CasePrepPlus

December 10, 2021

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

Editor: **Bruce Freeman**

NEW YORK STATE BAR ASSOCIATION
Serving the legal profession and the community since 1876

FIRST DEPARTMENT

ARBITRATION, LIEN LAW, CIVIL PROCEDURE.

THE MOTION TO DISMISS THE ARBITRATION IN THIS ACTION ALLEGING NONPAYMENT FOR CONSTRUCTION WORK SHOULD NOT HAVE BEEN GRANTED; THE ARBITRATOR RULES ON PAYMENT FOR LABOR AND MATERIALS; COURTS RULE ON THE VALIDITY OF MECHANIC'S LIENS.

The First Department noted that an arbitrator's ruling on the value of labor and materials is conclusive for all parties, but it is not conclusive on the validity of the underlying mechanic's lien itself. Here the contactor, Flowcon, filed mechanic's lens alleging defendant, Andiva, failed to pay for construction work on Andiva's townhouse. The construction contract required arbitration and granted the arbitrator broad powers. Supreme Court granted Andiva's motion to dismiss the arbitration and the First Department reversed, compelled arbitration and stayed the Lien Law counterclaims: "The AAA's Construction Industry Arbitration Rules provide that the arbitration tribunal shall rule on its own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement. Thus, the threshold issue of the arbitrability of Flowcon's claims alleging nonpayment is one for the arbitrator, not the courts, particularly given the parties' broad arbitration clause ... . To the extent Andiva argues that arbitration would usurp the court's 'gatekeeper' role of ruling upon the validity of a lien and undermine the public policy underlying the remedies afforded a lienee under Lien Law §§ 39 and 39-a since its allegation of lien exaggeration would be effectively resolved by an arbitrator rather than a court, the argument is unavailing. This Court has held that an arbitrator's decision as to the value of labor and materials is conclusive as to all parties to the arbitration but not conclusive as to the validity of the mechanic's lien itself ...". ***Flowcon, Inc. v. Andiva LLC*, 2021 N.Y. Slip Op. 06756, First Dept 12-2-21**

CIVIL PROCEDURE.

DEFENDANT'S MOTION TO COMPEL PLAINTIFF, WHO SUED UNDER THE NAME MARGARET DOE, TO AMEND THE CAPTION TO INCLUDE HER LEGAL NAME SHOULD NOT HAVE BEEN GRANTED; PLAINTIFF PRESENTED EVIDENCE SUING UNDER HER OWN NAME WOULD HAVE SEVERE MENTAL-HEALTH CONSEQUENCES.

The First Department, reversing Supreme Court, determined defendant's motion to compel plaintiff to amend the pleadings to include her legal name (the caption reads "Margaret Doe") should not have been granted: "The presumption in favor of open trials and the potential prejudice to defendant did not outweigh plaintiff's privacy interest ... . In addition to her own affidavit attesting to the psychological harm it would cause to disclose her name publicly, plaintiff submitted affidavits from her treating psychologist and psychiatrist, both of whom opined that forcing plaintiff to proceed with the litigation under her legal name would have severe consequences for her mental health. This particularized medical evidence corroborating plaintiff's claims of personal harm is compelling ...". ***Doe v. Bloomberg L.P.*, 2021 N.Y. Slip Op. 06754, First Dept 12-2-21**

CIVIL PROCEDURE, CONTRACT LAW, INSURANCE LAW.

THE INSURED, SPACE NEEDLE, LLC, IS LOCATED IN WASHINGTON STATE; ALTHOUGH THE INSURANCE POLICY NAMED NEW YORK AS THE FORUM AND REQUIRED THE APPLICATION OF NEW YORK LAW FOR ANY LAWSUITS, THE WASHINGTON INSURANCE CODE RENDERED SUCH PROVISIONS VOID; THEREFORE THE INSURER WAS NOT ENTITLED TO AN ANTI-SUIT PRELIMINARY INJUNCTION IN NEW YORK.

The First Department determined plaintiff Elite Insurance Company did not demonstrate a likelihood of success or a balancing of the equities in its favor in its attempt to have a preliminary injunction issued in New York to prevent a suit by the insured, Space Needle of Seattle, Washington, after the COVID-related business-loss claim was denied: Although the insurance contract indicated New York would be the forum and New York law would apply, the Washington Insurance Code rendered such provisions void. The decision includes extensive discussions of the leading cases in these areas: "[P]laintiff did not demonstrate either a likelihood of success on the merits of its claim for an anti-suit injunction based on the contractual choice-of-law and forum selection clauses of the parties' insurance contract, or a balancing of the equities in its favor. As an insurance company authorized to sell insurance in Washington, plaintiff was required to comply with the Washington Insurance Code's prohibition against choice-of-law and forum selection clauses in insurance policies sold in Washington (Wash Rev Code Chapter 48). The Code (RCW) expressly provides that no insurance contract delivered or is-

sued for delivery in this state (Washington) . . . 'shall contain any condition, stipulation or agreement (a) requiring it to be construed according to the laws of any other state or country. . .; or (b) depriving the courts of this state of the jurisdiction of action against the insurer . . .' (RCW 48.18.200 [1]). RCW further specifies that any such agreement violating this prohibition 'shall be void, but such voiding shall not affect the validity of the other provisions of the contract' (RCW 48.18.200 [2]). Thus, plaintiff has not demonstrated that the equities tip in its favor where it is attempting, as Supreme Court stated, 'a blatant end run around' Washington's prohibition against choice-of-law and forum selection clauses." ***North Am. Elite Ins. Co. v. Space Needle, LLC*, 2021 N.Y. Slip Op. 06769, First Dept 12-2-21**

CRIMINAL LAW.

THE WAIVER OF INDICTMENT AND SUPERIOR COURT INFORMATION WERE JURISDICTIONALLY DEFECTIVE.

The First Department, reversing defendant's conviction by guilty plea and dismissing the superior court information (SCI), determined the waiver of indictment and SCI were jurisdictionally defective: "[D]efendant's waiver of indictment and subsequent SCI were jurisdictionally defective, because the charged crime of attempted robbery in the third degree in the SCI was not named in the misdemeanor complaint and was a greater offense than those charged therein (see CPL 195.20 ...). The waiver of indictment was also jurisdictionally infirm because defendant, who was arraigned on a misdemeanor complaint, was not held for grand jury action (see CPL 195.10[1]...)." ***People v. Maglione*, 2021 N.Y. Slip Op. 06775, First Dept 12-2-21**

CRIMINAL LAW.

JURORS WHO ENGAGED IN PREMATURE DELIBERATIONS SHOULD NOT HAVE BEEN DISCHARGED AS "GROSSLY UNQUALIFIED" ABSENT A FINDING THEY COULD NOT RENDER AN IMPARTIAL VERDICT.

The First Department, reversing defendant's conviction and ordering a new trial, determined two jurors, who engaged in premature deliberations by discussing the case on the subway, should not have been discharged, over a defense objection, as "grossly unqualified:" "The record does not support the court's discharge of a juror and an alternate, over defense objection, as 'grossly unqualified.' The record establishes that the two jurors engaged in premature deliberations while on the subway by discussing the demeanor and testimony of witnesses and the age of the case. Initially, the court properly conducted an inquiry of the jurors themselves and confirmed that they had engaged in premature deliberations. However, it should have inquired further and ascertained whether they were unable to render an impartial verdict, rather than discharging them as grossly unqualified based solely on the conclusion that, by prematurely deliberating, they had violated the court's instructions not to discuss the case ... . 'Premature deliberation by a juror, by itself, does not render a juror grossly unqualified' ... . The 'grossly unqualified' standard for removal of a sworn juror is higher than that for a prospective juror, and 'the record must convincingly demonstrate that the sworn juror cannot render an impartial verdict for him or her to be disqualified'... . Nothing express or implied in the jurors' answers suggested that they could not render an impartial verdict in spite of their conversation and decide the case based solely on the evidence before them ...". ***People v. Thompson*, 2021 N.Y. Slip Op. 06778, First Dept 12-2-21**

CRIMINAL LAW.

THE PERSISTENT ABUSE STATUTE ENCOMPASSES THREE DISTINCT TYPES OF SEXUAL CONTACT; THE INDICTMENT DID NOT IDENTIFY THE SPECIFIC GENRE OF SEXUAL CONTACT WITH WHICH DEFENDANT WAS CHARGED; THE INDICTMENT THEREFORE DID NOT PROVIDE FAIR NOTICE OF THE ACCUSATIONS.

The First Department, reversing defendant's conviction and dismissing the indictment, determined the indictment failed to charge a particular crime: "The indictment was jurisdictionally defective because it 'd[id] not effectively charge the defendant with the commission of a particular crime' ... . A person is guilty of persistent sexual abuse ... when the person commits any of three separately codified offenses — forcible touching ... , second-degree sexual abuse ... , or third-degree sexual abuse ... — and the remaining requirements of § 130.53, which are not at issue in this case, are met. The indictment in this case charged defendant with 'PERSISTENT SEXUAL ABUSE, in violation of Penal Law § 130.53.' In its sole factual allegation, it alleged that, in New York County on November 17, 2017, defendant 'subjected an individual known to the Grand Jury to sexual contact.' This abbreviated count failed to specify which of the three discrete qualifying offenses defendant was alleged to have committed. The bare allegation of 'sexual contact' did not fulfill this function because sexual contact is an element of all three qualifying offenses. In failing to identify the qualifying offense, this count failed to satisfy the fundamental purposes of an indictment. It did not 'provide[] the defendant with fair notice of the accusations made against him so that he [would] be able to prepare a defense' and it did not 'provide[] some means of ensuring that the crime for which the defendant [was] brought to trial [was] in fact one for which he was indicted by the Grand Jury ...". ***People v. Hardware*, 2021 N.Y. Slip Op. 06772, First Dept 12-2-21**

CRIMINAL LAW, CONSTITUTIONAL LAW.

COMMENTS ALLEGEDLY MADE BY A JUROR DURING DELIBERATIONS EXPRESSING ETHNIC BIAS REQUIRED A HEARING AND FINDINGS WHETHER DEFENDANT'S CONSTITUTIONAL RIGHTS, BOTH FEDERAL AND STATE, WERE VIOLATED.

The First Department remitted the matter for a hearing on defendant's motion to vacate the judgment, Defendant's motion included an affidavit from the jury foreperson alleged a juror exhibited ethnic bias during deliberations: "The People consent to this matter being remanded for a hearing to determine whether ethnic bias tainted the jury's deliberations as alleged by defendant (see *Peña-Rodriguez v Colorado*, - US -, 137 S Ct 855 [2017]; *People v Leonti* , 262 NY 256 [1933]). Defendant's CPL 440 motion included an affidavit from the jury foreperson, in which he swore that, during deliberations, a juror made ethnic comments concerning defendant and the complainant exhibiting 'overt [ethnic] bias that cast serious doubt on the fairness and impartiality of the jury's deliberations and resulting verdict' (*Peña-Rodriguez* , - US -, 137 S Ct at 869). At the hearing, the court should determine the veracity of these allegations. Should the court find these allegations to be true, it should determine, as a matter of federal law, whether defendant's Sixth Amendment right to jury trial was denied because '[ethnic] animus was a significant motivating factor in the juror's vote to convict' ... . The court should also determine more broadly, as a matter of New York State law, whether the juror's statements 'created a substantial risk of prejudice to the rights of the defendant by coloring the views of the other jurors as well as her own' ...". ***People v. Chodakowski*, 2021 N.Y. Slip Op. 06781, First Dept 12-2-21**

CRIMINAL LAW, EVIDENCE.

POLICE OFFICERS PROPERLY ALLOWED TO IDENTIFY THE PERSON IN A SURVEILLANCE VIDEO AS THE DEFENDANT.

The First Department noted that police officers were properly allowed to identify the person in a videotape as the defendant: "The court providently exercised its discretion in permitting two officers to give lay opinion testimony that defendant was the man depicted in a surveillance videotape of the crime. This testimony 'served to aid the jury in making an independent assessment regarding whether the man in the [video] was indeed the defendant' ... . The quality of the videotape was poor, defendant's appearance had changed, and the officers had spent sufficient time with defendant to be in a better position than the jurors to identify him on the video ... . Any potential prejudice was minimized by the court's limiting instructions that the officers' testimony was merely to aid the jury in its independent assessment of whether the man in the video was defendant ...". ***People v. Lee*, 2021 N.Y. Slip Op. 06774, First Dept 12-2-21**

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA).

EVIDENCE OF OCCASIONAL MARIJUANA USE DID NOT SUPPORT THE ASSESSMENT OF 15 POINTS IN THIS SORA RISK-LEVEL PROCEEDING.

The First Department determined the evidence did not support the SORA risk-level assessment of 15 points for drug and alcohol abuse: "Defendant admitted to occasional marijuana use, and there is no evidence that he had smoked marijuana at the time of the offense. The only evidence of prior drug treatment was as a condition of parole, on a nondrug-related conviction, that was completed in 2005. There is no evidence that defendant's use of marijuana was established as anything more than occasional social use, and accordingly it does not warrant assessment of points under the risk factor for drug abuse." ***People v. Baez*, 2021 N.Y. Slip Op. 06771, First Dept 12-2-21**

ENVIRONMENTAL LAW, MUNICIPAL LAW, LAND USE.

EVEN THOUGH THE RECONSTRUCTION OF THE EAST RIVER PARK WILL BENEFIT THE SURROUNDING COMMUNITY (FLOOD PROTECTION) AS WELL AS THE PARK, THE RECONSTRUCTION SERVES A PARK PURPOSE AND THE APPROVAL OF THE STATE LEGISLATURE IS THERFORE NOT REQUIRED UNDER THE PUBLIC TRUST DOCTRINE.

The First Department, in a full-fledged opinion by Justice Gische, determined the planned reconstruction of the East River Park along the waterfront of the lower east side of Manhattan did not require approval by the state legislature pursuant to the public trust doctrine, even though the project benefitted the park and other community objectives (protection against neighborhood flooding): "Petitioners contend that the principal purpose of the project is construction of a coastal shore floodwall to safeguard the residential developments nearby. They argue that the conclusion of a nonpark purpose is warranted because the work proposed is disproportionate to the work required to preserve the Park. There is no dispute that the project will greatly benefit the nearby communities from the risk of coastal flooding. At its core, however, petitioners' argument is that any project that serves a park purpose cannot serve a dual purpose. Stated differently, that a park purpose is served only if that is the sole objective of a particular project. This is too narrow a reading of the park purpose requirement. A project that benefits a park as well as other community objectives can still be considered to serve a park purpose under the public trust doctrine. * * * ... [E]ven though a coastal flooding protection project will provide communities adjacent to the Park with flood protection, it will also protect the Park from coastal flooding. Once it is determined that there is a park

purpose, the salutary goal of preventing the alienation of parkland is satisfied." ***Matter of East Riv. Park Action v. City of New York*, 2021 N.Y. Slip Op. 06652, First Dept 11-30-21**

EVIDENCE.

THE TRIAL COURT AS FACT-FINDER PROPERLY ADMITTED IN EVIDENCE A PHOTOCOPY OF THE LEASE AT THE HEART OF THE DISPUTE AS AN EXCEPTION TO THE BEST EVIDENCE RULE.

The First Department determined a photocopy of a lease at the heart of the dispute was properly admitted in evidence pursuant to an exception to the best evidence rule: "The best evidence rule 'requires the production of an original writing where its contents are in dispute and sought to be proven' ... . However, under an exception to the rule, 'secondary evidence of the contents of an unproduced original may be admitted upon threshold factual findings by the trial court that the proponent [] has sufficiently explained the unavailability of the [original]' and that the secondary evidence 'is a reliable and accurate portrayal of the original' ... . Once such threshold showings have been made, 'final determination' of the weight to be given to the secondary evidence is 'left to the trier of fact' ... . [T]he reliability of the photocopies turned on the court's credibility determinations, which we find no reason to disturb. Defendants' handwriting expert acknowledged that the images of the parents' signatures on the photocopy of the lease were consistent with their known signatures and he found no evidence that the images of their signatures or the document itself was manipulated. Rather, he merely speculated that such a danger of manipulation always exists." ***Casanas v. Carlei Group, LLC*, 2021 N.Y. Slip Op. 06787, First Dept 12-2-21**

FREEDOM OF INFORMATION LAW, (FOIL), ATTORNEYS.

PETITIONER'S FOIL REQUEST FOR A POLICE MANUAL WAS AT FIRST DENIED, BUT WAS GRANTED AFTER THE ARTICLE 78 PROCEEDING WAS BROUGHT; RESPONDENT DID NOT HAVE A GOOD REASON FOR FIRST DENYING THE REQUEST; PETITIONER "SUBSTANTIALLY PREVAILED" AND WAS ENTITLED TO ATTORNEY'S FEES.

The First Department, reversing (modifying) Supreme Court, determined petitioner in this FOIL proceeding "substantially prevailed" and was therefore entitled to attorney's fees: "Upon petitioner's FOIL request seeking the contents of a medical screening manual used by the New York City Police Department, respondents, relying on Public Officers Law § 87(2)(d) among other sections of the statute, produced only the manual's cover, title page, and table of contents, maintaining that they lacked the necessary permission from the manual's developer to release the rest of the manual. After petitioner commenced this article 78 proceeding, however, respondents produced the rest of the manual in unredacted form, except for the appendices, with their response to the petition. Under these circumstances, petitioner substantially prevailed within the meaning of Public Officers Law § 89(4)(c) ... . [R]espondents have not established that they had a 'reasonable basis' for withholding production under Public Officers Law § 87(2)(d). Respondents concede that they sought permission from the manual's developer to release the information only after receiving the article 78 petition, suggesting that the disclosure was prompted solely by petitioner's resort to litigation and that respondents could have sought permission in response to the FOIL request itself. This fact militates against a finding that the agency had a 'reasonable basis' for withholding production ...". ***Matter of Jaskaran v. City of New York*, 2021 N.Y. Slip Op. 06762, First Dept 12-2-21**

LABOR LAW-CONSTRUCTION LAW, EVIDENCE, PERSONAL INJURY.

PLAINTIFF IN A LABOR LAW §§ 240(1) AND 241(6) ACTION NEED NOT SUBMIT AN AFFIDAVIT TO MAKE OUT A PRIMA FACIE CASE; THE HEARSAY STATEMENTS REFERENCING OR ATTRIBUTED TO PLAINTIFF DID NOT RAISE A QUESTION OF FACT.

The First Department, reversing Supreme Court and granting plaintiffs' summary judgment motion on the Labor Law §§ 240(1) and 241(6) causes of action, determined: (1) plaintiff need not submit an affidavit to make out a prima facie case; and (2) defendant's reliance on hearsay, including statements referenced in the certified medical records, did not raise a question of fact: "Plaintiffs established prima facie that defendant Choice is liable to them under Labor Law § 240(1) and Labor Law § 241(6) predicated on Industrial Code (12 NYCRR) § 23-1.7(b)(1)(i) through plaintiff Bledar Greca's (plaintiff) testimony that he was injured while working on the fifth floor of defendant Choice's property when a piece of wood that had been placed as a temporary path shifted, causing him to fall through an open area between beams. ... Although plaintiff's medical records were certified, Choice [defendant] did not establish that the statements contained in them on which it relied either were germane to plaintiff's diagnosis and treatment or are directly attributable to plaintiff ... . The handwritten statement ostensibly by defendant Cekaj Construction Corp.'s principal and the affidavit by the owner of second third-party defendant Donato Plumbing Group, Inc. as to what Cekaj's principal told him about plaintiff's accident are both inadmissible hearsay, and do not qualify as admissions by an opposing party ...". ***Greca v. Choice Assoc. LLC*, 2021 N.Y. Slip Op. 06759, First Dept 12-2-21**

PERSONAL INJURY.

PLAINTIFF, AN EXPERIENCED SKATER, FELL WHEN HIS SKATE HIT A RUT AS HE WAS COACHING HOCKEY; DESPITE THE APPLICABILITY OF THE ASSUMPTION OF RISK DOCTRINE, PLAINTIFF RAISED A QUESTION OF FACT ABOUT "INHERENT COMPULSION;" HE ALLEGED HE WAS DIRECTED TO CONTINUE THE PRACTICE AFTER COMPLAINING OF THE ROUGH ICE.

The First Department, reversing Supreme Court, determined that evidence of "Inherent compulsion" raised a question of fact, despite the applicability of the assumption of risk doctrine. Plaintiff is an experienced skater who fell while coaching hockey when his skate hit a rut in the ice: "Plaintiff does not dispute that defendants made a prima facie showing that his claims were barred by assumption of the risk ... . However, plaintiff raised an issue of fact as to inherent compulsion. Plaintiff testified that he understood that his supervisors were [defendant's] employees. He further testified that when he informed one of these supervisors of his concerns about the rough ice the supervisor dismissed his concerns and directed him to proceed with the practice. Plaintiff believed that he lacked authority to cancel or reschedule practice on his own initiative ...". ***Stewart v. Wollman Rink Operations LLC*, 2021 N.Y. Slip Op. 06661, First Dept 11-30-21**

PERSONAL INJURY, MUNICIPAL LAW, LANDLORD-TENANT.

THERE WAS A QUESTION OF FACT WHETHER THE FORKLIFT ACCIDENT RESULTED FROM A HOLE OR CRACK IN THE SIDEWALK ADJACENT TO THE OUT-OF-POSSESSION LANDLORD'S BUILDING; EVEN OUT-OF-POSSESSION LANDLORDS ARE RESPONSIBLE FOR MAINTAINING THE ADJACENT SIDEWALK IN A REASONABLY SAFE CONDITION.

The First Department, reversing Supreme Court, determined defendant out-of-possession landlord's motion for summary judgment in this forklift accident case should not have been granted. There was a question of fact whether the forklift struck a hole or a crack in the sidewalk. Under the NYC Administrative Code, an out-of-possession landlord is responsible for maintaining the adjacent sidewalk in a reasonably safe condition: "[T]he Administrative Code requires owners of real property abutting any public sidewalk to maintain that sidewalk in a reasonably safe condition (Administrative Code § 7-210 ...). This duty, on in- and out-of-possession landlords alike, is nondelegable ... . The statute does not impose strict liability, and thus a plaintiff must still prove the elements of negligence in order to hold an owner liable ... . Administrative Code § 19-101(d) defines 'sidewalk' as 'that portion of a street between the curb lines, or the lateral lines of a roadway, and the adjacent property lines' ... . If the area where plaintiff's accident occurred was either inside the premises or at an entrance that was within defendant's property, the Administrative Code does not apply ...". ***Vargas v. Weishaus*, 2021 N.Y. Slip Op. 06663, First Dept 11-30-21**

PERSONAL INJURY, PRODUCTS LIABILITY, UNIFORM COMMERCIAL CODE (UCC).

ALTHOUGH THE ELECTRIC BICYCLE WAS SOLD BY A THIRD-PARTY THROUGH AMAZON AND WAS ASSEMBLED BY AN APPROVED AMAZON PROVIDER, THERE IS NO THEORY UNDER WHICH AMAZON CAN BE HELD LIABLE FOR AN INJURY CAUSED BY IMPROPER ASSEMBLY OF THE BICYCLE.

The First Department, in a full-fledged opinion by Justice Shulman, determined Amazon could not be held liable for an injury caused by an electric bicycle purchased through Amazon which apparently was not assembled properly. Eshion, a China-based company, listed the bicycle on Amazon. The purchaser, plaintiff's father, elected to have the bicycle assembled. Codefendant Tri-State Assembly offers its assembly services on Amazon and was an Amazon approved service provider. Plaintiff alleged the bicycle was not assembled properly (by Tri-State) and plaintiff fell because the handlebars loosened while he was riding it: "The Uniform Commercial Code clearly provides that implied warranties only extend to sellers (see UCC 2-314 [1]; 2-315 ...). Plaintiff's breach of warranty claim fails because Amazon submitted sufficient documentary evidence and unrefuted affidavits from its representatives to establish prima facie that it did not sell, manufacture, distribute or assemble the bicycle. The supporting affidavits indicate that, pursuant to contract, third-party sellers such as Eshion are responsible for all aspects of their sales, such as setting a price, describing the product being sold, and offering any warranties. In this case, Eshion sold the bicycle and shipped it directly to plaintiff. At no time was the bicycle ever in Amazon's possession or control, nor did it ever obtain title to the bicycle (see UCC 2-106 [1]). Further, when placing orders all Amazon.com users agree to its Conditions of Use, wherein Amazon disclaims all warranties for products sold by third-party sellers. In opposition, plaintiff failed to raise an issue of fact." ***Wallace v. Tri-State Assembly, LLC*, 2021 N.Y. Slip Op. 06664, First Dept 11-30-21**

SECOND DEPARTMENT

CRIMINAL LAW.

THE CHALLENGE TO A JUROR WHO SAID HE WOULD FAVOR THE TESTIMONY OF THE POLICE SHOULD HAVE BEEN GRANTED.

The Second Department, reversing defendant's conviction and ordering a new trial, determined the challenge to a juror who said he would favor the police testimony should have been granted: "[D]uring voir dire, one prospective juror, a firefighter who worked in the neighborhood where the offenses occurred, told the Supreme Court that he 'personally see[s] a lot that goes on in the area[ ].' While he initially indicated that he could be fair and impartial, he subsequently stated that the police in the neighborhood 'defended us, stuck up for us,' and added that he would 'lean a little bit more to what [a police officer] had to say' and it would be 'tough' for him not to credit police officer testimony because he had 'seen it' himself. Although, when he was questioned by the court, he indicated that he would treat police officers' testimony the same as the testimony of civilian witnesses, when asked whether he was 'retracting' what he had said about 'favoring police testimony,' he did not answer in the affirmative. Instead, he stated that he would evaluate police testimony based on what he had experienced. Thus, at no point did the prospective juror provide 'an unequivocal assurance' that [he] could 'set aside any bias and render an impartial verdict based on the evidence' ... . Since the defendant exercised a peremptory challenge to remove the prospective juror and exhausted his allotment of peremptory challenges prior to the completion of jury selection, the judgment of conviction must be reversed and a new trial ordered ...". ***People v. Thomas*, 2021 N.Y. Slip Op. 06711, Second Dept 12-1-21**

CRIMINAL LAW, APPEALS, ATTORNEYS.

APPELLATE COUNSEL INEFFECTIVE FOR FAILING TO FILE AN AMENDED BRIEF OR A SUPPLEMENTAL BRIEF AFTER THE COURT OF APPEALS RULED SENTENCING COURTS MUST CONSIDER YOUTHFUL OFFENDER STATUS FOR ALL WHO ARE ELIGIBLE.

The Second Department, vacating defendant's sentence, determined appellate counsel was ineffective and granted a writ of coram nobis. Appellate counsel did not raise the sentencing court's failure to consider defendant's eligibility for a youthful offender adjudication. Although the controlling case was decided after the appellate brief was filed, appellate counsel should have amended the brief or submitted a supplemental brief: "[W]e grant the defendant's application for a writ of error coram nobis, based on former appellate counsel's failure to contend on appeal that the Supreme Court failed to determine whether the defendant should be afforded youthful offender status. As held by the Court of Appeals in *People v Rudolph* (21 NY3d 497, 501), CPL 720.20(1) requires 'that there be a youthful offender determination in every case where the defendant is eligible, even where the defendant fails to request it, or agrees to forgo it as part of a plea bargain.' Here, the record does not demonstrate that the court considered whether to adjudicate the defendant a youthful offender, even though the defendant was eligible ... . We acknowledge that the Court of Appeals decided Rudolph shortly after former appellate counsel filed the brief on the appeal. However, under the circumstances of this case, after Rudolph was decided, the standard of meaningful representation required former appellate counsel to seek to amend the brief or file a supplemental brief in order to argue that, pursuant to Rudolph, the sentence must be vacated and the matter remitted for determination of the defendant's youthful offender status ...". ***People v. Downing*, 2021 N.Y. Slip Op. 06698, Second Dept 12-1-21**

CRIMINAL LAW, EVIDENCE.

THE COMPLAINANT WAS CAJOLED BY OTHERS, NOT THE DEFENDANT, TO HAVE SEX WITH DEFENDANT IN FRONT OF THE OTHERS; THERE WAS NO EVIDENCE FORCE WAS USED AND NO EVIDENCE OF ANY THREATS TO USE FORCE; RAPE FIRST CONVICTION REVERSED.

The Second Department, reversing defendant's conviction and dismissing the indictment, determined there was no evidence of forcible compulsion in this Rape First case. The complainant was cajoled by others, not including the defendant, to have sex with the defendant in front of the others. But there was no evidence defendant used force and no overt or implied threats to use force: "[S]ince the complainant had never spoken with the defendant prior to the alleged sexual assault, there was no reason, even from her subjective point of view, to fear that he would physically harm her if she did not do what Franiqua and Franeisha were pressuring her to do ... . The complainant said repeatedly during her testimony that she was uncomfortable throughout the incident, that she 'fe[lt] like [she] had no control' over what was happening, and that there was 'nothing [she] could do' to stop it. But she never connected those feelings to a fear of being physically injured, or some other similarly serious consequence ... . [T]here was no testimony that the complainant had been physically abused by Franiqua prior to this incident, and no evidence that the defendant was aware that Franiqua was acting abusively towards the complainant, regardless of when that conduct began. Beyond that, the complainant acknowledged that at least some of her discomfort was attributable to the 'whole situation,' including, understandably, that several people were present." ***People v. Graham*, 2021 N.Y. Slip Op. 06699, Second Dept 12-1-21**

CRIMINAL LAW, IMMIGRATION LAW, APPEALS.

THERE IS AN EXCEPTION TO THE PRESERVATION REQUIREMENT WHERE A DEFENDANT IS UNAWARE OF THE DEPORTATION CONSEQUENCES OF A GUILTY PLEA AND THEREFORE DID NOT MOVE TO WITHDRAW THE PLEA ON THAT GROUND.

The Second Department, remitting the matter to give the defendant the opportunity to move to vacate his guilty plea on the ground he was not aware of the possibility of deportation. The court explained the relevant exception to the preservation requirement: " 'Generally, in order to preserve a claim that a guilty plea is invalid, a defendant must move to withdraw the plea on the same grounds subsequently alleged on appeal or else file a motion to vacate the judgment of conviction pursuant to CPL 440.1' ... . Thus, as relevant here, a defendant is ordinarily required to preserve the contention that his or her plea of guilty was not knowing, intelligent, and voluntary because the court failed to advise him or her that the plea could expose him or her to the risk of deportation ... . There is, however, a narrow exception to this general rule. Preservation is not required 'where a defendant has no practical ability to object to an error in a plea allocution which is clear from the face of the record' ... . The exception applies where the defendant is unaware of the possibility of deportation during the plea and sentencing proceedings, and, therefore, has no opportunity (as well as no motivation) to move to withdraw his or her plea based on the court's failure to apprise him or her of that potential consequence ... . A defendant, of course, 'can hardly be expected to move to withdraw his [or her] plea on a ground of which he [or she] has no knowledge' ...". ***People v. Jones*, 2021 N.Y. Slip Op. 06701, Second Dept 12-1-21**

FORECLOSURE, CIVIL PROCEDURE.

WHERE A FORECLOSURE ACTION IS TERMINATED BY A STIPULATION OF DISCONTINUANCE WITH PREJUDICE, THE STIPULATION CANNOT BE VACATED BY A MOTION, A PLENARY ACTION MUST BE BROUGHT.

The Second Department, reversing Supreme Court, determined the plaintiff bank's motion to vacate the stipulation terminating the foreclosure action should not have been granted: "The Supreme Court improperly granted Deutsche Bank's motion to vacate the stipulations. The mortgage foreclosure action was terminated by the stipulation of discontinuance with prejudice and Deutsche Bank could only vacate that stipulation by commencing a plenary action ...". ***Deutsche Bank Natl. Trust Co. v. Goltz*, 2021 N.Y. Slip Op. 06671, Second Dept 12-1-21**

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

IN THIS FORECLOSURE ACTION, THE BANK'S PROOF OF MAILING THE RPAPL 1304 NOTICE WAS INSUFFICIENT.

The Second Department, reversing Supreme Court in this foreclosure action, determined the bank's proof that the RPAPL 1304 notice was properly mailed to the defendant was insufficient: "[A]lthough Gonzales [an employee of plaintiff Wilmington's loan servicer] stated in her affidavit that RPAPL 1304 notices were mailed by certified and first-class mail, and attached copies of those notices, Wilmington failed to attach any documents showing that the mailings actually happened ... . Further, Gonzales did not aver that she had personal knowledge of the purported mailings, and did not describe any standard office procedure designed to ensure that notices are properly addressed and mailed ... . Accordingly, Wilmington failed to establish, prima facie, compliance with RPAPL 1304 ...". ***Wilmington Sav. Fund Socy., FSB v. Novis*, 2021 N.Y. Slip Op. 06720, Second Dept 12-1-21**

MEDICAL MALPRACTICE, PERSONAL INJURY, EVIDENCE.

THE DEFENDANTS' EXPERT'S AFFIDAVIT DID NOT SUFFICIENTLY ADDRESS THE ALLEGATIONS OF NEGLIGENCE IN THIS ACTION ALLEGING THE FAILURE TO CONDUCT A PROPER SUICIDE ASSESSMENT; THE FLAWS IN THE EXPERT'S AFFIDAVIT PROVIDE A USEFUL CHECKLIST FOR WHAT SHOULD HAVE BEEN ADDRESSED.

The Second Department, reversing Supreme Court, determined the defendants' expert did not sufficiently address the allegations of negligence. Therefore defendant's motion for summary judgment in this medical malpractice action should have been denied. Plaintiffs alleged defendants did not properly conduct a suicide assessment of plaintiffs' decedent (Nodor), who committed suicide four weeks after he was seen by defendants. The description of the flaws in the expert's affidavit reads like a checklist for the required contents of a defense expert's affidavit in a medical malpractice action: "[T]he defendants failed to establish, prima facie, that they did not depart from the standard of care, or that any such departure did not proximately cause Nodar's injuries. With respect to the plaintiffs' allegations that the defendants failed to conduct a proper suicide risk assessment during a scheduled doctor visit by Nodar, which was just weeks before Nodar attempted suicide by jumping off his roof, the defendants' expert failed to set forth the standard of care for conducting a suicide risk assessment ... . The expert's conclusory assertion that the suicide risk assessment that was conducted on that date did not deviate from the standard of care was insufficient to refute the plaintiffs' specific allegations of negligence ... . In addition, the defendants' expert did not address the plaintiffs' allegation that the defendants failed to schedule or conduct a timely follow-up visit with Nodar after changing one of his antidepressant medications and adding an anti-anxiety medication, or otherwise assert that the one-month follow-up appointment that Nodar was advised to do was appropriate under the circumstances

... . Moreover, the defendants' expert failed to establish, prima facie, that any departure from the standard of care did not proximately cause Nodar's injuries ...". ***Nodar v. Pascaretti*, 2021 N.Y. Slip Op. 06695, Second Dept 12-1-21**

PERSONAL INJURY, PRODUCTS LIABILITY.

THE PRODUCTS LIABILITY AND BREACH OF WARRANTY CAUSES OF ACTION ALLEGING THE FAILURE OF AN IMPLANTED MEDICAL DEVICE WHICH ASSISTS THE HEART WERE PREEMPTED BY FEDERAL LAW; THE CAUSES OF ACTION ALLEGING NEGLIGENCE ON THE PART OF THE ENGINEERS WHO REPLACED THE LEAD TO THE DEVICE WERE NOT PREEMPTED.

The Second Department, reversing (modifying) Supreme Court, determined the products liability and breach of warranty causes action alleging decedent's death was caused by an implanted medical device which assisted the heart were preempted by the Federal Food, Drug, and Cosmetic Act as amended by the Medical Device Amendments of 1976 (MDA). But the causes of action alleging negligence of the engineers who replaced a lead on the device were not preempted by the MDA: "The MDA ... includes an express preemption provision, prohibiting state requirements 'with respect to a device intended for human use' (21 USC 360k[a]) which are 'different from, or in addition to, any requirement' ... applicable under federal law and which 'relate[ ] to the safety or effectiveness of the device' ... . Pursuant to this provision, it has been held that common-law causes of action which 'challenge the safety and effectiveness of a medical device and seek to impose requirements that are 'different from, or in addition to,' federal requirements,' such as those sounding in products liability and breach of warranty, are preempted ... . [P]laintiff … claims in her first and fifth causes of action that negligent acts or omissions of the engineers ... , allegedly committed during the course of their replacement of the lead in the decedent's LVAD, were a proximate cause of his death. Those claims in those causes of action do not 'challenge the safety and effectiveness of a medical device and seek to impose requirements' different or additional to federal law ... . Accordingly, they are not preempted." ***Arnold v. Lanier*, 2021 N.Y. Slip Op. 06666, Second Dept 12-1-21**

THIRD DEPARTMENT

CIVIL PROCEDURE, DEBTOR-CREDITOR.

IF A DEBT IS ACCELERATED, THE SIX-YEAR STATUTE OF LIMITATIONS FOR RECOVERY OF THE DEBT IS TRIGGERED; IF THE DEBT IS NOT ACCELERATED, THE INSTALLMENTS DUE WITHIN THE SIX YEARS PRIOR TO COMMENCING SUIT ARE RECOVERABLE.

The Third Department determined that, because the debt was never accelerated, recovery of the installments due during the six years prior to commencement of the action is not time-barred: "The claim alleges that the [defendants] stopped making monthly payments as required by the 1988 agreement in December 2003, 15 years before the commencement of this action. 'Without acceleration of the entire debt by' [plaintiff], however, 'a cause of action for portions of the indebtedness' owed would only accrue when each of the individual installments became due ... . The ... defendants did not demonstrate that [plaintiff] accelerated the debt and, as a result, failed to sustain their burden of showing that the claim was time-barred to the extent that it sought to recover installments that became due after December 2012." ***DiCenzo v. Mone*, 2021 N.Y. Slip Op. 06734, Third Dept 12-2-21**

DISCIPLINARY HEARINGS (INMATES), EVIDENCE.

BECAUSE THE DRUG TESTING WAS FLAWED, THE SUBSTANCE PETITIONER WAS SMOKING WAS NOT IDENTIFIED AS MARIHUANA, AND THEREFORE WAS NOT PROVEN TO BE CONTRABAND; BOTH THE POSSESSION OF DRUGS DETERMINATION AND THE POSSESSION OF CONTRABAND DETERMINATION WERE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

The Third Department determined the possession of contraband determination was not supported by substantial evidence. Petitioner was seen smoking a cigarette. When he was asked what was in the cigarette, he answered "weed." A test was performed which identified the substance as marihuana and petitioner was charged with possession of drugs and possession of contraband. The drug possession determination was dismissed when an inconsistency in the drug testing instructions was discovered. But the contraband possession determination remained and the punishment was unchanged: "Substantial evidence does not support the determination of guilt and, therefore, we annul. '[T]he prohibition of contraband hinges on whether or not the item is authorized' ... . In light of the unreliable drug test and the absence of any hearing testimony identifying the substance at issue or attesting to petitioner's alleged admission, the substance was not adequately identified ... . Accordingly, 'substantial evidence does not support the determination that the substance was unauthorized and, therefore, contraband' ...". ***Matter of Razor v. Venettozzi*, 2021 N.Y. Slip Op. 06740, Third Dept 12-2-21**

EMPLOYMENT LAW, HUMAN RIGHTS LAW.

PETITIONER, A PROBATIONARY EMPLOYEE AND THE ONLY FEMALE MANUAL-LABOR EMPLOYEE OF THE DEPARTMENT OF PUBLIC WORKS, DEMONSTRATED SHE WAS TERMINATED SOLELY BECAUSE OF HER GENDER; SUPREME COURT PROPERLY REINSTATED HER WITH BACK PAY.

The Third Department determined petitioner, a probationary employee of the Department of Public Works (DPW), was terminated based solely upon her gender and was properly reinstated with back pay: "Despite receiving two interim probationary reports that indicated her performance was satisfactory during the course of her employment, on April 3, 2018, petitioner was called to a meeting with respondent Daniel Crandell, DPW's Commissioner, at which she was terminated after being told that she was 'just not a good fit.' Although petitioner received a written termination letter at the close of that meeting, petitioner received no prior warning or notice of any problematic conduct. Notably, petitioner was the only female employee of DPW that was in a position of manual labor at the time of her termination. * * * 'Judicial review of the discharge of a probationary employee is limited to whether the determination was made in bad faith or for an improper or impermissible reason' ... . * * * Supreme Court found that, '[i]n the absence of any credible evidence that her work performance provided a basis for her termination, [it was] compelled to find that the only reason she was terminated was because of her gender.' Significantly, the court found respondents' assertions regarding '[p]etitioner's alleged argumentative attitude' to 'reflect more of a post-termination justification for her dismissal than a valid or proper basis for the termination of her employment.' ... [R]espondents failed to meet their burden of establishing a legitimate, nondiscriminatory purpose for petitioner's termination ...". ***Matter of Triumpho v. County of Schoharie*, 2021 N.Y. Slip Op. 06727, Third Dept 12-2-21**

FAMILY LAW, EVIDENCE.

DOUBLE HEARSAY SUPPORTED THE DENIAL OF THE APPLICATION TO HAVE A REPORT MAINTAINED BY THE CENTRAL REGISTRY OF CHILD ABUSE AND MALTREATMENT AMENDED TO BE UNFOUNDED AND EXPUNGED.

The Third Department determined that double hearsay supported the denial of petitioner's application to have a report maintained by the Central Register of Child Abuse and Maltreatment amended to be unfounded and expunged: "[O]ur review of the record confirms that the double hearsay evidence introduced at the expungement hearing was sufficiently relevant and probative to the inquiries of whether petitioner drove under the influence of alcohol with the children in the car and whether she failed to exercise a minimum degree of care in providing the children with proper supervision and guardianship by misusing alcohol to the extent of losing control of her actions ... . Specifically, statements made to the investigating caseworker by the oldest and middle children, which were memorialized in the indicated report, supported the conclusion that petitioner drove under the influence of alcohol with the children in the car on at least two occasions in May 2019. Such statements were corroborated by petitioner's admissions that, after roughly five years of sobriety, she relapsed in or around mid-May and that she 'had a buzz' while driving the children. Further, the oldest child reported to the caseworker that, on the evening of May 29, 2019, she observed petitioner to be intoxicated, 'sick' and 'throwing up,' which prompted her to call her maternal grandparents. The oldest child's account was corroborated by the maternal grandfather, who stated that he believed petitioner to have been intoxicated on the night in question and that it was 'an ongoing concern.' " ***Matter of Elizabeth W. v. Broome County Dept. of Social Servs.*, 2021 N.Y. Slip Op. 06732, Third Dept 12-2-21**

To view archived issues of CasePrepPlus,
visit www.nysba.org/caseprepplus.