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# COURT OF APPEALS

## CONSTITUTIONAL LAW.

"INTERACTIVE FANTASY SPORT" (IFS) IS NOT "GAMBLING;" THE STATUTES AUTHORIZING AND REGULATING IFS ARE NOT, THEREFORE, UNCONSTITUTIONAL.

The Court of Appeals, in a full-fledged opinion by Judge DiFiore, over a comprehensive three-judge dissent, determined the 2016 statutes authorizing and regulating "interactive fantasy sport" (IFS) do not violate the New York Constitution's prohibition of "gambling:" "... IFS contests are not prohibited gambling activities because contestants use significant skill to select their rosters, creating fantasy teams, and therefore have influence over the outcome of the fantasy contests between IFS participants. ... [T]he historic prohibition on 'gambling' in article I, § 9 does not encompass skill-based competitions in which participants who exercise substantial influence over the outcome of the contest are awarded predetermined fixed prizes by a neutral operator. * * * ... [T]he prohibition on 'gambling' in article I, § 9 [of the NYS Constitution] encompasses either the staking of value on a game in which the element of chance predominates over the element of skill or the risking of value through bets or wagers on contests of skill where the pool of wagered value is awarded upon some future event outside the wagerer's influence or control. However, games in which skill predominates over chance and skill-based competitions for predetermined prizes in which the participants have influence over the outcome do not constitute 'gambling.' ... . **From the dissent:** Since 1894, New York's Constitution has prohibited 'lotter[ies] . . . poolselling, bookmaking, or any other kind of gambling.' Everyone knows that sports betting is gambling. Betting on how many touchdowns a particular player will score is gambling. ... Aggregating several bets involving different players into a point total that is pitted against point totals of other bettors does not transform gambling into something else." ***White v. Cuomo*, 2022 N.Y. Slip Op. 01954, Ct App 3-22-22**

## CRIMINAL LAW, APPEALS.

DEFENDANT, AT THE TIME OF THE PLEA, AGREED TO A SENTENCE OF 20 DAYS OF COMMUNITY SERVICE; AT SENTENCING, AFTER DEFENDANT HAD COMPLETED THE COMMUNITY SERVICE, THE PROSECUTOR AND DEFENSE COUNSEL ACKNOWLEDGED THAT THE BARGAINED-FOR SENTENCE WAS A ONE-YEAR CONDITIONAL DISCHARGE; ON APPEAL DEFENDANT ARGUED HE NEVER AGREED TO THE CONDITIONAL DISCHARGE AND HIS GUILTY PLEA WAS THEREFORE NOT VOLUNTARY; THE MAJORITY HELD THE ISSUE WAS NOT PRESERVED FOR APPEAL.

The Court of Appeals, in a full-fledged opinion by Judge DeFiore, over an extensive three-judge dissent, determined defendant's argument that his plea was invalid because he was not informed that a one-year conditional discharge (CD) would be imposed, was not preserved for appeal. Defendant argued only the community-service sentence was agreed to at the time of the plea and the subsequent imposition of the conditional discharge rendered the plea involuntary: "Defendant challenges the voluntariness of his guilty plea, asserting that the court in its plea colloquy failed to advise him that the 20 days of community service to be imposed would be a condition of a sentence of a one-year conditional discharge. At the outset of the sentencing proceeding, the defense counsel and prosecutor affirmatively acknowledged to the court that the bargained-for sentence to be imposed was a conditional discharge. Prior to imposition of that sentence, defendant who had the practical ability to do so, failed to protest or otherwise seek to withdraw his guilty plea. As a result, defendant's claim that the court's imposition of an alleged new sentence rendered his guilty plea involuntary is unpreserved for our review. * * * **From the dissent:** Defendant ... pleaded guilty to a reduced charge in exchange for a noncarceral sentence of 20 days of community service, along with a mandatory surcharge and temporary suspension of his driver's license. When defendant appeared after completing his community service and without further criminal incident, the sentencing should have been in accord with the prosecutor and defendant's agreement. Instead, the court imposed additional year-long conditions that were not agreed to and never mentioned during the plea colloquy or prior to sentencing. As a consequence, defendant's plea is invalid ...". ***People v. Bush*, 2022 N.Y. Slip Op. 01956, Ct App 3-22-22**

## CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT.

THE SEXUAL ASSAULT REFORM ACT (SARA), PROHIBITING CERTAIN SEX OFFENDERS FROM RESIDING WITHIN 1000 FEET OF A SCHOOL, APPLIES TO SEX OFFENDERS WHO ARE UNDER POSTRELEASE SUPERVISION (PRS); THE DISSENT ARGUED SARA, BY ITS TERMS, APPLIES ONLY TO THOSE ON PAROLE OR CONDITIONALLY RELEASED.

The Court of Appeals, over an extensive two-judge dissent, determined the residency requirement of the Sexual Assault Reform Act (SARA) is a mandatory condition of postrelease supervision (PRS) for sex offenders subject to SARA. The dissent argued the applicable statutes do not mention postrelease supervision (PRS) and, by their terms, apply only to defendants who are on parole or conditionally released: "In 1998, the legislature enacted the Sentencing Reform Act, amending the Penal Law to largely 'abolish parole' for most felony offenses, including serious sexual offenses, and institute determinate terms of imprisonment to be followed by periods of postrelease supervision ... . ...[T]the legislature added Penal Law § 70.45 (3)—entitled '[c]onditions of post-release supervision'—which provides that the Board of Parole 'shall establish and impose conditions of post-release supervision in the same manner and to the same extent as it may establish and impose conditions in accordance with the executive law upon persons who are granted parole or conditional release.' Further, Penal Law § 70.40 was amended to add references to postrelease supervision; namely Penal Law § 70.40 (1) (b) provides that 'conditions of release including those governing postrelease supervision, shall be such as may be imposed by the [Parole Board] in accordance with the provisions of the executive law.' ... . ... The SARA residency restriction bars offenders convicted of certain sex offenses from residing within 1,000 feet of a school (see Executive Law § 259-c [14] ...). Specifically, it provides that, when certain offenders are 'released on parole or conditionally released pursuant to subdivision one or two of this section,' the Parole Board 'shall require, as a mandatory condition of such release, that such sentenced offender shall refrain from knowingly entering into or upon any school grounds ...' . ... Penal Law §§ 70.45 (3) and 70.40 (1) (b), when read together with SARA, mandate that the SARA residency restriction be applied equally to offenders released on parole, conditional release, or subject to a period of postrelease supervision." ***Matter of Alvarez v. Annucci*, 2022 N.Y. Slip Op. 01957 Ct App 3-22-22**

## LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

THE INDUSTRIAL CODE PROVISION REQUIRING THAT POWER BUGGIES BE OPERATED BY TRAINED, COMPETENT, DESIGNATED PERSONNEL DOES NOT SET FORTH A SPECIFIC STANDARD OF CONDUCT SUCH THAT IT GIVES RISE TO A NON-DELEGABLE DUTY UNDER LABOR LAW § 241(6); PLAINTIFF WAS INJURED WHEN AN UNTRAINED OPERATOR LOST CONTROL OF A POWER BUGGY.

The Court of Appeals, in a full-fledged opinion by Judge Garcia, over an extensive three-judge dissent, reversing the Appellate Division, determined the Industrial Code provision which provides "[n]o person other than a trained and competent operator designated by the employer shall operate a power buggy" was not a concrete specification sufficient to give rise to a non-delegable duty under Labor Law § 241(6). Plaintiff was injured when a worker who was not designated or trained to operate a power buggy lost control. A power buggy is a small self-powered vehicle operated by one person and used to move material on construction sites: "[W]e have repeatedly reaffirmed the rule that to state a claim under section 241 (6), plaintiff must allege that defendant violated an Industrial Code regulation 'that sets forth a specific standard of conduct and [is] not simply a recitation of common-law safety principles' ... . ... The regulation relied on by plaintiff provides that '[n]o person other than a trained and competent operator designated by the employer shall operate a power buggy' (12 NYCRR 23-9.9 [a]). In assessing whether that regulation is specific enough to support a Labor Law § 241 (6) claim, we examine the text without reference to the underlying facts ... . With respect to 12 NYCRR 23-9.9 (a), we agree with the majority and dissent below that the 'trained and competent operator' requirement 'is general, as it lacks a specific requirement or standard of conduct' ... . We disagree, however, with the Appellate Division majority's conclusion that the additional direction that 'trained and competent' individuals must also be 'designated' somehow transforms the provision from a general standard of conduct to a 'specific, positive command' ...". ***Toussaint v. Port Auth. of N.Y. & N.J.*, 2022 N.Y. Slip Op. 01955, Ct App 3-22-22**

## MUNICIPAL LAW, NEGLIGENCE.

THE TARGETS OF A NO-KNOCK WARRANT ARE OWED A "SPECIAL DUTY" SUCH THAT A MUNICIPALITY MAY BE LIABLE FOR THE NEGLIGENCE OF THE POLICE OFFICERS EXECUTING THE WARRANT.

The Court of Appeals, in a comprehensive opinion by Judge Singas, over a two-judge dissent, determined the police owe a "special duty" to those targeted by a no-knock warrant such that liability may be imposed on a municipality for the negligence of the police during execution of the warrant. Here plaintiff alleged he was shot by a police officer who entered the apartment where he was sleeping. The certified question from the Second Circuit asked if the "special duty" requirement applies in this situation, or whether it is triggered only when the municipality fails to protect the plaintiff from injury by a third party who is not a municipal employee. The opinion lays out the confusing interplay between the "special duty" requirement and the "governmental-function immunity" affirmative defense, which can defeat a plaintiff's action even if a "special duty" is deemed to exist. The dissent argued the "special duty" requirement itself is invalid and the "ordinary negligence" standard should apply to governmental actors: "Our precedent dictates that a plaintiff must establish a special

duty when suing a municipality in negligence. However, because the underlying premise of the certified question appears to be that a special duty could not be established in a scenario like the one presented, we take this opportunity to clarify that this is not the case: a special duty may be established where the police plan and execute a no-knock search warrant on a targeted residence. Although we have not yet had an occasion to address application of the special duty rule to the execution of no-knock search warrants, that situation fits within the existing parameters of our special duty precedent. **From the dissent:** The majority's principal error, which infects its entire analysis, is embodied in the following statement: 'Consistent with our precedent and the purpose of the special duty rule, we reiterate that plaintiffs must establish that a municipality owed them a special duty when they assert a negligence claim based on actions taken by a municipality acting in a governmental capacity' ... . That statement: (1) is not consistent with our precedent, in which we have repeatedly evaluated negligence claims against governmental actors by asking whether an ordinary duty exists; and (2) improperly incorporates the governmental/proprietary distinction from immunity law into negligence law ...". ***Ferreira v. City of Binghamton*, 2022 N.Y. Slip Op. 01953, CtApp 3-22-22**

# FIRST DEPARTMENT

## CONTRACT LAW.

DEFENDANT VIDEO-HOSTING SERVICE, VIMEO, DID NOT BREACH ITS CONTRACT WITH PLAINTIFF BY REMOVING FIVE VIDEOS POSTED BY PLAINTIFF CLAIMING CHILDHOOD VACCINATION LEADS TO AUTISM; THE COMMUNICATIONS DECENCY ACT AUTHORIZES INTERNET PROVIDERS TO REMOVE "OBJECTIONABLE" MATERIAL.

The First Department, in a full-fledged opinion by Justice Singh, determined defendant video-hosting service, Vimeo, did not breach its contract with plaintiff by removing five videos posted by plaintiff which Vimeo concluded made false or misleading claims about vaccine safety. The videos claimed that childhood vaccines lead to autism: "This appeal concerns whether a video-hosting service may be held liable for its decision to remove videos that it determines violate its terms of service. Defendant Vimeo, Inc. prohibits users from posting videos that make false or misleading claims about vaccine safety. It removed five videos, posted by a commercial user, because the videos claimed that childhood vaccination leads to autism. The user sued, claiming that Vimeo had breached the parties' contract. The motion court held that liability was precluded by section 230 of the Communications Decency Act. We agree. Section 230 prevents lawsuits against Internet service providers for their good-faith decisions to remove content that they consider objectionable. If service providers had to justify those decisions in court, or if plaintiffs could circumvent immunity through unsupported accusations of bad faith, section 230 would be a dead letter. This is as true for commercial users as for any other plaintiff. Therefore, we affirm dismissal of the complaint. ... [S]ection 230(c)(2) prohibits holding an interactive computer service provider liable for 'any action voluntarily taken in good faith to restrict access to or availability of material that the provider . . . considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable' (47 USC § 230[c][2][A])." ***Word of God Fellowship, Inc. v. Vimeo, Inc.*, 2022 N.Y. Slip Op. 01978, First Dept 3-22-22**

## CRIMINAL LAW, JUDGES.

THE INDICTMENT CHARGED DEFENDANT WITH ASSAULT SECOND AND ATTEMPTED ASSAULT SECOND BUT DID NOT ALLEGE THE USE OF A DEADLY WEAPON OR A DANGEROUS INSTRUMENT; THE PEOPLE'S THEORY AT TRIAL WAS DEFENDANT USED A PVC PIPE AS A DEADLY WEAPON OR A DANGEROUS INSTRUMENT; BUT, TO CORRECT THE FLAWED INDICTMENT, THE JUDGE, A DAY BEFORE THE END OF THE TRIAL, AMENDED THE INDICTMENT TO CHARGE ASSAULT THIRD AND ATTEMPTED ASSAULT THIRD; THE AMENDMENT PREJUDICED THE DEFENDANT.

The First Department, in a full-fledged opinion by Justice Oing, vacating defendant's conviction with leave to resubmit, determined the indictment should not have been amended at the end of the trial to charge defendant with assault third and attempted assault third, instead of assault second and attempted assault second as originally charged in the indictment. The indictment did not allege the use of a deadly weapon or dangerous instrument. The last minute amendment was an effort to correct that charging flaw. However, the People's theory, before the grand jury and at trial, was defendant used a PVC pipe as a deadly weapon or a dangerous instrument. But, because of the amendment, the jury was not asked to consider the deadly weapon or dangerous instrument element: "An indictment may be amended to correct 'matters of form, time, place, names of persons and the like' (CPL 200.70[1]). An amendment must not 'change the theory or theories of the prosecution as reflected in the evidence before the grand jury . . . or otherwise tend to prejudice the defendant on the merits' (CPL 200.70[1]). ... [N]otice could not have been given, because the indictment's deficiency was not discovered until one day before the trial concluded. This unorthodox correction is not the kind of procedure sanctioned under CPL 200.70 or 300.50. The amendment was therefore not a mere correction of a 'misnomer' of the offense in the accusatory clauses of the indictment ... . ... [D]efendant was prejudiced by the amendment. The People's theory before the grand jury was that Bari's injuries were caused by the use of a dangerous instrument, i.e., the bike rental sign. The prosecutor in her opening statement made refer-

ences to the bike rental sign. She did so in her summation even after the court deleted the original second-degree hate crimes and replaced them with third-degree hate crimes. Further, on the People's case, the prosecutor elicited testimony from Bari to support this theory. Thus, the People tried the case from inception to conclusion, and defendant mounted a defense, on the theory that a deadly weapon or a dangerous instrument was used in the commission of the hate crimes. On the last day of the trial, however, the court amended the indictment and charged the jury with variations of third-degree assault, which do not require proof of the existence of a deadly weapon or a dangerous instrument. Thus, after hearing evidence of a dangerous instrument throughout the trial, the jury received instructions that did not require it to find that the People had proven the existence of a dangerous instrument beyond a reasonable doubt to convict defendant of the third-degree hate crimes or the third-degree assault. This result was an impermissible change in the theory of the prosecution." ***People v. Winston*, 2022 N.Y. Slip Op. 02080, First Dept 3-24-22**

## EMPLOYMENT LAW, HUMAN RIGHTS LAW.

PLAINTIFF SUFFICIENTLY ALLEGED CAUSES OF ACTION FOR EMPLOYMENT DISCRIMINATION BASED ON NATIONAL ORIGIN (YEMENI), HOSTILE WORK ENVIRONMENT, AND RETALIATION .

The First Department, reversing Supreme Court, determined plaintiff stated claims for (1) employment discrimination on the basis of national origin (Yemeni), (2) hostile work environment, and (3) retaliation: "[Plaintiff's] assertion that he was denied a promotion to sergeant on at least two occasions adequately supports ... his claim [for discrimination on the basis of national origin] ... . ... [H]is allegations that a coworker made derogatory remarks about Yemenis in the presence of his supervisors, that such remarks were ignored or condoned, and that non-Yemeni campus peace officers, who were less qualified than he, were promoted to the sergeant position, supports the fourth element of his claim, i.e. that the adverse action occurred under circumstances giving rise to an inference of discrimination ... . ... Plaintiff has also stated a cause of action for hostile work environment, as his coworker's multiple derogatory remarks about Yemenis, sometimes made in the presence of plaintiff's supervisors, along with the allegedly unfounded write-ups, unfavorable assignments, and denial of a promotion, were sufficiently severe and pervasive to support that cause of action ... . Plaintiff also alleges that defendants knew about the comments and failed to take appropriate action ... . Plaintiff has sufficiently alleged retaliation by showing that: (1) he engaged in protected activity in December 2016 when he filed a complaint stating that his supervisor was discriminating against him, (2) defendants were aware that he participated in such activity, (3) he was denied a promotion in February and May 2017, and (4) there is a causal connection between the protected activity and the adverse action ...". ***Alshami v. City Univ. of N.Y.*, 2022 N.Y. Slip Op. 02053, First Dept 3-24-22**

## LEGAL MALPRACTICE, NEGLIGENCE, CONTRACT LAW, ATTORNEYS.

PLAINTIFFS' LEGAL MALPRACTICE ACTION SHOULD NOT HAVE BEEN DISMISSED; PLAINTIFFS' 2010 BREACH OF A CONDOMINIUM-SALE CONTRACT ACTION WAS DISMISSED ON STATUTE OF FRAUDS GROUNDS; WHEN A WRITTEN CONTRACT SUBSEQUENTLY SURFACED, DEFENDANT ATTORNEYS DID NOT MOVE TO RENEW, VACATE OR APPEAL THE ORDER.

The First Department, reversing Supreme Court, determined the legal malpractice action should not have been dismissed. Plaintiffs, apparently represented by defendant attorneys, brought a 2010 action for breach of a condominium-sale contract which was dismissed on statute of frauds grounds (no written contract). When the written contract for the condominium sale surfaced, the defendants did not move to renew, vacate or appeal the order: "Regardless of whether the dismissal on statute of frauds grounds was ultimately correct, defendants should have known that the condominium claims, which involved the sale of real property, would be subject to the statute of frauds and thus would require reference to a written contract (General Obligations Law § 5-703[2]); that the statute of frauds could be raised and adjudicated on a motion to dismiss under CPLR 3211(a)(5); and that a dismissal under the statute of frauds would be on the merits, thus precluding any future claim for damages on the sale of the condominium ... . As a result, with respect to the condominium sale, it cannot be determined as a matter of law that plaintiffs failed to plead a claim for legal malpractice based upon defendants' actions in litigating the breach of contract claim." ***Komolov v. Popik*, 2022 N.Y. Slip Op. 01966, First Dept 3-22-22**

## MUNICIPAL LAW, EMPLOYMENT LAW.

CIVIL SERVICE LAW § 75-b SERVES THE SAME PURPOSE AS THE EMPLOYMENT ANTI-RETALIATION STATUTES IN THE NEW YORK STATE AND NEW YORK CITY HUMAN RIGHTS LAW; EVEN THOUGH PLAINTIFF HAD RESIGNED AT TIME OF THE SUIT, HIS RETALIATION CAUSE OF ACTION SHOULD NOT HAVE BEEN DISMISSED.

The First Department, reversing Supreme Court, determined plaintiff's retaliation claim pursuant to Civil Service Law § 75-b should not have been dismissed. Plaintiff, an employee of the NYC Department of Buildings (DOB), alleged he was denied a job because of a poor reference allegedly made in retaliation for his reporting a conflict of interest to the City's Department of Investigation. At the time plaintiff brought this action he had retired, but his retirement did not preclude his Civil Service Law cause of action: "[W]e reject the motion's court determination that Civil Service Law § 75-b does not apply to actions taken by a public employer after an employee has resigned. Civil Service Law § 75-b prohibits a public employer

from dismissing or taking any 'other disciplinary or other adverse personnel action against a public employee regarding the employee's employment' because the employee discloses information of either (1) a violation of rule or law, which presents a substantial and specific danger to public health and safety, or (2) improper governmental action ... . Section 75-b serves a purpose similar to that of other anti-retaliation statutes, including the New York State Human Rights Law (Executive Law § 296) and the New York City Human Rights Law (Administrative Code of City of NY § 8-107), in that they 'remediat[e] adverse employment actions which, if allowed, would undermine important public policy' ... . Thus, an analogous reading of the term 'employee' under Civil Service Law § 75-b to include former employees alleging post-employment retaliation for reports made in the course of their prior employment, is appropriate ... . Moreover, blacklisting and providing negative references to an individual's prospective employers in retaliation for prior reports of government misconduct may constitute adverse personnel action under the statute, in the same way that the State Human Rights Law has been found to cover such acts ...". ***DaCosta v. New York City Dept. of Bldgs.*, 2022 N.Y. Slip Op. 01963, First Dept 3-22-22**

# SECOND DEPARTMENT

## CIVIL PROCEDURE, CORPORATION LAW, LIMITED LIABILITY COMPANY LAW.

DEFENDANTS DID NOT DEMONSTRATE ACTUAL NOTICE OF THE SUMMONS WAS NOT RECEIVED IN TIME TO DEFEND THE ACTION, AND DID NOT PROVIDE A REASONABLE EXCUSE FOR THE DEFAULT; DEFENDANTS' MOTION TO VACATE THE DEFAULT SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined defendant's did not demonstrate they did not receive notice of the summons in time to defend the action, and did not demonstrate a reasonable excuse for the default. Therefore defendants' motion to vacate the default judgment should not have been granted: "Pursuant to CPLR 317, a defaulting defendant that was 'served with a summons, other than by personal delivery' may be permitted to defend the action upon a finding by the court that the defendant did not personally receive notice of the summons in time to defend and has a meritorious defense ... . Service on a limited liability company by delivery of the pleadings to the Secretary of State does not constitute personal delivery ... . 'The mere denial of receipt of the summons and complaint is not sufficient to establish lack of actual notice of the action in time to defend for the purpose of CPLR 317' ... . The affidavit ... submitted by the ... defendants in support of their motion, amounted to nothing more than a mere denial of receipt of the summons and complaint ... . ... [T]he ... defendants did not contend that the address it had on file with the Secretary of State was incorrect ... . ... [T]he ... defendants' mere denial of receipt of the summons and complaint, without more, was insufficient to demonstrate a reasonable excuse for its default pursuant to CPLR 5015(a)(1) ...". ***Andrews v. Wartburg Receiver, LLC*, 2022 N.Y. Slip Op. 01980, Second Dept 2-23-22**

## CRIMINAL LAW, EVIDENCE, ATTORNEYS, JUDGES.

BRADY MATERIAL WAS WITHHELD, CROSS-EXAMINATION ABOUT A COMPLAINANT'S INCONSISTENT STATEMENTS WAS NOT ALLOWED; THE INQUIRY AFTER A POLLED JUROR INDICATED SHE MAY NOT HAVE AGREED WITH THE VERDICT WAS INSUFFICIENT.

The Second Department, vacating the assault second conviction and dismissing the count, and reversing the gang assault and assault first convictions, determined: (1) Brady material was withheld by redacting the name of a 911 caller who indicated defendant was not involved in the assault; (2) cross-examination of a police officer about a discrepancy between a complainant's testimony and a statement attributed to the complainant in a police report should have been allowed; and (3) the judge should have inquired further after a juror indicated she "was not sure" about some of the convictions when the jury was polled: "While the contents of the 911 call may have provided some clues as to the identity of the caller, the defendant should not be forced to guess as to the identity of this caller. In addition, we are satisfied that there was a reasonable possibility that disclosure of the caller's identity and contact information would have led to evidence that would have changed the result of the proceedings ... . ... [T]he court erred in precluding defense counsel from questioning the police witness about the contents of the report and the alleged prior inconsistent statement of complainant one ... . ... [W]hen the jury was polled and asked if the verdict was theirs, juror number nine stated, 'Um, I'm not sure, with some, but most of them, yes.' Although the Supreme Court thereafter inquired of juror number nine if the verdict announced to the court was her own, it did so by asking her 'is that a yes or a no' in the presence of the remaining jurors, despite evidence before the court suggesting that juror number nine may have succumbed to pressure to vote with the majority even though she did not agree with the verdict as to certain counts. The court's inquiry was therefore not sufficient ...". ***People v. Ramunni*, 2022 N.Y. Slip Op. 02022, Second Dept 3-23-22**

## CRIMINAL LAW, JUDGES, APPEALS, CONSTITUTIONAL LAW.

DEFENDANT WAS DEPRIVED OF HIS RIGHT TO CONFRONT A WITNESS AGAINST HIM AND WAS PENALIZED FOR REJECTING THE JUDGE'S PLEA OFFER AND GOING TO TRIAL; THE ISSUES WERE NOT PRESERVED BUT WERE CONSIDERED IN THE INTEREST OF JUSTICE.

The Second Department, vacating one conviction and reducing the sentence for another, exercising its interest of justice jurisdiction over the unpreserved errors, determined defendant had been deprived of his right to confront a witness against him and the judge imposed a harsher sentence because defendant exercised his right to a trial: "[T]he defendant was not afforded the opportunity to cross-examine a DMV employee who was directly involved in sending out the suspension notices or who had personal familiarity with the mailing practices of the DMV's central mail room or with the defendant's driving record ... . Thus, the testimony of the DMV employee was improperly admitted in order to establish an essential element of the crime of aggravated unlicensed operation of a motor vehicle in the third degree in violation of the defendant's right of confrontation ... . ... [P]rior to trial, the Supreme Court made its own plea offer to the defendant of an aggregate term of 1½ years of imprisonment to be followed by a period of 2 years of postrelease supervision in full satisfaction of the 16-count indictment ... .The court ... stated to the defendant: 'You should understand the way I operate is as follows: Before trial with me you get mercy; after trial you get justice' ... . The defendant declined the plea offer and proceeded to trial, after which he was acquitted of the top counts of criminal sale of a controlled substance in the third degree and criminal possession of a controlled substance in the third degree. The court then sentenced the defendant on the conviction of criminal possession of a controlled substance in the fourth degree to a term of 5 years of imprisonment to be followed by a period of postrelease supervision of 2 years." ***People v. Ellerbee*, 2022 N.Y. Slip Op. 02016, Second Dept 3-23-22**

## EMPLOYMENT LAW, MEDICAL MALPRACTICE, NEGLIGENCE.

THE COMPANY WHICH STAFFED THE HOSPITAL EMERGENCY ROOM DID NOT DEMONSTRATE THE PHYSICIANS WHO TREATED PLAINTIFF IN THIS MEDICAL MALPRACTICE ACTION WERE INDEPENDENT CONTRACTORS, AS OPPOSED TO EMPLOYEES FOR WHOM THE COMPANY WOULD BE VICARIOUSLY LIABLE.

The Second Department, reversing Supreme Court, determined defendant NES, which staffed the hospital emergency room, should not have been granted summary judgment in this medical malpractice action. NES alleged the emergency room physicians who treated plaintiff (Perez) were independent contractors, not employees, and therefore NES was not vicariously liable for the acts or omissions of the physicians: "[T]he evidence submitted in support of NES's motion did not eliminate all triable issues of fact as to whether the emergency room physicians who treated Perez were independent contractors ... . Although the physician agreement between NES and one of the physicians who treated Perez designated the physician an independent contractor, among other things, NES's contract with Lutheran [the hospital] raises triable issues of fact regarding NES's involvement in the training of the physicians with whom it contracted and the extent of NES's obligation to participate in quality assurance and peer review activities and implement quality improvement plans ... . Additionally, NES failed to submit any evidence regarding how the physicians with whom it contracted were paid ...". ***Perez v. NES Med. Servs. of N.Y., P.C.*, 2022 N.Y. Slip Op. 02031, Second Dept 3-23-22**

## FORECLOSURE, CIVIL PROCEDURE.

DEFENDANTS' PARTICIPATION IN A SETTLEMENT CONFERENCE DID NOT WAIVE THEIR RIGHT TO MOVE TO DISMISS THE FORECLOSURE ACTION AS ABANDONED PURSUANT TO CPLR 3215.

The Second Department, reversing Supreme Court, determined the foreclosure complaint should have been dismissed as abandoned because the plaintiff did not move for a default judgment within a year (CPLR 3215(c)). The fact that the defendants participated in a settlement conference did not waive their right to move to dismiss the complaint as abandoned: "[T]he plaintiff failed to take steps to initiate proceedings for the entry of a default judgment against the defendants within one year after their default in the action, and has set forth no reasonable excuse for said failure ... . Contrary to the plaintiff's contention, the defendants did not waive their right to seek dismissal pursuant to CPLR 3215(c). The defendants' participation in a settlement conference did not result in a waiver of their right to seek dismissal pursuant to CPLR 3215(c) since they did not actively litigate the action before the Supreme Court or participate in the action on the merits ... . Moreover, the defendants' failure to move to vacate their default in answering the complaint or appearing in this action did not operate as a waiver of their right to seek dismissal of the complaint pursuant to CPLR 3215(c) ...". ***PennyMac Corp. v. Weinberg*, 2022 N.Y. Slip Op. 02010, Second Dept 3-23-22**

## FORECLOSURE, CIVIL PROCEDURE.

IF THE 2008 FORECLOSURE ACTION COMMENCED BY AEGIS WAS VALID, THE INSTANT FORECLOSURE ACTION BY A DIFFERENT BANK WOULD BE TIME-BARRED; PLAINTIFF BANK RAISED A QUESTION OF FACT BY SUBMITTING EVIDENCE THAT AEGIS DID NOT POSSESS THE NOTE AND MORTGAGE AT THE TIME THE 2008 ACTION WAS COMMENCED AND THEREFORE DID NOT HAVE STANDING TO FORECLOSE.

The Second Department, reversing Supreme Court, determined plaintiff raised a question of fact whether Aegis, the company which started a foreclosure action in 2008, had standing to commence that action. Therefore, there was a question of fact whether the Aegis action accelerated the debt and started the running of the six-year statute of limitations: "[P]laintiff proffered the affidavit of Sherry Benight, a document control officer for Select Portfolio Servicing, Inc. (hereinafter SPS), the servicer and attorney-in-fact for the plaintiff. Based upon her review of SPS's business records, Benight averred that pursuant to a pooling and servicing agreement (hereinafter PSA), dated January 1, 2006, the original note was transferred to SPS, in its capacity as servicer and attorney-in-fact, on May 14, 2008, and SPS has remained in physical possession of the note since that date. Benight attached to her affidavit copies of the PSA, and a mortgage loan schedule listing the subject loan, note, and mortgage. This evidence was sufficient to raise triable issues of fact as to whether Aegis lacked standing to commence the prior action, and whether this action is time-barred ...". ***U.S. Bank N.A. v. Nail*, 2022 N.Y. Slip Op. 02034, Second Dept 3-23-22**

## FORECLOSURE, CIVIL PROCEDURE, REAL PROPERTY ACTIONS AND PROCEEDINGS LAW.

ALTHOUGH NONPARTY JP MORGAN DID NOT APPEAR IN THE UNDERLYING FORECLOSURE, IT COULD RECOVER SURPLUS FUNDS BASED UPON DEFENDANTS' DEFAULT ON A CREDIT-LINE LOAN SECURED BY THE PROPERTY; JP MORGAN'S ACTION WAS NOT TIME-BARRED BECAUSE THE CREDIT-LINE DEBT WAS NEVER UNEQUIVOCALLY ACCELERATED.

The Second Department, reversing Supreme Court, determined nonparty JP Morgan was entitled to the surplus funds remaining after a foreclosure sale based upon the defendants' (Breuers') default on a credit-line loan secured by the property. The defendants' argument that the credit-line action was time-barred was rejected because the debt was never accelerated. Pursuant to RPAPL 1361, JP Morgan did not have to appear in the underlying foreclosure action to preserve a claim to the surplus funds: "Where, as here, 'the acceleration of the maturity of a mortgage debt on default is made optional with the holder of the note and mortgage, some affirmative action must be taken evidencing the holder's election to take advantage of the accelerating provision, and until such action has been taken the provision has no operation' ... . ... [T]he Breuers failed to demonstrate ... that the statute of limitations began to run on JP Morgan's entire claim at the time of the Breuers' initial default in 2010. A letter introduced into evidence during the hearing, in which JP Morgan informed the Breuers of its intent to accelerate the maturity of the loan and to commence foreclosure proceedings if the Breuers' default was not cured, was not sufficient to accelerate the debt, because it did not reflect a 'clear and unequivocal' election to accelerate ... . ... [T]he applicable statute which governs proceedings to recover surplus funds from a foreclosure sale, RPAPL 1361, did not require JP Morgan to appear in the action to foreclose the primary mortgage prior to the entry of the judgment of foreclosure and sale, in order to preserve its claim to surplus funds ...". ***Wells Fargo Bank, N.A. v. Breuer*, 2022 N.Y. Slip Op. 02037, Second Dept 3-23-22**

## FORECLOSURE, CONTRACT LAW, EVIDENCE.

THE FAILURE TO ATTACH THE RELEVANT BUSINESS RECORDS, AS WELL AS THE FAILURE TO PROVIDE PROOF OF MAILING, RENDERED THE PROOF OF COMPLIANCE WITH THE NOTICE-OF-DEFAULT PROVISIONS OF THE MORTGAGE INSUFFICIENT.

The Second Department, reversing Supreme Court, determined plaintiff bank did not demonstrate compliance with the notice-of-default provisions of the mortgage in this foreclosure action: "[T]he plaintiff failed to establish ... that it complied with the notice of default provisions of the mortgage, which ... required the plaintiff to send the notice by first-class mail to the subject property and to provide a 30-day cure period. Copies of the notice without proof of mailing, along with the affidavit of a representative of the loan servicer averring, based upon her review of unspecified business records which were not attached to the affidavit, that such a notice of default was sent on an unspecified date, was insufficient to satisfy the plaintiff's prima facie burden ...".***Bank of Am., N.A. v. Shirazi*, 2022 N.Y. Slip Op. 01984, Second Dept 3-23-22**

## FORECLOSURE, DEBTOR-CREDITOR, REAL PROPERTY LAW.

A NOTE EXECUTED BY ONE TENANT BY ENTIRETY AND SECURED BY REAL PROPERTY OWNED BY BOTH TENANTS BY THE ENTIRETY, DONE WITHOUT THE OTHER TENANT BY THE ENTIRETY'S CONSENT, DOES NOT ENCUMBER THE OTHER TENANT BY THE ENTIRETY'S INTEREST IN THE PROPERTY.

The Second Department determined the note executed by Gladys Pajuelo and secured by a mortgage on property owned by Gladys and Celso Pajuelo as tenants by the entirety, done without Celso's consent, did not encumber Celso's interest in the property. Therefore, the bank in this foreclosure action did not have an equitable mortgage on Celso's interest: "Supreme

Court properly denied that branch of the plaintiff's motion which was for leave to enter a default judgment against Celso F. Pajuelo, declaring that the plaintiff has an equitable mortgage on Celso F. Pajuelo's interest in the property. Where spouses own property as tenants by the entirety, a conveyance by one spouse, to which the other has not consented, cannot bind the entire fee ... . Here, the mortgage executed by Gladys F. Pajuelo did not encumber Celso F. Pajuelo's interest in the property, and the plaintiff failed to submit evidence to demonstrate its entitlement to an equitable mortgage against Celso F. Pajuelo's interest in the property ...". ***Nationstar Mtge., LLC v. Pajuelo*, 2022 N.Y. Slip Op. 02006, Second Dept 3-23-22**

### INSURANCE LAW, CONTRACT LAW.

THE MATERIAL MISREPRESENTATION THAT THERE WAS NO SWIMMING POOL ON THE PROPERTY JUSTIFIED THE DISCLAIMER OF COVERAGE FOR FIRE DAMAGE.

The Second Department, reversing Supreme Court, determined defendant insurer (Union Mutual) was entitled to rescission of the insurance policy based upon a material misrepresentation made by the plaintiff (the insured). The plaintiff-insured represented that there was no swimming pool on the property. After the property was damaged by fire, the insurer learned there was a swimming pool on the property and disclaimed coverage: "... Union Mutual established its prima facie entitlement to judgment as a matter of law by demonstrating that the plaintiff made misrepresentations on his application for insurance, and that it would not have issued the 2017 policy and the 2018 policy had the plaintiff disclosed that there was a swimming pool on the property ... .. Union Mutual submitted with its motion for summary judgment an affidavit from its underwriter, along with Union Mutual's Underwriting Guidelines for its New York Landlord/Tenant Property and General Liability Package Program, which provide that swimming pools are an unacceptable risk, and if a potential insured answered 'yes' to the question on the application asking if there is a swimming pool on the property, no policy of insurance would issue. With these undisputed facts, Union Mutual demonstrated as a matter of law that the misrepresentations in the plaintiff's applications for insurance were material. In opposition, the plaintiff failed to raise a triable issue of fact. A material misrepresentation, even if innocent or unintentional, is sufficient to warrant rescission of an insurance policy ...". ***Nabatov v. Union Mut. Fire Ins. Co.*, 2022 N.Y. Slip Op. 02005, Second Dept 3-23-22**

### NEGLIGENCE, EVIDENCE, PERSONAL INJURY.

THE METEOROLOGIST'S AFFIDAVIT SUBMITTED TO SHOW THERE WAS A STORM IN PROGRESS WHEN PLAINTIFF SLIPPED AND FELL WAS NOT ACCOMPANIED BY THE RECORDS RELIED UPON BY THE AFFIANT; THE AFFIDAVIT THEREFORE HAD NO PROBATIVE VALUE.

The Second Department, reversing (modifying) Supreme Court, determined the parking-lot-owner's (RGP's) motion for summary judgment in this slip and fall case should not have been granted under the storm-in-progress rule. The meteorologist's affidavit was not accompanied by the records the affidavit relied upon: "... RGP failed to establish its prima facie entitlement to judgment as a matter of law dismissing the complaint insofar as asserted against it based on the storm in progress rule. In support of its motion, RGP relied upon an affidavit and report of a meteorologist who opined that a storm was in progress at the time the plaintiff allegedly slipped and fell on ice. However, copies of the records upon which the meteorologist relied in forming his opinion were not attached to the report, and thus, the report has no probative value ...". ***Canciani v. Stop & Shop Supermarket Co., LLC*, 2022 N.Y. Slip Op. 01986, Second Dept 3-23-22**

## THIRD DEPARTMENT

### CRIMINAL LAW, EVIDENCE. JUDGES, APPEALS.

IN THIS SEX-OFFENSE CASE, THE SENTENCING JUDGE VIOLATED THE CRIMINAL PROCEDURE LAW BY REFUSING TO DISCLOSE THE VICTIM IMPACT STATEMENT TO THE DEFENDANT WITHOUT PLACING THE REASONS FOR NONDISCLOSURE ON THE RECORD; THE ISSUE SURVIVED THE WAIVER OF APPEAL.

The Third Department, vacating defendant's sentence and remitting for resentencing before a different judge, determined the sentencing judge who reviewed the victim impact statement in this sexual-offense case, and who granted the victim's request to keep the victim impact statement confidential, violated CPL § 390.50, which requires the judge to state the reasons, on the record, for not disclosing a victim impact statement to the defendant. The issue survived defendant's waiver of appeal: "[W]e find that defendant's CPL 390.50 (2) (a) argument must survive the waiver of appeal as the Legislature has, without qualification or restriction, expressly mandated that '[t]he action of the court excepting information from disclosure shall be subject to appellate review' (CPL 390.50 [2] [a]), and courts 'may not create a limitation that the Legislature did not enact' ... . ... [T]he record before us does not reflect any ruling by County Court with respect to the victim's request to except her statement from disclosure. We therefore must conclude that the court failed to set forth "the reasons for its action" on the record, in violation of CPL 390.50 (2) (a) …. The record also does not reflect that any consideration was given to redacting the victim's statement, leaving defendant wholly 'unable to verify the accuracy of the information [therein] or meaningfully respond to it,' in further contravention of the statute … . What is clear, however, is that defendant never had the opportunity to review the victim's statement and that County Court heavily relied upon it in fashioning its sentence." ***People v. Ortiz*, 2022 N.Y. Slip Op. 02041, Third Dept 3-24-22**

## FAMILY LAW, CONTRACT LAW.

THE BIOLOGICAL MOTHER AND THE ADOPTIVE MOTHER ENTERED A POSTADOPTION CONTACT AGREEMENT WHICH ALLOWED TWO SUPERVISED VISITS WITH THE BIOLOGICAL MOTHER PER YEAR; THE EVIDENCE OF THE CHILDREN'S BEHAVIOR AFTER VISITING WITH THE BIOLOGICAL MOTHER SUPPORTED FAMILY COURT'S CONCLUSION IT WAS IN THE BEST INTERESTS OF THE CHILDREN TO TERMINATE VISITATION WITH THE BIOLOGICAL MOTHER; THE DISSENT ARGUED THE EVIDENCE OF THE DAUGHTER'S, IN CONTRAST TO THE SON'S, POST-VISIT BEHAVIOR DID NOT SUPPORT TERMINATION OF VISITATION WITH THE DAUGHTER.

The Third Department, over a two-justice partial dissent, determined Family Court properly terminated the biological mother's visitation with her children who had been adopted. The biological mother and the adoptive mother had entered a postadoption contact agreement which allowed the biological mother two supervised visits per year with her son and daughter. The evidence at the fact-finding hearing demonstrated that the son's behavior changed drastically after visits. His behavior was characterized as "out of control." There was evidence the daughter began banging her head and had nightmares after a visit. The dissent argued the evidence supported termination of visits with the son, but did not support the termination of visits with the daughter: "The adoptive mother testified that after visiting the biological mother in December 2017, the son destroyed rooms in the house and was completely out of control for close to a month. After the July 2018 visit with the biological mother, the son 'climb[ed] the walls in [his] classroom,' hit his friend, hurt his sister and had difficulties regulating his behavior for several months. * * * With respect to the dissent's reference to the policy concerns underlying postadoption contact agreements, we note that we wholeheartedly embrace and promote the policies and goals of these types of agreements and encourage open adoptions. However, it is not our intention to address the underlying policies of postadoption contact agreements, but, instead, to focus solely upon the principle governing and guiding the initiation and continuation of open contact between the children and the biological parent — the best interests of the children. Here, it is uncontroverted that the daughter displayed a persistent pattern of bizarre and harmful behavior — head banging and disrupted sleep due to nightmares — commensurate with visits with her biological mother. These behaviors continued for 1½ years. Although the daughter did not display the behaviors at the time of the visits, a time when the adoptive parents were present and the daughter's attention was directed toward other activities, the behaviors were manifested subsequent to each visit. ... [W]e cannot agree that enforcing visitation with respect to one sibling but not the other serves the best interests of either." ***Matter of Jennifer JJ. v. Jessica JJ.*, 2022 N.Y. Slip Op. 02043, Third Dept 3-24-22**

## FAMILY LAW, JUDGES, ATTORNEYS.

THE FACT THAT THE ATTORNEY FOR THE CHILD (AFC) IN THIS CUSTODY MATTER HAD, AS A JUDGE, PRESIDED OVER A DIFFERENT CUSTODY MATTER INVOLVING MOTHER, BUT INVOLVING DIFFERENT CHILDREN AND A DIFFERENT FATHER, DID NOT REQUIRE AUTOMATIC DISQUALIFICATION OF THE AFC PURSUANT TO JUDICIARY LAW § 17.

The Third Department, over a two-justice dissent, determined the attorney for the child (AFC) in the instant custody matter, who, as a judge, had presided over another custody case involving mother and different children, was not subject to automatic disqualification: "Various factual circumstances exist where disqualification of an attorney under Judiciary Law § 17 has been found. * * * ... [T]he custody case noted by the mother neither involved the subject children nor the subject children's father] Rather, it was an entirely separate proceeding involving different children and a different father. Furthermore, the mother does not allege any factual ties between these underlying proceedings and the prior custody case ... . Indeed, the only common tie between them is that the mother was a litigant. ... [O]nly the mother, and not her present custody claim over the subject children, had been before the AFC during his tenure as a judge. ... [T]he mother's fitness as the custodial parent presumably was an issue presented in her prior custody case. It is also an issue present here. Equating a discrete issue with a 'matter' provided in Judiciary Law § 17, however, impermissibly stretches the meaning of 'matter' such that it does not comport with 'action, claim, . . . motion or proceeding' — the other terms in Judiciary Law § 17 ... . ... [I]n view of the jurisdiction of Family Court and the particular cases such court hears, a party's fitness as a custodial parent frequently arises as an issue whether directly or indirectly. By giving an expansive view to 'matter,' the AFC, a former Family Court judge who had presided over countless proceedings in the past, would be disqualified from representing any party in any future case where another party in such case was previously before the AFC in one of those past proceedings — a result that would occur without regard to the nature of either the past proceeding or future case." ***Matter of Corey O. v. Angela P.*, 2022 N.Y. Slip Op. 02044, Third Dept 3-24-22**

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