CasePrepPlus

February 18, 2022

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COURT OF APPEALS

CRIMINAL LAW, APPEALS.

THE WAIVER OF APPEAL WAS INVALID; THE PLEA COURT CONFLATED THE RIGHT TO APPEAL WITH THE RIGHTS FORFEITED BY A GUILTY PLEA; CASE REMITTED TO THE APPELLATE DIVISION FOR CONSIDERATION OF THE SUPPRESSION CLAIM.

The Court of Appeals, reversing the Appellate Division and remitting the case for consideration of the suppression claim, upon the People's concession, determined the waiver of appeal was invalid: "[O]rder reversed and case remitted to the Appellate Division, Second Department, for further proceedings. Under the totality of the circumstances and upon the People's concession that the appeal waiver was invalid because the plea court conflated the right to appeal with those rights automatically forfeited by a guilty plea, defendant's appeal waiver did not foreclose consideration of his suppression claim ...". ***People v. Johnson*, 2022 N.Y. Slip Op. 00909, CtApp 2-10-22**

EMPLOYMENT LAW, CONTRACT LAW.

ANSWERING A CERTIFIED QUESTION FROM THE SECOND CIRCUIT, THE COURT OF APPEALS DETERMINED THE RELEVANT PROVISIONS OF THE CIVIL SERVICE COLLECTIVE BARGAINING AGREEMENTS (CBA'S) DID NOT PROVIDE RETIREES WITH A VESTED RIGHT SUCH THAT THE HEALTH INSURANCE BENEFITS AWARDED AT RETIREMENT WOULD NOT BE REDUCED BY THE PROVISIONS OF SUBSEQUENT CBA'S.

The Court of Appeals, in a full-fledged opinion by Judge Singas, addressing certified questions from the US Court of Appeals, Second Circuit, determined the relevant provisions of the civil-service collective bargaining agreements (CBA's) did not create a vested right in the health insurance benefits afforded retirees. In other words, the CBA's did not provide that the coverage of health insurance premiums vested at retirement such that reductions in coverage in subsequent CBA's would not apply: "[N]one of the CBA provisions identified by the Second Circuit in the first certified question establish a vested right to lifetime fixed premium contributions, either singly or in combination." ***Donohue v. Cuomo*, 2022 N.Y. Slip Op. 00910, CtApp 2-10-22**

INSURANCE LAW, CONTRACT LAW.

AFTER MAKING THE LIFE INSURANCE PREMIUM PAYMENTS FOR 15 YEARS ON THE PREMIUM DUE DATE (JANUARY 14), PAYMENT WAS NOT TIMELY MADE IN 2018 AND DECEDENT DIED ON FEBRUARY 18, 2018, AFTER THE EXPIRATION OF THE 31-DAY GRACE PERIOD; COVERAGE WAS PROPERLY DENIED; TWO DISSENTERS ARGUED THE POLICY WAS AMBIGUOUS AND SHOULD BE INTERPRETED SUCH THAT THE GRACE PERIOD HAD NOT EXPIRED AT THE TIME OF DEATH.

The Court of Appeals, affirming the Appellate Division, over a two-judge dissent, determined the decedent's life insurance policy was unambiguous about the date premiums were due--January 14 or at the end of the 31-day grace period thereafter. After paying the premiums by January 14 for 15 years, the premium was not paid on time in 2018. The insured died on February 26, 2018, just days after the grace period expired. The insurer denied the claim arguing the coverage had lapsed. The Court of Appeals agreed with the insurer. The dissent argued the policy was ambiguous because it also stated the term of the policy was annual and the very first payment was made on January 31, which would place the decedent's death within the grace period: "Plaintiff is not entitled to benefits under the policy. The terms of the policy clearly and unambiguously tie the due date of the annual premium to the date of issue, January 14, 2002, and expressly state that January 14 is the premium due date. That the insurance policy uses the term 'annual' but the premium payment period—which runs from January 14th, the 'Date of Issue' and 'premium due date'—may not cover a full year creates no ambiguity in light of the clear policy language identifying January 14th as the 'premium due date' ... . Furthermore, any claimed ambiguity in the definition of 'policy date' is irrelevant inasmuch as the policy does not tie the premium due date to the 'policy date' but, rather, the date of issue, which is January 14th. Because the insured failed to pay the 2018 premium by January 14, 2018 or within the 31-day grace period, the policy lapsed prior to the insured's death." ***Bonem v. William Penn Life Ins. Co. of N.Y.*, 2022 N.Y. Slip Op. 00908. CtApp 2-10-22**

LABOR LAW, EMPLOYMENT LAW.

LABOR LAW § 198-B, WHICH PROHIBITS WAGE KICKBACKS, DOES NOT PROVIDE A FREESTANDING PRIVATE RIGHT OF ACTION.

The Court of Appeals, in a full-fledged opinion by Judge Garcia, over an extensive two-judge dissent, determined Labor Law § 198-b, which prohibits wage kickbacks, does not provide a freestanding private right of action: "Labor Law § 198-b prohibits 'kickbacks' by making it unlawful for any person to 'request, demand, or receive' part of an employee's wages or salary on the condition that 'failure to comply with such request or demand will prevent such employee from procuring or retaining employment.' Violation of the statute is a misdemeanor offense (see Labor Law § 198-b [5]). Labor Law § 218 also provides for administrative enforcement of section 198-b by the Commissioner of the Department of Labor. The statute empowers the Commissioner to grant affected employees restitution and liquidated damages in addition to imposing civil penalties. * * * ... [W]e apply a three-factor test to determine whether the legislative intent favors an implied right: '(1) whether the plaintiff is one of the class for whose particular benefit the statute was enacted; (2) whether recognition of a private right of action would promote the legislative purpose; and (3) whether creation of such a right would be consistent with the legislative scheme' ... . * * * The statutory scheme ... expressly provides two robust enforcement mechanisms, 'indicating that the legislature considered how best to effectuate its intent and provided the avenues for relief it deemed warranted' ...". **Konkur *v. Utica Academy of Science Charter Sch.*, 2022 N.Y. Slip Op. 00911, CtApp 2-10-22**

MUNICIPAL LAW, ENVIRONMENTAL LAW.

THE TOWN LAW STATUTE WHICH AUTHORIZES A TOWN TO REGULATE THE DISCHARGE OF "FIREARMS" DOES NOT AUTHORIZE A TOWN TO REGULATE THE DISCHARGE OF "BOWS."

The Court of Appeals, affirming the Appellate Division, determined the Town Law does not authorize the Town of Smithtown to regulate the discharge of "bows" pursuant to its authority to regulate "firearms:" "Town Law § 130 (27) specifically authorizes certain towns to prohibit the discharge of 'firearms' through ordinances that may be more restrictive than other laws where such discharge may be hazardous to the general public, and requires that notice be provided to the Department of Environmental Conservation of any ordinance 'changing the five hundred foot [setback] rule' (Town Law § 130 [27]; see Environmental Conservation Law § 11-0931 [4] [a] [2]). While the term 'firearm is undefined in the Town Law, construing it in accordance with its 'usual and commonly understood meaning' ... , the term 'firearm' does not encompass a 'bow' ... and we are unpersuaded that the Legislature intended otherwise when it used the term in the Town Law. Accordingly, Town Law § 130 (27) does not authorize Smithtown to regulate the discharge of bows." ***Hunters for Deer, Inc. v. Town of Smithtown*, 2022 N.Y. Slip Op. 00907, CtApp 2-10-22**

FIRST DEPARTMENT

ARBITRATION.

THE ARBITRATOR EXCEEDED HER POWERS BY AWARDING RELIEF WHICH WAS NOT REQUESTED BY ALL THE PARTIES OR AUTHORIZED BY LAW; PUNITIVE DAMAGES, SANCTIONS AND ATTORNEY'S FEES AWARDS VACATED.

The First Department vacated the arbitrator's award of punitive damages, sanctions and attorney's fees because that relief was not requested by the parties, therefore the arbitrator exceeded her power: "Although the American Arbitration Association (AAA) preprinted form petitioner used allows a claimant to seek other relief, including attorneys' fees, interest, arbitration costs and punitive/exemplary damages, the only boxes that petitioner checked off were for interest and arbitration costs. It did not check the punitive damages box or attorneys' fees box, nor indicate anywhere on its demand that it was seeking such relief. Petitioner never amended its demand for arbitration. Nor did it include a prayer for such relief in its subsequently filed post-arbitration memorandum. By granting unrequested relief, the arbitrator exceeded the expressly enumerated limits on her authority by deciding matters that were not before her ... . Although AAA commercial rule 47(d) empowers an arbitrator to award attorneys' fees, this is only 'if all parties have requested such an award or it is authorized by law or their arbitration agreement.' Here, neither party requested such an award and it is not authorized by law." ***Matter of 544 Bloomrest, LLC v. Harding*, 2022 N.Y. Slip Op. 00936, First Dept 2-10-22**

CIVIL PROCEDURE.

PLAINTIFF STARTED AN ACTION AGAINST DEFENDANT IN NEW YORK; THEN DEFENDANT STARTED AN ACTION AGAINST PLAINTIFF IN ROMANIA; THE RESULTS OF THE ROMANIAN ACTION MAY BE DISPOSITIVE IN THE NEW YORK ACTION; THE NEW YORK ACTION SHOULD HAVE BEEN STAYED PENDING THE OUTCOME OF THE ROMANIAN ACTION, EVEN THOUGH THE NEW YORK ACTION WAS COMMENCED FIRST.

The First Department, reversing Supreme Court, stayed the New York action pending the resolution of a related action brought by the defendant in Romania. the fact that the New York action was commenced first didn't matter: "In March 2021, plaintiff brought this action to recover on a personal guaranty executed by defendant as consideration for a loan by plain-

tiff to two Romanian companies partly owned by defendant. Two months later, defendant brought suit against the instant plaintiff in Romania, seeking a declaration that the companies' payment obligations under the underlying loan agreements were not enforceable. ... [T]he issues to be decided in the Romanian action are potentially dispositive of this action ... . Although this action was filed first, chronology is not dispositive, 'particularly where both actions are at the earliest stages of litigation' ... . '[T]he practice of determining priorities between pending actions on the basis of dates of filing is a general rule, not to be applied in a mechanical way, regardless of other considerations' ... . Here, both actions are in the early stages and were commenced reasonably close in time and the later-filed action is more 'comprehensive' and involves more parties ...". ***E D & F Man Sugar Ltd. v. Gellert*, 2022 N.Y. Slip Op. 00813, first Dept 2-8-22**

CIVIL PROCEDURE, LANDLORD-TENANT, MUNICIPAL LAW.

CLASS CERTIFICATION SHOULD NOT HAVE DENIED TENANTS IN THIS RENT-OVERCHARGE ACTION.

The First Department, reversing Supreme Court, determined class certification in this rent overcharge action should not have been denied. The tenants alleged the landlord unlawfully deregulated apartments while receiving J-51 tax benefits: "Class certification was improperly denied. The determination of whether plaintiffs have a cause that may be asserted as a class action turns on the application of CPLR 901. That section provides that '[o]ne or more members of a class may sue or be sued as representative parties on behalf of all' where five factors — sometimes characterized 'as numerosity, commonality, typicality, adequacy of representation and superiority' ... . The party seeking class certification has the burden of establishing the prerequisites of CPLR 901(a) and thus establishing entitlement to certification … . Here, plaintiffs met their burden of demonstrating the prerequisites for class action certification under CPLR 901 and 902. Contrary to the motion court's determination, plaintiffs established numerosity and typicality in their initial motion for class certification. The allegations in the amended complaint taken with the DOF tax bills showed that by June 2017, only 8 of 100 apartments were registered as rent-stabilized. ... [T]his Court [has] held that similar bills were sufficient to establish numerosity, i.e., the number of deregulated units. As to typicality, the predominant legal question involves one that applies to the entire class—whether defendant unlawfully deregulated rent-stabilized apartments while receiving J-51 real estate tax abatement benefits." ***Cupka v. Remik Holdings LLC*, 2022 N.Y. Slip Op. 00812, First Dept 2-8-22**

CRIMINAL LAW.

THE SECOND-DEGREE MURDER COUNTS SHOULD HAVE BEEN DISMISSED AS INCLUSORY CONCURRENT COUNTS OF THE FIRST-DEGREE MURDER COUNTS.

The First Department noted that the second-degree murder counts must be dismissed as inclusory concurrent counts of the first-degree murder counts: "As the People concede, the second-degree murder counts should be dismissed as inclusory concurrent counts of the first-degree murder counts (see CPL 300.40[3][b])." ***People v. Ortega*, 2022 N.Y. Slip Op. 00828, First Dept 2-8-22**

CRIMINAL LAW, EVIDENCE.

DEPRAVED INDIFFERENCE MURDER CONVICTION AFFIRMED; DURING A POLICE CHASE, DEFENDANT DROVE THE WRONG WAY ON A HIGHWAY AND CRASHED HEAD-ON INTO AN ONCOMING CAR.

The First Department determined the evidence supported defendant's depraved indifference murder conviction stemming from his driving the wrong way on a highway and crashing into an oncoming car during a police chase: "While fleeing from the police, defendant drove 14 blocks against oncoming traffic on the West Side Highway, a major roadway, despite openings in the median between the north and southbound lanes, while running several red lights and driving onto the curb and sidewalk. Additionally, defendant did not avail himself of parking lots and driveways on the west side of the Highway, where he could have pulled off to avoid any collision with an oncoming vehicle. Heading north, the Highway merges into, and becomes, the Henry Hudson Parkway at the intersection of 57th Street. Instead of utilizing the last available opportunity to turn into the north bound lanes, defendant made the decision to continue driving in the wrong direction and entered onto the Parkway. It is unrefuted that the Parkway had no breaks in the median through which he could return to the northbound lanes and that oncoming cars were going even faster there than on the Highway because the speed limit increased from 35 mph to 50 mph. After he got on the Parkway, defendant remained in the lane immediately to the left of the concrete barrier separating the northbound and southbound lanes, made no effort to change lanes or to swerve to avoid oncoming vehicles and made no effort to stop or slow down, despite the fact that he was now on a parkway. He continued driving this way on the Parkway for seven blocks at which time he collided, head-on, with a vehicle driving in the proper direction in the southbound lane." ***People v. Herrera*, 2022 N.Y. Slip Op. 00949, First Dept 2-10-22**

CRIMINAL LAW, EVIDENCE.

THE PEOPLE FOCUSED THEIR PROOF ON THE SEXUAL MOTIVATION FOR THE BURGLARY; ALTHOUGH BURGLARY SECOND IS A LESSER INCLUDED OFFENSE OF BURGLARY SECOND AS A SEXUALLY MOTIVATED OFFENSE, THE JURY SHOULD NOT HAVE BEEN CHARGED ON THE LESSER OFFENSE BECAUSE THE DEFENDANT HAD NO PRIOR NOTICE OF THAT POSSIBILITY.

The First Department, dismissing the burglary second count, determined the People's request to instruct the jury on burglary second as a lesser included offense of burglary second as a sexually motivated offense should not have been granted. Although burglary second is a lesser included offense of burglary second as a sexually motivated offense, the People's case focused only on the sexual motivation. Defendant therefore did not have notice the jury would consider burglary second: "[T]he court improperly charged the lesser-included offense because the People, through the way they presented their case, deprived defendant of notice of the possibility that the jury would be asked to consider a lesser-included. In People v Barnes (50 NY2d 375 [1980]), the Court of Appeals observed that, where the People in a burglary case limit to a particular crime the act that the defendant intended to commit while unlawfully in a building, 'the court is obliged to hold the prosecution to this narrower theory alone' ... . * * *In opposing defendant's pretrial motion to sever certain charges in the indictment from the others, the People focused exclusively on defendant's sexual harassment of the complainant, and on his grabbing the arm and pulling the shirt of another woman he encountered in the dorm. In making an application for the admission of certain Molineux evidence, the prosecutor focused only on the theory that defendant entered the dorm to satisfy his own sexual urges. And, in his opening statement, the prosecutor stated that defendant 'knowingly and unlawfully entered the private area of a dorm to do exactly what he had been doing minutes prior — to grab, to grope and to harass the young women who lived there.' Further, the prosecutor downplayed the behavior defendant displayed towards some men he saw in the lobby of the dorm, stating that 'the evidence will show that he was substantially motivated by his desire to abuse women when he passed that turnstile and unlawfully entered the private area of the dorm.' " ***People v. Seignious*, 2022 N.Y. Slip Op. 00948, First Dept 2-10-22**

FALSE IMPRISONMENT, CIVIL PROCEDURE, CRIMINAL LAW.

THE FALSE IMPRISONMENT CAUSE OF ACTION WAS UNTIMELY BECAUSE IT ACCRUED WHEN DEFENDANT WAS RELEASED UPON ARRAIGNMENT, NOT WHEN HE WAS RELEASED UPON COMPLETION OF HIS SENTENCE.

The First Department, reversing (modifying) Supreme Court, determined that the false imprisonment cause of action was untimely because it accrued when plaintiff was released upon arraignment, not when he was released after completing his sentence: "Contrary to the motion court's finding, the statute of limitations began to run not on the date on which plaintiff was released from incarceration, having completed his sentence, but on the date of his arraignment, when he was released on his own recognizance ... . False imprisonment consists of detention without legal process and ends once the accused is held pursuant to legal process, such as arraignment ... . Plaintiff's incarceration following his conviction is not part of his false imprisonment claim and thus is not relevant to determining the date of expiration of the limitations period for the claim." ***Butler v. City of New York*, 2022 N.Y. Slip Op. 00810, First Dept 2-8-22**

FRAUD, CONTRACT LAW, APPEALS.

THE COMPLAINT DID NOT STATE A CAUSE OF ACTION FOR FRAUD IN THE INDUCEMENT, AS OPPOSED TO AN INSINCERE PROMISE OF FUTURE PERFORMANCE; ALTHOUGH THE ISSUE WAS RAISED IN REPLY AND WAS NOT RAISED BELOW, IT WAS CONSIDERED ON APPEAL BECAUSE IT WAS DETERMINATIVE, DID NOT ALLEGE NEW FACTS, AND COULD NOT HAVE BEEN AVOIDED IF RAISED BELOW.

The First Department, reversing (modifying) Supreme Court, determined the complaint did not support a cause of action for fraud in the inducement. Plaintiff ordered an artistic silk floral display but rejected it when delivered on the ground the display did not match what plaintiff ordered. Defendants refused to refund the money. Although the inadequacy of the fraud in the inducement allegations was first raised in reply, the First Department considered it because it was determinative, did not allege new facts and could not have been avoided if raised below: "As for the fraud in the inducement claim, defendants challenged this claim in their reply brief in Supreme Court. While, normally, arguments set forth for the first time in reply should not be considered ... , this Court will consider this argument as it is determinative, does not allege new facts, and is a legal argument on the face of the record that would not have been avoidable if raised in defendants' moving brief below, and because the record is sufficient to resolve the issue ... . Here, plaintiff merely alleged that defendants 'grossly misrepresented the quality and nature of the Decorations' to induce plaintiff into retaining them and compensating them, and the representations were false when made. This simply alleges 'an insincere promise of future performance under the contract, which is insufficient to plead fraud' ...'. As such, the fraud in the inducement claim is dismissed." ***Newport E. Inc. v. Sviba Floral Decorators, Inc.*, 2022 N.Y. Slip Op. 00819, First Dept 2-8-22**

FREEDOM OF INFORMATION LAW (FOIL), MUNICIPAL LAW.

PETITIONER SOUGHT RECORDS FROM THE NYC TAXI AND LIMOUSINE COMMISSION (TLC) TO DETERMINE HOW THE COMMISSION WAS HANDLING LICENSE APPLICANTS WITH CRIMINAL CONVICTIONS; THE REQUEST SHOULD NOT HAVE BEEN DENIED; MATTER REMITTED FOR IN CAMERA REVIEW.

The First Department, reversing Supreme Court, determined petitioner's request for records from the NYC Taxi and Limousine Commission (TLC), including fitness interview decisions (FIDs) should not have been denied. The matter was remitted to Supreme Court for an in camera review of the records: "The Driver's Privacy Protection Act (DPPA) (18 USC § 2721 et seq.) does not impose a blanket prohibition on disclosure of all motor vehicle records. Instead, the law restricts disclosure of 'personal information,' which includes personal identifiers of the type that petitioner agrees should be redacted. Moreover, even as to such personal information, the DPPA still expressly provides for disclosure in various circumstances, such as for research purposes, where the personal information will not be further disclosed ... . Motor vehicle records under the DPPA are thus not the kind of records as to which production is absolutely prohibited, as long as they are redacted ... . The record is not clear as to what extent it is possible to anonymize production of the TLC fitness interview decisions (FIDs), which petitioner seeks in order to assess whether the TLC has been applying fair standards in its decision making on licensing determinations with respect to people with one or more criminal convictions ...". ***Matter of Brooklyn Legal Servs. v. New York City Taxi & Limousine Commn.*, 2022 N.Y. Slip Op. 00809, First Dept 2-8-22**

HUMAN RIGHTS LAW, MUNICIPAL LAW.

THE FACT THAT THE CITY BUILDING CODE DID NOT REQUIRE DISABLED-ACCESS TO THE THIRD FLOOR OF DEFENDANT RESTAURANT DID NOT CONFLICT WITH THE FACT THAT THE HUMAN RIGHTS LAW MAY REQUIRE SUCH ACCESS.

The First Department, reversing Supreme Court, determined plaintiff, a disabled wheelchair user, had standing to bring a discrimination action against defendant restaurant alleging the third floor of the restaurant was not accessible. The fact that the NYC Building Code did not require disabled-access to the third floor based on the square-footage did not conflict with the Human Rights Law which may require access: "The Building Code and disability discrimination laws serve different purposes and can easily be enforced and harmonized. The Building Code serves foremost to ensure safety in construction and maintenance of structures. The accessibility provision at issue simply states that no disabled access is required for building areas which measure less than 2,500 square feet. The provision does not prohibit building owners from providing such access — it simply provides that, for purposes of the Building Code, no such access is required. The disability discrimination laws are designed, as pertinent here, to ensure that disabled persons have reasonable access to public accommodations. While the Building Code might not require disabled access under the circumstances present here, this does not mean that more may not be required under the State and City Human Rights Laws' (HRLs) disability discrimination provisions. In this, there is no conflict. To the extent there is any tension between the Building Code's provisions and the HRLs, such tension may be remedied by the rule of reasonableness which is an integral component of the HRLs' requirement that disabled persons be reasonably accommodated (see Executive Law § 296[c][i]; Administrative Code of City of NY § 8-107[15][b])." ***Jones v. McDonald's Corp.*, 2022 N.Y. Slip Op. 00814, First Dept 2-8-22**

HUMAN RIGHTS LAW, MUNICIPAL LAW, EMPLOYMENT LAW.

PLAINTIFF'S EMPLOYMENT DISCRIMINATION ACTION SHOULD NOT HAVE BEEN DISMISSED.

The First Department, reversing Supreme Court, determined there were triable issues of fact in this employment discrimination case: "Plaintiff, an African American female, raises triable issues of fact whether her October 2017 termination (adverse employment action) was in retaliation for her verbal complaints (protected activity) concerning racist comments defendant Annie Liu allegedly uttered at work ... . A question of fact exists as to whether plaintiff complained in July or August 2017. If plaintiff's testimony is credited, the time frame between the discriminatory comments, plaintiff's complaints, and her firing is evidence of a causal connection between the protected activity and her termination two months later ... . Contrary to defendants' argument, it is unclear from the record whether an intervening event occurred to dispel an inference of a causal relationship. Moreover, issues of fact also exist as to whether defendants' proffered explanation for terminating plaintiff's employment was pretextual ...". ***Cancel v. Global Fertility & Genetics, Inc.*, 2022 N.Y. Slip Op. 00811, First Dept 2-8-22**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

THERE WERE QUESTIONS OF FACT WHETHER PLAINTIFF SLIPPED AND FELL ON ICE AND SNOW IN A "PASSAGEWAY" WITHIN THE MEANING OF THE INDUSTRIAL CODE; THEREFORE DEFENDANT WAS NOT ENTITLED TO SUMMARY JUDGMENT ON THE LABOR LAW § 241(6) CAUSE OF ACTION.

The First Department, reversing (modifying) Supreme Court, determined defendant's summary judgment on the Labor Law § 241(6) should not have been granted. Plaintiff alleged he slipped and fell on ice and snow on a passageway which had not been cleared of ice and snow: "Labor Law § 241(6) imposes on owners, general contractors, and their agents a non-

delegable duty to provide 'reasonable and adequate protection' to workers engaged in construction, demolition, and excavation activities by complying with Industrial Code regulations that specify concrete safety directives, regardless whether they exercised supervision or control over the work ... . Industrial Code § 23-1.7(d) provides that employers shall not allow any employee to use a 'floor, passageway, walkway, scaffold, platform, or other elevated work surface which is in a slippery condition,' and specifically enumerates ice and snow as foreign substances that must be removed, sanded, or covered. Plaintiff was allegedly injured at the construction site where he was working when he slipped and fell on snow and ice after he had passed through a perimeter gate, towards his employer's shanty nearby upon arriving for work one morning. Defendant construction manager ... testified the shanty area 'was commonly used as a roadway for egress' and an 'egress path' for workers going from the office trailers on one side of the shanties to the building under construction. Although it is unclear on this record whether there was a defined path where plaintiff fell, it is also unclear whether he was within the 'shanty area' that was used as a 'roadway for egress' and an 'egress path.' Accordingly, issues of fact exist as to whether plaintiff was in a defined walkway within the meaning of Industrial Code § 23-1.7(d) ...". ***Lapinsky v. Extell Dev. Co.*, 2022 N.Y. Slip Op. 00815, First Dept 2-8-22**

SECOND DEPARTMENT

CIVIL PROCEDURE, CONTRACT LAW, FRAUD, CORPORATION LAW.

THE FLORIDA DEFENDANTS ADVERTISED THROUGH A NATIONWIDE WEBSITE; THE NEW YORK PLAINTIFFS SOLICITED THE CONTRACT WITH DEFENDANTS; PLAINTIFFS DID NOT MAKE OUT A PRIMA FACIE CASE OF EITHER GENERAL OR SPECIFIC (LONG-ARM) JURISDICTION OVER DEFENDANTS.

The Second Department, reversing Supreme Court, determined the plaintiffs did not make out a prima facie case of general or specific (long-arm) jurisdiction over the Florida defendants in this breach of contract and fraud action. Through email correspondence the New York plaintiffs entered a contract for the creation of a "Dating App" for which plaintiffs allegedly paid $100,000. Plaintiff alleged defendants never provided the Dating App and sued in New York. The jurisdiction over the breach of contract action was analyzed under the general jurisdiction criteria, and jurisdiction over the fraud (tort) action was analyzed under the specific jurisdiction (long-arm) criteria: "In opposing the separate motions of [defendants], the plaintiffs asserted that jurisdiction over both defendants was proper pursuant to CPLR 301 and 302(a)(1) and (3). 'Under modern jurisprudence, a court may assert general all-purpose jurisdiction or specific conduct-linked jurisdiction over a particular defendant'... . Contrary to the plaintiffs' contention, they did not make a prima facie showing of personal jurisdiction ... . The complaint itself establishes that [the individual defendant] is domiciled in Florida and that [the corporate defendant] was incorporated in and has its principal place of business in Florida ... . Further, the facts alleged, even if established, do not support a conclusion that [defendant corporation's] contacts with New York were so 'continuous and systematic' ... as to render it 'essentially at home' in New York ... . Specific jurisdiction over a defendant is obtained through New York's long-arm statute, CPLR 302. * * * 'The CPLR 302(a)(1) jurisdictional inquiry is twofold: under the first prong the defendant must have conducted sufficient activities to have transacted business in the state, and under the second prong, the claims must arise from the transactions' ... . The affidavits ... establish that [the corporate defendant] advertises its services nationwide through a website that is not specifically directed toward New York residents or businesses. It is undisputed that the plaintiff ... initiated the contact between the parties and solicited the defendants' services in designing the Dating App. Contrary to the plaintiffs' contention, [the corporate defendant's] website does not constitute transacting business within the State." ***Fanelli v. Latman*, 2022 N.Y. Slip Op. 00849, Second Dept 2-9-22**

CIVIL PROCEDURE, FORECLOSURE.

ALTHOUGH THE FIRST FORECLOSURE ACTION COMMENCED IN 2009 WAS ADMINISTRATIVELY DISMISSED, IT WAS NEVER ABANDONED PURSUANT TO CPLR 3216; THEREFORE THE STATUTE OF LIMITATIONS WAS NOT TRIGGERED AND THE MOTION TO RESTORE THE 2009 ACTION TO THE CALENDAR IN 2018, AFTER THE SECOND (2015) FORECLOSURE ACTION WAS DISMISSED AS TIME-BARRED, SHOULD HAVE BEEN GRANTED; TWO-JUSTICE DISSENT.

The First Department, reversing Supreme Court, over a two-justice dissent, determined the first foreclosure action (commenced in 2009), which was "administratively dismissed," was not abandoned because the criteria in CPLR 3216 were not met. Therefore, the administrative dismissal did not trigger the statute of limitations and the motion to restore that action to the calendar (after the second foreclosure action commenced 2015 was dismissed as time-barred) should have been granted: "[T]he conditional order of dismissal, which, in effect, served as a 90-day notice pursuant to CPLR 3216, was defective in that it did not state that the plaintiff's failure to comply with the demand would serve as a basis for the Supreme Court, on its own motion, to dismiss the action for failure to prosecute (see id. § 3216[b][3] ...). * * * We reject the defendant's contention that the plaintiff effectively abandoned the instant action by commencing the 2015 action. * * * ... [T]he plaintiff was not required to move to restore the instant action to the calendar within any specified time frame ... . '[A] motion pursuant to CPLR 2221(a) to vacate an order is not subject to any specific time limitation' ... . The marking-off procedures of CPLR 3404

do not apply to pre-note of issue actions such as this one ...". ***Bank of Am., N.A. v. Ali*, 2022 N.Y. Slip Op. 00838, Second Dept 2-9-22**

CIVIL PROCEDURE, FORECLOSURE.

IN THIS FORECLOSURE ACTION, DEFENDANT DID NOT WAIVE THE LACK OF JURISDICTION DEFENSE BY PARTICIPATING IN THE MANDATORY SETTLEMENT CONFERENCE AND WAS ENTITLED TO A HEARING ON WHETHER SHE WAS PROPERLY SERVED WITH THE SUMMONS AND COMPLAINT.

The Second Department, reversing Supreme Court, determined defendant in this foreclosure action did not waive the lack of jurisdiction defense and demonstrated entitlement to a hearing on whether she was properly served: "[B]y participating in the mandatory settlement foreclosure conference and subsequently contacting the plaintiff for settlement purposes, the defendant did not demonstrate a clear intent to participate in the lawsuit on the merits, and therefore she did not formally or informally appear in the action ... . [D]efendant sufficiently rebutted the presumption of proper service. The defendant submitted her own sufficiently factually detailed sworn affidavit in which she, inter alia, denied receipt of service, denied residing at the subject address at the time service allegedly was made, and averred that she had not lived there since September 2011 and that she had moved to Georgia in November 2013. Under these circumstances, a hearing to determine whether the defendant was properly served pursuant to CPLR 308(2) was required ...". ***Nationstar Mtge., LLC v. Stroman*, 2022 N.Y. Slip Op. 00869, Second Dept 2-9-22**

CRIMINAL LAW, ATTORNEYS.

DEFENDANT WAS ENTITLED TO A HEARING ON HIS MOTION TO VACATE HIS CONVICTION ON INEFFECTIVE ASSISTANCE GROUNDS; DEFENDANT AVERRED HIS ATTORNEY DIDN'T REQUEST THE SEARCH WARRANT DOCUMENTS, DIDN'T MAKE A SUPPRESSION MOTION, AND DIDN'T INFORM HIM THAT THE LEGALITY OF THE SEARCH WARRANTS COULD BE CONTESTED.

The Second Department, reversing Supreme Court, determined defendant was entitled to a hearing on his motion to vacate his conviction on the ground of ineffective assistance of counsel. Defendant alleged his attorney did not "request and review the search warrant affidavits, move to controvert the search warrants, or advise him before he pleaded guilty that challenging the legality of the search warrants was an option:" "Defense counsel's 'investigation of the law, the facts, and the issues that are relevant to the case' is '[e]ssential to any representation, and to the attorney's consideration of the best course of action on behalf of the client' ... . Accordingly, a defendant's right to representation entitles him or her 'to have counsel conduct appropriate investigations, both factual and legal, to determine if matters of defense can be developed, and to allow himself [or herself] time for reflection and preparation for trial' ... . Here, the defendant's averments in his affidavit, along with other evidence submitted in support of his motion, were sufficient to warrant a hearing on the issue of whether his former counsel was ineffective for failing to conduct an appropriate investigation to determine whether pretrial motions concerning the search warrants should be made, and failing to advise him of potential challenges to the legality of the search warrants before he pleaded guilty to possession counts predicated on physical evidence recovered pursuant to the warrants ...". ***People v. Tindley*, 2022 N.Y. Slip Op. 00886, Second Dept 2-9-22**

CRIMINAL LAW, CONTRACT LAW.

THE SENTENCING COURT SHOULD NOT HAVE ENHANCED DEFENDANT'S SENTENCE BASED ON A POSITIVE DRUG TEST; DEFENDANT DID NOT VIOLATE ANY OF THE TERMS OF THE PLEA AGREEMENT AS IT WAS DESCRIBED ON THE RECORD BY THE COURT; DEFENDANT SUCCESSFULLY COMPLETED THE RESIDENTIAL DRUG TREATMENT PROGRAM, WHICH IS WHAT THE PLEA AGREEMENT CALLED FOR.

The Second Department determined Supreme Court should not have imposed an enhanced sentence because there was no showing that defendant had violated any condition of the plea agreement: "It was undisputed that the defendant successfully completed the 90-day in-patient residential program, which was the only specific program identified by the court at the plea proceeding. Indeed, the court's actual instruction to the defendant at the plea proceeding was to 'complete the . . . residential program.' The court did not indicate at the plea proceeding that the defendant would be subject to continuous and open-ended treatment, or that a single positive drug test at any time would constitute a violation of the plea agreement. While the court referenced 'the conditions of the program' at the beginning of the plea proceeding, there was no subsequent reference in the record to these conditions, and no allegation that the defendant breached any of them. Although the court could have directed the defendant to successfully engage in ongoing treatment up until the date of the sentence, it did not explicitly impose such a condition here ... . The court 'never stated' that the defendant was required to continue his treatment beyond the residential program identified on the record ... , and 'only the failure to comply with explicit conditions can form the basis of a violation' ...". ***People v. Martinez*, 2022 N.Y. Slip Op. 00880, Second Dept 2-9-22**

CRIMINAL LAW, EVIDENCE.

IN THIS CASE INVOLVING A FATAL CAR ACCIDENT WHEN DEFENDANT WAS APPARENTLY "RACING" THE OTHER DRIVER, THE EVIDENCE PRESENTED TO THE GRAND JURY WAS LEGALLY SUFFICIENT TO SUPPORT THE MANSLAUGHTER SECOND DEGREE CHARGE; THE INDICTMENT SHOULD NOT HAVE BEEN DISMISSED.

The Second Department, reversing County Court's dismissal of the indictment, determined the evidence of manslaughter second degree presented to the grand jury was legally sufficient: "[V]iewing the evidence in the light most favorable to the People, we find that it was legally sufficient to support the charges of manslaughter in the second degree ... . The evidence before the grand jury, if accepted as true, established that in addition to traveling at the excessive rate of speed of approximately 80 to 90 miles per hour, the defendant's vehicle and the Porsche were weaving in and out of traffic, without braking or signaling. As the Porsche and the defendant's vehicle approached a sharp bend in the roadway, they were traveling side-by-side, with the Porsche in the left lane. The defendant's vehicle struck the Porsche while attempting to enter the left lane, which caused the Porsche to hit the left hand curb of the roadway and fly 'at least a couple of hundred feet' in the air before coming to rest 'at the bottom of the highway.' Two passengers riding in the Porsche were killed. Although the defendant told a police sergeant at the scene that he did not see the Porsche when he attempted to maneuver his vehicle into the left lane and believed that the Porsche was in his blind spot, he also stated that he was 'kind of racing' with the Porsche ...". ***People v. Castro*, 2022 N.Y. Slip Op. 00874, Second Dept 2-9-22**

CRIMINAL LAW, EVIDENCE.

ALTHOUGH THE ARRESTING OFFICER OBSERVED SOME INTERACTIONS WITH OTHERS BY THE DEFENDANT AT A LOCATION KNOWN FOR DRUG ACTIVITY, THE OFFICER DID NOT SEE ANY PROPERTY OR CURRENCY CHANGE HANDS AND DID NOT FIND ANY DRUGS OR CURRENCY ON THE DEFENDANT OR THE TWO MEN WITH HIM ON THE STREET; THERE WAS NO PROBABLE CAUSE FOR DEFENDANT'S ARREST; THE HEROIN SUBSEQUENTLY FOUND IN THE POLICE CAR AND DEFENDANT'S STATEMENT HE HAD "DITCHED" THE DRUGS IN THE CAR SHOULD HAVE BEEN SUPPRESSED.

The Second Department determined defendant's motion to suppress the heroin found in back seat of a police car and his statement that he had "ditched" the drugs in the car should have been suppressed because the arresting officer did not have probable cause at the time of defendant's arrest. The officer had observed defendant engage in what appeared to the officer to be drug transactions on the street. But when the officer approached the defendant and two others on the street no drugs or currency were found. The defendant had been handcuffed and was subsequently arrested for loitering: "Detective Petrucci did not have probable cause to reasonably believe that the defendant was committing, or had committed, a crime, at any point prior to the defendant's arrest (see id.). Detective Petrucci testified that he arrested the defendant on the basis of the defendant's purported commission of loitering in the first degree, which is defined as 'loiter[ing] or remain[ing] in any place with one or more persons for the purpose of unlawfully using or possessing a controlled substance' (Penal Law § 240.36). However, there was no testimony at the suppression hearing that the defendant had 'remained' in any place with the other individuals with whom he interacted. The interactions between the defendant and the other individuals were described at the hearing as 'quick,' 'fluid,' and lasting approximately one minute. * * * Detective Petrucci did not observe any physical property or currency being handled by the defendant or exchanged between the defendant and either Flores or Mugaburu prior to approaching the defendant, and did not otherwise recover any drugs or currency from the defendant, Flores, or Mugaburu prior to the defendant's arrest. Contrary to the People's contention, the observations that Detective Petrucci did make—several brief, nondescript interactions involving the defendant at an address known to the police for past drug activity—were not a sufficient basis for Detective Petrucci to form a reasonable belief that a narcotics offense was occurring or had been committed." ***People v. Jones*, 2022 N.Y. Slip Op. 00878, Second Dept 2-9-22**

CRIMINAL LAW, EVIDENCE.

A PHOTOGRAPH DOWNLOADED FROM FACEBOOK ALLEGEDLY SHOWING DEFENDANT WEARING CLOTHES SIMILAR TO THE CLOTHES WORN BY THE PERPETRATOR SHOULD NOT HAVE BEEN ADMITTED IN EVIDENCE; THE PHOTOGRAPH WAS NOT AUTHENTICATED; NEW TRIAL ORDERED.

The Second Department, reversing defendant's conviction and ordering a new trial, determined that a photograph downloaded from Facebook allegedly showing the defendant wearing clothes similar to those worn by the perpetrator was not authenticated and should not have been admitted in evidence: "In order to admit a photograph into evidence, it must be authenticated by proof that it is genuine and that it has not been tampered with ... . Here, the People failed to properly authenticate the photograph. The People's only authentication evidence consisted of the testimony of a police witness who searched for the Facebook profile 1½ years after the crime. They did not proffer any evidence or testimony demonstrating that the photograph was 'a fair and accurate representation of the scene depicted or that it was unaltered' ... . To the contrary, the police witness testified that he did not know whether the photograph had been altered. Furthermore, the People did not present any evidence 'to establish that the web page belonged to, and was controlled by, [the] defendant' or any evidence as to when the photograph was created or posted ... . '[A]dmission of the photograph here lacked a proper foundation and, as such, constituted error as a matter of law' ...". ***People v. Mayo*, 2022 N.Y. Slip Op. 00881, Second Dept 2-9-22**

FAMILY LAW, EVIDENCE, JUDGES.

FATHER ALLEGED CHANGES IN HIS WORK SCHEDULE ALLOWED MORE TIME FOR PARENTAL ACCESS WITH THE CHILD; A HEARING SHOULD HAVE BEEN ORDERED ON FATHER'S MODIFICATION PETITION.

The Second Department, reversing Family Court, determined father had submitted sufficient evidence to warrant a hearing on his petition to modify the custody or parental access arrangement: "[F]ather stated that his probationary employment period had since ended, and his schedule was more consistent, and he was off from work on Saturdays and Sundays. Given this change, the father sought expanded parental access with the child. ... Entitlement to a hearing on a modification petition ... is not automatic; the petitioning parent must make a threshold evidentiary showing of a change in circumstances demonstrating a need for modification in order to insure the child's best interests ... . Requiring parents to make this threshold showing before a hearing is ordered serves an important purpose because ... litigation of custody and visitation issues is emotionally fraught and 'can create trauma and uncertainty for the child, as well as trauma, uncertainty, and expense for the parents' ... . Family Court improperly dismissed the father's petition. ... [T]he father's assertions, which were supported by the requisite threshold evidentiary showing, warranted a hearing to resolve whether the existing parental access arrangement continued to serve the child's best interests ...". ***Matter of LaPera v. Restivo*, 2022 N.Y. Slip Op. 00863, Second Dept 2-9-22**

FAMILY LAW, EVIDENCE, JUDGES.

FATHER'S PETITION FOR A MODIFICATION OF CUSTODY, REQUESTING AN AWARD OF SOLE CUSTODY, SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Family Court, over a dissent, in a decision too comprehensive to fairly summarize here, determined father's petition for a modification of custody (awarding him sole custody) should not have been granted: "... Family Court's determination that there was a change of circumstances since the issuance of the prior custody order such that an award of sole legal and physical custody to the father was required to protect the best interests of the child lacks a sound and substantial basis in the record ... . * * * ... Family Court also placed undue weight on an alleged suicide attempt by the mother in 2013, which predated the award of sole legal and residential custody to the mother in 2018 by several years, and thus, could not constitute a 'change of circumstances since the [prior] custody determination' ... . Family Court failed to afford sufficient weight to conduct by the father which militated against awarding him sole custody. In particular, the mother testified that the father did not allow her to speak to the child by phone, Facetime, or other means while the child was at the father's home. ... Family Court failed to afford sufficient weight to conduct by the father which militated against awarding him sole custody. In particular, the mother testified that the father did not allow her to speak to the child by phone, Facetime, or other means while the child was at the father's home." ***Matter of Paige v. Paige*, 2022 N.Y. Slip Op. 00866, Second Dept 2-9-22**

FAMILY LAW, EVIDENCE, JUDGES.

FAMILY COURT SHOULD HAVE HELD A HEARING ON PLAINTIFF'S MOTION TO HOLD DEFENDANT IN CIVIL CONTEMPT FOR FAILURE TO PAY CHILD SUPPORT AND DEFENDANT'S PETITION TO REDUCE THE CHILD SUPPORT PAYMENTS; FAMILY COURT HAD GRANTED DEFENDANT'S PETITION AND DENIED PLAINTIFF'S MOTION WITHOUT HOLDING A HEARING.

The Second Department, reversing Family Court, determined a hearing was necessary on plaintiff's motion to hold defendant in civil contempt for failure to pay child support and on defendant's petition to reduce his child support payments: "[T]he parties' submissions presented issues of fact with regard to the defendant's actual income ... , which the Supreme Court failed to ascertain ... and whether or not he was and is able to comply with his child support obligation under the judgment of divorce ... . Under such circumstances, the court erred in granting the defendant's petition to modify the child support provisions of the judgment of divorce to the extent of directing him to pay $25 per month in child support retroactive to July 10, 2018, and in denying that branch of the plaintiff's motion which was to adjudge the defendant in civil contempt for failure to pay child support without conducting a hearing ...". ***Zeidman v. Zeidman*, 2022 N.Y. Slip Op. 00906, Second Dept 2-9-22**

FORECLOSURE, CIVIL PROCEDURE, CONTRACT LAW, REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL), UNIFORM COMMERCIAL CODE (UCC), EVIDENCE.

THE BANK IN THIS FORECLOSURE ACTION DID NOT DEMONSTRATE STANDING TO BRING THE ACTION AND DID NOT DEMONSTRATE COMPLIANCE WITH THE NOTICE PROVISIONS OF THE MORTGAGE AND RPAPL 1304.

The Second Department, reversing Supreme Court, determined plaintiff bank in this foreclosure action did not prove standing to bring the action and compliance with the notice requirements of the mortgage and RPAPL 1304: "Although the plaintiff attached to the complaint copies of the note and an undated purported allonge endorsed in blank, the plaintiff did not demonstrate that the purported allonge, which was on a piece of paper completely separate from the note, was 'so firmly affixed thereto as to become a part thereof,' as required by UCC 3-202(2) ... . [T}he plaintiff failed to demonstrate,

prima facie, that a notice of default in accordance with sections 15 and 22 of the mortgage was properly transmitted to the defendant prior to the commencement of this action ... . [T]he plaintiff failed to establish, prima facie, its strict compliance with RPAPL 1304. The plaintiff failed to provide proof of the actual mailing of the 90-day notice required by RPAPL 1304, or proof of a standard office mailing procedure designed to ensure that items are properly addressed and mailed ... . Further, although Victoria Wolff, an assistant secretary for the plaintiff, stated in an affidavit that the notices required under RPAPL 1304 were mailed, she did not aver that she had mailed the notices herself or otherwise claim to have personal knowledge of the mailing ...". ***Raymond James Bank, NA v. Guzzetti*, 2022 N.Y. Slip Op. 00888, Second Dept 2-9-22**

FORECLOSURE, EVIDENCE.

THE AFFIDAVIT UPON WHICH THE REFEREE'S REPORT WAS BASED DID NOT LAY A PROPER FOUNDATION FOR THE ASSERTIONS MADE BY THE AFFIANT AND THE CALCULATIONS IN THE AFFIDAVIT WERE BASED UPON BUSINESS RECORDS WHICH WERE NOT PRODUCED, RENDERING THE INFORMATION INADMISSIBLE HEARSAY.

The Second Department, reversing Supreme Court, determined the referee's report should not have been confirmed. The affidavit submitted by the mortgage servicer was insufficient and the records upon which the calculations in the affidavit were based were not produced: "[T]he referee's report was not substantially supported by the record. The report was based in significant part on the affidavit of Elizabeth A. Ostermann, a vice president for Carrington Mortgage Services, LLC (hereinafter Carrington), the purported 'servicer and attorney-in-fact' for the plaintiff. However, Ostermann did not set forth when Carrington began servicing the loan and did not provide a power of attorney appointing it as attorney-in-fact ... . Moreover, Ostermann did not state that 'she was personally familiar with the record-keeping practices and procedures' at Carrington ... . Furthermore, computations based on the 'review of unidentified and unproduced business records . . . constitute[ ] inadmissible hearsay and lack[ ] probative value' ... . Here, the plaintiff did not submit the business records upon which Ostermann purportedly relied in computing the total amount due on the mortgage." ***Trust v. Campbell*, 2022 N.Y. Slip Op. 00845, Second Dept 2-9-22**

Similar issue and result in ***HSBC Bank USA, N.A. v. Sharon*, 2022 N.Y. Slip Op. 00852, Second Dept 2-9-22**

FORECLOSURE, EVIDENCE.

THE BANK IN THIS FORECLOSURE ACTION DID NOT PRESENT SUFFICIENT EVIDENCE OF DEFENDANTS' DEFAULT.

The Second Department, reversing Supreme Court, determined the bank did not demonstrate the defendants' default in this foreclosure action: " 'Among other things, a plaintiff can establish a default by submission of an affidavit from a person having personal knowledge of the facts, or other evidence in admissible form'... . Although Smith [plaintiff's vice president] averred that she had personal knowledge of the plaintiff's record-keeping practices and procedures, Smith's purported knowledge of the alleged default was based upon her review of unidentified business records, which she failed to attach to her affidavit ... . Thus, Smith's assertions regarding the defendants' alleged default constituted inadmissible hearsay and lacked probative value ...". ***Wells Fargo Bank, N.A. v. Gross*, 2022 N.Y. Slip Op. 00902, Second Dept 2-9-22**

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

SUPREME COURT SHOULD NOT HAVE DISMISSED THE FORECLOSURE ACTION AFTER TRIAL ON THE GROUND PLAINTIFF DID NOT LAY A PROPER FOUNDATION FOR THE ADMISSION OF THE DOCUMENTS REQUIRED TO MAKE OUT A PRIMA FACIE CASE; COMPLAINT REINSTATED AND JUDGMENT AWARDED TO PLAINTIFF.

The Second Department, reversing Supreme Court, determined plaintiff in this foreclosure action properly laid a proper foundation at trial for the admission of documents making out a prima facie case. Therefore the action should not have been dismissed and a judgment in favor of plaintiff should have been entered. At trial plaintiff established standing to bring the action, the defendant's default, and compliance with the notice provisions of RPAPL 1304. ***Bank of Am., N.A. v. Bloom*, 2022 N.Y. Slip Op. 00839, Second Dept 2-9-22**

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

THE AFFIDAVITS DID NOT PROVE THE RPAPL 1304 WAS ACTUALLY MAILED TO DEFENDANTS; PLAINTIFF'S SUMMARY JUDGMENT MOTION SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined the proof of compliance with the notice requirements of RPAPL 1304 was insufficient. Therefore plaintiff in this foreclosure action was not entitled to summary judgment: "Since HSBC failed to provide evidence of the actual mailing, or evidence of a standard office mailing procedure designed to ensure that items are properly addressed and mailed, it failed to establish, prima facie, its strict compliance with RPAPL 1304 ...". ***MTGLQ Invs., L.P. v. Cutaj*, 2022 N.Y. Slip Op. 00858, Second Dept 2-9-22**

Similar issues and result in ***U.S. Bank N.A. v. Adams*, 2022 N.Y. Slip Op. 00896, Second Dept 2-9-22**

Similar issues and result in ***Wells Fargo Bank, N.A. v. Davidson*, 2022 N.Y. Slip Op. 00901, Second Dept 2-9-22** which also held the bank's failure to comply with the "one envelope" rule for the RPAPL 1304 notice can be raised for the first time on appeal.

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

THE RPAPL 1304 NOTICE DID NOT INLUDE A LIST OF FIVE HOUSING COUNSELING AGENCIES SERVING THE COUNTY WHERE THE PROPERTY IS LOCATED; THE BANK'S SUMMARY JUDGMENT MOTION IN THIS FORECLOSURE ACTION SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined plaintiff bank did not demonstrate compliance with the RPAPL 1304 required that the notice of foreclosure include a list of five housing counseling agencies serving the county were the property is located: "[T]he plaintiff failed to establish, prima facie, its strict compliance with RPAPL 1304, as it failed to demonstrate that the 90-day notices it sent to the defendants contained the requisite list of five housing counseling agencies serving the county in which the subject property is located ... . In support of its motion, the plaintiff submitted the notices pursuant to RPAPL 1304, annexed to which was a list of five agencies. Four of the agencies were located in Queens, and one of the agencies, Hispanic Brotherhood of Rockville Centre, Inc., was located in Nassau County. Thus, the plaintiff failed to establish, prima facie, that all five of the agencies served Queens County." ***U.S. Bank N.A. v. Gordon*, 2022 N.Y. Slip Op. 00898, Second Dept 2-9-22**

Similar issues and result in ***Wells Fargo Bank, N.A. v. McMahon*, 2022 N.Y. Slip Op. 00903, Second Dept 2-9-22**

INSURANCE LAW.

ALTHOUGH THE INSURER DID NOT RECEIVE NOTICE OF THE CLAIM UNTIL 23 MONTHS AFTER THE CAR ACCIDENT, IT WAS NOT PREJUDICED BY THE DELAY AND DID NOT COMMENCE A TIMELY INVESTIGATION OF THE CLAIM; THE DISCLAIMER OF COVERAGE WAS INVALID.

The Second Department, reversing Supreme Court, determined the insurer (Utica) did not make a timely disclaimer of coverage in this car accident case. Although the insurer did not receive notice of the claim from the insured (Kassie) until 23 months after the accident, it was not prejudiced by that delay and failed to promptly investigate the claim when notice was received: "Utica first received notice of the SUM claim on May 5, 2017, just less than 23 months after the subject accident. Utica's representative testified at the hearing that, despite the apparent untimeliness of this notice, Utica did not disclaim coverage upon receiving the May 5, 2017 letter because it did not at that time face any specific deadline to take action, so it had not yet been prejudiced by the untimely notice. However, on June 26, 2017, Utica received a letter from Kassie requesting consent to settle with the tortfeasor. Utica was required to respond to the letter requesting consent to settle within 30 days ... . Utica's representative testified at the hearing that it disclaimed coverage after receiving the June 26, 2017 letter, since at that point it was prejudiced by the untimeliness of the notice of claim because it could not complete its investigation before the deadline to respond to the June 26, 2017 letter. However, Utica failed to present any evidence that upon receipt of the notice of claim it began fulfilling its 'duty to promptly and diligently investigate the claim' ... . Thus, Utica cannot reasonably claim that it was prejudiced by the untimely notice of claim based on its receipt over seven weeks later of the request from Kassie for consent to settle. Notably, Utica did not claim that it would have been unable to adequately investigate the SUM claim in time to respond to the request for consent to settle even if it had promptly commenced such an investigation upon receiving the notice of claim." ***Matter of Utica Natl. Ins. of Tex v. Kassie*, 2022 N.Y. Slip Op. 00867, Second Dept 2-9-22**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

DEFENDANTS DEMONSTRATED (1) THE PROTRUDING PIPE OVER WHICH PLAINTIFF TRIPPED WAS OPEN AND OBVIOUS AND NOT INHERENTLY DANGEROUS, (2) THEY DID NOT EXERCISE SUPERVISORY CONTROL OVER PLAINTIFF'S WORK, AND (3) THE INDUSTRIAL CODE PROVISION PROHIBITING THE ACCUMULATION OF DEBRIS DID NOT APPLY; THE LABOR LAW §§ 200 AND 241(6) CAUSES OF ACTION SHOULD HAVE BEEN DISMISSED.

The Second Department, reversing Supreme Court, determined the defendants' motion for summary judgment on the Labor Law §§ 200 and 241(6) causes of action should have been granted. Plaintiff, while pouring a concrete floor, tripped over a drainage pipe which had been covered by a blanket to protect it from the concrete. The defendants demonstrated: (1) the pipe was open and obvious and not inherently dangerous; (2) they did not exercise supervisory control over plaintiff's work; and (3), the Industrial Code provision which addresses accumulation of debris did not apply: "[T]he defendants met their prima facie burden of demonstrating both that the allegedly dangerous condition was open and obvious and not inherently dangerous, and that they lacked the authority to supervise or control the plaintiff's work. ... [T]he defendants demonstrated that 12 NYCRR 23-1.7(e)(2) is inapplicable because the protruding drainage pipe over which the plaintiff allegedly fell was a permanent and an integral part of what was being constructed ...". ***Sanchez v. BBL Constr. Servs., LLC*, 2022 N.Y. Slip Op. 00890, Second Dept 2-9-22**

LANDLORD-TENANT, CONTRACT LAW.

QUESTION OF FACT WHETHER THE SALES COUNTER AND DISPLAY UNIT INSTALLED AT THE OUTSET OF THE LEASE WAS A TRADE FIXTURE WHICH COULD BE REMOVED BY THE TENANT OR A PERMANENT FIXTURE WHICH COULD NOT BE REMOVED.

The Second Department, reversing Supreme Court, determined there was a question of fact whether the sales counter and display unit installed on the leased premises was a permanent or trade fixture. Supreme Court had ruled the counter and display unit was a trade fixture which was properly removed by the tenant at the end of the lease: "[T]he defendants [tenants] failed to establish as a matter of law that the sales counter and customer display unit is a trade fixture that they properly removed from the premises at the end of the lease term. Contrary to the defendants' contention, the fact that Medi-Fair [tenant], pursuant to the express and agreed upon terms of the lease regarding the tenant fit-up, paid extra for Wallkill [landlord] to construct and install the customized sales counter and customer display unit does not, under the circumstances, make it a trade fixture as a matter of law ... . Rather, read together, the articles of the lease pertaining to the tenant fit-up, alterations, and redelivery of the premises at the end of the lease term raise a triable issue of fact as to whether the parties intended items such as the sales counter and customer display unit annexed to the premises by Wallkill [landlord] as part of the initial, interior construction and tenant fit-up, as compared with any post-occupancy alterations and/or additions of fixtures to the premises by Medi-Fair [tenant], to be permanent fixtures of the premises." ***Wallkill Med. Dev., LLC v. Medi-Fair, Inc.*, 2022 N.Y. Slip Op. 00899, Second Dept 2-9-22**

MEDICAL MALPRACTICE, PERSONAL INJURY, EVIDENCE.

IN THIS MEDICAL MALPRACTICE ACTION, THE HOSPITAL-DEFENDANTS' EXPERT'S AFFIDAVIT DID NOT ADDRESS ALL OF THE MALPRACTICE ALLEGATIONS AND OFFERED CONCLUSORY ASSERTIONS; THEREFORE THE HOSPITAL'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined defendant hospital's (Lutheran's) expert affidavit did not address all of plaintiff's allegations of Dr. Barabe's medical malpractice and therefore the hospital should not have been awarded summary judgment: "[T]he Lutheran defendants' submissions were insufficient to establish Barabe's prima facie entitlement to judgment as a matter of law dismissing the cause of action to recover damages for medical malpractice insofar as asserted against him. The opinion of their expert with respect to the absence of a departure from the accepted standard of care failed, among other things, to address the plaintiffs' allegation that Barabe departed from the accepted standard of care in failing to order necessary diagnostic tests ... . In addition, the expert did not specify the accepted standard of medical care applicable to Barabe and failed to explain how Barabe did not depart from that standard ... . Moreover, the expert proffered only the most conclusory assertions regarding the absence of a causal link between Barabe's alleged departures and the injuries sustained by the decedent ...". ***Ojeda v. Barabe*, 2022 N.Y. Slip Op. 00870, Second Dept 2-9-22**

NUISANCE, MUNICIPAL LAW, ENVIRONMENTAL LAW, LAND USE.

ALLOWING DRIVING AND PARKING ON A LONG ISLAND BEACH MAY CONSTITUTE A PRIVATE AND PUBLIC NUISANCE.

The Second Department, reversing (modifying) Supreme Court, determined the causes of action for private and public nuisance against the town and village, based upon the code provisions and rules allowing vehicles to drive and park on the beach, should not have been dismissed: "[P]hotographs of the subject beach area as well as the affidavits of [plaintiff] and her family describing the conditions on the beach raised triable issues of fact as to whether driving and parking in the subject beach area, in the manner and at the intensity allegedly occurring at the time of this action, was of an unreasonable character. ... 'A public nuisance exists for conduct that amounts to a substantial interference with the exercise of a common right of the public, thereby offending public morals, interfering with the use by the public of a public place or endangering or injuring the property, health, safety or comfort of a considerable number of persons' ... . Here, contrary to the court's conclusion, triable issues of fact existed as to whether summer daytime beach driving and parking in the subject beach area, in the manner and at the intensity allegedly occurring at the time of this action, endangered the health and safety of members of the public who use that portion of the beach as well as the beach itself, including the lands seaward of the high-water line, which are held in trust for the public." ***Thomas v. Trustees of the Freeholders & Commonalty of the Town of Southampton*, 2022 N.Y. Slip Op. 00894, Second Dept 2-9-22**

PERSONAL INJURY, EVIDENCE.

PLAINTIFF ALLEGEDLY TRIPPED OVER AN ELECTRICAL BOX AS SHE STEPPED OFF A TREADMILL; DEFENDANTS RAISED QUESTIONS OF FACT ABOUT WHETHER THE CONDITION WAS OPEN AND OBVIOUS AND ABOUT THE CREDIBILITY OF THE PLAINTIFF AND HER WITNESSES, INCLUDING HER EXPERT.

The Second Department, reversing Supreme Court, determined plaintiff's motion for summary judgment in this premises liability case should not have been granted. Plaintiff alleged she tripped over an electrical box when she stepped off a treadmill at defendant fitness center. Defendants raised questions of fact about whether the condition was open and obvious and about the credibility of plaintiff and her witnesses, including the expert: "[T]he defendants cited to the evidence submitted in support of their motion for summary judgment dismissing the complaint, which included photographs allegedly depicting the subject electrical box, and testimony relating to the configuration and installation of the treadmills on the floor of the fitness center. The defendants' submissions tended to show that the electrical box was open and obvious, and not inherently dangerous ... . The defendants' opposition also raised triable issues of fact relating to '[the] plaintiff's credibility' ... , and the credibility of her other witnesses, including her expert witness ...". ***Sebagh v. Capital Fitness, Inc.*, 2022 N.Y. Slip Op. 00892, Second Dept 2-9-22**

THIRD DEPARTMENT

HUMAN RIGHTS LAW, EMPLOYMENT LAW.

PLAINTIFF'S "INVOLUNTARY RESIGNATION," HOSTILE WORK ENVIRONMENT AND RETALIATION ACTION PROPERLY SURVIVED SUMMARY JUDGMENT; TWO JUSTICE DISSENT.

The Third Department over a two-justice dissent, determined plaintiff's employment discrimination and retaliation action properly survived summary judgment. Among the issues presented by the allegations was whether she "involuntarily resigned" because of the intolerably hostile work environment. Plaintiff alleged she was subjected to sexual harassment and was retaliated against after she complained about her treatment: "In our view, the broader account by plaintiff of a hostile work environment, Hawkins' [plaintiff's supervisor's] behavior in placing plaintiff, but not a similarly situated man, on a PIP [performance improvement plan], and what plaintiff described as a wholly inadequate response by Russo [human resources official] to her August 2017 complaint about the situation reflect questions of fact as to whether plaintiff was subjected to a work environment so hostile that her only alternative was resignation and whether that hostility arose from a discriminatory motive ... . Defendants attempted to rebut the presumption of discrimination arising from those facts via the affidavit of Hawkins, who averred in conclusory fashion that the other employee he supervised was performing better than plaintiff at the time she was placed on a PIP and that the other employee was also placed on a PIP at some point. Hawkins, however, gave no detail as to how the other employee compared to plaintiff on the performance metrics, failed to deny that the other employee was also underperforming on those metrics in July 2017 and offered no explanation as to why he did not seek to place both on a PIP at that time." ***Long v. Aerotek, Inc.*, 2022 N.Y. Slip Op. 00915, Third Dept 2-10-22**

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