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COURT OF APPEALS

CRIMINAL LAW, ATTORNEYS, JUDGES.

DEFENDANT'S STATEMENT "I WOULD LOVE TO GO PRO SE" WAS NOT A DEFINITIVE REQUEST TO REPRESENT HIMSELF AND THEREFORE THE STATEMENT DID NOT TRIGGER THE NEED FOR A SEARCHING INQUIRY BY THE JUDGE.

The Court of Appeals, in a brief memorandum decision over an extensive two-judge dissent, determined defendant's statement "I would love to go pro se" was not a definitive commitment to self-representation and therefore did not trigger an inquiry by the judge: "[D]efendant did not clearly and unequivocally request to proceed pro se. During a colloquy with the trial court, defendant referenced the unsuccessful application to relieve his assigned counsel made at his prior appearance, and he renewed that application, claiming that counsel was 'ineffective.' The court denied the application and rejected defendant's renewed attempt to read aloud from what defendant had previously referred to as 'my testimony.' Upon review of the record as a whole, defendant's retort, 'I would love to go pro se,' immediately after the court's denial of his applications 'd[id] not reflect a definitive commitment to self-representation' that would trigger a searching inquiry by the trial court ...". ***People v. Duarte*, 2022 N.Y. Slip Op. 00960, Ct App 2-15-22**

CRIMINAL LAW, VEHICLE AND TRAFFIC LAW.

THE SO-CALLED TWO-HOUR RULE, REQUIRING THE REQUEST FOR A DWI BREATH TEST BE MADE AND THE REFUSAL WARNINGS BE GIVEN WITHIN TWO HOURS OF ARREST, DOES NOT APPLY TO THE ADMINISTRATIVE LICENSE REVOCATION HEARINGS HELD BY THE DEPARTMENT OF MOTOR VEHICLES (DMV); THEREFORE THE FACT THAT THE PETITIONER WAS ASKED TO TAKE THE BREATH TEST AND WAS GIVEN THE REFUSAL WARNINGS THREE HOURS AFTER ARREST DID NOT PRECLUDE THE DMV FROM CONSIDERING PETITIONER'S TEST REFUSAL.

The Court of Appeals, in a full-fledged opinion by Judge DiFore, over a dissenting opinion, determined the so-called two-hour rule does not apply to a driver's license revocation administrative hearing after a DWI arrest. Within two hours of arrest the police can warn the driver that a refusal to submit to the blood-alcohol breath test is admissible at trial. If the request to submit to the test is made and the refusal warnings are given more than two hours after arrest, however, the refusal is not admissible at trial. Here the petitioner refused the DWI breath test three hours after arrest, after the refusal warnings were given. He argued the two-hour rule should apply and the refusal should not be considered at the Department of Motor Vehicle's (DMV's) administrative license revocation hearing: "Petitioner's reliance on the statutory interpretation analysis in *People v Odum* [31 NY3d 344] as support for a motorist's substantive right to refuse a chemical test without consequence is misplaced. Odum addressed the admissibility at trial of the results of a chemical test administered more than two hours after the defendant's arrest, and whether the refusal warnings, including the inaccurate warning regarding the use of any refusal at a criminal trial, as given to him rendered his consent to the test involuntary. We emphasized that the 1973 statute authorizing the admissibility of evidence of a test refusal at a criminal trial was in derogation of common law and concluded as a result that the statutory provision authorizing such admission—Vehicle and Traffic Law § 1194 (2) (f)—had to be strictly construed to include the two-hour rule ... . In stark contrast, the limitation on the scope of the revocation hearing in section 1194 (2) (c) is not in derogation of the common law and is a subsequently enacted provision that specifically governs the issues that may be considered at an administrative hearing ...". ***Matter of Endara-Caicedo v. Vehicles*, 2022 N.Y. Slip Op. 00959, CtApp 2-15-22**

LANDLORD-TENANT, MUNICIPAL LAW, ADMINISTRATIVE LAW, CONTRACT LAW.

THE NYC LOFT BOARD PROPERLY REMITTED THE MATTER FOR FURTHER PROCEEDINGS IN THIS ACTION CONCERNING A SETTLEMENT AGREEMENT IN WHICH THE TENANTS PURPORTED TO WITHDRAW THEIR APPLICATION FOR LOFT LAW COVERAGE.

The Court of Appeals, reversing the Appellate Division, determined the NYC Loft Board properly remitted the matter for further proceedings in this proceeding involving a settlement agreement in which the tenants purported to withdraw their application for Loft Law coverage; "[T]he matter [is] remitted to the Appellate Division with directions to remand to the

New York City Loft Board for further proceedings in accordance with this memorandum. In accordance with its regulations (see 29 RCNY § 1-06 [j] [5]), the Loft Board reviewed and rejected the parties' proposed settlement agreement as perpetuating an illegal living arrangement. The rationality of that determination is not before us ... . Under these limited circumstances, it was not irrational for the Board to remand for further proceedings, thereby declining to give effect to a provision of the settlement agreement in which tenants purported to withdraw their application for Loft Law coverage." ***Matter of Callen v. New York City Loft Bd.*, 2022 N.Y. Slip Op. 00957, Ct App 2-15-22**

LANDLORD-TENANT, REAL PROPERTY LAW.

PURSUANT TO THE LOFT LAW AND THE REAL PROPERTY LAW, THE LANDLORD WAS ENTITLED TO TERMINATE THE TENANCY AND REGAIN POSSESSION OF THE LOFT IN A HOLDOVER PROCEEDING.

The Court of Appeals, in a full-fledged opinion by Judge Garcia, over an extensive two-judge dissent, reversing the Appellate Division, determined the Loft Law did not prohibit the landlord, Aurora, from terminating the tenancy and regaining possession of the loft by a holdover proceeding. The opinion and the dissenting opinion are comprehensive and cannot be fairly summarized here: "Aurora Associates LLC, the owner of Loft 3B at 78 Reade Street in Manhattan, commenced this holdover proceeding to recover possession and terminate the tenancy of the current occupant. Summary judgment was granted to the tenant on the ground that Aurora could not terminate his tenancy because the loft unit was subject to rent stabilization. We must decide whether a loft unit located in an interim multiple dwelling covered by the provisions of the Loft Law but exempt from the rent regulation provisions of that statute by operation of a sale of the prior tenant's rights and improvements is otherwise subject to rent stabilization. We hold that it is not ... . * * * As the Housing Court Judge explained, '[T]he core of the parties' dispute is the rent regulatory status of the subject premises' because '[I]f the subject premises is unregulated, termination of a tenancy pursuant to Real Property Law … 232-a is a remedy available to Petitioner,' and '[i]f the subject premises is rent-stabilized, RPL … 232-a is not a remedy available to Petitioner.' * * * Here, the prior owner purchased rights and improvements in a particular unit in this Loft Law-eligible building, removing that unit from the Loft Law's rent regulation provisions, entitling Aurora to charge a market rent and, pursuant to Real Property Law … 232-a, to regain possession of the apartment by means of a holdover proceeding. ***Matter of Aurora Assoc. LLC v. Locatelli*, 2022 N.Y. Slip Op. 00958, CtApp 2-15-22**

FIRST DEPARTMENT

ADMINISTRATIVE LAW, MUNICIPAL LAW, VEHICLE AND TRAFFIC LAW, EVIDENCE.

A STATEMENT FROM THE DEPARTMENT OF TRANSPORTATION AUTHENTICATING PHOTOGRAPHS OF PETITIONER'S CAR RUNNING A RED LIGHT NEED NOT BE NOTARIZED.

The First Department, reversing Supreme Court, determined the city (NYC) was not required to submit a notarized statement from the Department of Transportation authenticating photographs of petitioner's car running a red light: "For over half a century, the legislature has consistently provided for prima facie liability for minor traffic offenses to be established by a simple, nonnotarized affirmation under penalty of perjury, using the same 'sworn to or affirmed' language. Legislative history establishes the plain intent and meaning of the 'sworn to or affirmed' language of Vehicle and Traffic Law § 1111-a(d): that the reviewing technician merely affirm, under penalty of perjury, the veracity of his statement. No notarization is necessary. In the instant administrative proceeding, the notice of liability was supported by the requisite affirmation. The video images authenticated by the technician show petitioner's car running a red light. This constitutes, as per the statute, "prima facie evidence" of the traffic violation (Vehicle and Traffic Law §1111-a[d])." ***Matter of Monroe St. v. City of New York*, 2022 N.Y. Slip Op. 00972, First Dept 2-15-22**

CIVIL PROCEDURE, CORPORATION LAW.

PLAINTIFF, A DISSOLVED CORPORATION, PROPERLY PURSUED CLAIMS AND LIABILITIES WHICH AROSE PRIOR TO DISSOLUTION.

The First Department, reversing Supreme Court, determined plaintiff-dissolved-corporation properly pursued claims and liabilities which arose prior to dissolution: "A dissolved corporation is permitted to pursue claims and liabilities that arose prior to dissolution as part of the winding up process (Business Corporation Law §§ 1005[a][1]; 1006[a][4]; [b] ...). Plaintiff's commencement of this litigation, as well as the settlement of other predissolution claims against defendant, and its use of settlement funds to satisfy its outstanding liabilities in the wage violations case, are expressly contemplated and authorized by Business Corporation Law § 1006(a)(4). Thus, it was error to find that plaintiff's dissolution resulted in it lacking capacity to maintain this action against defendant for work performed before plaintiff was dissolved ... . Contrary to defendant's contention, plaintiff's winding up period has not been so extended as to be considered unreasonable ...". ***TADCO Constr. Corp. v. Dormitory Auth. of the State of N.Y.*, 2022 N.Y. Slip Op. 00990, First Dept 2-15-22**

CONTRACT LAW, CIVIL PROCEDURE, JUDGES.

SUPREME COURT, IN THE CONTEXT OF A MOTION TO DISMISS, SHOULD NOT HAVE DETERMINED AS A MATTER OF LAW THAT THE DEFENDANTS WERE NOT "AFFILIATES" WITHIN THE MEANING OF THE LANGUAGE OF A RELEASE.

The First Department, reversing (modifying) Supreme Court, determined Supreme Courts should have simply denied the motion to dismiss instead of deciding what parties were included in the term 'affiliates' in the release at issue: "Supreme Court erred in finding, as a matter of law, that the word 'affiliates' in the release entered into between plaintiffs and Siddiqui could not be read to include defendants Cernich and Huan Tseng ... . The word 'affiliates' may apply to individuals, and is 'not commonly understood to apply only to entities' ... . Furthermore, the arbitrator's conclusion, in an earlier arbitration against different parties, that the release did not apply to nonparty Ming Dang does not serve as a conclusive basis for finding that the release did not apply to defendants. Accordingly, the scope of the release language with respect to Cernich and Tseng was ambiguous, and Supreme Court should have simply denied the motion to dismiss without determining the meaning of the release language as a matter of law." ***Apollo Mgt., Inc. v. Cernich*, 2022 N.Y. Slip Op. 00964, First Dept 2-15-22**

CRIMINAL LAW, CONTRACT LAW, JUDGES, APPEALS.

DEFENDANT MADE GOOD FAITH EFFORTS TO COMPLY WITH THE TERMS OF HER PLEA AGREEMENT; SENTENCE REDUCED AND CONVICTION MODIFIED IN THE INTEREST OF JUSTICE.

The First Department, reducing defendant's sentence and modifying her conviction in the interest of justice, determined defendant had made good faith efforts to complete the anger-management program that was part of her plea agreement: "[D]efendant entered into a plea agreement whereby she would plead guilty to second-degree assault, third-degree assault and endangering the welfare of a child, and the case would be adjourned for one year to allow her to complete a 12-week anger management program. If defendant completed the program, complied with an order of protection and had no new arrests, the People would allow her to withdraw her guilty plea to second-degree assault, and she would be sentenced to conditional discharges on the two misdemeanor convictions. Despite defendant's diligent, repeated efforts to complete an anger management program, legitimate issues such as her inability to arrange childcare for her two young children after her 75-year-old grandmother, who had been caring for the children while defendant attended the sessions, broke her hip, prevented her from attending all the sessions. She enrolled in the program three times, each time beginning from the start, but could not complete the 12 weeks. At the time of sentencing, she had found, enrolled in and almost completed a different program close to her home with a schedule that allowed her to work and pick up her children after school. Although she did not complete the anger management program, defendant satisfied the remaining terms of the plea agreement. Under these circumstances, in the interests of justice we accordingly reduce the conviction and modify the sentence ...". ***People v. Perez*, 2022 N.Y. Slip Op. 01104, Second Dept 2-17-22**

INSURANCE LAW, EVIDENCE.

TO BE ENTITLED TO SUMMARY JUDGMENT BASED ON A PATIENT'S FAILURE TO SHOW UP FOR AN INDEPENDENT MEDICAL EXAMINATION (IME), THE NO-FAULT INSURER MUST SHOW BOTH THAT THE PATIENT DID NOT SHOW UP AND THE REQUEST FOR THE IME AND THE SCHEDULING OF THE IME COMPLIED WITH THE REQUIRED TIME-FRAMES.

The First Department, reversing Supreme Court, determined plaintiff-insurer's motion for summary judgment in this no-fault insurance action should not have been granted. Although an insurer need not pay no-fault claims if the patient did not appear for an independent medical examination (IME), in order to warrant an award of summary judgment the insurer must demonstrate compliance with the required time frames for requesting and scheduling the IME: "The failure to appear for a properly scheduled independent medical examination (IME) requested by the insurer 'when, and as often as, it may reasonably require is a breach of a condition precedent to coverage under the no-fault policy' and vitiates coverage ab initio ... . However, to meet its prima facie burden for summary judgment where it has denied a claim for no-fault benefits based on a patient's failure to appear for an IME, the insurer must establish that it requested IMEs in accordance with the procedures and time frames set forth in the no-fault implementing regulations and that the patient did not appear ... . Because it is impossible to discern from the record in each case here whether plaintiff complied with the requisite time frames requiring it to request IMEs within 15 days of receiving appellants' claims and scheduling the IMEs for within 30 days of receiving their claims (11 NYCRR 65-3.5[b],[d]), plaintiff failed to establish its prima facie entitlement to summary judgment ...". ***American Tr. Ins. Co. v. Martinez*, 2022 N.Y. Slip Op. 00963, First Dept 2-15-22**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

NEITHER THE BUILDING OWNER NOR THE PROSPECTIVE BUILDING OWNER HAD SUPERVISORY CONTROL OVER THE PREMISES OR THE WORK, INCLUDING THE WORK OF PLAINTIFF AND HIS CO-WORKER WHO APPARENTLY MOPPED THE FLOOR WHERE PLAINTIFF SLIPPED AND FELL; THE LABOR LAW 200 AND COMMON LAW NEGLIGENCE CAUSES OF ACTION AGAINST THE OWNER AND PROSPECTIVE OWNER SHOULD HAVE BEEN DISMISSED.

The First Department, reversing (modifying) Supreme Court, determined the Labor Law 200 and common law negligence causes of action against the building owner (Grand) and the prospective purchaser of the building (Empire) should have been dismissed. Plaintiff slipped and fell on a wet floor which apparently had just been mopped by a co-worker. Neither Grand nor Empire had general supervisory authority over the premises and did not supervise or control the work of plaintiff or the co-worker: "The building was owned by defendant Grand but was under a contract of sale to defendant Empire, with a closing date of February 1, 2017. Under the contract of sale, Empire was given access to the premises prior to closing to perform renovations and to stage and lease the apartments. Empire hired plaintiff's employer Infinity to act as general contractor for the renovations. According to the record, Empire did not have any employees at the premises on the date of the accident and did not supervise Infinity's work. Grand had no employees or agents at the premises full time, but an employee of a company related to Grand would occasionally visit the building to check that there were no problems and that everything was clean. The employee visited the building approximately four or five times, approximately twice in the four months prior to the accident, and once during construction. No one employed by Grand regularly supervised the construction ongoing at the premises." ***Arnold v. Empire 326 Grand LLC*, 2022 N.Y. Slip Op. 00965, First Dept 2-15-22**

MUNICIPAL LAW, SOCIAL SERVICES LAW, INSURANCE LAW.

THE NYC HUMAN RESOURCES ADMINISTRATION (HRA) WAS NOT ENTITLED TO ANY OF THE PROCEEDS OF PLAINTIFF'S CAR-ACCIDENT SETTLEMENT BECAUSE THE SETTLEMENT DID NOT INCLUDE MEDICAL EXPENSES; PLAINTIFF WAS BARRED FROM RECOVERY OF MEDICAL COSTS BECAUSE HER BASIC ECONOMIC LOSS WAS LESS THAN $50,000 (INSURANCE LAW § 5102).

The First Department, reversing Supreme Court, determined no part of plaintiff's automobile accident settlement was available to satisfy a medical lien held by the NYC Human Resources Administration (HRA) because the settlement did not include medical expenses: "HRA asserted a lien on the proceeds of plaintiff's settlement of an action arising out of an automobile accident in an amount representing the total amount of the medical bills it paid in connection with the treatment of the injuries plaintiff sustained in the accident (see Social Services Law § 104-b). However, plaintiff was barred from suing for medical expenses, because her basic economic losses were less than $50,000 (see Insurance Law § 5102[a]). Moreover, in light of the particular record before us, no portion of the proceeds of the settlement represents medical expenses, and HRA may not recover any portion of the proceeds for its medical costs ...". ***Marmol v. Mutino*, 2022 N.Y. Slip Op. 00970, First Dept 2-15-22**

REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL), ATTORNEYS.

IN AN ACTION FOR A LICENSE PURSUANT TO RPAPL 881 TO ALLOW PETITIONER ACCESS TO RESPONDENTS' ABUTTING BUILDING TO FACILITATE CONSTRUCTION WORK ON PETITIONER'S BUILDING, RESPONDENTS ARE ENTITLED TO LICENSE FEES, ATTORNEY'S FEES, ENGINEERING FEES, ETC., ASSOCIATED WITH PROTECTING THEIR BUILDING AND TO COMPENSATE FOR INTERFERENCE WITH THE USE OF THEIR BUILDING, IRRESPECTIVE OF WHETHER THERE IS ANY DAMAGE TO RESPONDENTS' BUILDING.

The First Department, in a full-fledged opinion by Justice Acosta, affirmed the grant of a license to petitioner, pursuant to RPAPL 881, to enter respondents' abutting property to protect the abutting property during construction work on petitioner's building, but vacated or reduced some of the specific costs and/or damages awarded. The First Department noted that attorney's fees, license fees and engineering fees, etc., associated with the respondents' efforts to protect their building and the loss of use and enjoyment of their building during construction are properly assessed to the petitioner: "What petitioner seeks is essentially to compel respondents to grant it a license on its own terms. However, as we have recognized, because '[t]he respondent to an 881 petition has not sought out the intrusion and does not derive any benefit from it . . . [e]quity requires that the owner compelled to grant access should not have to bear any costs resulting from the access' ... . Thus, the grant of licenses pursuant to RPAPL 881 often warrants the award of contemporaneous license fees ... . Contrary to petitioner's contention that a license fee constitutes a windfall unless there are some actual damages, such as lost business, we have found that a license fee is warranted 'where the granted license will entail substantial interference with the use and enjoyment of the neighboring property during the [license] period, thus decreasing the value of the property during that time' ... . Similarly, a compulsory licensor should be entitled to reasonable attorneys' and engineering fees ...". ***Matter of Panasia Estate, Inc. v. 29 W. 19 Condominium*, 2022 N.Y. Slip Op. 00975, First Dept 2-15-22**

SECOND DEPARTMENT

CIVIL PROCEDURE.

THE DAMAGES AMOUNT ASSESSED AGAINST THE DEFAULTING DEFENDANT IN THE INQUEST WAS EXCESSIVE.

The Second Department, reversing (modifying) Supreme Court, determined the amount of damages assessed against the defaulting defendant in the inquest was excessive: "Although this Court is not relieving the defendant of his default, this Court may consider whether excessive damages were awarded ... . 'An unwarranted and excessive award after inquest will not be sustained, as to do otherwise 'would be tantamount to granting the plaintiffs an open season at the expense of a defaulting defendant' ... . Based upon the proof submitted at the inquest, an award of $25,000 constitutes reasonable compensation ...". ***Kokolis v. Wallace*, 2022 N.Y. Slip Op. 01018, Second Dept 2-16-22**

CIVIL PROCEDURE.

NO ONE MOVED TO QUASH THE NONJUDICIAL SUBPOENA SERVED ON A NONPARTY; SUPREME COURT SHOULD HAVE GRANTED THE MOTION TO COMPEL THE NONPARTY'S APPEARANCE AT A DEPOSITION.

The Second Department determined Supreme Court should have compelled the former Town Supervisor (St. Lawrence) to appear for depositions in this slip and fall case: "[T]he plaintiff served nonparty Christopher St. Lawrence, former Town Supervisor for the Town, with a nonjudicial subpoena directing him to appear for a deposition. St. Lawrence failed to appear for the deposition as directed in the subpoena, and the plaintiff moved ... to compel him to comply with that subpoena by appearing for a deposition ... . Supreme Court denied the motion, and the plaintiff appeals. Since the Supreme Court found that the subpoena was proper, that no one had moved to quash it, and that St. Lawrence had failed to comply with it, the court should have directed St. Lawrence to comply with the subpoena (see CPLR 2308[b] ...). ... [T]he court should have granted that branch of the plaintiff's motion which was to compel St. Lawrence to comply with the subpoena by directing him to appear for a deposition ... Thus, we remit the matter to the Supreme Court, Rockland County, to schedule the deposition in compliance with the subpoena and for further proceedings to compel compliance with the subpoena." ***Schiller v. Town of Ramapo*, 2022 N.Y. Slip Op. 01061, Second Dept 2-16-22**

CIVIL PROCEDURE, FORECLOSURE, JUDGES.

THE PURPORTED STIPULATION OF DISCONTINUANCE OF THE FORECLOSURE ACTION AND THE PURPORTED NOTICE OF DISCONTINUANCE WERE INVALID; SUPREME COURT SHOULD NOT HAVE DETERMINED THE ACCELERATION OF THE MORTGAGE DEBT HAD BEEN REVOKED.

The Second Department, reversing Supreme Court, determined both the purported stipulation of discontinuance and the purported notice of discontinuance were invalid. Therefore the judge should not have determined the acceleration of the mortgage debt had been revoked: "... Supreme Court erred in discontinuing the action based upon a purported stipulation of discontinuance, and then interceding on the plaintiff's behalf to declare the acceleration of the loan revoked. The stipulation was clearly ineffective as it was only signed by the attorney for the plaintiff (see CPLR 3217[a][2] ...). Further, to the extent that the stipulation was construed as a notice of discontinuance, it was equally ineffective to discontinue the action, as it was not served upon the appellant (see CPLR 3217[a][1] ...)." ***HSBC Bank USA, N.A. v. Rini*, 2022 N.Y. Slip Op. 01016, Second Dept 2-16-22**

CIVIL PROCEDURE, MUNICIPAL LAW, NEGLIGENCE.

PETITIONER'S NOTICE OF CLAIM DEMONSTRATED HE HAD SUFFICIENT INFORMATION TO FORMULATE A COMPLAINT IN THIS SLIP AND FALL CASE; HIS REQUEST FOR PRE-JOINDER DISCOVERY AND PRESERVATION OF THE ACCIDENT SCENE SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined pre-joinder discovery and preservation of the accident site was not necessary in this slip and fall case: "The petitioner alleges ... he slipped and fell due to an accumulation of water leaking from the ceiling onto the landing at the top of an escalator in a subway station. The petitioner commenced this proceeding against the New York City Transit Authority (hereinafter the Transit Authority) seeking to direct the Transit Authority to preserve and produce any surveillance videos or records prepared in the regular course of business concerning the accident, or to provide an affidavit explaining the absence of any such videos or records. The petitioner also moved pursuant to CPLR 3102(c), in effect, to compel the Transit Authority to permit an inspection of the location of the accident upon certain conditions and to refrain from performing alterations or modifications to the location pending that inspection. ... CPLR 3102(c) provides, as relevant, that '[b]efore an action is commenced, disclosure to aid in bringing an action, to preserve information or to aid in arbitration, may be obtained, but only by court order.' Here, the petitioner's notice of claim demonstrates that the petitioner possessed sufficient information to enable him to formulate his complaint and commence an action ... . Therefore, under the circumstances, the only purpose of the pre-action discovery sought by the petitioner

would be to 'explore alternative theories of liability, which is not a proper basis for invoking CPLR 3102(c)' ... . Moreover, considering, inter alia, the evidence already in the petitioner's possession, the order directing the Transit Authority to preserve the condition of the site of the accident until completion of an inspection was unduly burdensome ...". ***Matter of Neham v. New York City Tr. Auth.*, 2022 N.Y. Slip Op. 01026, Second Dept 2-16-22**

CRIMINAL LAW, APPEALS.

THE JUDGE WAS REQUIRED TO DETERMINE WHETHER DEFENDANT IS AN "ELIGIBLE YOUTH," AND, IF SO WHETHER DEFENDANT SHOULD BE ADJUDICATED A YOUTHFUL OFFENDER; THE JUDGE WAS NOT AUTHORIZED TO ACCEPT A GUILTY PLEA TO SECOND DEGREE MURDER FROM THE JUVENILE DEFENDANT; THE WAIVER OF APPEAL WAS INVALID.

The Second Department determined: (1) because defendant pled guilty to "armed felonies," the judge was required to determine on the record whether defendant was an "eligible youth" and, if so, whether he should be afforded youthful offender status; (2) the judge was not authorized to accept a guilty plea for second degree murder from the juvenile defendant; and (3) the waiver of appeal was invalid: "... Supreme Court was required to determine on the record whether the defendant was an 'eligible youth' (CPL 720.10[2][a][ii]), by considering the presence or absence of the factors set forth in CPL 720.10(3), and, if so, whether he]should be afforded youthful offender status ... . Supreme Court was not authorized to accept a plea of guilty to count 3 [second degree murder]. As a juvenile offender, the defendant cannot be held criminally responsible for felony murder where the underlying felony, attempted robbery, is a crime for which he cannot be held criminally responsible (see CPL 1.20[42][2]; Penal Law § 30.00[2]; People v Stowe, 15 AD3d 597, 598; Matter of Tracy C., 186 AD2d 250, 251; People v Smith, 152 AD2d 56, 61). Accordingly, ... the defendant's plea of guilty to murder in the second degree ... must be set aside ... . Supreme Court's oral colloquy and written appeal waiver mischaracterized the nature of the appeal waiver as an absolute bar to the taking of a direct appeal and a forfeiture of the attendant right to counsel and poor person relief ...". **People v. Shelton, 2022 N.Y. Slip Op. 01050, Second Dept 2-16-22**

CRIMINAL LAW, JUDGES.

THE TRIAL JUDGE DID NOT MEANINGFULLY RESPOND TO A NOTE FROM THE JURY; RE-READING THE ORIGINAL INSTRUCTION WAS NOT SUFFICIENT; CONVICTION REVERSED, NEW TRIAL ORDERED.

The Second Department reversed the judgment of conviction and ordered a new trial because the trial judge did not meaningfully respond to a note from the jury. Re-reading the instructions what not sufficient under these facts: "[W]hen the jury was deliberating, the County Court failed to meaningfully respond to one of the jury's notes. 'Pursuant to CPL 310.30, the trial court has an obligation to meaningfully respond to all questions from the jury during deliberations' ... . 'Although simply rereading the original instructions may, under the appropriate circumstances, constitute a meaningful response' ... , here, it was error for the court to respond to the jury's last question about the elements of one of the charges by simply rereading its original instructions. The jury had previously sent a note about that charge demonstrating its initial confusion about that instruction ... . The record reflects that defense counsel and the court perceived that, with respect to the jury note at issue, the jury may have been asking whether the defendant was required to know of the falsity of the information in the document that was alleged to contain false information at the time she submitted it to the Department of Health investigator. Notwithstanding its perception about the jury's inquiry, the court did not seek any further clarification from the jury about that note. Under these circumstances, at a minimum, the court should have asked the jurors to again clarify their request ...". **People v. Manzano, 2022 N.Y. Slip Op. 01040, Second Dept 2-16-22**

FALSE ARREST, FALSE IMPRISONMENT, BATTERY.

PROBABLE CAUSE FOR ARREST IS A COMPLETE DEFENSE TO CAUSES OF ACTION FOR FALSE ARREST, FALSE IMPRISONMENT AND BATTERY STEMMING FROM THE ARREST.

The Second Department, reversing (modifying) Supreme Court noted that probable cause for arrest is a complete defendant to causes of action for false arrest, false imprisonment and battery association with the arrest: "The Supreme Court should have granted those branches of the municipal defendants' motion which were for summary judgment dismissing the seventh, eighth, and ninth causes of action, alleging false arrest, false imprisonment, and assault and battery insofar as asserted against them. The existence of probable cause constitutes a complete defense to causes of action alleging false arrest and false imprisonment ... . The existence of probable cause is also a complete defense to a cause of action alleging assault and battery based solely on bodily contact during an allegedly unlawful arrest ...". ***Farquharson v. United Parcel Serv.*, 2022 N.Y. Slip Op. 01007, Second Dept 2-16-22**

FAMILY LAW, ATTORNEYS.

THE SUPPORT MAGISTRATE DID NOT ENSURE THAT FATHER KNOWINGLY, INTELLIGENTLY AND VOLUNTARILY WAIVED HIS RIGHT TO COUNSEL IN THIS CHILD SUPPORT PROCEEDING; ORDER OF COMMITMENT REVERSED.

The Second Department, reversing Family Court's order of commitment for father's failure to pay child support, determined the Support Magistrate did not ensure that father's waiver of counsel was knowing, intelligent and voluntary:

"[A]t the beginning of the hearing, the Support Magistrate asked the father what he 'want[ed] to do about legal representation,' to which the father responded, 'I'm speaking for myself at this point.' The Support Magistrate did not make any further inquiries regarding counsel. The Support Magistrate also failed to advise the father about the potential pitfalls of proceeding pro se. Thus, the Support Magistrate failed to conduct a sufficiently searching inquiry to ensure that the father's waiver of his right to counsel was knowing, intelligent, and voluntary ... . Under these circumstances, the father was deprived of his right to counsel at the hearing. Contrary to the mother's contention, this violation was not cured by the fact that the father was later represented by assigned counsel during the confirmation hearing ...". ***Matter of Sylvester v. Goffe*, 2022 N.Y. Slip Op. 01028, Second Dept 2-16-22**

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

THE BANK'S PROOF OF COMPLIANCE WITH THE NOTICE REQUIREMENTS OF RPAPL 1304 IN THIS FORECLOSURE ACTION WAS INSUFFICIENT; THE BUSINESS RECORDS REFERRED TO IN THE AFFIDAVIT WERE NOT PRODUCED.

The Second Department, reversing (modifying) Supreme Court in this foreclosure action, determined the bank's proof of compliance with the notice requirements of RPAPL 1304 was insufficient. The court noted that, under the facts, standing to contest the bank's compliance with RPAPL 1304 was personal to each borrower, one borrower could not assert that defense on behalf of another borrower: "JPMorgan submitted an affidavit, entitled an 'Affidavit of Mailing,' signed by James A. Ranaldi, an 'Authorized Signer' employed by JPMorgan. Ranaldi, however, did not attest to personal knowledge of the actual mailings. Nor did he state that he had personal knowledge 'of a standard office mailing procedure designed to ensure that items are properly addressed and mailed' ... . Although Ranaldi asserted, based upon his review of business records associated with the subject loan, that 'a ninety-day (90) pre-foreclosure notice dated 12/04/2009 was sent by regular first class and certified mail under the exclusive care and custody of the United States Postal Service addressed to [the defendant at the subject property],' 'it is the business record itself, not the foundational affidavit, that serves as proof of the matter asserted'... . The records attached to Ranaldi's affidavit provided evidence that the 90-day notice was sent to the defendant by certified mail. But none of the documents, considered individually or together, including the copies of the notice letters themselves, provided any information as to whether the 90-day notice was sent to the defendant by regular first-class mail ... . Without business records proving the matter asserted, Ranaldi's 'unsubstantiated and conclusory' statement, by itself, was insufficient to establish that the RPAPL 1304 notice was mailed to the defendant by first-class mail ...". ***Wilmington Sav. Fund Socy., FSB v. Kutch*, 2022 N.Y. Slip Op. 01066, Second Dept 2-16-22**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

THE TENANT WHICH SUPPLIED THE ALLEGEDLY DEFECTIVE LADDER TO THE PLAINTIFF IN THIS LADDER-FALL CASE WAS NOT ENTITLED TO SUMMARY JUDGMENT ON THE LABOR LAW § 200 AND COMMON LAW NEGLIGENCE CAUSES OF ACTION.

The Second Department, reversing (modifying) Supreme Court, determined the tenant, Fresh Direct, which supplied the allegedly defective ladder to plaintiff was not entitled to summary judgment on the Labor Law § 200 and common law negligence causes of action. Plaintiff fell 20 feet when the ladder slipped: "Fresh Direct failed to establish, prima facie, that it did not have actual or constructive notice of the allegedly defective condition of the ladder that, according to the plaintiff, it provided at the time of the accident ...". ***Hamm v. Review Assoc., LLC*, 2022 N.Y. Slip Op. 01011, Second Dept 2-16-22**

PERSONAL INJURY.

PLAINTIFF WAS INJURED WHEN THE ARM AND FOOT PEDAL OF AN ELLIPTICAL MACHINE AT DEFENDANT'S GYM BROKE OFF; DEFENDANT DID NOT DEMONSTRATE A LACK OF CONSTRUCTIVE NOTICE OF THE DEFECT OR THE APPLICABILITY OF THE ASSUMPTION OF THE RISK DOCTRINE.

The Second Department, reversing Supreme Court, determined defendant gym was not entitled to summary judgment in this personal injury action. Plaintiff alleged the arm and foot pedal of the elliptical machine she was using detached. Defendant did not demonstrate that it did not have constructive notice of the defect or that plaintiff assumed the risk of injury: "Although the defendants submitted a transcript of deposition testimony from their employee regarding the defendants' general practice of testing exercise equipment each weekday, they failed to present any specific evidence as to when the subject elliptical machine was last inspected relative to the subject incident. Mere reference to general practices, with no evidence regarding any specific inspection of the equipment in question, is insufficient to establish lack of constructive notice ... . [P]articipants are not deemed to have assumed risks that are concealed or unreasonably increased over and above the usual dangers that are inherent in the sport or recreational activity ... . Here, the risk of the left arm and foot pedal of an elliptical machine detaching or hinging out is not inherent in the recreational activity of exercising on an elliptical machine in a gym. Rather, the alleged defective condition of the elliptical machine enhanced the risk of injuries ...". ***Buffalino v. XSport Fitness*, 2022 N.Y. Slip Op. 00998, Second Dept 2-16-22**

PERSONAL INJURY.

QUESTIONS OF FACT WHETHER THE DEFENDANT BUS DRIVER SAW WHAT SHOULD HAVE BEEN SEEN AND WHETHER THE EMERGENCY DOCTRINE APPLIED TO THIS REAR-END COLLISION CASE; THE BUS WAS BEHIND PLAINTIFF'S SCOOTER AND BOTH THE BUS AND THE SCOOTER APPARENTLY CHANGED LANES AT THE SAME TIME.

The Second Department, reversing (modifying) Supreme Court, determined there were questions of fact whether defendant bus driver (Payne) failed to see what should have been seen and whether the emergence doctrine applied to this rear-end collision case. Plaintiff was on a motor scooter in front of the bus and both the bus and the scooter changed lanes at approximate the same time: "[E]ven if Payne had the right of way, she testified at her deposition that she did not see the plaintiff on his motor scooter until "seconds" before the accident. Since the video recording taken from the bus seems to show that the bus was following the plaintiff's motor scooter for approximately two blocks prior to the accident, Payne's testimony raised a triable issue of fact as to whether Payne failed to see what was there to be seen through the proper use of her senses, and thus whether she exercised reasonable care to avoid the accident and whether her actions were a proximate cause of the accident ... . [T]he evidence failed to eliminate the existence of triable issues of fact as to whether Payne's actions contributed to or caused the emergency, in light of, inter alia, her failure to observe the motor scooter earlier ...". ***Fergile v. Payne*, 2022 N.Y. Slip Op. 01008, Second Dept 2-16-22**

PERSONAL INJURY.

THE ROLLED-UP MAT WHICH CAUSED PLAINTIFF TO SLIP AND FALL WAS KNOWN TO THE PLAINTIFF AND WAS OPEN AND OBVIOUS; DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined the rolled up map which caused plaintiff's slip and fall was open and obvious and therefore nonactionable: "While a possessor of real property has a duty to maintain that property in a reasonably safe condition ... , 'there is no duty to protect or warn against an open and obvious condition that, as a matter of law, is not inherently dangerous' ... . 'A condition is open and obvious if it is 'readily observable by those employing the reasonable use of their senses, given the conditions at the time of the accident' ... . Here, the defendants established their prima facie entitlement to judgment as a matter of law by submitting evidence demonstrating that the rolled-up mat, which was known to the plaintiff prior to the accident, was open and obvious, and was not inherently dangerous ...". ***Williams v. E & R Jamaica Food Corp.*, 2022 N.Y. Slip Op. 01065, Second Dept 2-16-22**

REAL ESTATE, CONTRACT LAW.

PLAINTIFF REAL ESTATE BROKER DID NOT ESTABLISH IT WAS ENTITLED TO A BROKERAGE FEE; THE BROKERAGE AGREEMENT EXPIRED BY ITS OWN TERMS BEFORE THE LEASE TOOK EFFECT.

The Second Department, reversing Supreme Court after a bench trial, determined plaintiff real estate broker was not entitled to a brokerage commission: " 'In order to recover a real estate brokerage commission, [a] broker must establish: (1) that [it] is duly licensed, (2) that [it] had a contract, express or implied, with the party to be charged with paying the commission, and (3) that [it] was the procuring cause of the [transaction]' ... . Although the agreement entitled the plaintiff to collect a commission '[i]f within 60 days after the expiration . . . of th[e] . . . agreement, a lease is signed or negotiations continue and ultimately lead to a signed lease of the Property to a person or entity' on a list of potential tenants to be provided by the plaintiff within 10 days of expiration of the brokerage agreement, the lease was not signed within 60 days of the expiration of the brokerage agreement, and the plaintiff did not present any evidence that it supplied a list of potential tenants to the defendant. Thus, the brokerage agreement, by its terms, expired months before the defendant entered into a binding lease ...". ***Cpex Real Estate, LLC v. Tomtro Realty Corp.*, 2022 N.Y. Slip Op. 00999, Second Dept 2-16-22**

REAL PROPERTY TAX LAW, CONSTITUTIONAL LAW.

THE PETITION STATED CAUSES OF ACTION FOR A VIOLATION OF REAL PROPERTY TAX LAW (RPTL) 305 AND VIOLATION OF EQUAL PROTECTION; THE PETITION ALLEGED LARGER HOMES WERE ASSESSED AT LESS THAN 100% OF MARKET VALUE AND SMALLER HOMES WERE ASSESSED AT 100% OF MARKET VALUE.

The Second Department, reversing Supreme Court, determined the petition stated causes of action for improper assessment of property values and violation of equal protection. It was alleged that the methodology used to assess the value of home for property tax purposes resulted in less than 100% assessment for the larger homes and 100% assessment for the smaller homes: "Under RPTL 305(2), real property within an assessing unit must 'be assessed at a uniform percentage of value'... . '[R]egardless of the methodology adopted by the [a]ssessor, the result must reflect the realistic value of the property so that the tax burden of each property is equitable' ... . Although there is a presumption that a tax assessor's property valuations are valid, property owners may rebut the presumption through submission of substantial evidence of overvaluation ... . The petition, as supplemented by affidavits from the petitioner's members and empirical and statistical analyses, sufficiently stated a cause of action for violation of RPTL 305. ... Accepting as true the facts alleged in the petition and according the petitioner the benefit of every favorable inference, the petition, as supplemented by the petitioner's submissions, sufficient-

ly stated a claim for violations of the equal protection clauses of the State and Federal Constitutions. ***Matter of Scarsdale Comm. for Fair Assessments v. Albanese*, 2022 N.Y. Slip Op. 01027, Second Dept 2-16-22**

ZONING, LAND USE, ENVIRONMENTAL LAW.

THE PETITIONERS DEMONSTRATED THAT THE OPERATION OF A CONCRETE PLANT WOULD CAUSE INJURIES TO THEM DIFFERENT FROM THOSE SUFFERED BY THE PUBLIC AT LARGE; SUPREME COURT SHOULD NOT HAVE DETERMINED PETITIONERS DID NOT HAVE STANDING TO CONTEST THE RENOVATION AND OPERATION OF THE PLANT.

The Second Department, reversing Supreme Court, determined petitioners had standing to contest the renovation and operation of a concrete plant: "Supreme Court improperly determined that the Hill & Dale petitioners and the Veteri petitioners lacked standing to challenge the ZBA's determination. The Hill & Dale petitioners alleged environmental injuries to a private lake owned by Hill & Dale, which was situated directly across from the subject property, as well as interference with recreational activities enjoyed in and around the lake, and impacts to their properties from increased noise, truck traffic, dust, and pollutants from the concrete manufacturing use. These alleged injuries were different from those suffered by the public at large ... , and fell within the zone of interests protected by the Town's zoning laws ... . Similarly, the Veteri petitioners sufficiently alleged that they would be adversely affected by the ZBA's determination and that their alleged injuries fell within the zone of interests protected by the zoning laws." ***Matter of Veteri v. Zoning Bd. of Appeals of the Town of Kent*, 2022 N.Y. Slip Op. 01030, Second Dept 2-16-22**

THIRD DEPARTMENT

CIVIL PROCEDURE, FAMILY LAW, SOCIAL SERVICES LAW, EVIDENCE, JUDGES, NEGLIGENCE, MEDICAL MALPRACTICE.

CERTAIN CHILD CUSTODY RECORDS AND CHILD PROTECTIVE SERVICES RECORDS (WHICH DO NOT RELATE TO AN INVESTIGATION) MAY BE DISCOVERABLE IN THIS MEDICAL MALPRACTICE ACTION BROUGH ON BEHALF OF AN INFANT.

The Third Department, reversing (modifying) Supreme Court, determined certain child custody records and Child Protective Services (CPS) records were or may be discoverable in this negligence and medical malpractice case brought on behalf of an infant. The custody records were relevant to plaintiff's standing to sue and to family dynamics which may have affected the child's health, and there may be some CPS records which are discoverable because they do not relate to an investigation, Therefore the matter was remitted for an in camera review: "Supreme Court did not address the second basis upon which defendants sought disclosure of the custody records, however, which was that they may contain information on family dynamics that impacted the infant's development and would therefore be relevant as to plaintiff's allegations, in her bill of particulars, that the infant's learning disabilities and intellectual and emotional deficits arose out of defendants' conduct. ... [D]efendants are not entitled to disclosure of records relating to either a report of abuse or an investigation into one ... . [C]hild protective officials and related child welfare organizations may well possess discoverable documents that were not generated in the course of a child protective investigation but do contain information relevant to assessing whether the infant's claimed injuries were linked to defendants' actions or some other cause." ***C.T. v. Brant*, 2022 N.Y. Slip Op. 01090, Third Dept 2-17-22**

CONTRACT LAW, CIVIL PROCEDURE.

THE BREACH OF THE IMPLIED COVENANT OF GOOD FAITH SHOULD HAVE BEEN DISMISSED AS DUPLICATIVE OF THE BREACH OF CONTRACT CAUSE OF ACTION.

The Third Department, modifying Supreme Court, determined the breach of the implied covenant of good faith should have been dismissed as duplicative of the breach of contract action: "Supreme Court …erred by denying that part of defendants' motion seeking dismissal of the cause of action alleging breach of the implied covenant of good faith and fair dealing. A review of the allegations in the amended complaint discloses that this cause of action is based upon the same set of facts and seeks similar damages as the breach of contract cause of action. In view of this, the breach of the implied covenant of good faith and fair dealing cause of action is duplicative of the breach of contract cause of action and, therefore, it should have been dismissed ...". ***Shmaltz Brewing Co., LLC v. Dog Cart Mgt. LLC*, 2022 N.Y. Slip Op. 01086, Third Dept 2-17-22**

CRIMINAL LAW, APPEALS.

ALLOWING THE PEOPLE'S INVESTIGATOR TO GO INTO THE JURY ROOM DURING DELIBERATIONS TO SHOW THE JURORS HOW TO OPERATE A DIGITAL RECORDER WAS A MODE OF PROCEEDINGS ERROR THAT REQUIRED REVERSAL, DESPITE THE DEFENDANT'S CONSENT TO THE PROCEDURE.

The Third Department, reversing defendant's conviction and ordering a new trial, determined the People's investigator should not have been allowed to go into the jury room during deliberations to show the jurors how to operate a digital

recorder. Although the defendant consented to the procedure, the Third Department decided the error was a "mode of proceedings" error which did not require preservation: "Pursuant to CPL 310.10 (1), a deliberating jury must be 'under the supervision of a court officer' or 'an appropriate public servant' and, '[e]xcept when so authorized by the court or when performing administerial duties with respect to the jurors, such court officer[] or public servant[] . . . may not speak to or communicate with [the jurors] or permit any other person to do so' ... . Certainly, the People's investigator cannot be said to be an appropriate public servant to interact with the jury in the deliberation room. Also troubling is the lack of a record of what occurred while the investigator was in the deliberation room. Indeed, the 'right to a trial by jury in criminal cases is 'fundamental to the American scheme of justice' and essential to a fair trial. At the heart of this right is the need to ensure that jury deliberations are conducted in secret, and not influenced or intruded upon by outside factors'... . Given that the procedure that occurred here, allowing a representative of the People to interfere in the jury's secret deliberations, goes 'to the essential validity of the process and [is] so fundamental that the entire trial is irreparably tainted'... , we must reverse and remit for a new trial." ***People v. Jones*, 2022 N.Y. Slip Op. 01069, Third Dept 2-17-22**

CRIMINAL LAW, JUDGES.

DEFENDANT SHOULD NOT HAVE BEEN RESENTENCED ON THE ORIGINAL CHARGE PURSUANT TO CPL § 420.10 FOR FAILURE TO PAY RESTITUTION; THE JUDGE DID NOT MAKE THE STATUTORILY REQUIRED FINDINGS FOR RESENTENCING UNDER THAT STATUTE; RESENTENCE VACATED.

The Third Department, reversing County Court, vacated defendant's resentence. Once a defendant is sentenced, the court no longer has jurisdiction over the matter. Here, after it was determined defendant had willfully failed to pay the ordered restitution, defendant was resentenced to prison on the original conviction. By statute a defendant may be resentenced for failure pay restitution, but only after the court makes a finding the defendant is unable to pay due to indigency. No such finding was made here: "CPL 420.10 (3) provides that, when a court imposes restitution as part of a defendant's sentence, the court can imprison the defendant if he or she fails to pay restitution; such provision authorizing imprisonment for failure to pay restitution can be set forth at the time of sentencing or may be added 'at any later date while the . . . restitution . . . or any part thereof remains unpaid' (CPL 420.10 [3]). Although County Court therefore retained jurisdiction under the auspices of this statute, it erred in resentencing defendant pursuant to CPL 420.10 (5). As relevant here, CPL 420.10 (5) provides that, '[i]n any case where the defendant is unable to pay a fine, restitution or reparation imposed by the court, he [or she] may at any time apply to the court for resentence.' Resentencing is authorized 'if the court is satisfied that the defendant is unable to pay the fine, restitution or reparation' (CPL 420.10 [5]). Here, there was no finding by the court that defendant was unable to pay the restitution due to indigency ... . [W]e refuse to equate defendant's acceptance of the global agreement [agreeing to 8 1/2 to 25 years in prison including time served] with the application necessary to resentence him under CPL 420.10 (5) ... . County Court could have sentenced defendant to a year in prison for his failure to pay under CPL 420.10 (3) and (4), but it did not. As it erred in utilizing CPL 420.10 (5), the resentence must be vacated." ***People v. Marone*, 2022 N.Y. Slip Op. 01070, Third Dept 2-17-22**

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

THE THIRD DEPARTMENT, JOINING THE SECOND, HOLDS THAT A DEFENDANT HAS A RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AT A SORA RISK-LEVEL PROCEEDING, DESPITE ITS CIVIL NATURE; DEFENDANT DID NOT RECEIVE EFFECTIVE ASSISTANCE; THE JUDGE DID NOT MAKE THE REQUIRED FINDINGS OF FACT AND CONCLUSIONS OF LAW.

The Third Department, reversing County Court, in a full-fledged opinion by Justice Garry, determined: (1) defendant was entitled to and did not receive effective assistance of counsel at the SORA risk-level proceeding (which is civil in nature). despite his decision not to appear; and (2) the SORA judge did not make the required findings of fact and conclusions of law, requiring remittal: "Despite SORA proceedings being civil in nature, not criminal ... , we now join the Second Department in explicitly holding that SORA defendants have the right to the effective assistance of counsel, pursuant to the Due Process Clauses contained in the 14th Amendment of the US Constitution and article I, § 6 of the NY Constitution, because the statutory right to counsel in such proceedings (see Correction Law § 168-n [3]) would otherwise be rendered meaningless, and because SORA determinations affect a defendant's liberty interest ... . Although defendant waived his right to be present at the SORA hearing, he did not waive his right to contest the Board's risk level recommendation or the People's arguments and proof ... . Counsel — who acknowledged at the hearing that he had 'had no contact' with defendant — made no arguments, essentially agreed to the Board's recommendation, and failed to require the People to admit any proof at the hearing or County Court to provide any reasoning for its determination. ... The record ... reveals that counsel, who did not communicate with his client at all and 'failed to litigate any aspect of the adjudication,' did not provide effective representation ... . As defendant was deprived of the effective assistance of counsel, upon remittal he is entitled to a new hearing with different assigned counsel." ***People v. VonRapacki*, 2022 N.Y. Slip Op. 01071, Third Dept 2-17-22**

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

COUNTY COURT DID NOT MAKE THE REQUIRED FINDINGS OF FACT FOR DEFENDANT'S REQUEST FOR A DOWNWARD DEPARTURE IN THIS SORA RISK LEVEL PROCEEDING; ORDER REVERSED AND MATTER REMITTED.

The Third Department, reversing County Court, determined County Court failed to make the required findings of fact for defendant's request for a downward departure: "Defendant ... argues that County Court erred in denying his request for a downward departure. Although the court did expressly deny this request in the order, it did not detail the factual findings in support of its conclusion. Thus, we are unable to ascertain the court's reasoning for denying defendant's request. Consequently, we reverse and remit for County Court to set forth its findings of fact for denying defendant's request for a downward departure as required ...". ***People v. Harvey*, 2022 N.Y. Slip Op. 01073, Third Dept 2-17-22**

ENVIRONMENTAL LAW, ZONING, LAND USE.

ALTHOUGH THE PLANS FOR THE EXPANSION OF A HOSPITAL WERE NOT YET FINALIZED, IT WAS CLEAR THAT SUCH AN EXPANSION WAS AN ANTICIPATED RESULT OF THE PROPOSED ZONING CHANGE; THEREFORE THE STATE ENVIRONMENTAL QUALITY REVUE ACT (SEQRA) PROHIBITION OF "SEGMENTATION" REQUIRED CONSIDERATION OF THE EXPANSION AS PART OF THE "HARD LOOK" AT THE CONSEQUENCES OF THE ZONING CHANGE.

The Third Department, reversing (modifying) Supreme Court, determined the respondents (city) did not take the requisite "hard look," required by the State Environmental Quality Review Act (SEQRA), at the environmental consequences before approving a zoning change that would allow an expansion of a hospital. Although there were no finalized plans to expand the hospital, it was clear that the zoning change was a first step in an expected expansion. Failure consider the expansion constituted a prohibited form of "segmentation:" "As to the segmentation claim, although the City Council was not presented with any impending, specific development proposals, rezoning parcel 1 was the 'first step' in the process of eventually developing parcel 1 ... . In essence, before Saratoga Hospital could move forward with any development and expansion, it needed to acquire the 'right' to do so ... . The zoning map amendment for parcel 1 provided just that; it would be the green light to reignite development plans. ... [T]he potential development of the parcel here was not so attenuated from the zoning map amendment that reviewing an expansion of the hospital constituted permissible segmentation ... . Thus, the City Council was 'obligated to consider the impacts to be expected from such future development at the time of rezoning, even absent a specific site plan for the project proposal' ...". ***Matter of Evans v. City of Saratoga Springs*, 2022 N.Y. Slip Op. 01079, Third Dept 2-17-22**

FAMILY LAW, EVIDENCE, ATTORNEYS.

MOTHER DID NOT WILLFULLY VIOLATE THE ORDER OF VISITATION; COVID MADE MEETING IN A PUBLIC PLACE DIFFICULT, THERE WAS CONFUSION ABOUT WHICH ORDER APPLIED, AND MOTHER RELIED ON HER ATTORNEY'S ADVICE.

The Third Department, reversing Family Court, determined mother did not willfully violate an order of visitation. There was confusion about which order applied and mother relied on her attorney's advice: "The mother contends that Family Court abused its discretion when it found that she willfully violated the visitation order. Specifically, she asserts that she did not produce the child because the father unilaterally canceled visits, there was confusion over what order was in effect, and she relied upon the communications between the parties' attorneys to establish when the visitation would occur. * * * ... Family Court erred in finding that she willfully violated the order. Under these circumstances, where both parties testified as to the difficulties involved in having parenting time take place in a public venue during COVID-19, there was confusion among the parties as to which order was in effect at the time, and the mother relied on her attorney's advice, which had a sound basis ... , it is clear that any violation was not willful." ***Matter of Damon B. v. Amanda C.*, 2022 N.Y. Slip Op. 01082, Third Dept 2-17-22**

INSURANCE LAW, CIVIL PROCEDURE, JUDGES.

THE JUDGE SHOULD NOT HAVE, SUA SPONTE, GRANTED DEFENDANT PARTIAL SUMMARY JUDGMENT ON THE STRUCTURE-LOSS (FIRE-DAMAGE) CLAIM; THE PARTIES WERE NOT MADE AWARE OF THAT POSSIBILITY PRIOR TO THE RULING.

The Third Department, reversing (modifying) Supreme Court, in a decision addressing many property-insurance (fire loss) issues not summarized here, determined the judge should not have, sua sponte, granted a motion for partial summary judgment: "... Supreme Court erred in sua sponte granting LaVigne [defendant] summary judgment on her structure loss claim as no party had moved on or briefed relative to this claim. We agree. 'Although a court may not generally grant summary judgment sua sponte in the absence of a motion pursuant to CPLR 3212, in certain circumstances, a court may grant such relief, even if it is not demanded, so long as there is no substantial prejudice to the adverse party. In such cases, [this Court] require[s] that the court give notice to the parties that summary judgment is being considered as a remedy, so that they may develop evidence and offer proof in support of or in opposition to the motion' ... . Here, although the court did

ask questions regarding the structure loss claim at oral argument, we do not find that to be sufficient notice that summary judgment was being considered and, as such, the insurance company was substantially prejudiced ... . [I]t is clear from the record that the parties were not 'deliberately charting a course for summary judgment' ... , and in fact were quite surprised by the Supreme Court's questions regarding summary judgment on this claim. Moreover, it appears from the record that the insurance company did not depose LaVigne." ***Collyer v. LaVigne*, 2022 N.Y. Slip Op. 01083, Third Dept 2-17-22**

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

PLAINTIFF'S ACTIONS WERE NOT THE SOLE PROXIMATE CAUSE OF HIS FALL FROM A MAKESHIFT PLATFORM ON A LULL (FORKLIFT) USED TO REACH ELEVATED AREAS; PLAINTIFF'S MOTION FOR A DIRECTED VERDICT ON HIS LABOR LAW § 240(1) CAUSE OF ACTION AGAINST THE HOMEOWNER WHO LEASED THE LULL AND DIRECTED PLAINTIFF'S WORK SHOULD HAVE BEEN GRANTED.

The Third Department, reversing Supreme Court, determined plaintiff's motion for a directed verdict on his Labor Law § 241(6) cause of action should have been granted. Plaintiff fell from a makeshift platform he placed on a lull (forklift) to reach elevated areas of a house he was wrapping with an insulation material (Tyvek). The central question was whether plaintiff's own actions were the sole proximate cause of his fall and injuries: "[I]t is beyond dispute that the lull was not an adequate safety device for the elevated work being performed by plaintiff at the time of his fall ... . This conclusion is not changed by defendant's provision of harnesses incompatible with the lull ... . Plaintiff's accident was plainly the direct result of the makeshift lull setup failing, and the parties are therefore in agreement that, unless plaintiff's choice not to use other available safety devices when installing the Tyvek was the sole proximate cause of his own injuries, plaintiff has established his Labor Law § 240 (1) claim. Plaintiff indeed brought extension ladders and scaffolding with him to the job site, and it appears that defendant provided some ladders as well. ...[T]here is simply no trial evidence to suggest that plaintiff knew he was expected to use a ladder or scaffolding to wrap the front of the house with Tyvek. It is uncontroverted that use of the lull with a makeshift platform had become commonplace at the job site in the weeks preceding plaintiff's accident, that the scaffolding was set up at the rear of the house specifically because the lull could not traverse the terrain there and that defendant's only affirmative safety-related instructions to plaintiff regarding the subject elevated work were to either use a harness or construct a platform, both of which involved use of the lull. As proof of the foregoing element is lacking, there is no rational process by which a jury could conclude that plaintiff was the sole proximate cause of his own injuries ...". ***DeGraff v. Colontonio*, 2022 N.Y. Slip Op. 01074, Third Dept 2-17-22**

LANDLORD-TENANT, CIVIL PROCEDURE.

THE NOTICE OF TERMINATION OF A LEASE DID NOT COMPLY WITH THE HUD REGULATION REQUIRING THAT THE REASONS FOR TERMINATION BE STATED WITH ENOUGH SPECIFICITY TO ALLOW THE TENANT TO MOUNT A DEFENSE; EVICTION ORDER REVERSED.

The Third Department, reversing County Court, in a full-fledged opinion by Justice Lynch, determined the landlord did not comply with the HUD regulation requiring that a notice of termination of a lease state the reasons for the termination with enough specificity to allow the tenant to mount a defense. The issue was raised by respondent-tenant's oral general denial: "In our view, the notice of termination was deficient, as it did not set forth the factual predicates underlying the alleged violation of the lease terms, instead merely paraphrasing the lease and the underlying regulation ... . No specific incident is described in the notice, nor are any specific facts. The regulatory standard of requiring 'enough specificity so as to enable the tenant to prepare a defense' demands more detail as to the nature of the asserted misconduct (24 CFR 247.4 [a] [2])." ***Matter of Metro Plaza Apts., Inc. v. Buchanan*, 2022 N.Y. Slip Op. 01087, Third Dept 2-17-22**

MEDICAL MALPRACTICE, CIVIL PROCEDURE.

THE FAILURE TO TIMELY FILE THE CERTIFICATE OF MERIT IN THIS MEDICAL MALPRACTICE ACTION WAS NOT A GROUND FOR DISMISSAL OF THE COMPLAINT.

The Third Department, reversing Supreme Court, determined, under the facts, plaintiff had not abandoned this medical malpractice action and plaintiff's failure to timely file the certificate of merit was not a ground for dismissal of the complaint: "[P]laintiff's attorney filed an alternative certificate with the complaint that he was unable to timely procure the required consultation in view of the impending statute of limitations in accord with CPLR 3012-a (a) (2). In such an instance, the certificate of merit must be filed within 90 days of commencement, a deadline that plaintiff did not meet ... . The mere failure to meet that deadline, however, does not require a dismissal of the action ... . [P]laintiff expressly identified his medical expert in the ... discovery response. In his opposing affidavit, plaintiff's counsel explained that the failure to file the certificate of merit was an oversight, i.e., basic law office failure, and further affirmed that he duly consulted with the physician in accord with the requirements of CPLR 3012-a (a) (1). In any event, plaintiff did not formally move for leave to file a late certificate of merit and, therefore, whether plaintiff established good cause under CPLR 2004 for such leave is not

at issue ... . [W]e find no basis to dismiss the complaint based on the certificate of merit issue." ***Duvernoy v. CNY Fertility, PLLC*, 2022 N.Y. Slip Op. 01084, Third Dept 2-17-22**

MUNICIPAL LAW, EMPLOYMENT LAW, SOCIAL SERVICES LAW.

ALTHOUGH THE PETITIONER, COUNTY COMMISSIONER OF SOCIAL SERVICES, WAS PROPERLY TERMINATED FROM HER EMPLOYMENT FOR OTHER REASONS, THE FACT THAT SHE TESTIFIED IN FAMILY COURT ABOUT THE PROPER PLACEMENT OF A JUVENILE WHICH WAS NOT AS SEVERE AS THE PLACEMENT ADVOCATED BY THE COUNTY ATTORNEY AND THE PROBATION DEPARTMENT DID NOT CONSTITUTE A BREACH OF LOYALTY.

The Third Department, in this Article 78 action, affirmed the county's decision to terminate the employment of petitioner, who was Commissioner of Social Services for the county. The allegations of misconduct are too detailed to be summarized here. But the Third Department noted that the fact that the petitioner disagreed with the county attorney and the probation department about the appropriate placement of a juvenile, and so testified in Family Court, was not actionable misconduct: "[P]etitioner, the Director of Probation and the County Attorney each had defined statutory roles in the Family Court proceeding ... . That petitioner opted to promote a less stringent measure than her counterparts does not, as charged by respondents, constitute a breach of loyalty owed to either the County Attorney or the Director of Probation, or vice versa. ... [T]o the extent that the Board relied, at all, on the Hearing Officer's findings with respect to [the relevant] charge ... , its determination is not supported by substantial evidence. It therefore follows that so much of the Board's determination as sustained said specifications are annulled." ***Matter of Scuderi-Hunter v. County of Del.*, 2022 N.Y. Slip Op. 01078, Third Dept 2-17-22**

WORKERS' COMPENSATION.

THE BOARD ACCEPTED ONE EXPERT'S OPINION AND REJECTED THE OTHER BASED ON AN ISSUE THE EXPERTS WERE NEVER ASKED ABOUT; DECISION REVERSED.

The Third Department, reversing the Workers' Compensation Board, determined that the Board relied on an issue the experts were never asked about. One expert (Katz) found that claimant lost 3.3% of his hearing and the other (Alleva) found claimant had lost 45.3% of his hearing. The Board rejected Alleva's opinion and adopted Katz's concluding claimant had not explained how he could have done his job with a 50% hearing loss, an issue not discussed by the experts: "Although '[t]he Board's authority in assessing the credibility of witnesses includes the power to selectively adopt or reject portions of a medical expert's opinion, . . . as with any administrative determination, the Board's decision in this regard must be supported by substantial evidence' ... . There is no evidence in the record that Alleva was asked to explain how claimant was able to work with a 45.3% loss of hearing. Nor is there any evidence in the record that the issue of whether claimant's hearing loss would have affected his job performance was ever raised by either party or their medical experts before the Workers' Compensation Law Judge. In light of the dearth of evidence supporting the conclusions reached by the Board, we cannot say that its decision was supported by substantial evidence in the record." ***Matter of Mogilevsky v. New York City Tr. Auth.*, 2022 N.Y. Slip Op. 01088, Third Dept 2-17-22**

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