CasePrepPlus

June 18, 2021

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FIRST DEPARTMENT

CIVIL PROCEDURE.

THE CONDITIONAL ORDER OF DISMISSAL DIRECTING THE FILING OF A NOTE OF ISSUE DID NOT MEET THE REQUIREMENTS OF CPLR 3216; THE ACTION SHOULD NOT HAVE BEEN DISMISSED.

The First Department, reversing Supreme Court, determined the conditional order of dismissal directing plaintiff to file a note of issue did not meet the statutory requirements of CPLR 3216 and, therefore, the action should not have been dismissed: "The conditional order of dismissal directing plaintiff to file a note of issue by February 28, 2019 or the action would be dismissed failed to adhere to the statutory procedure for dismissing an action for failure to file a note of issue. Specifically, the conditional order of dismissal failed to provide plaintiff with the requisite 90 days to file a note of issue, failed to specify the conduct constituting the neglect demonstrating a general pattern of delay, and did not constitute the requisite written notice because it was not signed by the parties (see CPLR 3216[a], [b][3] ...)." ***Flecha v. Neira*, 2021 N.Y. Slip Op. 03548, First Dept 6-8-21**

EMPLOYMENT LAW, LABOR LAW, CIVIL PROCEDURE.

PLAINTIFF STATED CAUSES OF ACTION FOR VIOLATION OF LABOR LAW § 193, IMPROPER DEDUCTIONS FROM WAGES, AND LABOR LAW § 215, TERMINATION FOR COMPLAINING OF THE IMPROPER DEDUCTIONS.

The First Department, reversing Supreme Court, determined plaintiff had stated causes of action for violation of Labor Law § 193 by making improper deductions from earned wages, and Labor Law § 215, by firing plaintiff after she complained of unlawful deductions: "... [P]laintiff alleged that defendants 'impermissibly and unlawfully made deductions from [her] wages including the operating costs and expenses of OFRM [her employer] such as, among other things, credit card fees, bank services bills and electric bills.' She also alleged that her draw and net bonus payments constituted 'earned wages,' and that defendants had 'unlawfully made deductions from [her] [w]ages.' ... Under Labor Law § 193(1)(b), '[n]o employer shall make any deduction from the wages of an employee, except deductions which . . . are expressly authorized in writing by the employee and are for the benefit of the employee.' In order to state a claim for a violation of § 193, 'a plaintiff must allege a specific deduction from wages and not merely a failure to pay wages' ... . Additionally, a 'deduction is more targeted and direct than the wholesale withholding' of wages' ... . * * * Labor Law § 215 provides, in pertinent part, that no employer 'shall discharge, threaten, penalize, or in any other manner discriminate against any employee (i) because such employee has made a complaint to his or her employer . . . that the employer has engaged in conduct that the employee, reasonably and in good faith, believes violates any provision of [the Labor Law].' " ***Schmidt-Sarosi v. Offices for Fertility & Reproductive Medicine, P.C.*, 2021 N.Y. Slip Op. 03564, First Dept 6-8-21**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

PLAINTIFF WAS INJURED ATTEMPTING TO HOLD BACK A HAND TRUCK WITH A 500-POUND LOAD AS HE WAS DESCENDING STAIRS; IT WAS POSSIBLE TO LOWER THE LOAD USING RIGGING IN AN ELEVATOR SHAFTWAY BUT PLAINTIFF WAS DIRECTED TO USE THE STAIRS; PLAINTIFF WAS PROPERLY AWARDED SUMMARY JUDGMENT ON HIS LABOR LAW § 240(1) CAUSE OF ACTION.

The First Department determined plaintiff was properly awarded summary judgment on his Labor Law § 240(1) cause of action. Plaintiff was injured trying to keep a hand truck from descending stairs too fast with a 500-pound load. The load could have been lowered with rigging equipment in an elevator shaftway but was directed to use the stairs: "Plaintiff was not provided with any hoisting equipment to use on the staircase and defendants had previously refused Dunwell's [plaintiff's employer's] requests to bring equipment through the building's lobby and down the shaftway of the lobby elevator, which was already outfitted with rigging equipment. Instead, defendants instructed Dunwell to bring their materials through the courtyard behind the building and down an exterior staircase to the basement. Plaintiff testified that he was holding the hand truck by the handles at the top, while his coworkers held it from the bottom to control its descent, and as the hand truck was going down the first step, one of the coworkers, a helper, 'kind of let off the pressure' on his side of the hand truck, causing the hand truck to go down the first step 'very fast,' which 'jerked' plaintiff and caused him to slip on some dirt, gravel, or debris on the step. Plaintiff testified further that at that point he attempted to hold back the weight of

the steel bedplate and stop the load's descent. Plaintiff 'yelled out a little bit' and the three workers rested for approximately 30 seconds, before continuing the descent down the stairs. All three workers rested at the bottom of the stairs before moving the bedplate into the building. During this break, plaintiff told his coworkers 'I pulled my shoulder out and my back is killing me.' " ***Agli v. 21 E. 90 Apts. Corp.*, 2021 N.Y. Slip Op. 03540, First Dept 6-8-21**

LANDLORD-TENANT, PERSONAL INJURY.

PLAINTIFF, WHO WAS ASSAULTED IN DEFENDANT LANDLORD'S BUILDING, DID NOT RAISE A QUESTION OF FACT WHETHER THE ASSAILANT WAS AN INTRUDER, WHO ENTERED THROUGH AN ALLEGEDLY BROKEN DOOR, OR A TENANT OR AN INVITEE; IF THE ASSAILANT WERE A TENANT OR INVITEE, THE ALLEGEDLY BROKEN DOOR WOULD NOT BE A PROXIMATE CAUSE OF PLAINTIFF'S INJURY.

The First Department, reversing Supreme Court, determined defendant landlord's motion for summary judgment in this third-party assault case should have been granted. Although there was an issue of fact whether exterior doors to the apartment building were operable in the day plaintiff was assaulted, plaintiff did not raise a question of fact about whether the assailant was an intruder, as opposed to a tenant: "While plaintiff raised an issue of fact as to whether the building's entrance doors were operable on the day of the incident, plaintiff failed to raise an issue of fact that the assailant was an intruder who gained access to the building through a negligently maintained entrance. Plaintiff testified that the assailant was masked and hooded, with only his eyes and the tip of his nose visible. Plaintiff admitted that she could not identify the assailant. Although plaintiff saw the assailant flee down the stairs, towards the 19th floor, she did not see him exit the building and does not know where he went ... . Under the circumstances, no triable issue of fact exists because there is no evidence from which a jury could conclude, without pure speculation, that the assailant was an intruder, as opposed to a tenant or invitee ...". ***Astupina v. West Farms Sq. Hous. Dev. Fund Corp.*, 2021 N.Y. Slip Op. 03542, First Dept, 6-8-21**

SECOND DEPARTMENT

CONTRACT LAW, EVIDENCE.

PLAINTIFF FAILED TO DEMONSTRATE STANDING TO SUE UNDER AN INSTALLMENT CONTRACT ALLEGEDLY ASSIGNED TO HIM; THE DOCUMENTS UPON WHICH PLAINTIFF RELIED DID NOT MEET THE CRITERIA FOR THE BUSINESS RECORDS EXCEPTION TO THE HEARSAY RULE.

The Second Department, reversing Supreme Court, determined plaintiff should not have been granted summary judgment on an installment contract for the purchase of a car which plaintiff alleged was assigned to him. Plaintiff did not demonstrate the documents he relied on for standing fit the criteria for the business records exception to the hearsay rule: " 'A proper foundation for the admission of a business record must be provided by someone with personal knowledge of the maker's business practices and procedures' ... . As a general rule, 'the mere filing of papers received from other entities, even if they are retained in the regular course of business, is insufficient to qualify the documents as business records' ... . 'However, such records may be admitted into evidence if the recipient can establish personal knowledge of the maker's business practices and procedures, or establish that the records provided by the maker were incorporated into the recipient's own records and routinely relied upon by the recipient in its own business' ... . Here, Dunn [plaintiff's record manager] failed to attest to her personal knowledge of the business practices of either Baron Auto City, Inc., [the dealer which sold the car] or the entity to which Baron Auto City, Inc., allegedly assigned the installment contract. She also failed to allege that either the installment contract or the initial assignment of the installment contract to the third party were incorporated into the plaintiff's records and routinely relied upon by the plaintiff in its business. Accordingly, under the circumstances, Dunn's affidavit was insufficient to lay a proper foundation for either the installment contract or the initial assignment of the installment contract to the third party ...". ***Autovest, LLC v. Cassamajor*, 2021 N.Y. Slip Op. 03570, Second Dept 6-9-21**

CRIMINAL LAW, ATTORNEYS, IMMIGRATION LAW.

DEFENDANT WAS ENTITLED TO A HEARING ON HIS MOTION TO VACATE HIS CONVICTION BY GUILTY PLEA ON INEFFECTIVE ASSISTANCE OF COUNSEL GROUNDS; DEFENDANT AVERRED HE WAS NOT INFORMED OF THE RISK OF DEPORTATION ASSOCIATED WITH THE PLEA.

The Second Department, reversing Supreme Court, determined defendant was entitled to a hearing on his motion to vacate his conviction on ineffective assistance grounds. Defendant averred that he was not informed of the risk of deportation associated with his guilty plea: "... '[I]n the context of a plea of guilty, an attorney's failure to advise a criminal defendant, or affirmative misadvice to the defendant, regarding the clear removal consequences of the plea constitutes deficient performance' ... . In such cases, relief will depend upon whether the defendant can demonstrate prejudice as a result thereof ... . [T]he defendant avers that he was not advised of the immigration consequences of his pleas of guilty, and there is no evidence in the transcript of the extremely brief plea proceeding that defense counsel advised the defendant of such consequences. Moreover, the defendant's averments, including that he has been in a long-term relationship with a United States citizen, with whom he has four children, sufficiently alleged that a decision to reject the plea offer, and take a chance,

however slim, of being acquitted after trial, would have been rational ...". ***People v. Bernard*, 2021 N.Y. Slip Op. 03601, Second Dept 6-9-21**
Similar issue and result in ***People v. Dillon*, 2021 N.Y. Slip Op. 03607, Second Dept 6-9-21**

CRIMINAL LAW, JUDGES.

DEFENDANT WAS NOT INFORMED OF THE PERIOD OF POSTRELEASE SUPERVISION AT THE TIME OF THE GUILTY PLEA; PLEA VACATED.
The Second Department, vacating defendant's guilty plea, determined the plea was not knowingly and voluntarily entered because defendant was not informed of the period of postrelease supervision: "... [F]or a plea of guilty to be knowing, intelligent, and voluntary, the court must inform the defendant of either the specific period of postrelease supervision that will be imposed or, at the least, the maximum potential duration of postrelease supervision that may be imposed ...". ***People v. Benitez*, 2021 N.Y. Slip Op. 03600, Second Dept 6-9-21**

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

THE PEOPLE PRESENTED INSUFFICIENT PROOF ON RISK FACTORS 2 AND 4, REQUIRING A 45 POINT REDUCTION.
The Second Department, reducing defendant's risk assessment by 45 points, without explaining the facts, determined the People did not submit sufficient evidence on two risk factors: "Supreme Court improperly assessed 25 points under risk factor 2 (sexual contact with victim) and 20 points under risk factor 4 (continuing course of sexual misconduct), as the People failed to establish by clear and convincing evidence ... that the defendant engaged in sexual contact with the victims or that, under the theory of accessorial liability, he shared the intent of the victims' clients in engaging in sexual contact ...". ***People v. Canady*, 2021 N.Y. Slip Op. 03618, Second Dept 6-9-21**

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

THE BASES FOR THE UPWARD DEPARTURE WERE ALREADY TAKEN INTO ACCOUNT BY THE SORA RISK ASSESSMENT GUIDELINES; UPWARD DEPARTURE REVERSED.
The Second Department, reversing County Court's upward departure from the SORA guidelines, determined the bases for the departure had been taken into account by the guidelines: "County Court lacked the discretion to upwardly depart from the presumptive risk assessment level because the People failed, as a matter of law, to identify an aggravating factor that was not adequately taken into account by the Guidelines. In seeking an upward departure from the presumptive risk assessment level established at the hearing, the People relied upon the defendant's prior conviction of public lewdness and indications in the record suggesting that he had not accepted responsibility for his sexual misconduct. The defendant's prior conviction of public lewdness constituted a misdemeanor sex crime, which is already accounted for under risk factor 9 of the Guidelines ... . Similarly, an offender's lack of acceptance of responsibility is accounted for under risk factor 12 ...". ***People v. Mott*, 2021 N.Y. Slip Op. 03621, Second Dept 6-9-21**

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

A FAMILY RELATIONSHIP WITH THE VICTIM, STANDING ALONE, DOES NOT WARRANT AN UPWARD DEPARTURE FROM THE SORA RISK ASSESSMENT GUIDELINES.
The Second Department, reversing Supreme Court's imposition of an upward departure from the SORA risk assessment guidelines, explained that the existence of a family relationship with the victim, standing alone, does not warrant an upward departure: "People seek an upward departure, they must identify an aggravating factor that tends to establish a higher likelihood of reoffense or danger to the community not adequately taken into account by the Guidelines, and prove the facts in support of the aggravating factor by clear and convincing evidence ... . Here, as we held in *People v Rodriguez* (_____ AD3d _____, 2021 N.Y. Slip Op. 03475 [2d Dept]), the existence of a familial relationship between the offender and the victim, standing alone, does not constitute an aggravating factor for purposes of granting an upward departure. That relationship has already been taken into account by the Guidelines ... , in which the board deliberately excluded familial relationships from the assessment of points on the RAI [risk assessment instrument] and expressly determined that intrafamilial offenders do not pose a comparatively higher risk of recidivism or danger to the community ...". ***People v. Velasquez*, 2021 N.Y. Slip Op. 03625, Second Dept 6-9-21**

FAMILY LAW, APPEALS.

THE ATTORNEY FOR THE CHILD, IN A BRIEF TO THE APPELLATE COURT, ALERTED THE COURT TO NEW INFORMATION RELEVANT TO THE CUSTODY RULING BY FAMILY COURT; THE MATTER WAS REMITTED FOR A REOPENED HEARING.
The Second Department sent the matter back to Family Court for a reopened custody hearing after the attorney for the child alerted the court to new relevant information: "… [T]he attorney for the child, in the brief submitted to this Court on the

child's behalf, has brought to this Court's attention certain alleged new developments including that shortly after the child began living with the father, the child reported that the father told her that the mother was evil, and the child stated that she no longer wanted to see the mother at all. 'As the Court of Appeals has recognized, changed circumstances may have particular significance in child custody matters and may render the record on appeal insufficient to review whether a child custody determination is still in the best interests of the children' ... . In light of the alleged new developments brought to this Court's attention by the attorney for the child, the record is no longer sufficient to determine which arrangement is in the best interests of the child ... . [W]e remit the matter to the Family Court ... for a reopened hearing at which the alleged new facts shall be considered, and a new custody determination thereafter. In so doing, we express no opinion as to the appropriate determination." ***Matter of Magana v. Delph*, 2021 N.Y. Slip Op. 03589, Second Dept 6-9-21**

FAMILY LAW, CRIMINAL LAW, EVIDENCE.

IN DETERMINING WHETHER A PRIMA FACIE CASE HAS BEEN MADE OUT IN A FAMILY OFFENSE PROCEEDING, CREDIBILITY IS IRRELEVANT.

The Second Department, reversing Family Court, determined the motion to dismiss the family offense petition for failure to make out a prima facie case should not have been granted, noting that the credibility of the evidence is not a factor to be considered at that stage: "In a family offense proceeding, the petitioner has the burden of establishing that the charged conduct was committed as alleged in the petition by a fair preponderance of the evidence (see Family Ct Act § 832 ...). 'In determining a motion to dismiss for failure to establish a prima facie case, the evidence must be accepted as true and given the benefit of every reasonable inference which may be drawn therefrom . . . The question of credibility is irrelevant, and should not be considered' ,,, . Here, the Family Court failed to properly apply this standard. Viewing the petitioner's evidence in the light most favorable to her, and accepting the evidence as true, it established a prima facie case ...". ***Matter of Prince v. Ford*, 2021 N.Y. Slip Op. 03591, Second Dept 6-9-21**

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

PLAINTIFF IN THIS FORECLOSURE ACTION DID NOT DEMONSTRATE COMPLIANCE WITH THE NOTICE REQUIREMENTS OF RPAPL 1304.

The Second Department, reversing Supreme Court, determined the plaintiff in this foreclosure action did not demonstrate compliance with the notice provisions of RPAPL 1304: "Although the RPAPL 1304 notices were allegedly mailed from New York by the same law firm that filed the summary judgment motion on behalf of the plaintiff, no one from that law firm provided an affidavit of mailing, or any other evidentiary proof in admissible form to establish that the mailing was properly completed. Instead, the plaintiff relied on the affidavit of Jennifer Jeudy, a contract management coordinator based in Palm Beach County, Florida, who averred, without further explanation, that the RPAPL 1304 notices 'were mailed by first-class and certified mail, having been placed in an official depository under the exclusive case [sic] and custody of the United States Post Office in postage-paid properly addressed envelopes.' Since the plaintiff failed to provide sufficient proof of the actual mailing, and Jeudy did not attest to knowledge of the mailing practices of the plaintiff's New York law firm, the plaintiff failed to establish its strict compliance with RPAPL 1304 ...". ***Ocwen Loan Servicing, LLC v. Malik*, 2021 N.Y. Slip Op. 03596, Second Dept 6-9-21**

Similar issues and result in ***U.S. Bank N.A. v. Ehrlich*, 2021 N.Y. Slip Op. 03627, Second Dept 6-9-21**

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

THE FORECLOSURE ACTION WAS PROPERLY DISMSSED AS TIME-BARRED; RPAPL 1304 IS A CONDITION PRECEDENT, NOT A STATUTORY PROHIBITION WHICH WOULD TOLL THE STATUTE OF LIMITATIONS.

The Second Department, over a two-justice partial dissent, determined the defendant's motion to dismiss the foreclosure action as time-barred, cancel the notice of pendency and cancel and discharge the mortgage (RPAPL article 15) was properly granted. The decision is too complex and factually specific to fairly summarize here (but well worth reading). One of the issues addressed was the difference between a statutory prohibition, which would toll the statute of limitations, and a condition precedent, which would not: "CPLR 204(a) provides that '[w]here the commencement of an action has been stayed by a court or by a statutory prohibition, the duration of the stay is not part of the time within which the action must be commenced' … . RPAPL 1304, which the plaintiff argues is a 'statutory prohibition,' requires that 'at least ninety days before a lender, an assignee or a mortgage loan servicer commences legal action against the borrower . . . , including mortgage foreclosure, such lender, assignee or mortgage loan servicer shall give notice to the borrower.' RPAPL 1304 describes the required content and manner of service of the notice. 'Strict compliance with RPAPL 1304 notice to the borrower or borrowers is a condition precedent to the commencement of a foreclosure action' ... . 'A statutory prohibition and a condition precedent are separate concepts' ... . The salient feature of a 'statutory prohibition' is the plaintiff's lack of control. Since a plaintiff has complete control over the acts necessary to effectuate compliance with a condition precedent, a condition precedent is not a statutory prohibition ... . Thus, because the plaintiff had control over when to serve the RPAPL 1304 notice, and could have

done so at least 90 days prior to the expiration of the statute of limitations, RPAPL 1304 is not a statutory prohibition within the meaning of CPLR 204(a) ...". ***Everhome Mtge. Co. v. Aber*, 2021 N.Y. Slip Op. 03574, Second Dept 6-9-21**

LABOR LAW-CONSTRUCTION LAW, CIVIL PROCEDURE, PERSONAL INJURY.

LABOR LAW §§ 240(1) AND 200 CAUSES OF ACTION MAY BE PLED IN THE ALTERNATIVE.

The Second Department, reversing (modifying) Supreme Court, determined the Labor Law § 200 cause of action should not have been dismissed on the ground that it duplicated the Labor Law § 240(1) cause of action. Those causes of action may be pled in the alternative: "... [T]he Supreme Court erred in granting those branches of the School District's motion which were for summary judgment dismissing the Labor Law § 200 and common-law negligence causes of action asserted against it on the ground that those causes of action were duplicative of the Labor Law § 240(1) cause of action, as the plaintiffs may assert alternative Labor Law causes of action ...". ***Cain v. Ameresco, Inc.*, 2021 N.Y. Slip Op. 03572, Second Dept 6-9-21**

LANDLORD-TENANT, FRAUD, CIVIL PROCEDURE, MUNICIPAL LAW.

PLAINTIFF'S COMPLAINT ALLEGING THE LANDLORD ENGAGED IN A FRAUDULENT SCHEME TO DEREGULATE APARTMENTS WAS PROPERLY DISMISSED.

The Second Department, in a full-fledged opinion by Justice Hinds-Radix, determined plaintiff's complaint alleging the landlord engaged in a fraudulent scheme to deregulate apartments was properly dismissed. The opinion is too complex to fairly summarize here: "... [T]he deregulation of the plaintiff's apartment was made in good faith ... . Further, the late registration of the apartment as rent-stabilized, only after notification by the DHCR [Department of Housing and Community Renewal] of a change in the law several years in the making, does not indicate that [defendant landlord] was engaged in a fraudulent scheme to deregulate the apartment. 'Fraud consists of 'evidence [of] a representation of material fact, falsity, scienter, reliance and injury' ... . The elements of fraud must be pleaded, and each element must be set forth in detail (see CPLR 3016[b] ...). That requirement was not met in this case. There are instances in which failure to timely register an apartment as rent stabilized could constitute evidence of fraud. Prior to 2016, and the DHCR's blanket notification to landlords of the change in the law, there were landlords involved in litigation over failure to register apartments as rent stabilized who nevertheless persisted in that practice ... ; attempted to obfuscate the regulatory status of the apartment ... ; pressured and misled tenants ... ; or even went so far as to engage in misrepresentations as to whether improvements were in fact made ... . It is clear that the plaintiff's apartment was in fact rent stabilized, but that fact was not evidence of fraud, and allegations of fraud based upon speculation are insufficient ...". ***Gridley v. Turnbury Vil., LLC*, 2021 N.Y. Slip Op. 03577, Second Dept 6-9-21**

PERSONAL INJURY, EVIDENCE.

PLAINTIFF'S DECEDENT WAS FOUND AT THE BOTTOM OF STAIRS; DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED BECAUSE THE CAUSE OF THE FALL WAS UNKNOWN; IN ADDITION, THE *NOSEWORTHY* DOCTRINE DID NOT APPLY.

The Second Department, reversing Supreme Court, determined defendants' motion for summary judgment in this slip and fall case should have been granted because the cause of the fall was unknown. Plaintiff's decedent was found dead at the bottom of the stairs: "[Defendants] moved ... for summary judgment dismissing the complaint ... contending ... that the plaintiffs did not know what caused the incident to occur and that it would be speculative to assume that any defect in the staircase caused the decedent to fall. ... The plaintiffs opposed the motion, contending ... that the *Noseworthy* doctrine applied and that circumstantial evidence showed that the decedent fell because the staircase connecting the first floor to the basement of the restaurant/bar was in a defective condition … . ... The defendants established their prima facie entitlement to judgment as a matter of law dismissing the complaint insofar as asserted against each of them by demonstrating that the plaintiffs could not identify what caused the decedent to fall ... . In opposition, the plaintiffs failed to raise a triable issue of fact. Contrary to the plaintiffs' contention, the Noseworthy doctrine does not apply to the circumstances of this case since the defendants' knowledge as to the cause of the decedent's accident is no greater than that of the plaintiffs ... . Even accepting the alleged defects identified in the plaintiffs' expert's affidavit, the plaintiffs failed to raise a triable issue of fact as to whether the decedent's fall was proximately caused by those allegedly unsafe conditions ...". ***Atehortua v. Jaramillo*, 2021 N.Y. Slip Op. 03569, Second Dept 6-9-21**

THIRD DEPARTMENT

FAMILY LAW, ATTORNEYS.

GRANDMOTHER SHOULD HAVE BEEN NOTIFIED OF HER RIGHT TO COUNSEL IN THIS CUSTODY CASE; MATTER SENT BACK TO FAMILY COURT TO DETERMINE WHETHER GRANDMOTHER WAS ELIGIBLE FOR ASSIGNED COUNSEL.

The Third Department determined grandmother should have been notified of her right to counsel in this custody case. But the question remains whether grandmother would have qualified (financially) for assigned counsel. The matter was sent back to Family Court to rule on grandmother's eligibility for assigned counsel: "We find merit to the grandmother's argument that she was potentially eligible for the assignment of counsel at the March 2017 appearance and that Family Court erred in failing to advise her of that right. The purpose of providing counsel to certain persons]involved in Family Court proceedings is to provide protection against 'infringements of fundamental interests and rights' (Family Ct Act § 261). The grandmother was listed as a respondent in the mother's modification petition brought under Family Ct Act article 6, part 3 ... , which sought sole legal and primary physical custody of the child. As of the initial appearance on that petition in March 2017, the grandmother jointly shared 'secondary legal custody' with the mother. Accordingly, the mother's request for sole legal custody of the child, if granted, had the potential to alter the grandmother's custodial rights. We are mindful that the mother subsequently withdrew her request for custody and instead advocated for the child's placement with the grandmother. However, she did not do so until the fact-finding hearing, nearly four months after the March 2017 appearance. Family Ct Act § 262 (a) requires the court to advise an eligible person of the right to counsel '[w]hen such person first appears in court' ... . As the grandmother was potentially eligible for assigned counsel under Family Ct Act § 262 (a), upon a showing of the required financial circumstances, the court was obligated to advise her of that right at the March 2017 appearance ...". ***Matter of Renee S. v. Heather U.*, 2021 N.Y. Slip Op. 03635, Third Dept 6-10-21**

FOURTH DEPARTMENT

CRIMINAL LAW.

DURING THE *BATSON* PROCEDURE, THE PROSECUTOR'S RACE-NEUTRAL EXPLANATION FOR A PEREMPTORY JUROR CHALLENGE WAS NOT SUPPORTED BY THE RECORD AND SHOULD NOT HAVE BEEN ACCEPTED BY THE COURT, NEW TRIAL ORDERED; TWO-JUSTICE DISSENT.

The Fourth Department, over a two-justice dissent, determined the race-neutral explanation for the prosecutor's peremptory challenge to a juror was not borne out by the record. A new trial was ordered. The prosecutor argued the prospective juror referred to police conduct as "harsh." But the prospective juror was apparently commenting on general differences between living in Rochester and Brooklyn, not the police: "We conclude that reversal is required because the race-neutral reason proffered by the prosecutor and accepted by the court is not borne out by the record ... . Although the record need not conclusively establish that a prospective juror actually harbors bias in order for a bias-based peremptory challenge to withstand review under *Batson* ... , a proffered race-neutral reason cannot withstand a *Batson* objection where it is based on a statement that the prospective juror did not in fact make ... . Here, the record does not support the prosecutor's characterization of the prospective juror's statements. We therefore reverse the judgment and grant a new trial on count one of the indictment ...". ***People v. Coleman*, 2021 N.Y. Slip Op. 03695, Fourth Dept 6-11-21**

CRIMINAL LAW, EVIDENCE.

DEFENDANT'S REQUEST TO INSTRUCT THE JURY ON THE LESSER INCLUDED OFFENSE OF ATTEMPTED STRANGULATION SECOND DEGREE SHOULD HAVE BEEN GRANTED; NEW TRIAL ON THAT CHARGE ORDERED.

The Fourth Department, reversing defendant's conviction of strangulation second degree, determined the request to instruct the jury to consider the lesser included offense of attempted strangulation second degree should have been granted. There was a reasonable view of the evidence which would have allowed the jury to find the victim did not suffer physical injury: "... [T]he disputed issue is whether there is a reasonable view of the evidence supporting a determination of guilt on the lesser count but not the higher count. Strangulation in the second degree requires proof that the victim suffered stupor, loss of consciousness, or physical injury or impairment (Penal Law § 121.12). Inasmuch as there was no evidence that the complainant suffered stupor or loss of consciousness, defendant's guilt of this offense rested entirely on the evidence that the complainant sustained a physical injury. Viewing the evidence in the light most favorable to defendant ... , we conclude that a reasonable view of the evidence would have supported a determination that the complainant did not sustain a physical injury and thus that defendant was guilty of only the lesser offense and not the greater ...". ***People v. Swift*, 2021 N.Y. Slip Op. 03785, Fourth Dept 6-11-21**

CRIMINAL LAW, EVIDENCE.

ALTHOUGH THE POLICE IN THIS STREET STOP CASE MAY HAVE HAD CAUSE FOR A LEVEL ONE INQUIRY (A CAN IN A PAPER BAG), THEY IMMEDIATELY ENGAGED IN LEVEL TWO INVASIVE QUESTIONING FOCUSED ON DEFENDANT'S POSSIBLE VIOLATION OF THE OPEN CONTAINER LAW; DEFENDANT'S MOTION TO SUPPRESS SHOULD HAVE BEEN GRANTED.

The Fourth Department, vacating defendant's guilty plea, over a two-justice dissent, determined defendant's motion to suppress based upon the illegal street stop should have been granted. The police may have been justified in a level one (*De Bour*) inquiry based upon an apparent violation of the open-container law (a can in a paper bag), but the police immediately moved to a level two encounter with invasive questioning about the container in the paper bag: "At the first level of a police-civilian encounter, i.e., a request for information, a police officer may approach an individual 'when there is some objective credible reason for that interference not necessarily indicative of criminality' (*De Bour*, 40 NY2d at 223), and '[t]he request may 'involve[] basic, nonthreatening questions regarding, for instance, identity, address or destination' ... . 'The next degree, the common-law right to inquire, is activated by a founded suspicion that criminal activity is afoot and permits a somewhat greater intrusion in that a [police officer] is entitled to interfere with a citizen to the extent necessary to gain explanatory information, but short of a forcible seizure' (*De Bour*, 40 NY2d at 223). Here, even assuming, arguendo, that the officers possessed a level one right to approach defendant and his companion ... the officers nonetheless immediately 'engaged in a level two intrusion, i.e., 'a more pointed inquiry into [the] activities [of defendant and his companion]' . . . , by asking 'invasive question[s] focusing on the possible criminality of the subject' ... . Notably, the officers did not see defendant or his companion drinking from whatever item was in the paper bag, and there were no other attendant circumstances indicative of criminal behavior that would warrant the more pointed inquiry at the outset ...". ***People v. Wright*, 2021 N.Y. Slip Op. 03675, Fourth Dept 6-11-21**

CRIMINAL LAW, EVIDENCE, CONSTITUTIONAL LAW.

ALTHOUGH ONE OF THREE STATEMENTS MADE TO A DETECTIVE AFTER DEFENDANT HAD INVOKED HIS RIGHT TO COUNSEL WAS NOT SPONTANEOUS, ITS ADMISSION WAS HARMLESS ERROR; THE DISSENT ARGUED ALL THREE STATEMENTS SHOULD HAVE BEEN SUPPRESSED AND THE CONSTITUTIONAL ERROR WAS NOT HARMLESS.

The Fourth Department, over a dissent, determined that two of three statements made after defendant had invoked his right to counsel were spontaneous and properly admitted. The third statement was deemed a response to the functional equivalent of interrogation, but its admission was harmless error. The dissent argued that all three statements should have been suppressed and the constitutional error was not harmless: "[The] statements were made by defendant after the interrogation ceased and while a detective was sitting next to him, completing the arrest paperwork. After the detective asked him certain pedigree questions, defendant asked 'How's Annie doing?,' referring to decedent's wife. The detective replied that she was 'hurt' and said that she 'lost the person she loved the most in life.' The detective then asked defendant if he wanted another coffee or soda and, after defendant responded that he would like another cup of coffee, he started crying. The detective whispered 'good response' and told him 'that's remorse.' There was a brief interruption when another detective opened the door to the interview room and discussed lunch plans with the first detective, and the first detective then asked defendant if he was hungry. Defendant responded 'yeah,' and then stated 'it wasn't supposed to happen like that' and that he 'didn't mean for any of that to happen' (first statement). After the detective responded 'I understand,' defendant stated 'I just wanted to prank 'em just like jig 'em' (second statement). After the detective responded with several statements including that 'remorse is what we wanted to see' and that the police did not think that defendant's intentions were to kill anyone, defendant said 'I should've just stuck around. Maybe I coulda [sic] done something' (third statement). * * * With respect to the third statement, we agree with defendant that it was not spontaneous because it was made in response to the functional equivalent of express questioning by the detective ...". ***People v. Bowen*, 2021 N.Y. Slip Op. 03685, Fourth Dept 6-11-21**

LABOR LAW-CONSTRUCTION LAW, EVIDENCE.

COMPARATIVE NEGLIGENCE IS A DEFENSE TO A LABOR LAW § 241(6) CAUSE OF ACTION.

The Fourth Department noted that comparative negligence is a defense to a Labor Law § 241(6) cause of action. Here plaintiff alleged he slipped and fell on ice and snow in a parking lot which functioned as a passageway and Supreme Court granted plaintiff's motion for summary judgment. The Fourth Department found defendant had raised a question of fact about whether it had discharged its duty to keep the passageway clear by salting it and sent the matter back for a trial: "... [G]iven the need for a trial on liability and, if necessary, a new trial on damages, we note our agreement with defendant that the court erred in granting plaintiff's request to preclude defendant from introducing at the prior damages trial any evidence of plaintiff's comparative fault with respect to the Labor Law § 241 (6) cause of action. The court determined that defendant was precluded from offering evidence of plaintiff's comparative fault at trial because that issue had been decided when the court granted plaintiff's motion. Contrary to the court's determination, however, consideration of comparative fault is still required even '[w]hen a defendant's liability is established as a matter of law before trial' because the jury must

still 'determine whether the plaintiff was negligent and whether such negligence was a substantial factor' in causing his or her injuries ... , 'comparative negligence remains a cognizable affirmative defense to a section 241 (6) cause of action ...". ***Baum v. Javen Constr. Co., Inc.*, 2021 N.Y. Slip Op. 03678, Fourth Dept 6-11-21**

MEDICAL MALPRACTICE, PERSONAL INJURY, EMPLOYMENT LAW.

THE MEDICAL MALPRACTICE ACTION AGAINST A FIRST-YEAR RESIDENT, WHO DID NOT EXERCISE INDEPENDENT JUDGMENT IN FOLLOWING THE DIRECTION OF HIS SUPERVISORS TO DISCONTINUE A MEDICATION, SHOULD HAVE BEEN DISMSSED; THE DISSENT DISAGREED.

The Fourth Department, reversing (modifying) Supreme Court, over a dissent, determined the medical malpractice action against Dr. Drummond, a first-year resident, should have been dismissed because he did not exercise any independent medical judgement but merely followed the direction of his supervisors when medication was discontinued: "Defendants met their initial burden on the motion by presenting the affidavit of an expert who opined that, as a first-year resident, Dr. Drummond could not and did not make any medical decisions independently and that he properly wrote the discharge instruction to discontinue the medication only after discussing and confirming that decision with the appropriate supervisors, a practice that complied with the applicable standard of care ... . Defendants also submitted the deposition testimony of Drs. Drummond and Bath, which established that Dr. Drummond consulted with Dr. Bath prior to decedent's discharge and confirmed with him that the decision had been made to discontinue the medication. Plaintiff failed to raise a triable issue of fact in opposition ... . Based on that conclusion, we likewise agree with defendants that the court erred in denying that part of the motion seeking summary judgment dismissing the complaint and any cross claims against Kaleida Health insofar as the complaint asserts a claim of vicarious liability based on the alleged conduct of Dr. Drummond ...". ***Bieger v. Kaleida Health Sys., Inc.*, 2021 N.Y. Slip Op. 03772, Fourth Dept 6-11-21**

MUNICIPAL LAW, EMPLOYMENT LAW. CONTRACT LAW.

THE CITY OF ROCHESTER LOCAL LAW WHICH PURPORTED TO TRANSFER THE POWER TO DISCIPLINE POLICE OFFICERS TO THE POLICE ACCOUNTABILITY BOARD (PAB) IS INVALID AND CANNOT BE ENFORCED.

The Fourth Department, in a full-fledged opinion by Justice NeMoyer, determined the City of Rochester Local Law which transferred the power to discipline police officers from the police chief to the Police Accountability Board (PAB) is invalid and cannot be enforced: "... [T]he challenged Local Law No. 2 necessarily falls insofar as it takes police discipline out of collective bargaining because, in that respect, it conflicts with the general law mandating collective bargaining over police discipline (see Civil Service Law § 204 [2] ...). As the Court of Appeals has explained, 'a local law is inconsistent [with the general law] where local laws prohibit what would be permissible under State law'... , and by creating a permanent administrative apparatus for disciplining police officers that is impervious to alteration or modification at the bargaining table, Local Law No. 2 necessarily and structurally prohibits something that ... is statutorily mandated for the City of Rochester: collective bargaining of police discipline. The court therefore properly invalidated Local Law No. 2 insofar as it imbues PAB with disciplinary authority over Rochester police officers without regard to collective bargaining." ***Matter of Rochester Police Locust Club, Inc. v. City of Rochester*, 2021 N.Y. Slip Op. 03787, Fourth Dept 6-11-21**

PERSONAL INJURY, EVIDENCE, CIVIL PROCEDURE.

IN THIS SLIP-AND-FALL CASE WHERE COGNITIVE IMPAIRMENT WAS ALLEGED, DEFENDANTS SHOULD NOT HAVE BEEN PRECLUDED FROM CONDUCTING A NEUROPSYCHOLOGICAL EXAMINATION (NPE) OF PLAINTIFF.

The Fourth Department, reversing Supreme Court, determined defendants were entitled to a neuropsychological examination (NPE) of the plaintiff pursuant to CPLR 3121: "... [W]e agree with defendants that the preclusion order sought by plaintiff is not warranted inasmuch as the NPE is material and necessary to defend against plaintiff's claims that he sustained head injuries and cognitive impairment … . Here, plaintiff placed his mental and physical condition in controversy by alleging in the verified complaint, as amplified by the verified bills of particulars, that he injured, inter alia, his head, neck, spine, left wrist and left elbow and suffered 'emotional and psychological pain . . . with related mental anguish, stress, and anxiety' as a result of the accident. Furthermore, defendants' submissions in opposition to the motion established, inter alia, that plaintiff's neurologist and psychologist had both ordered neuropsychological evaluations of plaintiff that had not been conducted, and that the requested NPE differs significantly from neurologic and neurosurgical examinations. In particular, defendants submitted an affidavit from the neuropsychologist who would conduct the NPE, who averred that he would utilize a different methodology, would administer a different battery of psychological tests, and would complete more detailed cognitive testing to determine the existence of any mood or behavioral deficits resulting from plaintiff's alleged injuries, whereas the testing done by neurologists and neurosurgeons generally focuses on physical abnormalities and physical manifestations of those abnormalities." ***Pokorski v. FDA Logistics*, 2021 N.Y. Slip Op. 03770, Fourth Dept 6-11-21**

PERSONAL INJURY, EMPLOYMENT LAW.

QUESTION OF FACT WHETHER THE DRIVER OF DEFENDANT'S TRUCK IN THIS TRAFFIC ACCIDENT CASE WAS AN INDEPENDENT CONTRACTOR OR AN EMPLOYEE FOR WHOM DEFENDANT WOULD BE LIABLE PURSUANT TO RESPONDEAT SUPERIOR.

The Fourth Department, reversing Supreme Court in this traffic accident case, determined there was a question of fact about the liability of the delivery company under respondeat superior. Supreme Court determined the driver was an independent contractor and the company was therefore not liable: "An entity that retains an independent contractor generally is not liable for the independent contractor's negligent acts ... . Whether a relationship between a delivery company and its drivers 'is that of employees or independent contractors involves a question of fact as to whether there is evidence of either control over the results produced or over the means used to achieve the results' ... . Here, defendant's own evidentiary submissions established that defendant rented the delivery truck that was involved in the accident, was empowered to install its own signage on the truck, designed the delivery routes, set the times for the deliveries, and required drivers to submit incident reports following any accidents, thereby raising a question of fact with respect to the nature of the employment relationship ...". ***Raymond v. Hillebert*, 2021 N.Y. Slip Op. 03684, Fourth Dept 6-11-21**

TRUSTS AND ESTATES, BANKING LAW.

QUESTIONS OF FACT PRECLUDED SURROGATE'S FINDING THAT THREE JOINT BANK ACCOUNTS WERE PART OF THE ESTATE AS OPPOSED TO JOINT ACCOUNTS WITH RIGHT OF SURVIVORSHIP.

The Fourth Department, reversing (modifying) Surrogate's Court, determined there were questions of fact about whether three joint bank accounts passed to respondent outside the estate or were part of the estate. The was no evidence of a signature card which included "right of survivorship" language. Respondent argued decedent intended the bank accounts to be gifts to the respondent, but the language of the will raised questions of fact about decedent's intent: "Absent the necessary survivorship language, the statutory presumption contained in Banking Law § 675 does not apply, even if the documents creating the account provide that it is a 'joint' account ... . Here, on her motion, respondent failed to establish that the statutory presumption created under Banking Law § 675 is applicable because she failed to submit signature cards or ledgers of the accounts that included the required survivorship language. ... Respondent averred in an affidavit that decedent placed her name on the accounts with the stated intention of gifting them to her. Respondent also submitted related account documents, including bank documents for all four accounts that reference both respondent and decedent's names and include survivorship or joint tenancy language. Thus, respondent submitted evidence establishing that the four accounts were joint accounts with right of survivorship, and the burden then shifted to petitioners. ... [P]etitioners submitted decedent's will, which left the estate to the three children. Thus, the intent of decedent, as evidenced by her will, is inconsistent with respondent's contention that the three bank accounts were gifts to respondent or joint tenancies with survivorship rights ... . [P]etitioners submitted respondent's deposition testimony that those three accounts were funded solely by decedent, that one of the ... accounts was used as decedent's primary checking account, and that payments out of that account were for only decedent's benefit. ... [R]espondent, who became joint owner of those three accounts when decedent was in her mid to late eighties, testified that she helped decedent with her banking." ***Matter of Najjar (Sanzone)*, 2021 N.Y. Slip Op. 03777, Fourth Dept 6-11-21**

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