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FIRST DEPARTMENT

CIVIL PROCEDURE.

A PRE-JOINDER MOTION FOR SUMMARY JUDGMENT MUST BE DENIED.

The First Department, reversing Supreme Court, noted that a pre-joinder motion for summary judgment must be denied: "The Court of Appeals has noted that the rule barring a pre-joinder motion for summary judgment is strictly applied (*City of Rochester v Chiarella*, 65 NY2d 92, 101 [1985]). While CPLR 3211(c) permits the court, on notice to the parties, to treat a motion to dismiss as a motion for summary judgment before issue is joined, that is not the case here, where [plaintiff] moved directly for summary judgment; thus, a motion for summary judgment brought before a defendant has answered the complaint is premature and must be denied ...". ***SHG Resources, LLC v. SYTR Real Estate Holdings LLC*, 2022 NY Slip Op 00525, First Dept 1-27-22**

CIVIL PROCEDURE, EVIDENCE, JUDGES.

THE TRIAL JUDGE SHOULD HAVE GIVEN THE ADVERSE INFERENCE CHARGE WHICH HAD BEEN ORDERED AS A DISCOVERY SANCTION RE: A MISSING SURVEILLANCE TAPE; JURY VERDICT SET ASIDE.

The First Department, reversing Supreme Court and setting aside the verdict, determined the trial judge should have given the adverse inference charge with respect to a missing video surveillance tape: "[T]he court erred in declining to give an adverse inference charge with respect to a missing video surveillance tape. An order stating that plaintiff was entitled to such a charge had been issued during discovery upon plaintiff's motion for sanctions pursuant to CPLR 3126. Thus, the adverse inference charge was a discovery sanction, not a prospective evidentiary ruling ... . While the verdict is supported by sufficient evidence, that error was not harmless." ***Hegbeli v. TJX Cos., Inc.*, 2022 NY Slip Op 00502, First Dept 1-27-22**

CIVIL PROCEDURE, PERSONAL INJURY.

THE NOTICE OF CLAIM ACT DOES NOT APPLY TO THE PORT AUTHORITY, WHICH IS A BISTATE ENTITY (NEW YORK AND NEW JERSEY) CREATED BY COMPACT.

The Frist Department, reversing Supreme Court, determined the action against the Port Authority was time-barred pursuant to New York and New Jersey law, noting that the Notice of Claim Act does not apply: "[N]either CPLR 217-a nor New York Unconsolidated Laws § 6412-a — both of which were enacted as part of the Uniform Notice of Claim Act ... — extends the time in which an action may be commenced against the Port Authority. CPLR 217-a does not apply to the Port Authority because it is not a 'political subdivision of the state, . . . instrumentality or agency of the state or a political subdivision, . . . public authority[,] or . . . public benefit corporation entitled to receive a notice of claim as a condition precedent to commencement of an action' within the meaning of the statute; rather, it is a bistate agency ... . What is more, New Jersey has not enacted identical legislation ... . and bistate entities created by compact are not subject to the unilateral control of any one state ...". ***McKenzie v. Port Auth. of N.Y. & N.J.*, 2022 NY Slip Op 00378, First Dept 1-25-22**

CONTRACT LAW, CIVIL PROCEDURE.

DEFENDANT HAD WITHHELD PAYMENT ON THE CONTRACT AS AN OFFSET FOR THE LIQUIDATED DAMAGES PROVISION OF THE CONTRACT; THE AWARD OF LIQUIDATED DAMAGES TO THE DEFENDANT THEREFORE CONSTITUTED A DOUBLE RECOVERY.

The First Department, reversing Supreme Court, determined defendant should not have been awarded summary judgment on the liquidated damages counterclaim because defendant had withheld payment on the contract as an offset to the liquidated damages: "Supreme Court should have denied summary judgment in defendant's favor on the liquidated damages counterclaim. To be sure, the liquidated damages provision of the contract, providing for damages of $100 for each day that plaintiff failed to timely respond to a request for repairs or to complete repairs already begun and $100 for failing to timely provide a written estimate, was not an unenforceable penalty ... . However, to the extent defendant has withheld payment from plaintiff for work performed to offset liquidated damages, the award of liquidated damages constitutes a double recovery." ***Summit Rest. Repairs & Sales, Inc. v. New York City Dept. of Educ.*, 2022 NY Slip Op 00526, First Dept 1-27-22**

CRIMINAL LAW.

THIRD-DEGREE POSSESSION OF A CONTROLLED SUBSTANCE (PENAL LAW § 220.16(12)) IS NOT A LESSER INCLUDED OFFENSE OF THIRD-DEGREE POSSESSION OF A CONTROLLED SUBSTANCE (PENAL LAW § 220.16 (1)); GUILTY PLEA VACATED.

The First Department, reversing Supreme Court and vacating defendant's guilty plea, determined defendant pled to an offense which was not a lesser included offense of any offense in the indictment: " '[W]here the indictment charges two or more offenses in separate counts, a defendant may enter a plea of guilty to one or more of the offenses charged and/or lesser included offenses thereof' ... . 'For plea purposes only, lesser included offenses include not only those qualifying as such under the general statutory definition of lesser included crimes (CPL 1.20[37]), but also the specifically enumerated extensions of the lesser included offense concept, set forth in CPL 220.20(1)(a)-(k)' ... . Third-degree possession of a controlled substance in violation of Penal Law § 220.16(12) is not a lesser included offense of third-degree possession in violation of Penal Law § 220.16(1). The former subsection was not charged in the indictment, does not qualify as a lesser included offense under the general statutory definition, and is not included in the class of crimes that are deemed lesser included offenses of criminal possession of a controlled substance pursuant to CPL 220.20(1)(i) ...". ***People v. Acosta*, 2022 NY Slip Op 00509, First Dept 1-27-22**

CRIMINAL LAW, EVIDENCE. APPEALS.

AN APPELLATE COURT CANNOT DETERMINE A SUPPRESSION MOTION BASED ON TRIAL EVIDENCE; THE TRIAL EVIDENCE REVEALED THE SEARCH OF DEFENDANT'S APARTMENT MAY HAVE BEEN UNLAWFUL; BASED UPON THE LIMITED INFORMATION AVAILABLE TO DEFENDANT WHEN THE SUPPRESSION MOTION WAS MADE, THE ALLEGATION THE POLICE DID NOT HAVE PERMISSION TO ENTER WAS ENOUGH TO WARRANT A PROBABLE CAUSE HEARING; MATTER REMITTED.

The First Department, in a full-fledged opinion by Justice Pitt, reversing Supreme Court's denial of a probable cause hearing, determined the evidence revealed for the first time at trial called into serious question whether the search of defendant's apartment was unlawful. Prior to trial the information provided to defendant gave the impression the apartment was entered and searched pursuant to a warrant. At trial the police testified they entered the apartment two hours before the search warrant was issued. The defendant was convicted of drug possession. The suppression motion stated the police entered the apartment without defendant's permission. Given the limited and misleading information available to the defendant at the time the suppression motion was made, the allegations in the motion were sufficient to warrant a probable cause hearing. The appeal was held in abeyance and the matter was sent back for the hearing: "[T]he Appellate Division 'may not make its own finding of an independent source based upon trial testimony' ... . Thus, we cannot hold that the denial of the Mapp/Dunaway hearing was proper, and the claim unpreserved, due to legal arguments pertaining to the lawfulness of the search and based on evidence adduced at trial, well after the lower court ruled on the motion to suppress. ... [H]ere, the trial testimony is being used solely to determine the context of defendant's motion, the extent of her lack of access to information ..., and the extent of information withheld from the motion court prior to making its decision to summarily deny defendant's motion. ... [W]e find that defendant's motion should not have been summarily denied pursuant to CPL 710.60, and a hearing should have been conducted to make the necessary findings of fact." ***People v. Esperanza*, 2022 NY Slip Op 00383, First Dept 1-25-22**

FAMILY LAW, EVIDENCE.

DESPITE THE ORDER OF PROTECTION EXCLUDING RESPONDENT FROM THE HOME, THE PETITIONER PRESENTED SUFFICIENT EVIDENCE RESPONDENT WAS A PERSON LEGALLY RESPONSIBLE FOR THE CHILD; PETITIONER DEMONSTRATED RESPONDENT HAD NEGLECTED THE CHILD BY COMMITTING DOMESTIC VIOLENCE IN THE CHILD'S PRESENCE.

The First Department, reversing Family Court, determined the evidence demonstrated respondent was a person legally responsible (PLR) for the child and respondent neglected the child by committing domestic violence in the child's presence: "Petitioner demonstrated by a preponderance of the evidence that respondent was a person legally responsible (PLR) for the subject child, as well as for the child's three older siblings. Respondent and the children's mother were in a romantic relationship and lived together before the child was born, and they both represented to caseworkers that respondent was the child's biological father. There is evidence that, although he was excluded from the home because of an order of protection against him, respondent maintained communication with the mother and slept at the home at least on occasion, sharing the mother's bed. Respondent failed to appear or testify to dispute the evidence that he was the child's biological father or a PLR for him ... . The fact that respondent was excluded from the household before the child's birth as a result of having committed acts of excessive corporal punishment against the child's eldest sibling does not outweigh the evidence that demonstrates that he is a PLR for the child ... . The finding that respondent is a PLR for the child is further supported by his failure to appear in court, 'allowing the court to draw a negative inference against him' ...". ***Matter of Tristian B. (Winston B.)*, 2022 NY Slip Op 00498, First Dept 1-27-22**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

IN THIS SCAFFOLD-FALL CASE, EVIDENCE PLAINTIFF WAS INSTRUCTED TO USE GUARD RAILS ON THE SCAFFOLD BUT DID NOT REQUIRED DENIAL OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON THE LABOR LAW § 240(1) CAUSE OF ACTION.

The First Department determined Supreme Court properly denied plaintiff's motion for summary judgment in this scaffold-fall case. Defendants raised a question of fact with evidence plaintiff was instructed to use guard rails on the scaffold but did not: "[T]hrough the testimony that plaintiff declined to use guardrails even though he was instructed to do so and even though guardrails were available, [defendants] raised an issue of fact as to whether plaintiff was the sole proximate of his accident, thus rendering summary judgment in his favor inappropriate ... . Although the field supervisor did not witness the accident, he attested that he arrived on the scene as plaintiff was getting into the ambulance and proceeded straightaway to the worksite, where he found the Baker scaffold that plaintiff had been using to be in good condition, but the guardrails that plaintiff had been instructed to use leaning up against a nearby wall." ***Vargas v. 1166 LLC*, 2022 NY Slip Op 00528, 1-27-22**

PERSONAL INJURY.

PLAINTIFF WAS AN EMPLOYEE OF THE CONTRACTOR DEFENDANT HOMEOWNER HIRED TO BUILD A NEW STAIRCASE; PLAINTIFF WAS INJURED BY A PROTRUDING SCREW ON THE NEW STAIRCASE; DEFENDANT WAS NOT LIABLE; THE HOMEOWNER DID NOT CREATE THE CONDITION, DID NOT SUPERVISE THE CONTRACTOR'S WORK, AND DID NOT HAVE NOTICE OF THE CONDITION.

The First Department, reversing Supreme Court, determined defendant homeowner was not liable to plaintiff, an employee of the contractor defendant hired to replace a staircase. Plaintiff was injured by a protruding screw attached to the new staircase: "[D]efendant established prima facie that he did not create the allegedly unsafe condition in the unfinished staircase ... . Although defendant testified that he tried to repair the old staircase before hiring the contractor, the uncontradicted evidence showed that the contractor removed the old staircase and that plaintiff was injured on a screw attached to the new staircase. The new staircase was built entirely by the contractor. ... [P]laintiff's testimony that defendant gave the contractor instructions on where to place the staircase and general instructions on how he wanted the construction to proceed does not, without more, raise a triable issue of fact as to whether defendant created the condition. On the contrary, the mere retention of general supervisory powers over an independent contractor, as opposed to the giving of specific directions on how to do the work, cannot form a basis for the imposition of liability against the principal ... . There is ... no evidence in the record that defendant had actual or constructive notice of the condition in the unfinished staircase, as the protruding screw was not visible and apparent, nor is there any evidence showing that it existed for a sufficient length of time before the accident to permit defendant to discover and remedy it ...". ***Lara v. Kadir*, 2022 NY Slip Op 00504, First Dept 1-27-22**

SECOND DEPARTMENT

ADMINISTRATIVE LAW, ZONING, LAND USE, CONSTITUTIONAL LAW.

PETITIONER FAILED TO EXHAUST AVAILABLE ADMINISTRATIVE REMEDIES AFTER THE APPLICATION FOR A BUILDING PERMIT WAS DENIED BY APPEALING TO THE ZONING BOARD OF APPEALS; THE FAILURE WAS NOT EXCUSED ON THE GROUND THAT A CONSTITUTIONAL ISSUE WAS AT STAKE.

The Second Department, reversing Supreme Court, determined petitioner did not exhaust the available administrative remedies before bringing an Article 78 proceeding. Petitioner's application for a building permit, apparently for a gas station, was denied by the village building inspector. Supreme Court, pursuant to the Article 78, granted the petition. The Second Department held that petitioner's failure to appeal the building inspector's ruling to the zoning board of appeals rendered the petition abandoned. Petitioner's argument that the failure to exhaust administrative remedies should be excused because a constitutional issue was at stake was rejected: " 'The exhaustion rule ... is not an inflexible one. It is subject to important qualifications. It need not be followed, for example, when an agency's action is challenged as either unconstitutional or wholly beyond its grant of power, or when resort to an administrative remedy would be futile or when its pursuit would cause irreparable injury' ... . 'A constitutional claim that hinges upon factual issues reviewable at the administrative level must first be addressed to the agency so that a necessary factual record can be established' ... . 'Further, the mere assertion that a constitutional right is involved will not excuse the failure to pursue established administrative remedies that can provide the required relief' ...". ***Matter of 5055 N. Blvd., LLC v. Incorporated Vil. of Old Brookville*, 2022 NY Slip Op 00424, Second Dept 1-26-22**

CIVIL PROCEDURE.

THE ONE YEAR TIME-LIMIT IN CPLR 3404 FOR A MOTION TO RESTORE AN ACTION TO THE CALENDAR DID NOT APPLY TO THIS CASE WHERE THE ACTION WAS ADMINISTRATIVELY DISMISSED.

The Second Department, reversing Supreme Court, determined CPLR 3404, which requires a motion to restore an action to the calendar be made within one year, did not apply here where the action was administratively dismissed: "The plaintiffs commenced this action, inter alia, for a judgment declaring a certain deed null and void. In November 2017, the plaintiffs moved, among other things, to extend their time to file a note of issue. Subsequently, this action was administratively dismissed on December 26, 2017, for failure to file a note of issue, and the plaintiffs' motion was 'marked off' the calendar on January 10, 2018. On or about January 31, 2019, the plaintiffs moved, inter alia, to restore the action to the active calendar. In an order dated February 26, 2019, the Supreme Court denied the plaintiffs' motion on the ground that they had failed to move to restore the action within the one-year time limit of CPLR 3404. The plaintiffs appeal. CPLR 3404 does not apply to this pre-note of issue action ... . Since the action could not properly be marked off pursuant to CPLR 3404, the plaintiffs were 'not required to move to restore within any specified time frame' ... . Further, there was neither a 90-day demand pursuant to CPLR 3216 ... , nor an order dismissing the action pursuant to 22 NYCRR 202.27 ...". ***Wynn v. Wynn-Wright*, 2022 NY Slip Op 00466, Second Dept 1-26-22**

CIVIL PROCEDURE, MEDICAL MALPRACTICE, EVIDENCE, JUDGES.

SUPREME COURT SHOULD NOT HAVE STRUCK PLAINTIFF'S EXPERT'S TESTIMONY IN THIS MEDICAL MALPRACTICE ACTION ON THE GROUND THE TESTIMONY EXCEEDED THE CPLR 3101(d) DISCLOSURE; PLAINTIFF'S MOTION FOR A MISTRIAL SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined plaintiff's motion for a mistrial in this medical malpractice action should have been granted. The trial judge should not have precluded plaintiff's expert's testimony on the ground the scope of the testimony exceeded the CPLR 3101(d) disclosure: "Because portions of the expert's testimony purportedly fell outside the notice pursuant to CPLR 3101(d), the Supreme Court struck all of this expert's testimony concerning [defendants] Inglis and Shukla. However, even assuming that portions of the expert's testimony fell outside the CPLR 3101(d) disclosure, it was error to strike all of his testimony concerning Inglis and Shukla. ... [T]o the extent that portions of the expert's testimony fell outside the CPLR 3101(d) disclosure, the relevant subject matter was raised in the bills of particulars and in the expert's affirmation submitted in opposition to the defendants' motions for summary judgment. Under these circumstances, the court improvidently struck the expert's testimony concerning the treatment provided by Inglis and Shukla ... . In addition, the Supreme Court sustained objections to questions of the same expert about whether Mosu departed from the accepted standard of care, for a lack of foundation. The court erred in precluding the expert from testifying as to whether Mosu departed from the accepted standard of care since there was a foundation for the expert's testimony, including the defendants' and plaintiff's trial testimony, and the relevant medical records ...". ***Johnson-Hendy v. Mosu*, 2022 NY Slip Op 00409, Second Dept 1-26-22**

CRIMINAL LAW, EVIDENCE, APPEALS.

THE COMPLAINANT'S IDENTIFICATION OF DEFENDANT FROM A SINGLE PHOTOGRAPH WAS UNDULY SUGGESTIVE; PROOF OF SERIOUS INJURY RE: THE ASSAULT CHARGE WAS LEGALLY INSUFFICIENT; ALTHOUGH THE LEGAL SUFFICIENCY ARGUMENT WAS NOT PRESERVED IT WAS CONSIDERED IN THE INTEREST OF JUSTICE.

The Second Department, over an extensive partial dissent, determined: (1) the defendant was entitled to a new trial on the burglary charge because the identification procedure was unduly suggestive; and (2) the serious injury element of the assault charge was not supported by legally sufficient evidence: "[A]lthough the burglary complainant's identification of the Facebook photograph was not the product of a police-arranged identification procedure, the complainant's identifications of the defendant from a single arrest photograph were the result of unduly suggestive identification procedures, and those identifications should have been suppressed ... . [U]pon the exercise of our interest of justice jurisdiction (see CPL 470.05[2]), we conclude that the conviction of assault in the second degree is not supported by legally sufficient evidence that the detective sustained a 'physical injury' within the meaning of Penal Law § 10.00(9). ... The record did not support a finding that the detective experienced substantial pain. At the time of his discharge from the hospital, the detective assessed his pain as a '3' and was advised to take Tylenol for pain. His 'quality' of pain was characterized as 'aching.' Furthermore, there was no evidence as to the duration of any pain." ***People v. Wheeler*, 2022 NY Slip Op 00442, Second Dept 1-26-22**

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA).

DEFENDANT HAD BEEN RELEASED FOR 12 YEARS WITHOUT REOFFENDING AT THE TIME OF THE SORA HEARING; DEFENDANT WAS ENTITLED TO A DOWNWARD DEPARTURE TO LEVEL ONE.

The Second Department, reversing Supreme Court's SORA risk-level assessment and designating defendant a level one sex offender, the fact that defendant had not reoffended between 2004 and 2018 was a factor warranting a downward departure: "A defendant seeking a downward departure from the presumptive risk level has the initial burden of '(1) identifying, as a matter of law, an appropriate mitigating factor, namely, a factor which tends to establish a lower likelihood of reoffense or danger to the community and is of a kind, or to a degree, that is otherwise not adequately taken into account by the [SORA] Guidelines; and (2) establishing the facts in support of its existence by a preponderance of the evidence' ... . [T]he defendant committed a sex offense in Georgia in 2004. In the time between that crime and the SORA hearing, which was held in 2018, the defendant was at liberty for approximately 12 years without reoffending. In light of the lengthy amount of time without reoffense, we conclude that the RAI [risk assessment instrument] overstated the defendant's risk of reoffense." ***People v. Addison*, 2022 NY Slip Op 00445, Second Dept 1-26-22**

FORECLOSURE, CIVIL PROCEDURE, EVIDENCE.

DEFENDANT RAISED A QUESTION OF FACT WHETHER THE NOTE SUBMITTED BY THE BANK TO DEMONSTRATE STANDING TO FORECLOSE WAS THE NOTE SHE SIGNED.

The Second Department, reversing Supreme Court, determined defendant had raised a question of fact whether the bank had standing to foreclosure by producing a note that was different from the note submitted by the bank to demonstrate standing: "[T]he defendant raised a triable issue of fact as to whether the plaintiff had produced the unpaid note and had standing to commence the action, by submitting, among other things, a copy of another version of the note, purportedly produced by the plaintiff in this litigation, bearing a different version of the defendant's purported signature and initials than the note relied upon by the plaintiff in support of its motion. In an affidavit submitted in opposition to the plaintiff's motion, the defendant averred that she only signed one copy of the note at closing, and denied that any of the copies of the note produced by the plaintiff were the note she signed ...". ***JPMorgan Chase Bank, N.A. v. Rodriguez*, 2022 NY Slip Op 00411, Second Dept 1-26-22**

FORECLOSURE, CIVIL PROCEDURE, EVIDENCE.

THE REFEREE'S REPORT IN THIS FORECLOSURE ACTION SHOULD NOT HAVE BEEN CONFIRMED BECAUSE IT WAS BASED UPON BUSINESS RECORDS WHICH WERE NOT PRODUCED (HEARSAY).

The Second Department, reversing Supreme Court, determined the referee's report should not have been confirmed in this foreclosure action because the computations in the report were based on business records which were not produced: "... '[T]he referee's findings with respect to the total amount due upon the mortgage were not substantially supported by the record inasmuch as the computation was premised upon unproduced business records' ... . We therefore reverse the order and judgment of foreclosure and sale and remit the matter to the Supreme Court ... for a new report computing the amount due, to be followed by further proceedings in accordance with CPLR 4403 and the entry of an appropriate amended judgment thereafter ...". ***Wells Fargo Bank, N.A. v. Dhanani*, 2022 NY Slip Op 00460, Second Dept 1-26-22**

FORECLOSURE, CIVIL PROCEDURE, EVIDENCE UNIFORM COMMERCIAL CODE (UCC).

THE BANK DID NOT DEMONSTRATE THE ALLONGE WAS FIRMLY AFFIXED TO THE NOTE AND THEREFORE DID NOT DEMONSTRATE STANDING TO BRING THE FORECLOSURE ACTION.

The Second Department, reversing Supreme Court, determined the bank did not demonstrate standing to bring the foreclosure actions: "Where, as here, the plaintiff's standing has been placed in issue by the defendant's answer, the plaintiff must prove its standing as part of its prima facie showing ... . '[A] plaintiff may demonstrate its standing in a foreclosure action through proof that it was in possession of the subject note endorsed in blank, or the subject note and a firmly affixed allonge endorsed in blank, at the time of commencement of the action' ... . Here, the Supreme Court should have denied those branches of the plaintiff's motion which were for summary judgment on the complaint insofar as asserted against the defendant and for an order of reference, as the plaintiff failed to establish, prima facie, that it had standing to commence this action. 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) ... . The affidavit of the plaintiff's employee and the copy of the note attached thereto which were submitted in support of the plaintiff's motion for summary judgment did not clarify whether the allonge was firmly affixed to the note ...". ***Nationstar Mtge., LLC v. Calomarde*, 2022 NY Slip Op 00428, Second Dept 1-26-22**

FORECLOSURE, CIVIL PROCEDURE, EVIDENCE, UNIFORM COMMERCIAL CODE (UCC).

DEFENDANTS RAISED A QUESTION OF FACT WHETHER THE BANK POSSESSED THE CORRECT VERSION OF THE NOTE, AND, THEREFORE, WHETHER THE BANK HAD STANDING TO BRING THE FORECLOSURE ACTION.

The Second Department, reversing Supreme Court, determined defendants in this foreclosure action raised a question of fact whether the bank possessed the relevant note, and therefore had standing, when the action was commenced: " 'Pursuant to article 3 of the Uniform Commercial Code, a note can be endorsed, or signed over, to a new owner' ... . A note can also be endorsed in blank, naming no specific payee, which makes it a bearer instrument, so that any party that possesses it has the legal authority to enforce it (see UCC 3-202[1]; 3-204[2] ...). ... The version of the note that contained the special endorsement by GreenPoint to GMAC ..., which was submitted in the 2008 foreclosure action, was not consistent with the endorsement in blank by GreenPoint. If the note was specially endorsed to GMAC, it would subsequently had to have been specially endorsed to the plaintiff or endorsed in blank by GMAC in order for the plaintiff to enforce it (see UCC 3-202[1]; 3-204[1] ...). Thus, the defendants raised a triable issue of fact as to whether the plaintiff possessed the legal authority to enforce the note at the time this action was commenced ...". ***U.S. Bank N.A. v. Rozo-Castellanos*, 2022 NY Slip Op 00457, Second Dept 1-26-22**

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

THE BANK DID NOT DEMONSTRATE: (1) STANDING TO BRING THE FORECLOSURE ACTION; (2) COMPLIANCE WITH THE NOTICE PROVISION IN THE MORTGAGE; AND (3), COMPLIANCE WITH THE NOTICE REQUIREMENTS OF RPAPL 1304.

The Second Department, reversing Supreme Court, determined the bank did not demonstrate standing to bring the foreclosure action and did not demonstrate compliance with the notice provision of the mortgage and RPAPL 1304: "[T]he record does not reflect that a copy of the endorsed note was attached to the summons and complaint when the action was commenced ... . Moreover, the plaintiff failed to establish its status as the holder of the note at the time of commencement of the action ... . * * * The plaintiff failed to establish ... it complied with the condition precedent contained in the mortgage agreement, which required that it provide the defendant with a notice of default prior to demanding payment of the loan in full. The evidence submitted by the plaintiff did not establish that a notice of default was mailed by first-class mail or actually delivered to the defendant's 'notice address' if sent by other means, as required by the terms of the mortgage agreement ... . [Plaintiff] failed to provide proof of a standard office mailing procedure and provided no independent evidence of the actual mailing ... . For the same reason, the plaintiff failed to establish ... it sent the defendant the required notice under RPAPL 1304 ...". ***Deutsche Bank Natl. Trust Co. v. Crosby*, 2022 NY Slip Op 00402, Second Dept 1-26-22**

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

SLIGHTLY DIFFERENT SIGNATURES ON THE NOTE AND DEFENDANTS' DENIAL OF RECEIPT OF THE RPAPL 1304 NOTICE DID NOT RAISE QUESTIONS OF FACT; THE BANK'S MOTION FOR SUMMARY JUDGMENT IN THIS FORECLOSURE ACTION SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined plaintiff bank's motion for summary judgment in this foreclosure action should have been granted. Slightly different signatures on the note and defendants' denial of receipt of the RPAPL 1304 notice did not raise questions of fact: "[U]nder the circumstances of this case, the fact that the plaintiff submitted a copy of the consolidated note that contained slightly different signatures of the defendants than the copy appended to the CEMA [consolidation, extension, and modification agreement], did not provide a sufficient basis to deny the plaintiff's motion ... . The defendants do not dispute that they signed the consolidated notes, including the one under which the plaintiff wished to proceed, nor do they claim that there were any differences in the terms of the notes ... . Furthermore, the defendants' mere denial of receipt of the RPAPL 1304 notices was insufficient to raise a triable issue of fact warranting denial of the motion ...". ***Wilmington Sav. Fund Socy. v. Theagene*, 2022 NY Slip Op 00465, Second Dept 1-26-22**

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

THE BANK FAILED TO DEMONSTRATE STRICT COMPLIANCE WITH THE NOTICE REQUIREMENTS OF RPAPL 1304; THE BANK'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined the bank in this foreclosure action did not demonstrate strict compliance with the notice requirements of RPAPL 1304. The bank's motion for summary judgment should not have been granted: "No evidence that the RPAPL 1304 notice was mailed by certified mail to the defendant at the subject property was provided, and the affidavit of a document control officer of the plaintiff's loan servicer submitted by the plaintiff failed to describe the procedures in place designed to ensure that RPAPL 1304 notices are properly addressed and mailed by both certified and first-class mail ... . Since the plaintiff failed to provide evidence of actual mailing of the RPAPL 1304 notice by certified mail to the defendant at the subject property, 'or proof of a standard office mailing procedure designed

to ensure that items are properly addressed and mailed, sworn to by someone with personal knowledge of the procedure,' the plaintiff failed to establish its strict compliance with RPAPL 1304 ...". ***Bank of N.Y. Mellon v. Sae Young Min*, 2022 NY Slip Op 00393, Second Dept 1-26-22**

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

STRICT COMPLIANCE WITH THE MAILING REQUIREMENTS OF RPAPL 1304 WAS NOT DEMONSTRATED; THE BANK'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined the proof surrounding the mailing of the RPAPL 1304 notice was insufficient: "... '[T]he plaintiff failed to provide evidence of the actual mailing, 'or proof of a standard office mailing procedure designed to ensure that items are properly addressed and mailed, sworn to by someone with personal knowledge of the procedure,' the plaintiff failed to establish its strict compliance with RPAPL 1304' ...". ***Citimortgage, Inc. v. Leitman*, 2022 NY Slip Op 00397, Second Dept 1-26-22**

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

THE BANK IN THIS FORECLOSURE ACTION DID NOT SUBMIT SUFFICIENT PROOF OF DEFENDANT'S DEFAULT AND COMPLIANCE WITH THE NOTICE REQUIREMENTS OF RPAPL 1304.

The Second Department, reversing Supreme Court, determined the bank in this foreclosure action did not demonstrate defendant's default and did not demonstrate compliance with the notice provisions of RPAPL 1304: "… [I]n attempting to establish the defendant's default in payment, the plaintiff relied on the affidavit of Jessica Fernandez, an assistant vice president of Bayview, the plaintiff's assignee. * * * ... [T]he payment history was a record made by Chase, not Bayview. ... Fernandez did not attest that she was personally familiar with Chase's record-keeping practices and procedures ... or that records provided by Chase were incorporated into Bayview's records and routinely relied upon by Bayview in its own business ... .Fernandez failed to lay a proper foundation for the admission of the payment history and her assertions based on that record were inadmissible ... . The plaintiff also failed to establish, prima facie, its strict compliance with RPAPL 1304. RPAPL 1304 provides that, 'at least ninety days before a lender, an assignee or a mortgage loan servicer commences legal action against the borrower, . . . including mortgage foreclosure, such lender, assignee or mortgage loan servicer shall give notice to the borrower' ... . 'The statute further provides the required content for the notice and provides that the notice must be sent by registered or certified mail and also by first-class mail to the last known address of the borrower' ... . In support of its motion, the plaintiff submitted a copy of a 90-day notice from the plaintiff, addressed to the defendant at the premises address. ... [T]he notice ... does not include the list of at least five housing agencies that served the region where the defendant resided ... . [T]he plaintiff failed to submit proof of the actual mailing of the notice, or proof of a standard office mailing procedure designed to ensure that items are properly addressed and mailed, sworn to by someone with personal knowledge of the procedure ...". ***JPMorgan Chase Bank, N.A. v. Deblinger*, 2022 NY Slip Op 00410, Second Dept 1-26-22**

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

THE BANK DID NOT DEMONSTRATE COMPLIANCE WITH THE NOTICE REQUIREMENTS OF RPAPL 1304.

The Second Department, reversing Supreme Court, determined the bank did not demonstrate compliance with the notice requirements of RPAPL 1304 in this foreclosure action: "Although the envelope has 'Wells Fargo Home Mortgage' printed on it, there is no visible sender address. The envelope has the name 'Shields' [defendant] hand-written in the top right corner. The envelope is further marked 'return to sender illegible unable to forward' by the United States Post Office. The plaintiff also provided a copy of a certified mail return receipt card addressed to both of the defendants at the subject property's address. This card is neither signed by a recipient nor postmarked. In addition, the plaintiff provided a certified manifest demonstrating proof of filing pursuant to RPAPL 1306, which only refers to a purported mailing to Shields. Therefore, the plaintiff failed to eliminate questions of fact as to whether notices were sent to both defendants in compliance with RPAPL 1304, and whether the notices were received." ***Wells Fargo Bank, N.A. v. Shields*, 2022 NY Slip Op 00462, Second Dept 1-26-22**

MUNICIPAL LAW, LANDLORD-TENANT, CONSTITUTIONAL LAW.

THE TOWN CODE PROVISION WHICH REQUIRES A PROPERTY INSPECTION BEFORE ISSUANCE OF A RENTAL PERMIT DOES NOT VIOLATE THE CONSTITUTIONAL PROTECTION AGAINST UNREASONABLE SEARCHES AND SEIZURES BECAUSE THE PROVISION ALLOWS THE LANDLORD TO HAVE THE INSPECTION DONE BY A STATE-LICENSED ENGINEER, AS OPPOSED TO THE TOWN BUILDING INSPECTOR.

The Second Department, reversing Supreme Court, determined the town code provision which required a property inspection before issuance of a rental permit is not unconstitutional. Although the provision would be unconstitutional if an inspection by the town building inspector was required (a mandatory warrantless search), the provision also allows the landlord to have the property inspected by a state-licensed engineer: "It is well-settled that 'the imposition of a penalty upon a landlord for renting his [or her] premises without first consenting to a warrantless search violates the property owner's Fourth Amendment rights' ... . Here, however, the Town's rental permit law does not 'expressly require . . . an inspection

before the issuance or renewal of a permit' ... , since a property owner who is applying for a rental permit has the option of obtaining a certification from a state-licensed professional engineer in lieu of submitting to an inspection by a Town building inspector ... . Accordingly, the provisions did not violate constitutional provisions against unreasonable searches and seizures ...". ***Infinite Green, Inc. v. Town of Babylon*, 2022 NY Slip Op 00407, Second Dept 1-26-22**

PERSONAL INJURY.

PLAINTIFF ALLEGED SHE WAS INJURED WHEN DEFENDANT'S TREADMILL SUDDENLY ACCELERATED; PLAINTIFF ALLEGED SHE COMPLAINED ABOUT THE TREADMILL-ACCELERATION DAYS BEFORE SHE WAS INJURED, RAISING A QUESTION OF FACT ABOUT DEFENDANT'S ACTUAL NOTICE OF THE DEFECT; DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined the defendant fitness center's motion for summary judgment in this treadmill-injury case should not have been granted. Plaintiff alleged the treadmill accelerated suddenly. Plaintiff's deposition was submitted by the defendant in support of its motion. Plaintiff testified she had complained about the treadmill-acceleration several days prior to her injury. The defendant submitted no evidence concerning when the treadmill was last maintained or inspected: "[T]he plaintiff testified at her deposition that she complained to a front desk employee of the defendant several days prior to the subject accident that the subject treadmill had spontaneously accelerated while the plaintiff was using it, causing her to quickly get off the machine. No inspection or maintenance records for the subject treadmill were submitted by the defendant in support of its motion. While the defendant submitted the deposition testimony of one of its owners, who testified that the defendant never received any complaints about the subject treadmill spontaneously accelerating at any time prior to the subject accident, this merely raised a question of fact, as well as an issue of credibility, that should be decided by the trier of fact." ***Mermelstein v. Campbell Fitness NC, LLC*, 2022 NY Slip Op 00419, Second Dept 1-26-22**

TAX LAW.

THE COMPLAINT ADEQUATELY ALLEGED DEFENDANT VIOLATED THE CIGARETTE MARKETING STANDARDS ACT (CMSA) BY OFFERING REBATES WHICH EFFECTIVELY LOWERED THE PRICE OF CIGARETTES.

The Second Department, reversing Supreme Court, determined the complaint stated a cause of action for the violation of the Cigarette Marketing Standards Act (CMSA) by offering rebates which effectively lowered the price of cigarettes: "[T]he CMSA and its regulations make clear that rebates which directly or indirectly serve to reduce prices below legal minimums constitute violations of the prohibition on offers to sell or sales of cigarettes at less than minimum prices (see Tax Law § 484[a][1]). The Supreme Court therefore erred in directing dismissal of the complaint on the basis that the alleged conduct involved the provision of rebates. Contrary to [defendant's] contention, the complaint sufficiently pleaded that these rebates resulted in prices below the legal minimum (see 20 NYCRR 84.1[b][2]). The Supreme Court also erred in determining that the good faith 'meeting competition' exception to the CMSA applied as a matter of law. The exception permits an agent or wholesale dealer to sell cigarettes 'at a price made in good faith to meet the price of a competitor who is rendering the same type of services and is selling the same article at cost to him [or her]' ... . [T]he complaint sufficiently pleads that [defendant] did not offer the rebates in good faith to meet the prices of a competitor selling cigarettes at its cost ... . The complaint alleges that [defendant] lowered its prices to beat, not meet, legal competition. Moreover, it alleges that [defendant's] sales manager was aware that such rebates violated the CMSA ...". ***Amsterdam Tobacco Co., Inc. v. Harold Levinson Assoc., LLC*, 2022 NY Slip Op 00390, Second Dept 1-26-22**

TRUSTS AND ESTATES.

EVEN THOUGH THE PROCEEDS OF A TRUST HAD BEEN DISTRIBUTED TO DECEDENT BEFORE HIS DEATH, THERE WAS A QUESTION OF FACT WHETHER DECEDENT RETAINED THE PROCEEDS AT THE TIME OF DEATH; IF SO, PURSUANT TO THE WILL, THE BEQUEST DID NOT LAPSE AND THE PROCEEDS WOULD BE DISTRIBUTED TO THE NAMED BENEFICIARIES.

The Second Department, reversing Surrogate's Court, determined there was a question of fact whether the decedent possessed the proceeds of a trust at the time of his death. If so, pursuant to the will, those proceeds would pass to the named beneficiaries: " 'A specific disposition is a disposition of a specified or identified item of the testator's property' (EPTL 1-2.17). '[U]nless the subject of a specific legacy exists, unchanged in substance, at the date of the will, there results an ademption, complete or partial according to the facts' ... . A specific bequest fails if the article specifically bequeathed has been given away, lost or destroyed during the testator's lifetime ... . 'A conveyance, settlement or other act of a testator by which an estate in his property, previously disposed of by will, is altered but not wholly divested does not revoke such disposition, but the estate in the property that remains in the testator passes to the beneficiaries pursuant to the disposition. However, any such conveyance, settlement or other act of the testator which is wholly inconsistent with such previous testamentary disposition revokes it' (EPTL 3-4.3). Here, the subject bequest to the objectants, namely, the net proceeds received by the decedent under the trust, was a specific disposition ... , subject to whole or partial ademption ... . However, questions of fact exist, inter alia, as to whether at the time of his death the decedent retained the property distributed to him upon the

termination of the trust, such that it passes to the objectants pursuant to Paragraph THIRD of the will." ***Matter of Johnson*, 2022 NY Slip Op 00425, Second Dept 1-26-22**

THIRD DEPARTMENT

CIVIL PROCEDURE, CORPORATION LAW.

THE DOCTRINE OF COLLATERAL ESTOPPEL DID NOT PRECLUDE THIS ACTION TO DETERMINE THE VALIDITY OF THE PURPORTED 2017 ELECTION OF THE BOARD OF DIRECTORS; THE PRIOR ACTION CONCERNED ONLY THE VALIDITY OF THE PURPORTED 2019 ELECTION OF THE BOARD OF DIRECTORS.

The Third Department, reversing Supreme Court, held the doctrine of collateral estoppel did not preclude this Sullivan County action, which sought to determine whether a 2017 election of the board of directors of plaintiff religious corporation was valid. A prior action in Kings County determined a 2019 election of the board of directors of the same corporation was a nullity: "As defendants' amended petition and the order of Supreme Court ... in the Kings County proceeding reflect, the issue to be determined therein was the validity of the 2019 election, not the validity of the 2017 election. Defendants sought in that proceeding to declare the 2019 election a nullity and, as a result, enjoin the individual plaintiffs, purportedly elected in 2019, from acting as the board of directors. Indeed, the court went out of its way during oral argument in that matter to so limit the issue when it stated that it 'want[ed] to be very clear that [it was] making no determination in this case as to whether [defendants] have any right to control the corporation by virtue of any acts that predated the [June 2019 election.]' The court further clarified 'that [it] take[s] no position on the validity of any actions that [defendants] claim[] to have taken in 2017 and thereafter,' and added that the allegations relating to the 2017 election was part of '[t]he Sullivan County matter' which 'is not before [it],' and that the proceeding 'has nothing to do with the Sullivan County matter.' More importantly, the order signed by the court was so circumscribed, and granted the amended petition 'to the sole extent that it [sought] to invalidate' the 2019 election." ***Congregation Machne Ger v. Berliner*, 2022 NY Slip Op 00483, Third Dept 1-27-22**

CIVIL PROCEDURE, WORKERS' COMPENSATION.

DEFENDANTS ARGUED PLAINTIFF WAS NOT AN EMPLOYEE IN THE WORKERS' COMPENSATION PROCEEDING; HERE THE DEFENDANTS ARGUED PLAINTIFF WAS AN EMPLOYEE AND HIS REMEDY WAS LIMITED TO WORKERS' COMPENSATION; THE DOCTRINE OF JUDICIAL ESTOPPEL PRECLUDED THE WORKERS' COMPENSATION AFFIRMATIVE DEFENSE IN THIS ACTION.

The Third Department, reversing (modifying) Supreme Court, over a dissent, determined the judicial estoppel doctrine applied and plaintiff's motion to dismiss the workers' compensation affirmative defense in this personal injury action should have been granted. Plaintiff was injured on the job. In the Workers' Compensation proceeding defendants argued plaintiff was an not an employee. In this action defendants argued he was an employee and his recovery is limited to Workers' Compensation: "[T]he record makes clear that defendants, through Old Republic [insurance company], consistently advanced in the Workers' Compensation Law proceeding the theory that plaintiff was not its employee. Old Republic, as the workers' compensation carrier for defendants, was subsequently discharged from this proceeding. As such, defendants achieved its desired result after asserting the lack of an employer-employee relationship. Although the record is not explicit as to the basis for the discharge of Old Republic from the Workers' Compensation Law proceeding, '[t]he policy behind judicial estoppel would not be served by limiting its application to cases where the legal position at issue was ruled upon in the context of a judgment' ... . In this action ... defendants have taken a contrary position — i.e., plaintiff was employed by defendants as a special employee and, therefore, his sole remedy for compensation was to pursue workers' compensation benefits. Allowing defendants to argue in this action that plaintiff was their employee, after they had disavowed an employer-employee relationship in the Workers' Compensation Law proceeding and received a benefit from this position, would subvert the equitable policy behind the doctrine of judicial estoppel ...". ***Walker v. GlaxoSmithKline, LLC*, 2022 NY Slip Op 00484, Third Dept 1-27-22**

CRIMINAL LAW, JUDGES, APPEALS.

WHEN THE TERMS OF THE PLEA AGREEMENT WERE DISCUSSED BOTH TWO AND THREE-YEAR SENTENCES WERE MENTIONED; DEFENDANT WAS SENTENCED TO THREE YEARS; DEFENDANT'S GUILTY PLEA WAS THEREFORE NOT VOLUNTARY; THE ISSUE WAS NOT PRESERVED BY A MOTION AND WAS CONSIDERED IN THE INTEREST OF JUSTICE.

The Third Department, vacating defendant's guilty plea, determined defendant was not clearly informed of the sentence, rendering his plea involuntary. Although the issue was not preserved by a motion, the Third Department considered the appeal in the interest of justice: "[W]hen the terms of the plea agreement were placed on the record, it was stated that the prison term to be imposed would be two years. County Court then, in discussing defendant's second felony offender status, stated that the prison term was three years but, thereafter, informed defendant that, if he violated any jail rules prior to sentencing, it would not be bound by the promise of a two-year prison term. The record does not reflect that there was any

clarification or correction regarding the misstatements as to the agreed-upon sentence either during the plea colloquy or at sentencing before a three-year prison term was imposed. As '[t]he record thus fails to reveal that defendant was accurately advised of the essential terms and conditions of the plea agreement' ... , we find that his plea was not knowing, voluntary and intelligent." ***People v. Lumpkin*, 2022 NY Slip Op 00477, Third Dept 1-27-22**

PERSONAL INJURY, EVIDENCE.

THE EVIDENCE SUPPORTED THE DEFENSE VERDICT IN THIS ALL-TERRAIN VEHICLE ACCIDENT CASE; TWO DISSENTERS ARGUED THE 14-YEAR-OLD DEFENDANT DRIVER ACKNOWLEDGED HIS NEGLIGENCE ON THE STAND.

The Third Department, over a partial dissent, determined the jury verdict finding the 14-year-old defendant driver of an all-terrain vehicle (a Gator) was not negligent was supported by the evidence. The Gator overturned and the 16-year-old passenger was injured. The defendant's and plaintiff's descriptions of the accident conflicted. The dissenters argued the defendant acknowledged he was negligent when he testified: "The jury heard … conflicting testimony regarding how defendant was driving at the time of the accident, whether that driving was what led to the Gator tipping over and whether defendant had any reason to believe that his actions posed a risk of harm given the acknowledged stability of the Gator and the fact that he and plaintiff had already performed several donuts without incident. It was for the jury to resolve these factual questions and determine whether defendant 'fail[ed] to use that degree of care that a reasonably prudent person would have used under the same circumstances' and engaged in conduct posing a reasonably foreseeable risk to others ... . **From the dissent:** ... [D]efendant testified that he was 14 years old on the day of the accident, that he was operating the John Deere Gator Utility Vehicle (hereinafter Gator) and performing a 'donut' at the time of the accident. He described a donut as 'the action of turning the wheel of the vehicle while pressing the accelerator in order to get the back wheels to spin out.' He stated that he knew that the Gator was not intended as a recreational vehicle and also testified that, although he was aware of the manufacturer's safety warnings pertaining to limitations on speed, the use of seat belts and the prohibition of anyone younger than 16 years old driving the vehicle, he disregarded many of those warnings at the time of the accident. Finally, he testified that, although he had always operated the Gator safely in the past, his parents were angry with him after this accident 'because [he] was driving [the Gator] in a manner that was inconsistent with [his] entire past.' When asked if this manner was unsafe, defendant simply stated 'yes.' " ***Wright v. O'Leary*, 2022 NY Slip Op 00485, Third Dept 1-27-22**

RETIREMENT AND SOCIAL SECURITY LAW.

PETITIONER POLICE OFFICER'S SITTING IN A DESK CHAIR (WHICH WAS SUBSEQUENTLY FOUND TO BE BROKEN), LEANING BACK, FALLING BACKWARD AND INJURING HIS HEAD CONSTITUTED AN "ACCIDENT" WITHIN THE MEANING OF THE RETIREMENT AND SOCIAL SECURITY LAW.

The Third Department, reversing the Comptroller, over a dissent, annulled the determination that petitioner police officer was not injured in an "accident" within the meaning of the Retirement and Social Security Law. Petitioner alleged he sat in a desk chair, leaned back and fell over striking his head. There was evidence the chair was broken: "Petitioner's burden was to demonstrate that his disability arose out of an accident which, for purposes of the Retirement and Social Security Law, is defined as 'a sudden, fortuitous mischance, unexpected, out of the ordinary, and injurious in impact' ... . * * * In our view, the incident as described constitutes an accident. Contrary to the findings of the Hearing Officer, whether the chair was broken prior to or during the fall is of no moment, as either way petitioner was unaware of any defect. In either situation, the collapse of a chair back would be a sudden, unexpected outcome for anyone who simply sits and leans back." ***Matter of Crone v. DiNapoli*, 2022 NY Slip Op 00481, Third Dept 1-27-22**

FOURTH DEPARTMENT

CONTRACT LAW, DEBTOR-CREDITOR, EMPLOYMENT LAW.

DEFENDANT'S AGREEMENT TO PURCHASE PLAINTIFF'S BUSINESS WAS NOT ENTWINED WITH AN EMPLOYMENT AGREEMENT BETWEEN PLAINTIFF AND DEFENDANT WHICH INCLUDED A COVENANT NOT TO COMPETE; THEREFORE PLAINTIFF'S ALLEGED BREACH OF THE COVENANT NOT TO COMPETE WAS NOT A DEFENSE TO DEFENDANT'S BREACH OF THE PURCHASE AND SALE AGREEMENT.

The Fourth Department, reversing (modifying) Supreme Court, determined an employment contract between plaintiff and defendant, which included a covenant not to compete, was not entwined with the separate sales agreement in which defendant promised to pay $200,000 for plaintiff's business. Therefore plaintiff was entitled to summary judgment on the sales contract because defendant defaulted after making the first payment: " 'Generally, breach of a related contract will not in the ordinary course defeat summary judgment on [a promissory] note[]' ... . Nonetheless, that 'rule does not apply where the contract and instrument are intertwined' and inseparable ... . Whether two agreements are inextricably intertwined is a question of law for the court to decide because it involves a matter of contract interpretation ... . Here, the sales contract

and employment agreement are not inextricably intertwined such that plaintiff's purported breach of the noncompetition covenants in the latter constitute a defense to defendant's default on the promissory note ... '. ***Saulsbury v. Durfee*, 2022 NY Slip Op 00566, Fourth Dept 1-28-22**

CRIMINAL LAW, APPEALS, VEHICLE AND TRAFFIC LAW.

"REFUSING A BREATH TEST" IS NOT A COGNIZABLE OFFENSE; A CONVICTION IS THEREFORE A FUNDAMENTAL ERROR WHICH MUST BE CORRECTED ON APPEAL EVEN IF THE ISSUE IS NOT BRIEFED.

The Fourth Department, reversing defendant's conviction of "refusing a breath test," explained that it is not a cognizable offense. The court noted that it was obligated to correct this fundamental error which cannot be waived, even though the issue was not briefed on appeal: "[T]he purported traffic infraction to which defendant pleaded guilty under count two of the indictment—refusing the breath test mandated by Vehicle and Traffic Law § 1194 (1) (b)—is not a cognizable offense for which a person may be charged or convicted in a criminal court ...". ***People v. Adams*, 2022 NY Slip Op 00562, Fourth Dept 1-28-22**

Same issue in ***People v. Harris*, 2022 NY Slip Op 00568, Fourth Dept 1-28-22**

CRIMINAL LAW, CONTRACT LAW.

DEFENDANT MAY HAVE PLED GUILTY AND ACCEPTED A 16-YEAR SENTENCE IN MONROE COUNTY BECAUSE HE WAS ALREADY SENTENCED TO 14 - 24 YEARS FOR ANOTHER OFFENSE IN ONTARIO COUNTY; ON APPEAL THE ONTARIO COUNTY SENTENCE WAS REDUCED TO FOUR YEARS; MONROE COUNTY GUILTY PLEA VACATED.

The Fourth Department, vacating defendant's guilty plea, determined defendant may have pled guilty and accepted a 16-year sentence in Monroe County because he was already serving a 14-24 year sentence for another offense in Ontario County. Subsequently, on appeal, the Fourth Department reduced the Ontario County sentence to four years: " 'The critical question is whether the removal or reduction of the preexisting sentence nullified a benefit that was expressly promised and was a material inducement to the guilty plea' ... . Here, when defendant pleaded guilty in Monroe County, the court expressly informed him that the aggregate 16-year term of imprisonment would run concurrently with the aggregate 14-to-24-year term already imposed in Ontario County, and thus the plea would result in no or relatively little additional prison time ... . Once the Ontario County sentence was reduced as a result of our determination on the prior appeal to a term of four years, defendant lost the benefit previously conferred by the concurrent nature of the Monroe County plea, and 'we cannot say defendant would have accepted the plea bargain . . . had it not been for his [14-to-24]-year sentence in the [Ontario County] case, now reduced to [four years]' ...". ***People v. Ringrose*, 2022 NY Slip Op 00569, Fourth Dept 1-28-22**

CRIMINAL LAW, CONTRACT LAW, APPEALS.

THE IMPOSITION OF A FINE WAS NOT PART OF THE PLEA AGREEMENT; ALTHOUGH THE ISSUE WAS NOT PRESERVED, THE FINE WAS VACATED IN THE INTEREST OF JUSTICE.

The Fourth Department, reversing (modifying) County Court, determined the imposition of a fine was not part of the plea agreement and vacated that part of the sentence: "Defendant's … contention that his guilty plea was not knowingly, intelligently, and voluntarily entered is actually a contention that County Court erred in imposing a $1,000 fine that was not part of the negotiated plea agreement without affording him an opportunity to withdraw his plea ... . Although defendant failed to preserve his contention for our review by failing to object to the imposition of the fine or by moving to withdraw his plea or to vacate the judgment of conviction (see id.), we exercise our power to review it as a matter of discretion in the interest of justice (see CPL 470.15 [3] [c] ...). ... [T]he court improperly enhanced defendant's sentence by imposing 'a fine that was not part of the negotiated plea agreement' ... . [W]e conclude that it is 'appropriate to vacate the provision of the defendant's sentence imposing a fine, so as to conform the sentence imposed to the promise made to the defendant in exchange for his plea of guilty' ...". ***People v. Wilson*, 2022 NY Slip Op 00593, Fourth Dept 1-28-22**

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

BECAUSE OF UNAMBIGUOUS STATUTORY LANGUAGE, DEFENDANT'S MICHIGAN CONVICTION WAS DEEMED A "SEXUALLY VIOLENT OFFENSE" EVEN THOUGH THE SAME CONDUCT IN NEW YORK WOULD NOT QUALIFY AS A "SEXUALLY VIOLENT OFFENSE;" STRONG TWO-JUSTICE DISSENT.

The Fourth Department, over a two-justice dissent, determined the result, while admittedly unfair, is required by unambiguous statutory language. For predicate felony purposes, a Michigan conviction was deemed a "sexually violent offense," even though the same conduct would not constitute a "sexually violent offense" if committed in New York: "A '[s]exually violent offender' means a sex offender who has been convicted of a sexually violent offense' (Correction Law § 168-a [7] [b]). A '[s]exually violent offense,' among other things, is 'a conviction of an offense in any other jurisdiction which includes all of the essential elements of any [New York] felony [enumerated in section 168-a (3) (a)] *or conviction of a felony in any other jurisdiction for which the offender is required to register as a sex offender in the jurisdiction in which the conviction occurred*' (§ 168-a [3] [b] [emphasis added]). It is undisputed that defendant was convicted of a felony in Michigan 'for which [he] is required

to register as a sex offender in [that] jurisdiction' (id.). Defendant's Michigan conviction thus constitutes a '[s]exually violent offense' as defined by the second of the two disjunctive clauses that comprise section 168-a (3) (b). It follows that defendant was properly designated a sexually violent offender, even though he would not qualify as such had he committed the same conduct in New York ...". ***People v. Talluto*, 2022 NY Slip Op 00575, Fourth Dept 1-28-22**

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA).

DEFENDANT, WHO WAS CONVICTED OF STATUTORY RAPE (NO FORCE) WHEN HE WAS 18 IN 1996, SHOULD HAVE BEEN CLASSIFIED A LEVEL ONE, NOT LEVEL TWO, RISK.

The Fourth Department, reversing (modifying) County Court, determined defendant, who was convicted of statutory rape (no force) in 1996, should have classified as a level one risk, not level two: "Defendant appeals from an order classifying him as a level two sex offender stemming from his 1996 conviction in Virginia for the statutory rape of a 14-year-old female 'without the use of force.' Defendant was 18 years old at the time of the offense, which the Board of Examiners of Sex Offenders characterized as an 'isolated incident.' Defendant successfully completed both sex offender treatment and substance abuse treatment, and he has not been convicted of any other sex crime. Under these circumstances, we agree with defendant, in the exercise of our own discretion, that his presumptive level two classification overestimates his 'dangerousness and risk of sexual recidivism' ... . We therefore modify the order by determining that defendant is a level one risk ...". ***People v. Stevens*, 2022 NY Slip Op 00581, Fourth Dept 1-28-22**

FAMILY LAW, EVIDENCE, JUDGES.

IN THIS MODIFICATION OF CUSTODY PROCEEDING, FATHER PRESENTED SUFFICIENT EVIDENCE OF A CHANGE OF CIRCUMSTANCES TO WARRANT A HEARING ON THE BEST INTERESTS OF THE CHILD.

The Fourth Department, reversing Family Court, determined respondent-father had presented sufficient evidence of a change in circumstances to warrant a hearing on the best interests of the child: "Where ... 'a respondent moves to dismiss a modification proceeding at the conclusion of the petitioner's proof, the court must accept as true the petitioner's proof and afford the petitioner every favorable inference that reasonably could be drawn therefrom' ... . Here, the father testified that, at the time the order of custody and visitation was entered into and for a short time thereafter, the mother and the father were communicating effectively and, in addition to scheduled visitation, were able to agree to further overnight and weekend visitation. That arrangement subsequently changed, however, and the father could not get the mother to agree to any visitation time apart from his scheduled day. The father further testified that communication with the mother regarding additional visitation time essentially ended after he moved to a new home 30 miles away. Taking the father's testimony as true and considering the circumstances of the father's move and the development of 'extreme acrimony between the parties,' we conclude that the father met his burden of showing a change in circumstances warranting an inquiry into the best interests of the child ...". ***Matter of Cooley v. Roloson*, 2022 NY Slip Op 00534, Fourth Dept 1-28-22**

JUDGES, ATTORNEYS, APPEALS.

THE JUDGE ADOPTED A DECISION DRAFTED BY COUNSEL AS THE FINAL DETERMINATION OF THE CASE AND THEREBY VITIATED THE PURPOSE SERVED BY JUDICIAL OPINIONS; THE FOURTH DEPARTMENT VACATED THE JUDGMENT.

The Fourth Department, vacating the judgment, determined the judge erred by adopting a proposed decision drafted by counsel as the final determination of the case: "[T]he court erred in adopting, almost verbatim, the proposed decision drafted by petitioners' counsel as the final determination in this case ... . 'When a court adopts a party's proposed opinion as its own, the court vitiates the vital purposes served by judicial opinions' ... . Even assuming, arguendo, that [respondent] CME could or should have objected to the court's error, we would exercise our discretion to correct that error notwithstanding CME's failure to object. We therefore vacate the judgment in its entirety and remit the matter to Supreme Court for consideration and determination of any pending issue or motion." ***Bruckel v. Town of Conesus*, 2022 NY Slip Op 00580, Fourth Dept 1-28-22**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

PLAINTIFF FELL THROUGH A SKYLIGHT HOLE WHEN ATTEMPTING TO REMOVE PLYWOOD WHICH WAS COVERING THE HOLE; PLAINTIFF WAS PROPERLY AWARDED SUMMARY JUDGMENT ON HIS LABOR LAW § 240(1) CAUSE OF ACTION.

The Fourth Department determined plaintiff's motion for summary judgment on his Labor Law § 240(1) cause of action was properly granted. Plaintiff fell through a skylight hole while attempting to remove plywood which was covering the hole: "Plaintiff submitted his own deposition testimony, in which he testified that, at the time of his injury, he was removing the plywood covering of the skylight hole as part of his work of preparing to install the final roofing. Plaintiff further testified

that, upon removing the plywood, he fell through the skylight hole, and he was given no safety device to protect him from falling. Even assuming, arguendo, that the plywood cover constituted a safety device ... , we note that 'the availability of a particular safety device will not shield an owner or general contractor from absolute liability if the device alone is not sufficient to provide safety without the use of additional precautionary devices or measures' ... . While the plywood cover 'may have provided proper protection when it was in place over the opening, . . . once it was removed plaintiff was exposed to an elevation-related risk which required additional precautionary measures or devices' ...". ***Tanksley v. LCO Bldg. LLC*, 2022 NY Slip Op 00567, Fourth Dept 1-28-22**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

PLAINTIFF WAS IN A TRENCH WHEN HE WAS STRUCK BY THE BUCKET OF AN EXCAVATOR WHICH WAS ON THE EDGE OF THE TRENCH ABOVE HIM IN THIS LABOR LAW §§ 240(1), 241(6) AND 200 ACTION; THERE WERE QUESTIONS OF FACT ABOUT WHETHER THE INJURY WAS THE RESULT OF THE USUAL AND ORDINARY DANGERS OF A CONSTRUCTION SITE AS OPPOSED TO A RISK CONTEMPLATED BY THE LABOR LAW.

The Fourth Department, reversing (modifying) Supreme Court, determined plaintiffs' motion for summary judgment on the Labor Law §§ 240(1) and 241(6) causes of action should not have been granted. Plaintiff was in a trench when he was struck by the bucket of an excavator which was on the edge of the trench above him: "Plaintiffs' own submissions created a triable issue of fact concerning the manner in which the accident occurred ... , specifically whether plaintiff was injured due to a risk contemplated by the statute or, alternatively, by 'the usual and ordinary dangers of a construction site' ... . [T]he court erred in granting plaintiffs' motion with respect to liability on the Labor Law § 241 (6) cause of action insofar as it is premised upon alleged violations of 12 NYCRR 23-9.4 (c) and 23-9.5 (a). The issue of fact concerning the manner in which the accident occurred precludes a determination as a matter of law whether either of those regulations were violated ...". ***Malvestuto v. Town of Lancaster*, 2022 NY Slip Op 00577, Fourth Dept 1-28-22**

MEDICAL MALPRACTICE, PERSONAL INJURY, EVIDENCE.

IN THIS MEDICAL MALPRACTICE/PUBLIC HEALTH LAW ACTION AGAINST A NURSING HOME, DEFENDANTS' EXPERTS' OPINIONS WERE NOT SUPPORTED BY THE SUBMISSION OF DECEDENT'S MEDICAL RECORDS, RENDERING THE OPINIONS SPECULATIVE; DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The Fourth Department, reversing Supreme Court, determined the defendant nursing home's motion for summary judgment in this medical malpractice, Public Health Law action should not have been granted. The defendant's experts' opinions were not supported by the submission of decedent's medical records: "[D]efendant's experts proffered opinions about decedent's care at the nursing home facility that were not based on facts in the record because defendant failed to submit any of decedent's medical records, certified or otherwise, to support those opinions. Additionally, those opinions were not based on facts personally known to the experts. Thus, the experts' affidavits are 'speculative or unsupported by any evidentiary foundation' ...". ***Ritts v. Gowanda Rehabilitation & Nursing Ctr.*, 2022 NY Slip Op 00578, Fourth Dept 1-28-22**

MENTAL HYGIENE LAW, CRIMINAL LAW.

THE STATE DID NOT DEMONSTRATE DEFENDANT WAS UNABLE TO CONTROL SEXUAL URGES, AS OPPOSED HAVING DIFFICULTY CONTROLLING SEXUAL URGES; THEREFORE CONFINEMENT IS NOT AN APPROPRIATE REMEDY.

The Fourth Department, reversing Supreme Court, determined petitioner did not demonstrate defendant was unable to control his sexual urges, as opposed to having difficulty controlling them. Therefore confinement of the defendant was not an appropriate remedy: "[A] '[d]angerous sex offender requiring confinement' is a sex offender' suffering from a mental abnormality involving such a strong predisposition to commit sex offenses, and such an inability to control behavior, that [he or she] is likely to be a danger to others and to commit sex offenses if not confined' (Mental Hygiene Law § 10.03 [e]). The statutory scheme 'clearly envisages a distinction between sex offenders who have *difficulty* controlling their sexual conduct and those who are *unable to control it*. The former are to be supervised and treated as 'outpatients' and *only the latter may be confined*' ... . In other words, only where the offender is '*presently 'unable*' to control his [or her] sexual conduct' may he or she be confined under section 10.03 (e) ... . [P]etitioner failed to meet its burden of proving, by clear and convincing evidence, that he is 'presently 'unable' to control his sexual conduct' and is thus a dangerous sex offender requiring confinement ... . Contrary to petitioner's contention, the record does not establish that respondent touched an unknown adult female without her knowledge on an unknown date; rather, the record reflects only the possibility that such an act might have taken place. The balance of respondent's alleged SIST [strict and intensive supervision and treatment] violations are technical missteps that do not evince an 'inability' to control sexual misconduct ... . [T]he report of petitioner's expert failed to meaningfully address respondent's successful integration into the community while on SIST. At most, petitioner

established that respondent 'was struggling with his sexual urges, not that he was unable to control himself' ... , and that is legally insufficient to justify confinement under Mental Hygiene Law § 10.03 (e) ...". ***Matter of State of New York v. Scott M.*, 2022 NY Slip Op 00595, Fourth Dept 1-28-22**

PERSONAL INJURY, MUNICIPAL LAW.

PLAINTIFF FAILED TO RAISE A QUESTION OF FACT WHETHER AN ALLEGED DEFECT IN THE ROAD WAS CAUSED BY DEFENDANT'S SPECIAL USE OF THE ROAD; TWO DISSENTERS DISAGREED.

The Fourth Department, reversing Supreme Court, over a two-justice dissent, determined defendant demonstrated it did not create a dangerous condition in the street by a special use. Plaintiff alleged defendant created the dangerous condition by storing heavy materials in the street. Plaintiff alleged a steel beam fell on his foot from a forklift when the forklift struck a defect in the road (Simmons Avenue): " 'Generally, liability for injuries sustained as a result of a dangerous condition on a public sidewalk or street is placed on the municipality, and not on the owner or lessee of abutting property, unless the landowner or lessee has either affirmatively created the dangerous condition, voluntarily but negligently made repairs, caused the condition to occur through a special use, or violated a statute or ordinance expressly imposing liability on the landowner or lessee for a failure to maintain the abutting street' ... . Defendant met its initial burden on the motion by establishing, as relevant here, that '[it] neither owned nor made special use of [Simmons Avenue], and that [it] had no connection to the condition' that caused the accident ... . **From the dissent:** In our view, defendant failed to establish as a matter of law that it did not make special use of Simmons Avenue or affirmatively create the defective condition on Simmons Avenue that allegedly caused plaintiff's injuries." ***Beck v. City of Niagara Falls*, 2022 NY Slip Op 00563, Fourth Dept 1-28-22**

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