August 13, 2021

CasePrepPlus

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FIRST DEPARTMENT

CRIMINAL LAW, EVIDENCE.

DEFENSE COUNSEL TOLD THE COURT DURING THE PRE-TRIAL SUPPRESSION HEARING THAT DEFENDANT WAS NOT CONTESTING HIS CONSENT TO THE INTOXILYZER BREATH TEST; SUPREME COURT PROPERLY DENIED DEFENDANT'S ATTEMPT TO RAISE THAT SAME SUPPRESSION ISSUE DURING TRIAL; THE DISSENT DISAGREED.

The First Department, over a dissent, determined defendant's attempt, during trial, to suppress the results of the Intoxilyzer breath test was properly denied. Defense counsel had told the court, during the pretrial suppression hearing. defendant did not wish to contest the validity of his consent to the breath test and, consequently, the prosecutor did not introduce a video of the procedure: "A defendant may move to suppress the results of a chemical test administered pursuant to Vehicle and Traffic Law § 1194(3) (see CPL 710.20[5]) by filing a motion 'within forty-five days after arraignment and before commencement of trial, or within such additional time as the court may fix upon application' (see CPL 255.20[1]). CPL 255.20(3) prescribes that for pretrial motions filed outside the 45-day limitation, the court 'must entertain and decide on its merits, at any[]time before the end of the trial, any appropriate pre-trial motion based upon grounds of which the defendant could not, with due diligence, have been previously aware, or which, for other good cause, could not reasonably have been raised within the period specified.' The section also provides that any other motion not filed within the specified time 'may be summarily denied.' The record indicates that when counsel made the omnibus motion, dated September 12, 2017, defendant was well aware of the facts underlying the administration of the Intoxilyzer breath test and, for reasons that are not apparent, chose not to file a motion on that ground." ***People v. Marte*, 2021 N.Y. Slip Op. 04648, First Dept 8-5-21**

LANDLORD-TENANT, MUNICIPAL LAW, REAL PROPERTY TAX LAW.

SUPREME COURT PROPERLY REJECTED THE LANDLORD'S CALCULATION OF RENT OVERCHARGES FOR RENT-REGULATED APARTMENTS REMOVED FROM RENT STABILIZATION WHILE THE BUILDING WAS RECEIVING J-51 TAX BENEFITS.

The First Department, over a dissent, determined Supreme Court properly refused to consider defendant landlord's (Whitehouse's) calculation of rent overcharges and ordered calculation by a referee. The landlord had removed rent-regulated apartments from rent stabilization while the building received J-51 tax benefits: "We find that the motion court correctly determined that plaintiffs' legal regulated rent should be calculated according to the default formula set forth in RSC (9 NYCRR) § 2522.6(b). Although defendants may have been following the law in deregulating apartments during the period before Roberts [13 NY3d 270] was decided (see Regina, 35 NY3d at 356), their 2012 retroactive registration of the improperly deregulated apartments was an attempt to avoid the court's adjudication of the issues and to impose their own rent calculations rather than face a determination of the legal regulated rent within the lookback period." ***Casey v. Whitehouse Estates, Inc.*, 2021 N.Y. Slip Op. 04646, First Dept 8-5-21**

SECOND DEPARTMENT

CIVIL PROCEDURE, FORECLOSURE.

PLAINTIFF DID NOT SHOW DUE DILIGENCE IN ASCERTAINING THE NAME OF THE PARTY REFERRED TO AS "JOHN DOE" IN THE COMPLAINT RENDERING THE ACTION TIME-BARRED; ALTHOUGH THE COURT PROPERLY DEEMED PROOF OF SERVICE OF THE COMPLAINT AGAINST THE NAMED PARTY TIMELY FILED NUNC PRO TUNC, THE DEFAULT JUDGMENT AGAINST THE NAMED PARTY SHOULD NOT HAVE BEEN GRANTED RETROACTIVELY ONCE THE DEFECT WAS CURED.

The Second Department, reversing (modifying) Supreme Court in this foreclosure action, determined plaintiff should not have been allowed to substitute the party's name (here Esther Shasho) for the "John Doe" named in the complaint because the plaintiff did not demonstrate it exercised due diligence to timely ascertain Esther's identity. Therefore the complaint as against Esther was time-barred. As for the complaint against Elliot Shasho, who was named in the complaint, the proof of service was never filed. Although the filing failure is not a jurisdictional defect and therefore did not preclude ruling the

proof of service timely filed nunc pro tunc, the default judgment against Elliot should not have been granted retroactively when the defect was cured. Elliot was given the opportunity to answer the complaint: "Supreme Court should not have granted that branch of the plaintiff's motion which was for leave to amend the caption to substitute Esther for the defendant "John Doe." The court erred in applying the 'John Doe' designation authorized by CPLR 1024 and the relation-back doctrine of CPLR 203(c) to bar application of the statute of limitations, because the plaintiff failed to establish that it 'made diligent efforts to ascertain the unknown party's identity prior to the expiration of the statute of limitations' ... . The failure to file proof of service is a procedural irregularity, not a jurisdictional defect, that may be cured by motion, or sua sponte by the court in its discretion pursuant to CPLR 2004 ... . Supreme Court properly granted that branch of the plaintiff's motion which was to deem proof of service to have been timely filed nunc pro tunc. In granting this relief, however, the court must do so upon such terms as may be just, and only where a substantial right of a party is not prejudiced (see CPLR 2001 ...). The court may not make such relief retroactive, to the prejudice of a defendant, by placing the defendant in default as of a date prior to the order ... . Accordingly, the court should have granted that branch of the Shashos' cross motion which was for leave to serve and file an answer, and denied that branch of the plaintiff's motion which was for leave to enter a default judgment against Elliot (see CPLR 320[a])." ***Wilmington Trust, N.A. v. Shasho*, 2021 N.Y. Slip Op. 04632, Second Dept 8-4-21**

CIVIL PROCEDURE, JUDGES.

THE MOTION TO RESETTLE REQUESTED A SUBSTANTIVE CHANGE IN THE PARTIES' RIGHTS WHICH CANNOT BE ADDRESSED BY RESETTLING AN ORDER; A MOTION TO RESETTLE IS MEANT TO ADDRESS CLERICAL ERRORS.

The Second Department, reversing Supreme Court, determined plaintiff's motion to resettle the court's order requested a substantive change in the parties' rights which cannot be addressed by resettling an order: "... [T]he court ... granted that branch of the plaintiff's motion which was to resettle the order ... and thereupon deleted the provision directing that the defendant shall receive $284,069.66 of the proceeds from the sale of the subject property before the remainder is split equally between the plaintiff and the defendant. * * * 'Resettlement is generally intended to remedy clerical errors or clear mistakes in an order or judgment when there is no dispute about the substance of what that order or judgment should contain' ... . 'It may be used where the order improperly reflects the decision or fails to include necessary recitals, but [it] cannot be used to obtain a ruling not adjudicated on the original motion or to modify the decision which has been made' ... . The court's determination ... to reform the parties' open court stipulation upon its finding that the parties did not intend to agree to the monetary award effectuated a substantive change in the parties' rights, rather than the correction of a clerical error." ***Renaud v. Renaud*, 2021 N.Y. Slip Op. 04624, Second Dept 8-4-21**

CIVIL PROCEDURE, JUDGES, FORECLOSURE.

COURTS HAVE THE DISCRETION TO GRANT A MOTION TO RENEW EVEN IF BASED ON INFORMATION KNOWN AT THE TIME OF THE ORIGINAL MOTION; HERE THE MOTION TO RENEW ADDRESSED AN OMISSION IN THE ORIGINAL MOTION PAPERS WHICH THE JUDGE HAD RAISED SUA SPONTE AS THE GROUND FOR DENYING THE MOTION.

The Second Department, reversing Supreme Court, determined plaintiff's motion to renew in this foreclosure action should have been granted. The judge denied plaintiff's motion for summary judgment on a ground not raised by the parties—plaintiff's failure to submit a power of attorney authorizing a party to act as a loan servicer. The motion to renew addressed that omission, which had been raised by the judge sua sponte: " 'Generally, 'a motion for leave to renew is intended to bring to the court's attention new or additional facts which were in existence at the time the original motion was made, but were unknown to the movant' ... . 'However, the requirement that a motion for leave to renew be based upon new or additional facts unknown to the movant at the time of the original motion is a flexible one and the court, in its discretion, may also grant renewal, in the interest of justice, upon facts which were known to the movant at the time the original motion was made'... . Under the circumstances presented, the Supreme Court improvidently exercised its discretion in denying the plaintiff's motion for leave to renew based upon the submission of the limited power of attorney, since the plaintiff's initial failure to submit the power of attorney was raised sua sponte by the court ...". ***NP162, LLC v. Harding*, 2021 N.Y. Slip Op. 04612, Second Dept 8-4-21**

CRIMINAL LAW, APPEALS, CIVIL PROCEDURE.

THE DENIAL OF A MOTION TO SEAL A CRIMINAL CONVICTION IS CIVIL IN NATURE AND IS THEREFORE APPEALABLE, NOT WITHSTANDING THE ABSENCE OF A CRIMINAL-PROCEDURE STATUTE EXPRESSLY AUTHORIZING APPEAL.

The Second Department, in a full-fledged opinion by Justice Brathwaite Nelson, determined the denial of a motion to seal a criminal conviction pursuant to Criminal Procedure Law § 160.59 is appealable. Appeals in criminal matters must be authorized by statute. The court deemed the motion to seal to be civil in nature and therefore not subject to the strict restrictions on criminal appeals: "Where, as here, the court issuing the order being appealed from possesses both civil and criminal jurisdiction, appellate courts look to 'the true nature of the proceeding and to the relief sought in order to determine whether

the proceeding was criminal or civil' … . Where the relief sought is 'quintessentially, of a criminal nature' … . or an integral part of an ongoing criminal investigation, the proceeding falls within the court's criminal jurisdiction and an appeal may not be taken from an order issued therein in the absence of express statutory authority ... . * * * By contrast, even when an order is issued pursuant to a criminal investigation or relates to a collateral aspect of a criminal proceeding, if the nature of the relief sought is civil in nature and the order can be said to be final and does not affect the criminal judgment itself, courts have found the matter to be civil and appeals from such orders are not constrained by the rule controlling appeals from orders in criminal proceedings ...". ***People v. Coulibaly*, 2021 N.Y. Slip Op. 04616, Second Dept 8-4-21**

CRIMINAL LAW, ATTORNEYS.

DEFENDANT DID NOT DEMONSTRATE HE DID NOT ENTER HIS GUILTY PLEA VOLUNTARILY, KNOWINGLY AND INTELLIGENTLY; HIS MOTION TO WITHDRAW HIS PLEA WAS PROPERLY DENIED; STRONG DISSENT ARGUED DEFENDANT DEMONSTRATED AN INADEQUATE OPPORTUNITY TO CONSULT WITH DEFENSE COUNSEL.

The Second Department, over an extensive dissent, determined defendant entered his guilty plea voluntarily, knowingly and intelligently. Therefore, defendant's motion to withdraw his plea was properly denied. The dissent argued defendant demonstrated he did not have an adequate opportunity to consult with defense counsel: "The defendant ... contended in his motion that he had inadequate opportunity to speak with his counsel regarding the case and any defenses. However, ... when the plea court endeavored to inquire further as to an equivocal statement by the defendant that he was able to discuss 'some' of the facts of the case with his counsel, the defendant terminated that inquiry, and confirmed that he had sufficient time to speak with his attorney. The defendant also does not dispute the People's assertion that, while the defendant was out on bail, he and defense counsel met with the prosecutor to view surveillance video allegedly depicting the explosives and reckless endangerment crimes. * * * ... [T]he record here demonstrates that the defendant was feeling pressure to decide whether to plead guilty and be remanded or face greater charges if the People presented the matter to the grand jury. Indeed, the defendant's precise words were: 'I am forced to plead because they don't—they will put me in the Grand Jury.' However, as this Court has observed: 'When offered benefits for pleading guilty and confronted with the risk of more severe punishment if a plea offer is refused, a defendant will certainly feel pressure to plead guilty. But such pressure does not render a guilty plea involuntary because 'the imposition of these difficult choices [is] an inevitable—and permissible—attribute of any legitimate system which tolerates and encourages the negotiation of pleas' ...". ***People v. Hollman*, 2021 N.Y. Slip Op. 04617, Second Dept 8-4-21**

CRIMINAL LAW, EVIDENCE.

ALTHOUGH THE WARRANTLESS SEARCH OF THE INTERIOR OF THE CAR FOR MARIJUANA WAS JUSTIFIED, THE FORGED CREDIT CARDS SHOULD NOT HAVE BEEN EXAMINED AND SEIZED; THERE WAS NOTHING ABOUT THE CARDS WHICH INDICATED THEY WERE CONTRABAND UNDER THE "PLAIN VIEW" DOCTRINE; THE COMPREHENSIVE DISCUSSION OF THE CRITERIA FOR WARRANTLESS SEARCHES UNDER THE NYS CONSTITUTION IS WORTH CONSULTING.

The Second Department, reversing Supreme Court, in a comprehensive decision addressing the criteria for warrantless searches under the NYS Constitution, determined the credit cards seized in a legitimate warrantless automobile search for marijuana should have been suppressed. Although it turned out the credit cards were forged, there was nothing about their appearance which justified ascertaining the names on the cards under the "plain view" doctrine: "The record here established that Officer Zaleski had probable cause to search the center console of the vehicle—and the small zippered wallet that was contained within it—for the presence of marihuana ... . * * * Although Officer Zaleski lawfully encountered the three credit cards when he opened the zippered wallet to see whether there was marihuana inside it, the facts available to Officer Zaleski at the time he opened the zippered wallet would not 'warrant a [person] of reasonable caution in the belief that [the credit cards] may be contraband' ... . Indeed, at the time Officer Zaleski opened the zippered wallet, there was no evidence connecting the defendant to any burglary, or any other reason to believe that]the three credit cards in the zippered wallet were stolen, forged, or otherwise illicit ... . * * * On this record, Officer Zaleski's discovery of three credit cards stacked inside a small zippered wallet was insufficient, without more, to justify an additional search that went beyond the search for marihuana." ***People v. Mosquito*, 2021 N.Y. Slip Op. 04620, Second Dept 8-4-21**

FAMILY LAW.

IN NEW YORK A MARRIAGE WHICH HAS BEEN SOLEMNIZED IS VALID IN THE ABSENCE OF A MARRIAGE LICENSE.

The Second Department noted that a marriage which has been solemnized is valid in the absence of a marriage license: "There is a strong presumption favoring the validity of marriages ... . While the Domestic Relations Law deems it necessary for all persons intending to be married to obtain a marriage license ... , a marriage is not void for the failure to obtain a marriage license if the marriage is solemnized ... . A marriage is solemnized where the parties 'solemnly declare in the presence of a clergyman or magistrate and the attending witness or witnesses that they take each other as husband and wife'... . Thus, under New York law, the marriage between parties will be valid, even without a marriage license, in instances where it is

solemnized ... . Pursuant to Domestic Relations Law § 12, '[n]o particular form or ceremony is required when a marriage is solemnized as herein provided by a clergyman or magistrate, but the parties must solemnly declare in the presence of a clergyman or magistrate and the attending witness or witnesses that they take each other as husband and wife. In every case, at least one witness beside the clergyman or magistrate must be present at the ceremony.' ...". ***Yusupov v. Baraev*, 2021 N.Y. Slip Op. 04634, Second Dept 8-4-21**

FAMILY LAW, CONTRACT LAW.

THE APPLICABILITY OF THE CHILD SUPPORT STANDARDS ACT (CSSA) WAS NOT ADEQUATELY WAIVED IN THE STIPULATION OF SETTLEMENT; THE CHILD SUPPORT PROVISIONS OF THE STIPULATION SHOULD HAVE BEEN VACATED.

The Second Department, reversing Supreme Court, determined the child support provisions of the stipulation of settlement should have been vacated because the applicability of Child Support Standards Act (CSSA) was not waived: "Parties to a separation agreement are free to 'opt out' of the provisions of the Child Support Standards Act (Domestic Relations Law § 240[1-b] [hereinafter the CSSA]) 'so long as their decision is made knowingly'... . To ensure that waivers of the statutory provisions of the CSSA are truly knowingly made, Domestic Relations Law § 240(1-b)(h) requires that stipulations of settlement include provisions: '(1) stating that the parties have been advised of the provisions of the CSSA; (2) stating that the basic child support provisions of the CSSA would presumptively result in the determination of the correct amount of child support to be awarded; (3) stating what the amount of basic child support would have been if calculated pursuant to the CSSA, if the parties' stipulation or agreement deviates from the basic child support obligation; and (4) setting forth the parties' reason or reasons for deviating from the CSSA calculation, if they have chosen to deviate' ... . 'The policy reasons underlying the requirement that waivers must be knowingly made are so strong that agreements that do not comply with the strictures of the CSSA are invalid and unenforceable, at least to the extent of the child support provisions set forth therein' ... . Here, the child support provisions in the parties' stipulation of settlement did not include any of the foregoing recitals, including a calculation of basic child support pursuant to the CSSA." ***Haik v. Haik*, 2021 N.Y. Slip Op. 04599, Second Dept 8-4-21**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

ALTHOUGH THE HOMEOWNER HIRED CONTRACTORS TO REPAIR HER HOME AND VISITED THE PROPERTY AS THE WORK WAS BEING DONE, SHE DID NOT DIRECT OR SUPERVISE THE WORK AND THEREFORE WAS ENTITLED TO SUMMARY JUDGMENT DISMISSING THE LABOR LAW §§ 240(1), 241(6) AND 200 CAUSES OF ACTION.

The Second Department determined defendant homeowner's (Hanson's) motion for summary judgment in this Labor Law §§ 240(1), 241(6) and 200 action was properly granted, in part because the homeowner's exemption from Labor Law liability applied. The facts that the homeowner hired several contractors to repair her home and visited the property while work was being done did not subject her to liability: "Hannon established ... that she was the owner of a single-family home and that she did not direct or control the work performed by the plaintiff or his employer... . While Hannon testified at her deposition that she visited the property several times per week to '[p]ick up the mail, check on progress, say hello,' her deposition testimony, along with that of the plaintiff, established that she never directed the work ... .[T]he fact that Hannon hired separate contractors to perform different aspects of the work on her property does not render her 'a general contractor, responsible for supervising the entire construction project and enforcing safety standards' ... . Supreme Court properly granted that branch of Hannon's motion which was for summary judgment dismissing the Labor Law § 200 and common-law negligence causes of action insofar as asserted against her. Hannon established, prima facie, that she did not have the authority to supervise or control the method or manner in which the plaintiff's work was performed ...". ***Navarra v. Hannon*, 2021 N.Y. Slip Op. 04611, Second Dept 8-4-21**

MEDICAL MALPRACTICE, NEGLIGENCE, EVIDENCE.

PLAINTIFF'S EXPERT'S AFFIDAVIT IN THIS MEDICAL MALPRACTICE ACTION WAS NOT CONCLUSORY OR SPECULATIVE; THE AFFIDAVIT DEMONSTRATED THE EXPERT WAS QUALIFIED TO RENDER AN OPINION ON PROPER WOUND CARE; DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined plaintiff's expert's affidavit should not have been rejected on the ground the expert was not qualified to give an opinion on proper wound care, or on the ground the affidavit was conclusory: "... [T]he plaintiff raised a triable issue of fact through the expert affirmation of Craig A. Nachbauer, a thoracic surgeon and Medical Director of the University of Vermont Health Network-CVPH Wound Center, who opined within a reasonable degree of medical certainty that the respondents departed from the accepted standard of care and that such departure resulted in decubitus ulcers and the disfigurement of the plaintiff's knees ... . [T]he plaintiff's expert raised a triable issue of fact as to whether the respondents failed to take appropriate measures to prevent the decubitus ulcers ... ,

including allowing him to remain prone without turning or repositioning him for over 90 hours, without the use of pillows, foam, and gel pads to protect his hips or knees ... . [T]he plaintiff's expert established that his qualifications were sufficient to render an opinion as to the propriety of the wound care provided to the plaintiff in 2008 ... . [T]he plaintiff's expert averred ... that he had practiced surgery and wound care for approximately 30 years and that by virtue of his training and experience, he was fully familiar with the standards of accepted practice in the field of wound care, and with the responsibilities of hospital staff and physicians in the prevention and treatment of pressure/decubitus ulcers, as they existed in 2008." ***Cerrone v. North Shore-Long Is. Jewish Health Sys., Inc.*, 2021 N.Y. Slip Op. 04593, Second Dept 8-4-21**

MUNICIPAL LAW, NEGLIGENCE, CONTRACT LAW.

THE CITY ORDERED PLAINTIFF TO REPAIR A WATER LEAK ON PLAINTIFF'S PROPERTY WHICH THE CITY CLAIMED CAUSED A SINK HOLE IN THE ABUTTING ROAD; PLAINTIFF PAID FOR EXCAVATING THE AREA AND FIXING THE ROAD; PLAINTIFF SUED THE CITY ALLEGING NO LEAK WAS FOUND AND THE CITY NEGLIGENTLY ORDERED HER TO REPAIR THE ROAD; THE NEGLIGENCE CAUSE OF ACTION WAS PROPERLY DISMISSED (NO SPECIAL RELATIONSHIP WITH PLAINTIFF), BUT THE UNJUST ENRICHMENT CAUSE OF ACTION BASED ON PLAINTIFF'S PAYING FOR THE REPAIR OF THE PUBLIC ROAD SHOULD NOT HAVE BEEN DISMISSED.

The Second Department, reversing (modifying) Supreme Court, determined the negligence cause of action against the city was properly dismissed, but the unjust enrichment cause of action should not have been dismissed. A sink hole developed in front of plaintiff's proper. The city concluded there was a leak in the water connection to plaintiff's property and issued a violation requiring repair. Plaintiff had the area excavated and repaired the sink hole but allegedly discovered no leak. Plaintiff sued the city for the related expenses. The negligence cause of action did not fly because the city was exercising a governmental function and there was no special relationship between the city and plaintiff. However the unjust enrichment cause of action should not have been dismissed: " 'An unjust enrichment claim is rooted in the equitable principle that a person shall not be allowed to enrich himself unjustly at the expense of another' ... . 'To adequately plead such a cause of action, a plaintiff must allege that '(1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered' ... . [W]e find [the complaint] sufficiently alleged that the City was unjustly enriched, at the plaintiff's expense, by the plaintiff's excavation and repair of the public road where the sinkhole was located, and that it would be against equity and good conscience to permit the City to retain what is sought to be recovered—i.e., the repaired road—without paying for those repairs ... . The City had a duty to keep its public road in a reasonably safe condition ... , and it could be unjustly enriched by being spared the expense of repairing the sinkhole in the road ... . Moreover, the complaint alleges that the plaintiff only incurred fees in repairing the road because the City's agent negligently informed her that she had to excavate the road to fix an alleged leak. This alleged benefit conferred on the City through its allegedly tortious conduct sufficiently pleads that it is against equity and good conscience to permit the defendant to retain the benefit ...". ***Trenholm-Owens v. City of Yonkers*, 2021 N.Y. Slip Op. 04627, Second Dept 8-4-21**

PERSONAL INJURY, EMPLOYMENT LAW, EDUCATION-SCHOOL LAW.

THE FACT THAT A CONTRACT DESCRIBES A PARTY AS AN INDEPENDENT CONTRACTOR IS NOT NECESSARILY DISPOSITIVE; DESPITE THE WORDING OF THE CONTRACT, THE COMPLAINT HERE STATED A CAUSE OF ACTION BASED UPON AN EMPLOYER-EMPLOYEE RELATIONSHIP.

The Second Department determined the complaint stated a cause of action against the school district as the employer of a therapist, Silecchia, who allegedly injured plaintiff-student in therapy session. Although the contract between the school district and Silecchia's employer, PBS, stated PBS was responsible for the conduct of PBS's employees, evidence suggested some control over PBS by the district: "Although the agreement provided that all employees of the service provider, which was defined as PBS, shall be deemed as employees of the service provider for all purposes and that the service provider alone would be responsible for their work, personal conduct, direction, and compensation, '[t]he fact that a contract exists designating a person as an independent contractor is to be considered, but is not dispositive' ... . Other provisions in the agreement, including the scope of services provision, which provided, ... that parent training services shall be in coordination with the students' classroom teachers and/or at the direction of the District's Committee on Special Education, provided some indication that the District may have maintained control over the method and means by which PBS, and therefore, Silecchia, were to perform the work ...". ***D. S. v. Positive Behavior Support Consulting & Psychological Resources, P.C.*, 2021 N.Y. Slip Op. 04626, Second Dept 8-4-21**

THIRD DEPARTMENT

ADMINISTRATIVE LAW.

PETITIONER WAITED EIGHT MONTHS WITHOUT RECEIVING A DECISION ON THE ADMINISTRATIVE APPEAL OF THE DENIAL OF HIS GRIEVANCE BEFORE FILING AN ARTICLE 78 CONTESTING THE DENIAL; PETITIONER WAS ENTITLED TO THE "FUTILITY EXCEPTION" TO THE REQUIREMENT THAT HE EXHAUST ALL ADMINISTRATIVE REMEDIES BEFORE TURNING TO THE COURTS.

The Third Department determined petitioner-inmate was entitled to the "futility exception" to the requirement that administrative remedies be exhausted before bringing an Article 78 proceeding to contest the administrative ruling. Petitioner brought a grievance alleging the Department of Corrections and Community Supervision (DOCCS) should not have reduced his pay for work in the mess hall because of his refusal to participate in certain prison programs. After the superintendent denied relief petitioner appealed to the Central Office Review Committee (CORC) but eight months passed without a decision. Then petitioner brought the Article 78: "... [P]etitioner filed his administrative appeal with CORC on December 12, 2018 and commenced this proceeding on August 19, 2019. He waited more than eight months without having received a decision — which is seven months after CORC's 30-day limit had expired — before he commenced this proceeding. To the extent that the regulations are unclear regarding whether CORC's failure to decide an appeal within 30 days constitutes a constructive denial, a grievant is placed in a catch-22 situation — if he or she files a CPLR article 78 proceeding before receiving a decision from CORC, DOCCS may seek dismissal based on the defense of failure to exhaust administrative remedies, but, if the grievant does not commence a court proceeding within four months after the 30-day decision period, he or she risks the possibility of DOCCS seeking dismissal based on a statute of limitations defense ... . This untenable position, which arises from the confluence of CORC's failure to comply with the regulation's time frame for deciding administrative appeals and the lack of clarity in a different DOCCS regulation, creates substantial prejudice to a grievant such as petitioner ... . Under the circumstances, we find that exhaustion should be excused based on the futility exception." ***Matter of McMillian v. Krygier*, 2021 N.Y. Slip Op. 04638, Third Dept 8-5-21**

CRIMINAL LAW, EVIDENCE.

THE WARRANTLESS SEARCHES OF CLOSED CONTAINERS WERE NOT JUSTIFIED BY THE ITEMS BEING IN DEFENDANT'S "GRABBABLE" AREA OR BY "EXIGENT CIRCUMSTANCES;" CONVICTION REVERSED.

The Third Department, reversing defendant's conviction, over a concurrence, determined the skimmer (a forgery device) was the product of an illegal warrantless search and should have been suppressed: " 'To justify a warrantless search of a closed container incident to arrest, the People must satisfy two requirements: The first imposes spatial and temporal limitations to ensure that the search is not significantly divorced in time or place from the arrest' ... . Specific to this 'place' requirement, the item searched must be conducted within the immediate control or grabbable area of the suspect ... . 'The second, and equally important, predicate requires the People to demonstrate the presence of exigent circumstances' ... . [T]he trooper testified that he removed the fanny pack and backpack from the apartment when he left and then placed defendant — who was in handcuffs — in the patrol vehicle. Thereafter, the trooper made a cursory search of the fanny pack and backpack on the hood of the vehicle. At the time of the search, defendant was incapable of grabbing the items as he was handcuffed and inside the trooper's vehicle. The fanny pack and backpack were in the exclusive control of the trooper and defendant could not possibly gain possession of them or destroy any evidence in them ... . [T]he record reflects that defendant's demeanor and actions were not threatening, he had been pat-frisked earlier in the apartment, he was cooperative and offered no resistance when he was handcuffed and ... the circumstances of defendant's arrest did not give rise to a reasonable belief that the fanny pack or backpack contained a weapon or dangerous instrument. ... [T]he trooper's testimony at the suppression hearing did not demonstrate exigent circumstances." ***People v. Crosse*, 2021 N.Y. Slip Op. 04636, Third Dept 8-5-21**

FAMILY LAW, EVIDENCE.

FAMILY COURT RELIED ON HEARSAY (WHAT MOTHER TOLD THE CASEWORKER) IN THIS NEGLECT PROCEEDING AGAINST FATHER, NEGLECT FINDINGS REVERSED.

The Third Department, reversing Family Court, determined the court improperly relied upon hearsay to make neglect findings and the evidence was otherwise insufficient. Mother's neglect petitions were disposed of after she admitted neglect. The instant proceeding concerned the neglect petitions against father (the respondent) to which mother was not a party. The caseworker testified about what mother had told her: "... [P]etitioner's caseworker testified as to what the mother had told her based upon their conversations. In this regard, the caseworker stated that the mother told her that, while the middle and youngest children were with her, she had been drinking heavily, that the mother believed that she may have assaulted one of the children and that, after respondent took the children for a while, he came back to her with some vodka, which she drank. As respondent and the attorney for the children correctly argue, Family Court improperly relied on this hearsay

testimony — i.e., what the mother told the caseworker — in reaching its determination ... , and the error in doing so was not harmless ... " ***Matter of Aiden J. (Armando K.)*, 2021 N.Y. Slip Op. 04637, Third Dept 8-5-21**

FREEDOM OF INFORMATION LAW (FOIL).

RESPONDENT DID NOT CONSTRUCTIVELY DENY PETITIONER'S FOIL REQUEST BY EXTENDING ITS SELF-IMPOSED DEADLINES FOR RESPONDING TO THE REQUEST.

The Third Department, reversing Supreme Court, over a dissent, determined respondent NYS Department of Transportation did not constructively deny petitioner's FOIL request by extending the time for a response. Therefore petitioner's Article 78 proceeding was premature and was rendered moot by petitioner's ultimate response to the request: "Generally, an agency must respond to a written request for records within a reasonable time and 'there is no specific time period in which the agency must grant access to the records' ... . The response protocol for an agency to follow is set forth in Public Officers Law § 89 (3) (a). An agency must respond within five business days and has various options — to either provide the records, deny the request or, as pertinent here, to 'furnish a written acknowledgement of the receipt of such request and a statement of the approximate date, which shall be reasonable under the circumstances of the request, when such request will be granted or denied' ... . Respondent exercised that third option through the extension notices." ***Matter of Save Monroe Ave., Inc. v. New York State Dept. of Transp.*, 2021 N.Y. Slip Op. 04639, Third Dept 8-4-21**

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