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COURT OF APPEALS

ADMINISTRATIVE LAW, ZONING, LAND USE, MUNICIPAL LAW.

ONCE THE APPELLATE DIVISION DECIDED THE NYC DEPARTMENT OF BUILDINGS ACTED RATIONALLY IN APPROVING THE USE OF A BUILDING AS A HOMELESS SHELTER ITS JUDICIAL REVIEW WAS DONE; THE APPELLATE DIVISION SHOULD NOT HAVE REMITTED THE MATTER FOR A HEARING ON THE SAFETY OF THE BUILDING.

The Court of Appeals, reversing the Appellate Division, determined the Appellate Division did not have the authority to send the matter back for a hearing after finding the NYC Department of Buildings (DOB) acted rationally when it approved the use of a building as a homeless shelter: "The Appellate Division erred in remitting to Supreme Court for a hearing on whether the building's use as a homeless shelter was 'consistent with general safety and welfare standards.' In this CPLR article 78 proceeding, the scope of judicial review does not extend past the question of whether the challenged determinations were irrational, which is a question of law (see CPLR 7803[3] ...). Upon concluding that an authorized agency has reviewed a matter applying the proper legal standard and that its determination has a rational basis, a court cannot second guess that determination by granting a hearing to find additional facts or consider evidence not before the agency when it made its determination ... . Accordingly, it was improper for the Appellate Division to remit for plenary judicial proceedings to address 'general safety and welfare' issues, thereby contravening the applicable standard of judicial review in this context and inviting inconsistent enforcement of the Building Code." ***Matter of West 58th St. Coalition, Inc. v. City of New York*, 2021 N.Y. Slip Op. 03346, CtApp 5-27-21**

CRIMINAL LAW, EVIDENCE.

NO PROOF DEFENDANT'S BACKPACK WAS WITHIN DEFENDANT'S REACH WHEN IT WAS SEIZED AND SEARCHED; THEREFORE THE SEARCH WAS NOT A VALID SEARCH INCIDENT TO ARREST.

The Court of Appeals, reversing the Appellate Division, in a brief memorandum decision, determined the search of defendant's backpack could not be justified as a search incident to arrest because there was no evidence the backpack was within defendant's reach when it was seized and searched: "The People failed to establish that the warrantless search of defendant's backpack was a valid search incident to arrest ... . The record does not contain evidence supporting a determination that the backpack was in defendant's 'immediate control or 'grabbable area' ... . There is a lack of testimony in the record indicating where the bag was in relation to defendant immediately prior to the search. Because Supreme Court denied defendant's suppression motion without reaching the People's alternative argument raised in opposition, we remit the matter to Supreme Court ...". ***People v. Mabry*, 2021 N.Y. Slip Op. 03348, CtApp 5-27-21**

CRIMINAL LAW, VEHICLE AND TRAFFIC LAW, ADMINISTRATIVE LAW.

THE TRAFFIC AND PARKING VIOLATIONS BUREAU (TPVA) IS A CRIMINAL COURT WHICH CANNOT ISSUE A DEFAULT JUDGMENT WHEN A DEFENDANT FAILS TO APPEAR FOR A TRAFFIC-INFRACTION TRIAL; IN CONTRAST, A TRAFFIC VIOLATIONS BUREAU (TVB) IS AN ADMINISTRATIVE AGENCY, NOT A CRIMINAL COURT, AND MAY ISSUE A DEFAULT JUDGMENT.

The Court of Appeals, in a full-fledged opinion by Judge Garcia, determined the Suffolk County Traffic and Parking Violations Bureau (TPVA) is a criminal court which cannot issue a default judgment when a defendant who has pled not guilty does not show up for a traffic-infraction trial. On the other hand, a Traffic Violations Bureau (TVB) is not a criminal court and may issue a default judgment: "Defendants in these cases were prosecuted in district court ... . Each defendant timely appeared before the TPVA, pleaded not guilty, and requested a trial. They were each given a document indicating the date and time of the trial with a warning of the repercussions for failure to appear: 'THE COURT MAY ISSUE A WARRANT FOR YOUR ARREST OR PROCEED IN YOUR ABSENCE AND YOU WILL BE LIABLE FOR ANY SENTENCE AND/OR FEES IMPOSED, INCLUDING INCARCERATION, AND other penalties permitted by law.' Despite the warning notice, defendants failed to timely appear on their respective trial dates. No attempt was made by the People to try defendants in absentia. Rather, a judicial hearing officer of the TPVA rendered default judgments against them and imposed fines. ... The issue before us is whether a TPVA judicial hearing officer is authorized under the Vehicle and Traffic Law to render a

default judgment against a defendant charged with a traffic infraction who first enters a timely not guilty plea but then fails to appear for trial. We answer that question in the negative. ... Unlike TPVAs, ... the TVB is not a criminal court ... . It is ... an administrative tribunal where, in cities having a population of one million or more, traffic infractions may be disposed of in an administrative hearing held before a hearing officer appointed by the Commissioner of Motor Vehicles ... . In contrast to trials conducted before TPVAs, hearings before the TVB are not governed by the CPL ...". ***People v. Iverson*, 2021 N.Y. Slip Op. 03347, CtApp 5-27-21**

FIRST DEPARTMENT

CIVIL PROCEDURE, CONTRACT LAW, APPEALS.

THE GUARANTEES QUALIFED AS INSTRUMENTS FOR THE PAYMENT OF MONEY ONLY AND SUPPORTED SUMMARY JUDGMENT IN LIEU OF COMPLAINT; ONLY PURELY LEGAL ARGUMENTS RAISED FOR THE FIRST TIME ON APPEAL CAN BE CONSIDERED.

The First Department determined the plaintiffs were entitled to summary judgment in lieu of complaint based upon guarantees which met the definition of instruments for the payment of money only. The court noted that two arguments raised for the first time on appeal (documents not qualified as business records and failure to include a payment schedule) could not be considered because they were not purely legal arguments. A third argument, which was purely legal, was considered: "Defendants' contention that the guaranties do not qualify as instruments for the payment of money only, as required by CPLR 3213, because they guarantee performance as well as payment and reference must be made to documents outside the guaranties to determine if the debt service coverage ratio (DSCR) conditions have been met, is unavailing. Although this argument was raised for the first time on appeal, since these are 'legal issues appearing on the face of the record which could not have been avoided' if they had been raised earlier, we will address the argument ... . The guaranty at issue in 27 West 72nd St. qualifies as an instrument for the payment of money only because it guarantees only payment and not performance. ... [T]he ... operative provision of the guaranty says, 'Guarantor guarantees the payment of the Guaranteed Obligations.' The guaranty at issue in 31 East 28th St. also qualifies as an instrument for the payment of money only. Although it says, 'Guarantor guarantees the payment and performance of the Guaranteed Obligations as and when due and payable,' the mere addition of the words 'and performance' does not necessarily remove the guaranty from the category of instruments for the payment of money only, particularly when the sentence ends with 'as and when due and payable.'" ***27 W. 72nd St. Note Buyer LLC v. Terzi*, 2021 N.Y. Slip Op. 03364, First Dept 5-27-21**

CONTRACT LAW, CIVIL PROCEDURE.

WHERE THERE IS A DISPUTE ABOUT THE EXISTENCE OF A CONTRACT A CAUSE OF ACTION FOR UNJUST ENRICHMENT IS NOT DUPLICATIVE.

The First Department, reversing (modifying Supreme Court) noted that where there is a dispute about the existence of an enforceable contract, a cause of action for unjust enrichment is not duplicative: "With respect to the unjust enrichment ... [t]hese claims should not have been dismissed as duplicative because 'where there is a bona fide dispute as to the existence of a contract or the application of a contract in the dispute in issue, a plaintiff may proceed upon a theory of quasi contract as well as breach of contract, and will not be required to elect his or her remedies' ...". ***CIP GP 2018, LLC v. Koplewicz*, 2021 N.Y. Slip Op. 03370, First Dept 5-27-21**

CRIMINAL LAW.

DEFENDANT WAS TOLD HE FACED A 45-YEAR SENTENCE AFTER TRIAL WHEN THE ACTUAL SENTENCE WOULD HAVE BEEN CAPPED AT 20 YEARS; DEFENDANT'S DECISION TO PLEAD GUILTY WAS NOT KNOWINGLY AND VOLUNTARILY MADE.

The First Department, vacating defendant's guilty pleas, determined defendant's pleas were not knowingly and voluntarily entered because was told he could be sentenced to 45 years after trial when the sentence would have been capped at 20 years: "Defendant was told that he faced the possibility of serving three 15-year sentences, to run consecutively, if he chose to proceed to trial, when at most he was facing 20 years because of the statutory cap ... . Thus, he was weighing a 9-year plea offer against what he was told was a maximum of 45 years' imprisonment. Because defendant was not told about the capping statute, he did not have a 'full understanding of what the plea connotes and of its consequences' ... . This 25-year disparity between the true legal sentence and the sentence defendant was told he could receive was so significant alone as to render his plea involuntary ... . As defendant explained in his affidavit, submitted in support of his CPL 440.10 motion, the prospect of spending 45 years in prison—and dying there—factored into the 42-year-old's calculation of the relative pros and cons of accepting the plea ...". ***People v. Buchanan*, 2021 N.Y. Slip Op. 03386, First Dept 5-27-21**

CRIMINAL LAW, ATTORNEYS.

DEFENDANT'S SPEEDY TRIAL MOTION SHOULD HAVE BEEN GRANTED; THE CASE COULD BE PRESENTED WITHOUT THE COMPLAINANT, WHO HAD NO MEMORY OF THE INCIDENT; DEFENSE COUNSEL WAS NOT UNAVAILABLE WITHIN THE MEANING OF THE STATUTE BECAUSE A COLLEAGUE WAS IN COURT REPRESENTING DEFENDANT.

The First Department, reversing Supreme Court, determined defendant's speedy trial motion should have been granted. The court noted the issue is the prosecution's readiness for trial, not whether defense counsel is available: "The court erred, firstly, in excluding 93 days of pre-readiness delay in which the prosecution failed to present its case to the grand jury. '[T]he obligation to obtain a proper accusatory instrument is the prosecutor's alone' ... , making 'the period prior to the People's obtaining an indictment [] chargeable to them, absent the applicability of some exclusion' ... . [T]he prosecutor did not and could not establish its inability to proceed with the case since the complainant was not necessary to present its case to the grand jury. The charges against defendant were for leaving the scene of the accident without reporting it. The complainant remembered nothing of the accident, let alone defendant's actions in its aftermath, professing to this lack of memory on the very day of the accident. ... The court also erred in excluding 83 days of post-readiness delay that was due to the prosecutor's improper declaration that its readiness was 'moot' because lead defense counsel was on trial. While acknowledging that a colleague of defense counsel was present, the court nonetheless erroneously concluded that 'the People's state of readiness is irrelevant where counsel is unavailable,' misconstruing the law as to what constitutes 'unavailability.' ... Because a colleague of defense counsel stood up on the case on July 8, 2015, as the court itself acknowledged, defendant was not without representation on the basis that 'counsel was unavailable.'" ***People v. Alvarez*, 2021 N.Y. Slip Op. 03286, First Dept 5-25-21**

CRIMINAL LAW, ATTORNEYS, JUDGES, EVIDENCE, APPEALS.

DEFENDANT'S WAIVER OF HIS RIGHT TO COUNSEL WAS INVALID BECAUSE DEFENDANT WAS NOT AWARE OF HIS SENTENCING EXPOSURE AND THE JUDGE DID NOT CONDUCT A SEARCHING INQURY; THE EVIDENCE OF CRIMINAL MISCHIEF AND AUTO STRIPPING WAS LEGALLY INSUFFICIENT AND THE CONVICTIONS WERE AGAINST THE WEIGHT OF THE EVIDENCE.

The First Department, reversing defendant's conviction, determined the waiver of defendant's right to counsel was invalid and the evidence of criminal mischief and auto stripping was legally insufficient, and the convictions were against the weight of the evidence: "Defendant's waiver of his right to counsel was invalid, because the record 'does not sufficiently demonstrate that defendant was aware of his actual sentencing exposure' ... . 'The critical consideration is defendant's knowledge at the point in time when he first waived his right to counsel'; the court's subsequent warnings about sentencing 'were incapable of retrospectively 'curing' the . . . court's error' ... . Moreover, the court 'improperly granted defendant's request to proceed pro se without first conducting a searching inquiry regarding defendant's mental capacity to waive counsel' ... , in light of his history of mental illness, as well as his statement, in response to the court's reference to the 'tremendous pitfalls of representing yourself,' that '[n]one of that has been explained,' even after the court had warned him of a number of such risks. Defendant's conviction of third-degree criminal mischief as to one of the vehicles he damaged (count four), and his conviction of first-degree auto stripping, were unsupported by legally sufficient evidence (a claim we review in the interest of justice), and were also against the weight of the evidence ... . The People failed to establish that particular charge of criminal mischief because the evidence did not show that 'the reasonable cost of repairing the damaged property' ... . Such costs 'may not be established by hearsay'... . The People relied on a nonexpert witness who was not the owner of the vehicle and did not pay for the repairs, but testified that he looked at a receipt and that the repair costs were $600 ... , and the People do not invoke any exception to the hearsay rule. In the absence of admissible evidence as to the repair costs for that vehicle, the People also failed to establish that the aggregate damage to all the vehicles exceeded $3,000, the minimum value for first-degree auto stripping ...". ***People v. Jackson*, 2021 N.Y. Slip Op. 03288, First Dept 5-25-21**

EMPLOYMENT LAW, HUMAN RIGHTS LAW, MUNCIPAL LAW.

PLAINTIFF'S ALLEGATION DEFENDANT SUPERVISOR CONDITIONED HIS SUPPORT OF PLAINTIFF AT WORK ON HER COMPLIANCE WITH HIS DEMANDS FOR SEX SUPPORTED PLAINTIFF'S REQUEST FOR PUNITIVE DAMAGES RE: DEFENDANT SUPERVISOR AND DEFENDANT EMPLOYER.

The First Department, reversing (modifying) Supreme Court, determined the punitive damages request in this employment discrimination action should not have been dismissed: "The request for punitive damages should be reinstated. [defendant] Ravich's conduct in conditioning his support of plaintiff at work on her compliance with his demands for sex, if proven, would be sufficient to demonstrate discrimination 'with willful or wanton negligence, or recklessness, or a conscious disregard of the rights of others or conduct so reckless as to amount to such disregard' ... . Punitive damages could also be awarded against the TCW defendants if they are found vicariously liable for this conduct, although they would be entitled to mitigate such damages with proof of policies established to deter discrimination ...". ***Tirschwell v. TCW Group Inc.*, 2021 N.Y. Slip Op. 03397, First Dept 5-27-21**

FRAUD, CIVIL PROCEDURE, FIDUCIARY DUTY, CONTRACT LAW, ATTORNEYS.

DEFENDANT ATTORNEY WAS UNABLE TO DEMONSTRATE PLAINTIFFS LEARNED OF DEFENDANT'S ALLEGED FRAUD MORE THAN TWO YEARS BEFORE THE ACTION WAS COMMENCED; THE STATUTE OF LIMITATIONS FOR THE UNJUST ENRICHMENT AND AIDING AND ABETTING BREACH OF FIDUCIARY DUTY IS SIX YEARS BECAUSE OF THE ALLEGATIONS OF FRAUD.

The First Department determined the fraud, unjust enrichment and aiding and abetting breach of fiduciary duty causes of action were timely brought against defendant attorney. Defendant attorney represented a party who was found to have defrauded plaintiffs in an arbitration resulting in a $56,4 million judgment. Plaintiffs alleged the attorney's participation in the fraud was not discovered until the arbitration proceedings: "The limitations period for fraud is the greater of six years from the date of the fraud or two years from the time when, with reasonable diligence, the plaintiff could have uncovered the fraud (CPLR 213[8] ...). In order to prevail, the defendant must show that there is no issue of fact under either prong. Here, defendant failed to show dispositively that plaintiffs were in possession of facts that would have triggered inquiry notice under CPLR 213(8) more than two years before the action was commenced ... . Nor are plaintiff's unjust enrichment or aiding and abetting breach of fiduciary duty claims time-barred. Both claims are subject to the six-year statute of limitations because they are based on allegations of actual fraud (CPLR 213[8] ...)". ***Sabourin v. Chodos*, 2021 N.Y. Slip Op. 03392, First Dept 5-27-21**

FRAUD, CONTRACT LAW.

THE COMPLAINT STATED A CAUSE OF ACTION FOR FRAUD BASED UPON DEFENDANTS' ALLEGED INFLATION OF THE VALUE OF THE BUSINESS PURCHASED BY PLAINTIFF; AND THE COMPLAINT STATED A CAUSE OF ACTION FOR BREACH OF CONTRACTUAL WARRANTIES WHICH DID NOT DUPLICATE THE FRAUD CAUSE OF ACTION.

The First Department, reversing Supreme Court, determined the complaint adequately alleged fraud (inflating the value of defendants' business which was purchased by plaintiff) and breach of contract: "... [T]he key ... element of a claim for fraudulent concealment — duty to disclose — is met here, given the hidden nature of the fraud, which turned on falsified records and bribed auditors, and the practical impossibility of discovering the fraud through ordinary diligence ... . Defendants' alleged deception also breached numerous warranties set forth in the governing stock purchase agreement, including that ... financial statements were materially complete and correct, that its [earning] projections were reasonable and made in good faith, that it had no material undisclosed liabilities, and that it conducted its business in compliance with applicable law. Nevertheless, '[a] warranty is not a promise of performance, but a statement of present fact. Accordingly, a fraud claim can be based on a breach of contractual warranties notwithstanding the existence of a breach of contract claim' ... . Thus, the fraud claim does not duplicate the contract claim ...". ***VXI Lux Holdco, S.A.R.L. v. SIC Holdings, LLC*, 2021 N.Y. Slip Op. 03294, First Dept 5-25-21**

PERSONAL INJURY, FAMILY LAW.

INFANT PLAINTIFF, H.M., WAS INJURED BY HOT WATER IN THE SHOWER; THE PROPERTY OWNER WHO REPLACED THE WATER HEATER MAY BE LIABLE; THE FOSTER-CARE SERVICE WHICH PLACED H.M. IN THE HOME, HOWEVER, COULD NOT HAVE FORESEEN THE INCIDENT.

The First Department, reversing (modifying) Supreme Court, determined there was a question of fact whether the property owner could be liable for injury to a child, H.M. caused by hot water in the shower. The defendant placement service (Leake) had placed H,M. in the foster care of defendant Butler who lived in a home owned by Alicea. Butler had turned on the shower and was picking up H.M.'s clothes when H.M. climbed into the tub. There was a question of fact whether the property owner, Alicea, was liable because of conflicting expert evidence about the danger posed by the temperature of the water. However, the incident was not foreseeable from the perspective of the placement agency (Leake). Therefore, Leake's motion for summary judgment should have been granted: "... [T]here is an issue of fact as to whether [Alicea] created the dangerous hot water temperature when he replaced the home's hot water heater prior to the accident. ... Leake demonstrated prima facie entitlement to summary judgment dismissing the negligent supervision claim against it because it established that it did not have 'sufficiently specific knowledge or notice of the dangerous conduct which caused injury,' and '[t]he scalding hot bath water was an intervening act or event that is divorced from and not the foreseeable risk associated with. . .defendant's alleged negligence' ... . The excessively hot water was not the foreseeable risk associated with Leake's alleged negligence in placing more than five children in the home, and the momentary inattention of Butler was not an act that should have been foreseeable by Leake in the exercise of reasonable care ...". ***H.M. v. City of New York*, 2021 N.Y. Slip Op. 03376, First Dept 5-27-21**

REAL PROPERTY LAW, MUNICIPAL LAW, DEBTOR-CREDITOR.

ALTHOUGH THE NOTARY STAMP WAS MISSING FROM THE SCANNED MORTGAGE IN THE NYC REGISTER, PLAINTIFF BANK DEMONSTRATED THE MORTGAGE WAS PROPERLY ACKNOWLEDGED WHEN DELIVERED TO THE OFFICE OF THE REGISTER; THEREFORE DEFENDANT'S INTEREST IN THE PROPERTY WAS SUBORDINATE TO THE MORTGAGE.

The First Department, over an extensive concurrence, determined defendant bank demonstrated the mortgage was properly recorded in the NYC Register and, therefore, plaintiff's interest the property was subordinate to defendant's mortgage: "The parties do not dispute that the mortgage, as reflected in the records of the Office of the New York City Register, did not bear a notary stamp or any indication that the mortgage was properly acknowledged as required by Real Property Law §§ 291, 298, 309-a(1), and 333(2). However, the bank proffered evidence establishing that the mortgage was properly acknowledged when submitted for recording. This evidence included the original inked mortgage containing the notary public's information; an affidavit from the notary who affixed her notary stamp at the time; an affidavit from the title company that submitted the mortgage for recording, and an expert affidavit and report by a forensic document examiner in which he concluded that the Register's scanner could have caused the notary stamp to disappear from the imaged mortgage. Plaintiff has failed to show by clear and convincing evidence that the acknowledgment was defective ... . Thus, the bank demonstrated that the mortgage was 'entitled to be recorded . . . and is considered recorded from the time of [ ] delivery [to the Office of the New York City Register]' (Real Property Law § 317). Given that the mortgage was duly acknowledged, delivered and actually recorded, plaintiff is deemed to have constructive notice of it ...". ***80P2L LLC v. U.S. Bank Trust, N.A.*, 2021 N.Y. Slip Op. 03275, First Dept 5-25-21**

SECOND DEPARTMENT

CIVIL PROCEDURE, FORECLOSURE.

FAILURE TO TAKE TIMELY STEPS TO SETTLE THE ORDER IN THIS FORECLOSURE ACTION RENDERED THE ACTION ABANDONED PURSUANT TO 22 N.Y.C.R.R. § 202.48.

The Second Department, reversing Supreme Court, determined the foreclosure action was abandoned because no steps were taken to settle the order: " 'Proposed orders . . . with proof of service on all parties where the order is directed to be settled or submitted on notice, must be submitted for signature, unless otherwise directed by the court, within 60 days after the signing and filing of the decision directing that the order be settled or submitted' (22 NYCRR 202.48[a]). 'Failure to submit the order . . . timely shall be deemed an abandonment of the motion or action, unless for good cause shown' (22 NYCRR 202.48[b]). These provisions are not applicable where the decision does not explicitly direct that the proposed judgment or order be settled or submitted for signature (*see Funk v Barry*, 89 NY2d 364). However, the direction to 'settle' order 'ordinarily entails more complicated relief,' and therefore 'contemplates notice to the opponent so that both parties may either agree on a draft or prepare counter proposals to be settled before the court' (id. at 367 ...). Here, Nationstar failed to timely settle the order pursuant to the requirements of 22 NYCRR 202.48(a), and did not show good cause for its failure to do so ... . Accordingly, the Supreme Court should have granted that branch of the defendant's motion which was pursuant to 22 NYCRR 202.48 to deem, as abandoned, Nationstar's motion." ***Aurora Loan Servs., LLC v. Yogev*, 2021 N.Y. Slip Op. 03297, Second Dept 5-26-21**

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

DEFENDANT DID NOT RECEIVE EFFECTIVE ASSISTANCE OF COUNSEL AT THE SORA RISK-LEVEL ASSESSMENT PROCEEDING IN THIS CHILD PORNOGRAPHY CASE; COUNSEL MADE AN ARGUMENT WHICH WAS EXPRESSLY REJECTED BY THE COURT OF APPEALS AND THE 2ND DEPARTMENT.

The Second Department determined defense counsel was ineffective the SORA risk-level assessment proceeding: "The defendant was convicted, in federal court, of possession of child pornography ... . After a hearing to determine his level of risk pursuant to the Sex Offender Registration Act ... , at which the defendant was assessed 30 points under risk factor 3 (number of victims), 30 points under risk factor 5 (age of victims), and 20 points under risk factor 7 (victims were strangers), the defendant was designated a level two sex offender. ... A defendant has a right to the effective assistance of counsel in a SORA proceeding ... . Here, the only argument that defense counsel made at the hearing—challenging the assessment of points under risk factors 3 and 7 in light of the nature of the offense—had been soundly rejected by the Court of Appeals ... and this Court ... . Under the particular circumstances of this case, defense counsel's failure to apply, instead, for a downward departure on the basis of an overassessment of risk level due to application of points under risk factors 3 and 7 ... , demonstrated a misunderstanding of the relevant law and amounted to ineffective assistance of counsel ...". ***People v. Bertrand*, 2021 N.Y. Slip Op. 03338, Second Dept 5-25-21**

CRIMINAL LAW, EVIDENCE APPEALS.

THERE WAS NO EVIDENCE DEFENDANT KNEW THE COMPLAINANT WAS A 14-YEAR-OLD RUNAWAY WHEN SHE STAYED AT HIS HOUSE; THE EVIDENCE OF KIDNAPPING WAS LEGALLY INSUFFICIENT.

The Second Department, reversing defendant's kidnapping conviction, determined the evidence was legally insufficient: " 'A person is guilty of kidnapping in the second degree when he or she] abducts another person' ... . 'Abduct' means to restrain a person with intent to prevent his [or her] liberation by . . . (a) secreting or holding him [or her] in a place where he [or she] is not likely to be found' ... . 'Restrain' means to restrict a person's movements intentionally and unlawfully in such [a] manner as to interfere substantially with his [or her] liberty by moving him [or her] from one place to another, or by confining him [or her] either in the place where the restriction commences or in a place to which he [or she] has been moved, without consent and with knowledge that the restriction is unlawful'... . 'A person is so moved or confined 'without consent' when such is accomplished by . . . any means whatever, including acquiescence of the victim, if he [or she] is a child less than sixteen years old . . . and the parent, guardian or other person or institution having lawful control or custody of him [or her] has not acquiesced in the movement or confinement' ... . [T]he evidence does not establish that the defendant had 'knowledge that the restriction [of the complainant's movements was] unlawful' … , as the record fails to establish that the defendant knew that the complainant was under the age of 16 or that he knew she had run away and that her parents were looking for her, during a period of three days to one week that she was staying at his house ... . Moreover, the evidence also failed to establish that the defendant intentionally restricted the complainant's movements by confining her ... , or that he intended to prevent her liberation by 'secreting or holding [her] in a place where [she was] not likely to be found' ... . Without establishing that the defendant knew that the complainant was a 14-year-old runaway, the People failed to establish that the defendant possessed the requisite intent to restrict her movements by confining her, or to prevent her liberation by keeping her hidden from her parents in a place where she was unlikely to be found." ***People v. Legrand*, 2021 N.Y. Slip Op. 03333, Second Dept 5-26-21**

EMPLOYMENT LAW, HUMAN RIGHTS LAW, MUNICIPAL LAW.

THE DIFFERING CRITERIA FOR GENDER DISCRIMINATION, HOSTILE WORK ENVIRONMENT AND RETALIATION UNDER THE NEW YORK STATE AND NEW YORK CITY HUMAN RIGHTS LAW CAREFULLY EXPLAINED.

The Second Department, reversing (modifying) Supreme Court, carefully laid out the criteria for gender discrimination, hostile work environment and retaliation under the NYS Human Rights Law (NYSHRL) and the NYC Human Rights Law (NYCHRL). The gender discrimination claims should have been dismissed, but the hostile work environment and retaliation claims properly survived summary judgment. The decision is too detailed to fairly summarize here and should be consulted for its explanation of the differing criteria under the NYS and NYC Human Rights Law. With respect to gender discrimination, the court wrote: "[Under the NYSHRL] a triable issue of fact regarding the falsity of the appellants' proffered reasons for the employment action is not enough; there must be evidence 'both that the reason was false, and that discrimination was the real reason' ... . Here, the parties' evidentiary submissions reveal no evidence that gender discrimination was the real reason for the challenged employment actions. ... [A]n action alleging discrimination in violation of the NYCHRL 'must be analyzed under both the familiar framework of *McDonnell Douglas Corp. v Green* (411 US 792 [1973]) and under the newer mixed motive framework, which imposes a lesser burden on a plaintiff opposing such a motion' (*Sanderson-Burgess v City of New York*, 173 AD3d 1233, 1235 ...). 'Summary judgment dismissing a claim under the NYCHRL should be granted only if no jury could find [the] defendant liable under any of the evidentiary routes—McDonnell Douglas, mixed motive, direct evidence, or some combination thereof' ... . Here, the plaintiff ... failed to raise a triable issue of fact as to whether the conduct was a pretext to mask a discriminatory intent or was in part motivated by discrimination ...". ***Bilitch v. New York City Health & Hosps. Corp.*, 2021 N.Y. Slip Op. 03300, Second Dept 5-26-21**

FAMILY LAW, EVIDENCE.

FAMILY COURT PROPERLY CONSIDERED THE BEST INTERESTS OF THE TWO CHILDREN IN ITS PLACEMENT DECISION; STRONG TWO-JUSTICE DISSENT.

The Second Department, over an extensive two-justice dissent, determined Family Court properly considered the best interests of two children in deciding where the children should be place. The dissent disagreed. The decision is too detailed and fact-specific to fairly summarize here: "At its essence, this appeal presents a circumstance where everyone involved—the foster mother, the godmother, the attorney for the child, ACS, and the Family Court—agreed that the child and his half-sibling should be kept together. The court found that both the godmother's home and the foster mother's home were entirely suitable, but in choosing between the two, properly noted that the half-sibling's father did not consent to the half-sibling being placed anywhere except with the godmother. The court's consideration of that fact did not mean that the child's best interests were not globally considered, but was instead a relevant and necessary fact that the court needed to take into account in determining how to best promote the child's best interests and the obvious benefit to him of keeping the two half-siblings together as each other's sole living, known, biological relatives. It was not error for the court to do so, and in

fact, the court would have been derelict in its duties had it failed to do so." ***Matter of Adonnis M. (Kenyetta M.)*, 2021 N.Y. Slip Op. 03322, Second Dept 5-26-21**

FAMILY LAW, JUDGES.

FATHER'S ABILITY TO BRING FUTURE PETITIONS FOR CUSTODY SHOULD NOT HAVE BEEN CONDITIONED UPON HIS UNDERGOING TREATMENT OR COUNSELING.

The Second Department, reversing Family Court, determined father's ability to bring future custody petitions should not have been condition upon father's undergoing counseling or treatment: "A court deciding a custody proceeding may 'direct a party to submit to counseling or treatment as a component of a [parental access] or custody order' ... . 'A court may not, however, order that a parent undergo counseling or treatment as a condition of future [parental access] or reapplication for [parental access] rights' ... . Here, the Family Court erred in conditioning the filing of any future petitions by the father to modify parental access upon his successful completion of an anger management class and a negative drug test, and we modify the order so as to eliminate that condition." ***Matter of Hardy v. Hardy*, 2021 N.Y. Slip Op. 03320. Second Dept 5-26-21**

FAMILY LAW, JUDGES.

FAMILY COURT SHOULD NOT HAVE ORDERED THE PARTIES TO EQUALLY SHARE THE COSTS OF FATHER'S SUPERVISED VISITATION WITHOUT EVALUATING THE PARTIES' FINANCES.

The Second Department determined Family Court properly found father had committed the family offense of harassment and properly ordered therapeutic supervised parental access for father. However, Family Court should not have order the parties to equally share the expense of supervised parental access without evaluating the parties' ability to pay: "The Family Court should not have directed the parties to equally share the costs of the father's supervised parental access, without evaluating the parties' 'economic realities,' including the father's ability to pay and the actual cost of each visit ... . Accordingly, we remit the matter to the Family Court, Orange Country, for a hearing to resolve those issues, and a determination thereafter regarding the parties' respective shares of the costs for the father's supervised therapeutic parental access." ***Matter of Livesey v. Gulick*, 2021 N.Y. Slip Op. 03321, Second Dept 5-26-21**

FORECLOSURE, EVIDENCE, UNIFORM COMMERCIAL CODE (UCC).

THE BANK DID NOT DEMONSTRATE STANDING TO BRING THE FORECLOSURE ACTION.

The Second Department, reversing Supreme Court, determined the bank did not present sufficient evidence of standing to bring the foreclosure action. Therefore the bank's motion for summary judgment should not have been granted: "Generally, in order to establish prima facie entitlement to judgment as a matter of law in a foreclosure action, a plaintiff must produce the mortgage, the unpaid note, and evidence of the default ... . Where the plaintiff's standing has been placed in issue by the defendants' answer, the plaintiff must prove its standing as part of its prima facie showing ... . Here, contrary to the Supreme Court's determination, the plaintiff failed, prima facie,]to establish its standing to commence this action. The copy of the note submitted in support of the plaintiff's motion contained an additional page, entitled 'Allonge to Note,' which contained a special indorsement from the original lender to the plaintiff. However, … the plaintiff did not submit any evidence to establish that the purported allonge was so firmly affixed to the note as to become a part thereof (see UCC 3-202[2] ...)". ***Wells Fargo Bank, N.A. v. Maleno-Fowler*, 2021 N.Y. Slip Op. 03344, Second Dept 5-26-21**

MEDICAL MALPRACTICE, PERSONAL INJURY, EVIDENCE.

ALTHOUGH PLAINTIFF'S EXPERT'S THEORY IN THIS MEDICAL MALPRACTICE CASE WAS NOT SUPPORTED BY MEDICAL LITERATURE, THE THEORY HAD AN OBJECTIVE BASIS AND SHOULD NOT HAVE BEEN PRECLUDED AFTER A FRYE HEARING.

The Second Department, reversing Supreme Court, determined the evidence offered by plaintiff's treating physician (Paget) as expert opinion should not have been precluded after a Frye hearing, despite the absence of medical literature on the topic. Plaintiff alleged a contrast agent was negligently injected into the tissue of her arm instead of a vein: "The plaintiff's expert witness disclosure indicated that Paget was expected to testify that the defendants deviated from good and accepted medical practice in allowing gadolinium, a toxin, to leak into and remain inside the plaintiff's arm in high concentration, which caused the plaintiff to develop injuries including a progressive fibrosing disease. ... * * * Although Paget did not rely upon medical literature unequivocally establishing that the administration of gadolinium into tissue has a causal link to the development of a systemic fibrosing disease in the absence of renal insufficiency, the plaintiff established that Paget's theory 'had an objective basis and was founded upon far more than theoretical speculation or a scientific hunch'... . The absence of medical literature directly on point pertains to the weight to be afforded to Paget's testimony, but does not preclude its admissibility ...". ***Farrell v. Lichtenberger*, 2021 N.Y. Slip Op. 03305, Second Dept 5-26-21**

PERSONAL INJURY, CIVIL PROCEDURE.

DEFENDANT DRIVER RAISED A QUESTION OF FACT ABOUT WHETHER THE DRIVER OF THE CAR IN WHICH PLAINTIFF WAS A PASSENGER WAS NEGLIGENT; THE FACT THAT THE DEFENDANT'S OUT-OF-STATE AFFIDAVIT DID NOT HAVE A CERTIFICATE OF CONFORMITY DID NOT AFFECT ITS VALIDITY.

The Second Department, reversing Supreme Court, determined the motion for summary judgment by Ellis, the driver of the car in which plaintiff was a passenger, should have been denied. And the cross motion for summary judgment by plaintiff should have been denied. The defendant driver's description of the accident raised a question of fact whether Ellis was negligent. The fact that the defendant driver submitted an out-of-state affidavit without a certificate of conformity was not a fatal defect: "... [T]he ... defendants raised a triable issue of fact through the affidavit of John Koranteng, the alleged operator of the ... defendants' vehicle. Koranteng averred that he checked to make sure that the left side of his vehicle was clear before he began to initiate a right turn onto Brooklyn Avenue. Koranteng claimed that, while he was turning right, the collision occurred when Ellis's vehicle attempted to aggressively pass him on his driver's side ... . Ellis's contention that Koranteng's affidavit was not in admissible form and, therefore, should not have been considered, is without merit, since the absence of a certificate of conformity for an out-of-state affidavit is not a fatal defect ... . [T]he Supreme Court should have denied the plaintiff's cross motion for summary judgment on the issue of liability insofar as asserted against the ... defendants. ... [T]he ... defendants raised a triable issue of fact through the submission of ... Koranteng's affidavit ... . ' ... [I]f triable issues of fact are raised by the defendants . . . summary judgment on the issue of liability must be denied, even if the moving plaintiff was an innocent passenger' ...". ***Wise v. Boyd Bros. Transp., Inc.*, 2021 N.Y. Slip Op. 03345, Second Dept 5-26-21**

PERSONAL INJURY, TOXIC TORTS, EVIDENCE.

PLAINTIFF'S EXPERT RAISED ISSUES OF FACT ABOUT WHETHER EXPOSURE TO ASBESTOS CAUSED THE INJURY TO PLAINTIFF; DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined plaintiff's expert raised questions of fact about whether exposure to asbestos injured plaintiff: " 'In toxic tort cases, an expert opinion on causation must set forth (1) a plaintiff's exposure to a toxin, (2) that the toxin is capable of causing the particular injuries plaintiff suffered](general causation) and (3) that the plaintiff was exposed to sufficient levels of the toxin to cause such injuries (specific causation)' ... . '[T]here must be evidence from which the factfinder can conclude that the plaintiff was exposed to levels of the agent that are known to cause the kind of harm that the plaintiff claims to have suffered' ... . '[I]t is not always necessary for a plaintiff to quantify exposure levels precisely or use the dose-response relationship, provided that whatever methods an expert uses to establish causation are generally accepted in the scientific community' ... . [T]he plaintiffs submitted expert affidavits raising triable issues of fact as to both general and specific causation ... . The conclusions of the plaintiffs' experts were sufficiently supported by studies and medical literature, and demonstrated specific causation through a scientific method ... . The experts' conflicting interpretations of the underlying studies and literature presented a credibility battle between the parties' experts, which is properly left to a jury for its resolution ...". ***Pistone v. American Biltrite, Inc.*, 2021 N.Y. Slip Op. 03341, Second Dept 5-26-21**

REAL PROPERTY LAW, NUISANCE, MUNICIPAL LAW.

PLAINTIFF'S ACTION FOR PRIVATE NUISANCE ALLEGING DEFENDANTS' AIR CONDITIONING UNIT IS TOO LOUD SHOULD NOT HAVE BEEN DISMISSED.

The Second Department, reversing Supreme Court, determined the private nuisance cause of action should not have been dismissed. Plaintiff alleged defendants' air conditioning unit made too much noise: "The elements of a private nuisance cause of action are: '(1) an interference substantial in nature, (2) intentional in origin, (3) unreasonable in character, (4) with a person's property right to use and enjoy land, (5) caused by another's conduct in acting or failure to act' ... . '[E]xcept for the issue of whether the plaintiff has the requisite property interest, each of the other elements is a question for the jury, unless the evidence is undisputed' ... . Here, the plaintiff stated a cause of action to recover damages for private nuisance by alleging that the defendants' air conditioning and condenser units generated a noise level exceeding that permitted by the Code of the Town of Hempstead ... , which interfered with the plaintiff's use and enjoyment of his bedroom, garden, and patio, and diminished his property value ...". ***Curry v. Matranga*, 2021 N.Y. Slip Op. 03304, Second Dept 5-26-21**

THIRD DEPARTMENT

EDUCATION-SCHOOL LAW, CONSTITUTIONAL LAW.

ALL EIGHT OF THE SCHOOL DISTRICTS EXAMINED VIOLATED THE CONSTITUTIONAL REQUIRMENT TO PROVIDE A SOUND EDUCATION TO THE AT-RISK STUDENT POPULATIONS.

The Third Department, in a full-fledged opinion by Justice Lynch, determined the plaintiffs established a violation of the constitutional requirement to provide a sound education to the at-risk student population in all of the school districts named in the action---Jamestown, Kingston, Mount Vernon, Newburgh, Niagara Falls, Port Jervis, Poughkeepsie, and Utica:

"... [P]laintiffs in this case have demonstrated a ... set of coalescing circumstances with respect to the at-risk student population in the subject school districts sufficient to establish a constitutional violation. Each of the subject school districts had a high percentage of at-risk students during the stipulated academic years — those who came from impoverished backgrounds, had disabilities, or whose primary language was one other than English. The compelling evidence demonstrated that, in order to place a sound basic education within the reach of such students, they require early interventions, more time on task and other supplemental programming, as well as support from adequate numbers of guidance counselors, social workers or other similar professionals. Despite these enhanced needs, the districts lacked a combined total of over $1.1 billion in funding ... , necessitating further cuts to already diminished staff and essential services. Most unfortunately, the performance of the students in these districts suffered as a result. Working from the premise ... that all children can succeed when given appropriate instructional, social and health services, we find — based upon the evidence of inadequate inputs, poor outputs and a causal connection to defendant's school financing system — that plaintiffs have established a constitutional violation with respect to the at-risk student population in each of the subject school districts." ***Maisto v. State of New York*, 2021 N.Y. Slip Op. 03350, Third Dept 5-27-21**

ENVIRONMENTAL LAW, MUNICIPAL LAW.

PURSUANT TO ECL 23-2711, THE DEPARTMENT OF ENVIRONMENTAL CONSERVATION DID NOT HAVE THE AUTHORITY TO ISSUE A MINING PERMIT BECAUSE THE TOWN LAW PROHIBITED MINING.

The Third Department, reversing Supreme Court, over an extensive dissent, determined the mining permit issued by the Department of Environmental Conservation (DEC) must be annulled pursuant to Environment Conservation Law (ECL) 23-2711 because the local law prohibiting mining. The permit purported to allow the expansion of an existing mining operation: "ECL 23-2703 (3) provides that, in the event that an application for a permit is received from an applicant whose mine falls within an area described in the statute, the agency may not process the application if the local zoning laws prohibit same. ECL 23-2703 (3) is not vague or ambiguous; it is concise and clear. Contrary to all other permit applications received by DEC, an application received from an area protected under ECL 23-2703 (3) must be put on hold until the status of the local laws is determined ... . There is no qualification on what type of permit applications must be put on hold; rather, by its certain language, the statute applies to all applications. ... . ECL 23-2703 (3) clearly recognizes that the local laws of the municipality are determinative as to whether an application can be processed. Here, where it is unchallenged that the Town's laws prohibit zoning [SIC mining?], DEC cannot process the application, let alone issue the permit. It cannot do by fiat what is prohibited under the law. Therefore, the act of issuing the permits here, in contravention of ECL 23-2703 (3), was arbitrary and capricious." ***Matter of Town of Southampton v. New York State Dept. of Envtl. Conservation*, 2021 N.Y. Slip Op. 03351, Third Dept 5-27-21**

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