRANTED SUMMARY JUDGMENT IN THE UNDERLYING PERSONAL INJURY ACTION BROUGHT BY THE GENERAL CONTRACTOR'S EMPLOYEES.

The Second Department, reversing Supreme Court, determined that Conrad Geoscience Corp was not required to indemnify Ketco, the general contractor for the removal of contaminated soil. Ketco had hired Conrad to draw up environmental safety plans. The underlying lawsuit was brought by four Ketco dump truck drivers who experienced dizziness during work and were treated at a hospital. Conrad won its motion for summary judgment in the underlying action because it did not exercise and supervisory control over the work done by the Ketco employees. Collateral estoppel precluded Ketco's indemnification action against Conrad: "Several days prior to the Supreme Court's denial of Conrad's motion for summary judgment in this action, the court had granted that branch of Conrad's motion, made in the underlying action commenced by the Ketco employees, which was for summary judgment dismissing the complaint in that action insofar as asserted against it. That determination was affirmed by this Court in a prior appeal, in which we concluded, 'Conrad submitted evidence that, as the entity charged with creating environmental safety plans, it exercised no supervisory authority at the highway construction project work site and owed no duty of care to the plaintiffs. In opposition, the plaintiffs failed to raise a triable issue of fact' ... . Based upon Ketco's concession in its papers submitted in opposition to Conrad's motion for summary judgment in this action, Conrad contends, in effect, that Ketco is collaterally estopped from seeking contractual indemnification against it. 'Collateral estoppel precludes a party from relitigating in a subsequent action or proceeding an issue raised in a prior action or proceeding and decided against that party or those in privity' ... . Privity may be found where a nonparty to a prior litigation has 'a relationship with a party to the prior litigation such that his [or her] own rights

or obligations in the subsequent proceeding are conditioned in one way or another on, or derivative of, the rights of the party to the prior litigation' ... . Here, we agree with Conrad's contention that, under the circumstances, Ketco, which was clearly in privity with the Ketco employees, is bound by the prior determination of Conrad's nonliability for the Ketco employees' alleged injuries." ***New York State Thruway Auth. v. Ketco, Inc.*, 2021 N.Y. Slip Op. 03462, Second Dept 6-2-21**

CIVIL PROCEDURE, JUDGES, APPEALS.

THE J.H.O./REFEREE WAS NOT AUTHORIZED BY CPLR 3104 OR ANY ORDER ISSUED BY THE COURT TO CONSIDER AN ALLEGED DEFICIENCY IN THE AMENDED BILL OF PARTICULARS; THE ISSUE PRESENTED A QUESTION OF LAW WHICH COULD NOT HAVE BEEN AVOIDED BELOW, THEREFORE IT MAY BE RAISED FOR THE FIRST TIME ON APPEAL; ORDER STRIKING THE COMPLAINT VACATED.

The Second Department, reversing Supreme Court, determined the Judicial Hearing Officer (J.H.O)/Referee did not have the authority to grant defendants motion to strike the complaint on the ground the amended bill of particulars did not comply with prior court orders. A bill of particulars is not part of any disclosure procedure which CPLR 3104 authorizes a referee to supervise. Because this is question of law could not have been avoided if brought up below, the issue can be raised for the first time on appeal: " 'Since a bill of particulars is not a disclosure device but a means of amplifying a pleading, the present dispute over the contents of the [plaintiffs' amended] bill[s] of particulars is not part of any disclosure procedure that CPLR 3104 authorizes a referee to supervise' ... . Since CPLR 3104 did not authorize the J.H.O./Referee to determine the defendants' separate motions, among other things, to strike the complaint insofar as asserted against each of them based upon the defendants' objections to the plaintiffs' amended bills of particulars, and there exists no order of reference authorizing the J.H.O./Referee to determine the defendants' motions, the J.H.O./Referee was without authority to determine the defendants' separate motions, inter alia, to strike the complaint insofar as asserted against each of them ...". ***Kramarenko v. New York Community Hosp.*, 2021 N.Y. Slip Op. 03450, Second Dept 6-2-21**

CIVIL PROCEDURE, MUNICIPAL LAW, CONTRACT LAW.

THE FIRST NOTICE OF CLAIM DEMANDED ONLY AN EXTENSION OF THE CONTRACTUAL TIME-LIMIT FOR COMPLETION OF THE PLUMBING CONTRACT; THE PURPORTED AMENDED NOTICE OF CLAIM DEMANDED $2.5 MILLION IN DAMAGES; THE AMENDMENT WAS NOT TECHNICAL IN NATURE AND THEREFORE THE MOTION TO AMEND WAS PROPERLY DENIED.

The Second Department determined plaintiff's motion for leave to amend its notice of claim was properly denied. The original demanded only an extension of time to complete the plumbing work plaintiff was hired to do by the NYC School Construction Authority. The proposed amended notice of claim included a demand for nearly $2.5 million in damages: "Public Authorities Law § 1744(2) requires the plaintiff to serve a notice of claim upon the defendant within three months after the accrual of such claim ... . Under Public Authorities Law § 1744(3), a notice of claim 'must set forth in detail . . . (i) the amount of the claim; (ii) a specific and detailed description of the grounds for the claim, relating the dollar amount claimed to the event purportedly giving rise to the claim and indicating how the dollar amount is arrived at; and (iii) the date of the event allegedly underlying the claim.' Here, the original notice of claim filed by the plaintiff failed to comply with Public Authorities Law § 1744(3) ... . The Supreme Court properly denied that branch of the plaintiff's motion which was for leave to amend the original notice of claim, inter alia, to include damages in the total principal sum of $2,455,740.63. 'A notice of claim may be amended only to correct good faith and nonprejudicial technical mistakes, omissions, or defects, not to substantively change the nature of the ... .claim or the theory of liability' . Here, the proposed amendments to the original notice of claim were not technical in nature, and thus, are not permitted as late-filed amendments to a notice of claim ... . In addition, the plaintiff failed to explain the inordinate delay in seeking leave to amend the original notice of claim." ***BG Natl. Plumbing & Heating, Inc. v. New York City Sch. Constr. Auth.*, 2021 N.Y. Slip Op. 03435, Second Dept 6-2-21**

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA).

A FAMILIAL RELATIONSHIP BETWEEN THE SEX OFFENDER AND THE VICTIM (HERE DEFENDANT'S YOUNG STEPDAUGHTER) DOES NOT INCREASE THE RISK TO THE PUBLIC AND THEREFORE CANNOT, STANDING ALONE, BE THE BASIS FOR AN UPWARD DEPARTURE FROM THE RISK ASSESSMENT GUIDELINES.

The Second Department, in a full-fledged opinion by Justice Mastro, determined the existence of a family relationship between the sex offender and the victim (here the defendant's young stepdaughter) cannot, standing alone, be the basis for an upward departure from the risk assessment guidelines. The purpose of the risk assessment is to assess the threat posed to the public by a defendant. Abuse of a family member, as opposed to a stranger, does not pose a greater risk to the public: "... [T]he inclusion of familial relationships in ... risk factor [7] was ... expressly considered—and deliberately rejected—by the Board based on its determination that offenders who victimize family members do not pose the same risk of recidivism or danger to the community as offenders who target strangers. * * * Inasmuch as the Board has already determined in the Guidelines that a familial relationship between an offender and his or her victim does not warrant the imposition of points on the RAI [risk assessment instrument] because it poses a comparatively lower risk of reoffense and danger to the public,

that relationship, without more, likewise will not constitute an appropriate aggravating factor to justify an upward departure to a higher risk level." ***People v. Rodriguez*, 2021 N.Y. Slip Op. 03475, Second Dept 6-2-21**

FORECLOSURE, CIVIL PROCEDURE, CONTRACT LAW, UNIFORM COMMERCIAL CODE (UCC).

PLAINTIFF BANK IN THIS FORECLOSURE ACTION DID NOT DEMONSTRATE STANDING WITH SUFFICIENT PROOF THAT THE NOTE WAS LOST (PURSUANT TO THE UCC) AND DID NOT PRESENT EVIDENCE SUFFICIENT TO WARRANT CORRECTION OF THE LEGAL DESCRIPTION OF THE PREMISES IN THE MORTGAGE BASED UPON MUTUAL MISTAKE.

The Second Department, reversing Supreme Court, determined plaintiff bank did not demonstrate the note was lost and did not present sufficient evidence to warrant correction of the legal description of the premises in the mortgage: " 'Pursuant to UCC 3-804, which is intended to provide a method of recovery on instruments that are lost, destroyed, or stolen, a plaintiff is required to submit 'due proof of [the plaintiff's] ownership, the facts which prevent [its] production of [the note,] and its terms' ... . Here, the copy of the note annexed to the lost note affidavit provided sufficient evidence of the terms of the note ... . However, the lost note affidavit failed to sufficiently establish Wells Fargo's ownership of the note, as it 'failed to establish when the note was acquired and failed to provide sufficient facts as to when the search for the note occurred, who conducted the search, or how or when the note was lost' ... .Thus, the affidavit failed to sufficiently establish Wells Fargo's ownership of the note at the time the action was commenced. ... Supreme Court should have denied that branch of [plaintiff's]]motion which was for summary judgment ... to reform the mortgage to correct the legal description of the premises. 'A party seeking reformation of a contract by reason of mistake must establish, with clear and convincing evidence, that the contract was executed under mutual mistake or a unilateral mistake induced by the other party's fraudulent misrepresentation' ...". ***Wells Fargo Bank, N.A. v. Zolotnitsky*, 2021 N.Y. Slip Op. 03482, Second Dept 6-2-21, Second Dept 6-2-21**

PERSONAL INJURY.

PLAINTIFF'S ACTION ALLEGING INADEQUATE BUILDING SECURITY WAS A PROXIMATE CAUSE OF AN ASSAULT ON PLAINTIFF IN THE BUILDING LOBBY SHOULD NOT HAVE BEEN DISMISSED; THERE WAS EVIDENCE OF PRIOR CRIMINAL ACTIVITY RAISING A QUESTION OF FACT WHETHER THE ASSAULT WAS FORESEEABLE.

The Second Department, reversing Supreme Court, determined plaintiff security guard's third-party assault action stemming from an assault by young persons who entered the lobby where plaintiff was working through an unlocked door should not have been dismissed. There was evidence the assault was foreseeable: "... [T]he defendants did not demonstrate their prima facie entitlement to judgment as a matter of law on the ground that they provided reasonable minimal security precautions at the building, given the evidence of prior incidents of criminal activity. The submissions on the defendants' motion included, inter alia, transcripts of the deposition testimony of their property manager and the plaintiff, as well as evidence of a report indicating that several days prior to the subject incident, a group of 'skateboarders' entered the lobby during the evening and refused to leave. The record also contained evidence of other prior crimes in the building, including an incident approximately seven months earlier, when an individual became belligerent and damaged a front door in the lobby. Against this backdrop of prior criminal activity, the defendants' submissions failed to eliminate all triable issues of fact as to whether they provided reasonable minimal security precautions at the building under the circumstances ... . In this regard, the defendants failed to demonstrate that the actions of the assailants were so unforeseeable as to sever any causal nexus between the defendants' alleged negligence and the plaintiff's injuries." ***Vilsaint v. SL Green Realty Corp.*, 2021 N.Y. Slip Op. 03481, Second Dept 6-2-21**

PERSONAL INJURY, EDUCATION-SCHOOL LAW.

QUESTIONS OF FACT WHETHER THE SCHOOL PERSONNEL PROPERLY INSTRUCTED INFANT PLAINTIFF ON THE USE OF THE ZIP LINE FROM WHICH SHE ALLEGEDY FELL.

The Second Department, reversing Supreme Court, determined the school's motion for summary judgment in this negligence supervision case should not have been granted. The infant plaintiff, C.G., allegedly was injured when she fell of a zip line. There were questions of fact about whether C.G. was properly instructed on the use of zip line: " 'Schools are under a duty to adequately supervise the students in their charge and they will be held liable for foreseeable injuries proximately related to the absence of adequate supervision' ... 'A school has a duty to exercise the same degree of care toward its students as would a reasonably prudent parent' ... . The duty to provide adequate supervision includes the duty to instruct students as to the safe use of playground equipment ... . As the plaintiff correctly contends, the defendants' submissions failed to eliminate triable issues of fact as to whether C. G. was adequately instructed on the safe use of the zip line prior to her fall and whether the instruction that students were allowed to have another student 'give them a head start push' across the zip line was appropriate." ***Genova v. Town of Clarkstown*, 2021 N.Y. Slip Op. 03444, Second Dept 6-2-21**

PERSONAL INJURY, MEDICAL MALPRACTICE, EVIDENCE, CIVIL PROCEDURE.

THE DEFENDANT DOCTORS IN THIS MEDICAL MALPRACTICE ACTION CLAIMED THEY DID NOT HAVE POSSESSION OF THE VENOGRAM USED TO DIAGNOSE A BLOCKAGE IN A VEIN IN DEFENDANT'S LEG; PLAINTIFF'S APPLICATION FOR SANCTIONS FOR SPOLIATION OF EVIDENCE SHOULD NOT HAVE BEEN DENIED.

The Second Department, reversing Supreme Court, determined the defendants' motion for summary judgment in this medical malpractice action should not have been granted, and the application for sanctions for spoliation of evidence should not have been denied. The doctors claimed to no longer have possession of a venogram used to diagnose the blockage of a vein: "... [T]he plaintiff sufficiently established that the defendant doctors lost or destroyed the venogram imaging. The record demonstrates that it was the defendant doctors' regular practice to record the results of venograms, that the defendant doctors had recorded the plaintiff's other tests, and that the defendant doctors offered no explanation for the absence of the venogram imaging ... . Moreover, the plaintiff established that the venogram imaging was relevant and necessary to the prosecution of the action. Contrary to the defendant doctors' contention, the handwritten notation on the plaintiff's treatment notes indicating the results of the venogram was not an adequate substitute. Accordingly, the Supreme Court should have granted the plaintiff's application to impose sanctions on the defendant doctors to the extent of directing an adverse inference charge against those defendants at trial with regard to the missing evidence ...". ***Loccisano v. Ascher*, 2021 N.Y. Slip Op. 03451, Second Dept 6-2-21**

THIRD DEPARTMENT

ARBITRATION, EMPLOYMENT LAW. CONTRACT LAW.

THE ARBITRATOR EXCEEDED HIS AUTHORITY UNDER THE COLLECTIVE BARGAINING AGREEMENT BY DISMISSING TWO CHARGES BECAUSE OF THEIR PUPORTED FACIAL DEFICIENCIES AND FAILING TO ASSESSS THE EVIDENCE IN SUPPORT OF THE CHARGES.

The Third Department, reversing Supreme Court, determined the arbitrator's dismissal of two of the disciplinary charges against a corrections officer (Norde) based solely on alleged defects in the charges, as opposed to the relevant evidence, exceeded the arbitrator's authority under the collective bargaining agreement (CBA): "... [R]espondent complied with the CBA by pleading in the notice of discipline that the exception [to the usual time limits] applied, and by citing and quoting the language of the specific criminal statute that Norde had allegedly violated; respondent would then need to prove the elements of that statute at the hearing to establish the basis of the timeliness exception ... . Accordingly, by requiring respondent to prove the underlying crime in the notice to support the CBA's time exception, the arbitrator essentially added a term to the CBA and, thus, exceeded his authority ... . [T]he arbitrator modified the CBA and exceeded his authority by dismissing the first two charges as facially deficient due to an alleged lack of particularization in the notice of discipline. As the charges in the notice were sufficiently stated, the arbitrator should have rendered a determination as to Norde's guilt based on the evidence presented at the hearing." ***Matter of New York State Corr. Officers & Police Benevolent Assn., Inc. (New York State Dept. of Corr. & Community Supervision)*, 2021 N.Y. Slip Op. 03504, Third Dept 6-3-21**

CIVIL PROCEDURE, EMPLOYMENT LAW, ADMINISTRATIVE LAW, SOCIAL SERVICES LAW.

THERE WERE PARALLEL DISCIPLINARY PROCEEDINGS STEMMING FROM PETITIONER'S ALLEGED ABUSE OF A PSYCHIATRIC PATIENT; THE ARBITRATOR'S FINDING THAT PETITIONER DID NOT ABUSE THE PATIENT WAS ENTITLED TO PRECLUSIVE EFFECT IN THE PARALLEL PROCEEDING.

The Third Department, reversing the determination of the Administrative Law Judge (ALJ) in this employment disciplinary matter, determined the prior finding by the arbitrator in a parallel proceeding that petitioner did not abuse the psychiatric patient was entitled to preclusive effect: "Petitioner's sole contention on appeal is that the ALJ erred in not giving preclusive effect to the arbitrator's determination that petitioner's conduct did not constitute physical abuse. We agree. 'The underlying purpose of the doctrines of res judicata and collateral estoppel is to prevent repetitious litigation of disputes which are essentially the same' ... . [R]espondent contends that the issue decided by the arbitrator was not the identical issue before the ALJ. ... Respondent's 'Report of Investigation Determination' and OMH's [Office of Mental Health's] notice of discipline were issued four days apart and both referenced the same case number and charged petitioner with physically abusing the service recipient. Although neither the notice of discipline nor the arbitrator's decision specifically cite the relevant portion of the Social Services Law associated with physical abuse, the arbitrator specifically took notice of said provision at the disciplinary hearing ... . [T]he arbitrator and the ALJ both reviewed the same videos of the underlying incident and petitioner's interview. Although the arbitrator and the ALJ both agreed that petitioner pushed the service recipient's head down into the restraint bed, the arbitrator concluded that petitioner was 'cradling the neck of [the service recipient] at that time' such that his conduct did not constitute physical abuse. ... [T]his was the same factual issue the ALJ later confronted." ***Matter of Anonymous v. New York State Justice Ctr. for the Protection of People with Special Needs*, 2021 N.Y. Slip Op. 03510, Third Dept 6-2-21**

CIVIL PROCEDURE, FORECLOSURE.

WHERE THE ORDER DISMISSING A COMPLAINT PURSUANT TO CPLR 3215 AFTER A SEVEN-YEAR DELAY IN SEEKING A DEFAULT JUDGMENT DID NOT SPECIFICALLY SET FORTH CONDUCT DEMONSTRATING A GENERAL PATTERN OF DELAY THE SAVINGS CLAUSE OF CPLR 205 APPLIES AND THE ACTION MAY BE RE-COMMENCED WITHIN SIX MONTHS OF THE DISMISSAL.

The Third Department, reversing Supreme Court, determined the initial foreclosure action was not dismissed for failure to prosecute and, therefore, the savings provision of CPLR 205 applied. The court noted that the seven-year delay in seeking a default judgment which resulted in the dismissal did not constitute "neglect to prosecute:" "For purposes of the savings provision of CPLR 205 (a), '[w]here a dismissal is one for neglect to prosecute the action made pursuant to [CPLR 3216] or otherwise, the judge shall set forth on the record the specific conduct constituting the neglect, which conduct shall demonstrate a general pattern of delay in proceeding with the litigation' ... . Here, the first action was dismissed as abandoned pursuant to CPLR 3215 (c). In making this determination, Supreme Court noted that plaintiff waited almost seven years before moving for a default after defendant failed to answer and that plaintiff failed to establish a reasonable excuse for the delay in seeking the default. Therefore ... Supreme Court's order dismissing the first action did not set forth on the record conduct that 'demonstrate[d] a general pattern of delay' ... . As such, under these circumstances, the second action does not fall outside the savings provision ... . * * * ... [T]he Second Department recently ruled that the savings provision was still applicable to a subsequent action when the prior action was dismissed pursuant to CPLR 3215 (c) for failure to move for a judgment against a defendant for 'almost seven years' because the trial court did not include findings of specific conduct demonstrating a general pattern of delay in proceeding with litigation ...". ***U.S. Bank N.A. v. Jalas*, 2021 N.Y. Slip Op. 03506, Third Dept 6-3-21**

FAMILY LAW, EVIDENCE.

THE EVIDENCE DID NOT DEMONSTRATE THE DEVELOPMENT OF A PARENT-CHILD RELATIONSHIP BETWEEN RAYMOND F AND THE CHILD; THEREFORE RAYMOND F'S REQUEST FOR A GENETIC MARKER TEST SHOULD NOT HAVE BEEN DENIED.

The Third Department, reversing Family Court, determined Raymond F's request for a genetic marker test should not have been denied. The evidence did not demonstrate a parent-child relationship such that Raymond F should be equitably estopped from denying paternity: "The application of the doctrine of equitable estoppel does not involve the equities between adult participants to the paternity proceedings ... . 'Rather, in the context of a paternity proceeding, it is the child's justifiable reliance on a representation of paternity that is considered and, therefore, the doctrine of equitable estoppel will be applied only where its use furthers the best interests of the subject child' ... . The trial testimony established that the mother and Trini G., the mother's boyfriend with whom she and her children lived for nine years (from the time the child was two to three months old), 'co-parented' all of the children by contributing financially to their care and feeding, bathing and playing with them. Trini G. referred to the child as 'stepson' and the child called him 'daddy.' The record established that Reymond F. had no contact with the child since birth, except during sporadic visits between Reymond F. and his two older children. Reymond F. testified that he did not do 'anything' with the child during these visits, was not called 'dad' and did not call the child 'son.' He further testified that he never called the child on the phone, never gave him gifts and never checked on his educational or medical issues. The mother testified that, while she did not encourage the child to have a relationship with Reymond F., the child knew that Reymond F. was his biological father." ***Matter of Montgomery County Dept. of Social Servs. v. Trini G.*, 2021 N.Y. Slip Op. 03489, Third Dept 6-3-21**

FREEDOM OF INFORMATION LAW (FOIL).

DOCUMENTS CREATED AND HELD BY A PRIVATE ENTITY PURSUANT TO THE REGULATIONS OF A STATE AGENCY ARE NOT "RECORDS" WHICH THE STATE AGENCY MUST DISCLOSE PURSUANT TO THE FREEDOM OF INFORMATION LAW, DESPITE THE FACT THAT THE AGENCY CAN DEMAND PRODUCTION OF THE DOCUMENTS.

The Third Department, reversing Supreme Court, determined documents created and held by a private entity (Union) pursuant to a state agency's (New York Department of Labor's) regulations regarding apprenticeship programs are not "records" which the Department of Labor is required to produce under the Freedom of information Law (FOIL): "... [R]espondent [New York Department of Labor] did not delegate a duty to the Union nor did the Union perform any essential service on respondent's behalf. The mere fact that respondent has the discretionary regulatory authority to ask the Union for the requested documents does not, ipso facto, render all documents that are created and maintained by the Union with respect to its apprenticeship programs subject to disclosure (see Public Officers Law § 86 [4]). Practically speaking, to so hold would render any document that was created or maintained by a private entity in order to comply with a corresponding agency regulation requiring the production and retention thereof a 'record' subject to disclosure under FOIL (see Public Officers Law § 86 [4]) ... . Although we recognize that 'FOIL is to be liberally construed and its exemptions narrowly interpreted so that the public is granted maximum access to the records of government' ... , we do not find the definition of 'record' to be so broad and all-encompassing as to bring within its ambit any document that a private entity might create

and maintain pursuant to a state agency's regulation under the guise that said records are held 'for' that agency (see Public Officers Law §§ 86 [4]; 87 [2]; 89 [3] [a] ...)". ***Matter of Broach & Stulberg, LLP v. New York State Dept. of Labor*, 2021 N.Y. Slip Op. 03509, Second Dept 6-3-21**

PERSONAL INJURY, CIVIL PROCEDURE, EVIDENCE.

PLAINTIFF ALLEGED THE INCREASED TRAFFIC RELATED TO AN EVENT AT DEFENDANT COUNTRY CLUB CREATED A DANGEROUS CONDITION CONTRIBUTING TO A COLLISION WITH A VEHICLE ATTEMPTING TO ENTER THE COUNTRY CLUB PREMISES; PLAINITIFFS WERE ENTITLED TO DISCOVERY FROM THE COUNTRY CLUB REGARDING CROWD CONTROL, MARKETING, EVENT PLANNING, SAFETY PLANS, ETC.

The Third Department determined plaintiffs' motion to compel discovery from defendant country club was properly granted. Plaintiffs were injured in a collision when defendant driver made a left turn across plaintiffs' lane of travel to enter the country club premises to attend a special event. Plaintiffs alleged that defendant country club did not take adequate measures to control the increased traffic generated by the event, thereby creating a dangerous condition: "Plaintiffs' complaint alleges a cause of action for negligence based on, as relevant here, breach of a special duty of care by defendant. The crux of plaintiffs' theory of liability against defendant is that it organized and hosted an event that it knew or should have known would generate a large amount of traffic to the site, but failed to account for the impact of same, and said failure was a proximate cause of plaintiffs' injuries. A review of plaintiffs' demands evinces that they generally sought information regarding crowd control, marketing/advertisement materials, ticket sales, minutes concerning the planning of the event, copies of emergency management plans, safety plans and copies of any and all reports of past medical emergencies at the event. For the most part, the demands were concerned with the event held in 2019, as well as those held in the preceding five years. A review of the record reveals that the discovery sought is aimed at determining whether defendant created a dangerous condition by holding a large event, thus increasing vehicular and pedestrian traffic, with notice of the danger and failing to take appropriate precautions ...". ***Rote v. Snyder*, 2021 N.Y. Slip Op. 03508, Third Dept 6-3-21**

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