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COURT OF APPEALS

CRIMINAL LAW.

THE COURT OF APPEALS, WITHOUT EXPLANATION, REVERSED THE FOURTH DEPARTMENT WHICH HAD REVERSED DEFENDANT'S CONVICTION ON THE GROUND THE DEFENDANT WAS NOT PRESENT DURING A SIDEBAR CONFERENCE CONCERNING THE BIAS OF A PROSPECTIVE JUROR; THE MATTER WAS SENT BACK TO THE FOURTH DEPARTMENT FOR CONSIDERATION OF OTHER ISSUES AND FACTS RAISED IN THE APPEAL BUT NOT CONSIDERED BY THE FOURTH DEPARTMENT.

The Court of Appeals, without explanation, reversed the Fourth Department which had reversed defendant's conviction on the ground defendant was not present during a side bar conference concerning the bias of a prospective juror: ***People v. McKenzie-Smith*, 2022 N.Y. Slip Op. 03308, CtApp 5-19-22** **From the Fourth Department Decision (Reversed Without Explanation by the Court of Appeals):** "A … prospective juror was peremptorily excused by defendant's counsel, however, and, during a sidebar conference at which defendant was not present, that juror was questioned 'to search out [her] bias, hostility or predisposition to believe or discredit the testimony of potential witnesses' (Antommarchi, 80 NY2d at 250). Consequently, we conclude that, 'absent a knowing and voluntary waiver by defendant of his right to be present at that sidebar conference, his conviction cannot stand' … . The only evidence in the record concerning a waiver consists of a conversation between the court, defendant's counsel and codefendant's counsel that occurred after the prospective juror was excused, in which codefendant's counsel indicated that he had just discussed with codefendant the right to approach the bench during such conferences, and defendant's counsel merely assented. Inasmuch as the discussion was vague and prospective, and there is no indication that defendant or defendant's counsel were waiving defendant's Antommarchi rights retrospectively, that conversation is insufficient to establish that defendant waived those rights concerning the questioning of the prospective juror at issue here. We therefore reverse the judgment of conviction and grant a new trial." ***People v. Mckenzie-Smith*, 2020 N.Y. Slip Op. 05653, Fourth Dept 10-9-20**

CRIMINAL LAW, EVIDENCE.

HERE SCREENSHOTS OF TEXT MESSAGES WHICH HAD BEEN DELETED FROM THE VICTIM'S PHONE WERE SUFFICIENTLY AUTHENTICATED TO BE ADMISSIBLE, EVEN IF THE BEST EVIDENCE RULE APPLIED; THE MESSAGES OF A SEXUAL NATURE ALLEGEDLY WERE SENT BY THE DEFENDANT, A VOLLEYBALL COACH, TO THE VICTIM, A 15-YEAR-OLD PLAYER ON THE TEAM.

The Court of Appeals, reversing the Appellate Division, determined the trial court did not abuse its discretion when screen shots of text messages of a sexual nature allegedly sent by the defendant, a high-school volleyball coach, to the 15-year-old victim, a player on the team. The victim had deleted the messages, but her boyfriend had taken screenshots of some of the messages and those screenshots were allowed in evidence. On appeal the Second Department reversed the conviction on the ground that the screenshots had not been properly authenticated: " '[T]echnologically generated documentation [is] ordinarily admissible under standard evidentiary rubrics' and 'this type of ruling may be disturbed by this Court only when no legal foundation has been proffered or when an abuse of discretion as a matter of law is demonstrated' … . This Court recently held that for digital photographs, like traditional photographs, 'the proper foundation [may] be established through testimony that the photograph accurately represents the subject matter depicted' … . We reiterated that '[r]arely is it required that the identity and accuracy of a photograph be proved by the photographer' … . which would be the boyfriend here. Rather, 'any person having the requisite knowledge of the facts may verify' the photograph' or an expert may testify that the photograph has not been altered' … . Here, the testimony of the victim—a participant in and witness to the conversations with defendant—sufficed to authenticate the screenshots. She testified that all of the screenshots offered by the People fairly and accurately represented text messages sent to and from defendant's phone. The boyfriend also identified the screenshots as the same ones he took from the victim's phone on November 7. Telephone records of the call detail information for defendant's subscriber number corroborated that defendant sent the victim numerous text messages during the relevant time period. Moreover, even if we were to credit defendant's argument that the best evidence rule applies in this context, the court did not abuse its discretion in admitting the screenshots." ***People v. Rodriguez*, 2022 N.Y. Slip Op. 03307, CtApp 5-19-22**

INSURANCE LAW, MEDICAL MALPRACTICE, NEGLIGENCE.

WHEN A MUTUAL INSURANCE COMPANY WHICH ISSUES PROFESSIONAL LIABILITY POLICES TO MEDICAL PROFESSIONALS DEMUTUALIZES, THE CASH-CONSIDERATION PROCEEDS, ABSENT AGREEMENTS TO THE CONTRARY, ARE DISTRIBUTED TO THE EMPLOYEE, NOT THE EMPLOYER WHICH PAID THE PREMIUMS.

The Court of Appeals, in a full-fledged opinion by Judge Wilson, determined that when a mutual insurance company which issued professional liability policies to medical professionals demutualizes, where the employer paid the premiums, the distribution of cash consideration goes to the employee, not the employer: "Medical Liability Mutual Insurance Company (MLMIC), formerly a mutual insurance company, issued professional liability insurance policies to the eight medical professionals who are litigants in the eight cases before us on these appeals. The premiums for those policies were paid by their employers. In October 2018, MLMIC demutualized and was acquired by National Indemnity Company. Pursuant to its 'Plan of Conversion'—approved by the New York State Department of Financial Services—MLMIC sought to distribute $2.502 billion in cash consideration to 'Eligible Policyholders.' The question presented is as follows: when an employer pays premiums to a mutual insurance company to obtain a policy for its employee, and the insurance company demutualizes, who is entitled to the proceeds from demutualization: the employer or the employee? We answer that, absent contrary terms in the contract of employment, insurance policy, or separate agreement, the employee, who is the policyholder, is entitled to the proceeds." ***Columbia Mem. Hosp. v. Hinds*, 2022 N.Y. Slip Op. 03306, CtApp 5-19-22**

FIRST DEPARTMENT

CIVIL PROCEDURE.

NEW YORK DID NOT HAVE LONG-ARM JURISDICTION OVER A BAVARIAN STEM DONOR REGISTRY INVOLVED IN DECEDENT'S PHYSICIANS' SEARCH FOR A BONE-MARROW MATCH TO TREAT LEUKEMIA.

The First Department, reversing Supreme Court, determined New York did not have jurisdiction over BSB, a Bavarian stem donor registry: "BSB was contacted through a chain of interactions between donor registries that began with decedent's New York physicians reaching out to the National Marrow Donor Program in Minnesota to find a match for decedent so that she could undergo a bone marrow transplant to treat her leukemia. When no match was found there, the search was expanded, including to Republic of German's central registry, and ultimately a donor was located in the BSB registry. BSB did not engage in a regular course of conduct, nor did it purposefully avail itself of the privilege of conducting activities within New York State ... . Furthermore, BSB, a 20-employee not-for-profit organization, was reimbursed with a set sum by a German entity for providing the donation to decedent's transplant center's courier in Germany, and reimbursement was not contingent on decedent's ability to pay, insurance, or the like. There is no evidence that BSB derived substantial revenue from the transaction or from New York, where it has no offices, employees, agents, marketing, registrations, or presence ... . Even if the long-arm statute applied, BSB does not have the minimum contacts necessary such that it should have reasonably expected to be brought into court here ...". ***Aloisio v. New York-Presbyt./Weill Cornell Med. Ctr.*, 2022 N.Y. Slip Op. 03205, First Dept 5-17-22**

CIVIL RIGHTS LAW, ATTORNEYS, DEFAMATION.

THE ANTI-SLAPP STATUTES IN THE CIVIL RIGHTS LAW PROTECTED DEFENDANT AGAINST A DEFAMATION ACTION BY THE PLASTIC SURGEON ABOUT WHOM DEFENDANT POSTED NEGATIVE ONLINE REVIEWS; THE COMPLAINT WAS PROPERLY DISMISSED AND DEFENDANT WAS ENTITLED TO ATTORNEY'S FEES AND DAMAGES.

The First Department, reversing (modifying) Supreme Court, in a full-fledged opinion by Justice Rodriguez, in a matter of first impression, determined the Civil Rights Law anti-SLAPP statutes protected defendant's negative online reviews of plaintiff Aristocrat Plastic Surgery and Dr. Kevin Tehrani. Supreme Court dismissed the complaint but did not award defendant attorney's fees or damages because the anti-SLAPP statutes were deemed not to apply. The First Department held that the anti-SLAPP statutes applied and defendant was entitled to attorney's fees and damages: "[D]efendant posted her reviews on two public internet forums, one of which has a stated purpose of being a key advisor for people considering plastic surgery, and the purpose of defendant's reviews was to provide information to potential patients, including reasons not to book an appointment with Dr. Tehrani. Defendant's posts concerning the plastic surgery performed upon her by Dr. Tehrani qualify as an exercise of her constitutional right of free speech and a comment on a matter of legitimate public concern and public interest—namely, medical treatment rendered by a physician's professional corporation and the physician performing surgery under its auspices … . We therefore find that defendant's negative website reviews of plaintiffs' services constitute a matter of "public interest" as set forth in Civil Rights Law § 76-a(1)(d). Since defendant's posts fall under the ambit of the amended anti-SLAPP law, defendant is entitled to seek damages and attorneys' fees under Civil Rights Law §§ 70-a and 76-a(1)(a)(1)." ***Aristocrat Plastic Surgery, P.C. v. Silva*, 2022 N.Y. Slip Op. 03311, First Dept 5-19-22**

CONTRACT LAW, FRAUD.

PLAINTIFF'S COMPLAINT ALLEGING HE WAS INDUCED TO SIGN A RELEASE BY FRAUD, DURESS AND/OR OVERREACHING SHOULD NOT HAVE BEEN DISMISSED.

The First Department, reversing (modifying) Supreme Court, determined the defendants' motion to dismiss to complaint should not have been granted. Plaintiff alleged he signed a released because of the fraud, duress and/or overreaching of the defendants: "The complaint and plaintiff's affidavit raise issues of fact as to whether defendants engaged in fraud, duress, and/or overreaching to procure plaintiff's signature

on a general release of his claims against them related to his alleged fall from a 30-foot ladder while working at a construction site ... . There is little dispute that the release, written in English, unambiguously released all plaintiff's claims against defendants in exchange for $30,000 in consideration, which plaintiff received. However, plaintiff avers that he does not read English, that he did not have counsel at the time he executed the document, that he did not know the nature or purpose of the document he signed, and that defendants represented to him that the execution of the document was a mere formality required for his receipt of compensation for work performed. Plaintiff averred that he was out of work at the time, facing eviction and medical bills, and in need of financial support, and that he was hoping to travel to Puerto Rico to see his brother, who was dying. He averred that he did not understand the nature of the release he signed until he retained counsel to aid him in prosecuting a workers' compensation claim." ***Rosa v. McAlpine Contr. Co.*, 2022 N.Y. Slip Op. 03216, First Dept 5-17-22**

CONTRACT LAW, FRAUD, REAL ESTATE, NEGLIGENCE.

PURSUANT TO THE SPECIAL FACTS DOCTRINE, THE PURCHASE AND SALE AGREEMENT FOR THIS "AS IS" SALE OF A BUILDING RELEASED THE SELLER FROM LIABILITY FOR NEGLIGENCE AND NEGLIGENT MISREPRESENTATION, BUT NOT FOR FRAUD.

The First Department, reversing (modifying) Supreme Court, determined Supreme Court properly found that the Purchase and Sale Agreement (PSA). pursuant to the special facts doctrine, did not release the seller of the building from a claim based on fraud (building was sold "as is"). But the PSA did release the seller from liability for negligence or negligent misrepresentation: "Plaintiff's negligence and negligent misrepresentation claims against the seller are barred by the Purchase and Sale Agreement (PSA). In section 6.02 of the PSA, plaintiff agreed that it had not relied on any representations as to the condition of the building, and agreed to purchase the building 'as is.' Although Supreme Court correctly found that under the special facts doctrine, section 6.02 does not serve to bar the causes of action based on fraud, the provision does, in fact, bar the causes of action based on negligence (compare TIAA Global Invs., LLC v One Astoria Sq., 127 AD3d 75, 87-88 [1st Dept 2015] [under special facts doctrine, which provides that a contractual disclaimer cannot preclude a fraud claim when the underlying facts are peculiarly within the defendant's knowledge, 'as is' and 'no reliance' provisions in a real estate sales contract did not require dismissal of fraud claim under CPLR 3211]). Similarly, while the release in PSA section 19.15 exempts fraud claims from the scope of the release, plaintiff released the seller for claims relating to any defects in the building 'whether the result of negligence or otherwise.' " ***470 4th Ave. Fee Owner, LLC v. Adam Am. LLC*, 2022 N.Y. Slip Op. 03204 First Dept 5-17-22**

CONTRACT LAW, LABOR LAW-CONSTRUCTION LAW, NEGLIGENCE.

THE INDEMNIFICATION CLAUSE IN THIS LADDER-FALL CASE STATED THAT THE CONTRACTOR FOR WHOM THE INJURED PLAINTIFF WORKED WOULD HOLD THE "OWNER'S AGENT" HARMLESS AND DID NOT MENTION THE PROPERTY OWNER; THE CONTRACT MUST BE STRICTLY CONSTRUED; THE PROPERTY OWNER'S INDEMNIFICATION ACTION AGAINST THE CONTRACTOR SHOULD HAVE BEEN DISMISSED.

The First Department, reversing Supreme Court, determined the indemnification clause in the ladder-fall case must be strictly construed. The clause stated that the contractor for whom plaintiff worked, Collins, would hold harmless the "owner's agent" but did not mention the property owner, LIC. Therefore, LIC's indemnification action against Collins should have been dismissed: "Plaintiff alleged common-law negligence, including failure to provide her with a safe ladder, and violations of Labor Law §§ 200, 202, 240(1)-(3), and 241(6). * * * LIC commenced this third-party action against Collins asserting that 'Collins was obligated to provide plaintiff, its employee, with the necessary equipment to enable her to properly and safely perform her cleaning related duties' at the premises, and that plaintiff's injuries were due to Collins' failure to perform its duties under the contract and provide her with the proper tools, equipment, supervision, direction, and control. The third-party complaint also asserted that Collins agreed to indemnify LIC from any accidents, injuries, claims, or lawsuits arising out of the cleaning related services Collins provided at the premises. ... The indemnification provision states that Collins shall 'hold harmless the OWNER'S AGENT from all claims by Tenants or others whose personnel or property may be damaged by [Collins], its operators, and including but not limited to the use of any of the required equipment or material.' Tishman is designated as the 'owner's agent' in the contract. LIC is neither identified nor included under the indemnification provision and the indemnification provision must be 'strictly construed' ...". ***Tavarez v. LIC Dev. Owner, L.P.*, 2022 N.Y. Slip Op. 03339, First Dept 5-19-22**

CRIMINAL LAW, MUNICIPAL LAW, ADMINISTRATIVE LAW, CONSTITUTIONAL LAW.

THE NEW YORK CITY ADMINISTRATIVE CODE PROVISION WHICH PROHIBITS "COMPRESSION OF THE DIAPHRAGM" (BY KNEELING, SITTING OR STANDING ON A PERSON) WHEN EFFECTING AN ARREST IS NOT VOID FOR VAGUENESS.

The First Department, reversing Supreme Court, determined the NYC Administrative Code provision prohibiting and criminalizing the use of certain methods of restraint in effecting an arrest was not void for vagueness. "Plaintiffs challenge Administrative Code § 10-181 as unconstitutionally vague and preempted by New York State law. This provision, which became effective July 15, 2020, makes it a criminal misdemeanor to use certain methods of restraint 'in the course of effecting or attempting to effect an arrest' (Administrative Code § 10-181[a]). Specifically, the statute prohibits 'restrain[ing] an individual in a manner that restricts the flow of air or blood by compressing the windpipe or the carotid arteries on each side of the neck [the chokehold ban], or sitting, kneeling, or standing on the chest or back in a manner that compresses the diaphragm [the diaphragm compression ban]' ,,, , ... The only language plaintiffs take issue with is 'in a manner that compresses the diaphragm.' But the meaning of this language, even if 'imprecise' or 'open-ended,' is sufficiently definite "when measured by common understanding and practices' ... . Police officers — the targets of the law — can be (and are) trained on the location and function of the diaphragm. And even plaintiffs have no difficulty understanding the meaning of the word 'compress[]' when used in the context of

the accompanying chokehold ban, which they do not challenge. That it may not be the most accurate word, from a medical standpoint, to describe what happens to the diaphragm when someone sits, kneels, or stands on it does not mean that it is incapable of being understood." ***Police Benevolent Assn. of the City of N.Y., Inc. v. City of New York*, 2022 N.Y. Slip Op. 03329 First Dept 5-19-22**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

PLAINTIFF ALLEGEDLY TRIPPED AND FELL CARRYING A PIPE DOWN A PLYWOOD RAMP IN THIS LABOR LAW § 200 ACTION; THERE WERE QUESTIONS OF FACT WHETHER THE RAMP CONSTITUTED A DANGEROUS CONDITION AND WHETHER THE DEFENDANTS HAD CONSTRUCTIVE NOTICE OF IT.

The First Department, reversing Supreme Court, determined there were questions of fact whether a plywood ramp was a dangerous condition and whether the defendants had constructive knowledge of the ramp in this Labor Law § 200 action. Plaintiff allegedly tripped and fell when carrying a pipe down the ramp: "Defendants established their prima facie entitlement to judgment as a matter of law on the causes of action alleging a violation of Labor Law § 200 and common-law negligence by demonstrating that they did not have authority to supervise or control the means and methods of plaintiff's work. However, to the extent those causes of action are also predicated on the existence of a dangerous or defective condition (a defective plywood ramp), triable issues of fact remain as to whether the owner or general contractor had actual or constructive notice ... . Defendants' witnesses all testified to a lack of knowledge of the plywood ramp, thereby establishing lack of actual notice. However, plaintiff raised a triable issue as to constructive notice by his deposition testimony and affidavit that he had seen the plywood ramp in place when he began working at the construction site, although he never traversed it prior to his accident, which occurred months into his work, and that defendants' trailers were located only 30 to 50 feet from where plaintiff's accident occurred. Contrary to defendants' insinuations, the number of witnesses contradicting plaintiff's account is not a basis for granting them summary judgment; it merely raises issues of credibility for the fact-finder." ***Jackson v. Hunter Roberts Constr., L.L.C.*, 2022 N.Y. Slip Op. 03321, First Dept 5-19-22**

LEGAL MALPRACTICE, NEGLIGENCE, ATTORNEYS, CONTRACT LAW.

PLAINTIFF ALLEGED DEFENDANTS-ATTORNEYS DID NOT ADVISE IT OF AN AMENDMENT TO THE COMMERCIAL LEASE WHICH EFFECTIVELY ELIMINATED THE OPTION FOR PLAINTIFF TO PURCHASE THE PROPERTY FOR $11.4 MILLION IF THE LANDLORD RECEIVES A BONA FIDE PURCHASE OFFER; THE LANDLORD IN FACT RECEIVED SUCH AN OFFER AND PLAINTIFF EXERCISED ITS OPTION, BUT PAID $14.5 MILLION.

The First Department, reversing Supreme Court, determined defendants-attorneys' motion for summary judgment in this legal malpractice action should not have been granted. Plaintiff alleged defendants-attorneys did not advise it of an amendment to the commercial lease. The lease included an option to purchase the property for $11.4 million. The amendment extinguished the option to purchase for $11.4 million upon purchase of the property. The landlord received a bona fide purchase offer and plaintiff exercised its option, but paid $14.5 million: "Defendants' email attaching a marked-up copy of the relevant lease section does not establish as a matter of law that defendants advised plaintiff as to the meaning of the amendment, and the parties dispute the oral advice that was provided by defendants. ... [T]he fact that plaintiff's agent read the amendment does not establish as a matter of law that defendants were not negligent ... . Any evidence that plaintiff's agent, a sophisticated businessman, knew or should have known that the amendment was substantive despite defendants' advice that it was 'housekeeping' does not disprove defendants' negligence but is evidence that can be offered in mitigation of damages ... . The fact that plaintiff sent the signed lease to the landlord without defendants' knowledge does not as a matter of law refute causation." ***Alrose Steinway, LLC v. Jaspan Schlesinger, LLP*, 2022 N.Y. Slip Op. 03310, First Dept 5-19-22**

MENTAL HYGIENE LAW, FAMILY LAW, JUDGES, CIVIL PROCEDURE.

BOTH THE WIFE AND THE JUDGE WERE AWARE OF THE HUSBAND'S MENTAL ILLNESS IN THIS DIVORCE ACTION IN WHICH THE HUSBAND WAS PRO SE; WHEN THE HUSBAND FAILED TO APPEAR FOR THE INQUEST AN INQUIRY INTO WHETHER A GUARDIAN AD LITEM SHOULD BE APPOINTED SHOULD HAVE BEEN HELD.

The First Department, reversing Supreme Court, determined the judge should have conducted an inquiry into whether a guardian ad litem should be appointed for the husband in this divorce action. The husband did not appear at the inquest and both the wife and the judge were aware of the husband's significant mental illness: "Judgment was entered in this divorce proceeding after the husband, pro se, failed to appear for an inquest. At the time of the inquest, both the wife and Supreme Court were aware that the husband had been diagnosed with a significant mental health condition, which resulted in episodes during which the husband was demonstrably unable to care for himself or otherwise protect his interests. Indeed, at the conclusion of the inquest, the court explicitly acknowledged that the husband's absence was likely attributable to his mental health. Thus, before entering judgment upon the husband's default, there should have been an inquiry into whether a guardian ad litem was necessary (see CPLR 1201, 1203 ...). Because there was no inquiry, the judgment must be vacated and the matter remanded for further proceedings, including, if necessary, an inquiry into the husband's current capacity ...". ***Richard v. Buck*, 2022 N.Y. Slip Op. 03335, First Dept 5-19-22**

MENTAL HYGIENE LAW, JUDGES.

SUPREME COURT SHOULD NOT HAVE REMOVED THE INCAPACITATED PERSON'S (IP'S) SON AS GUARDIAN OF THE PROPERTY WITHOUT HOLDING A TESTIMONIAL HEARING, CRITERIA FOR REMOVAL EXPLAINED.

The First Department, reversing Supreme Court, determined the judge should not have merely accepted the Court Examiner's position that petitioner, the Incapacitated Person's (IP's) son, should be removed as guardian of the property. A hearing should have been held: "Petitioner interposed an answer in which he raised issues of law and fact. He claimed, in part, that some of his actions did not require further court order but were permissible under the original order appointing him as guardian. He also claimed that he obtained prior court approval, albeit in the informal manner (i.e. emails or phone calls) employed by the previous judge who was assigned to this matter. He also made credible arguments that the decisions he made benefitted, and did not harm, the IP's estate ... . Rather than hold a testimonial hearing, Supreme Court simply accepted what the Court Examiner claimed in her motion and appointed a nonrelative successor guardian ... . We have long recognized that strangers will not be appointed either a guardian of the person or the property unless it is impossible to find someone within the family circle who is qualified to serve ... . The preference for a relative may be overridden by a showing that the guardian-relative has rendered inadequate care to the IP, has an interest adverse to the IP or is otherwise unsuitable to exercise the powers necessary to assist the IP ... . Moreover, the ultimate remedy of removal may be an abuse of discretion, where a guardian's errors do not prejudice or harm the estate. The court should also consider whether other less drastic remedies, such as ordering compliance or reducing the Guardian's compensation, would be appropriate. None of these considerations were addressed by the Supreme Court before removing petitioner…". ***Matter of Roberts*, 2022 N.Y. Slip Op. 03336, First Dept 5-19-22**

NEGLIGENCE, EMPLOYMENT LAW, CIVIL PROCEDURE, PRIVILEGE.

PLAINTIFF IN THIS NEGLIGENT-HIRING ACTION AGAINST THE HOSPITAL WHICH EMPLOYED A DOCTOR WHO ALLEGEDLY SEXUALLY ASSAULTED HER AND OTHER PATIENTS SOUGHT DISCOVERY; THE IDENTITIES OF THE OTHER ASSAULTED PATIENTS WERE NOT PROTECTED BY THE DOCTOR-PATIENT PRIVILEGE; PARTY STATEMENTS WERE NOT PROTECTED BY THE QUALITY ASSURANCE PRIVILEGE; AND PLAINTIFF WAS ENTITLED TO THE NAMES OF THE DOCTOR'S COWORKERS.

The First Department, reversing (modifying) Supreme Court, determined plaintiff, who, along with other patients, was allegedly sexually assaulted by a doctor, Newman, employed by defendant hospital (Mount Sinai), was entitled to certain discovery. Plaintiff sought discovery of party statements, incident reports, the identities of the other assaulted patients, and the names of the doctor's coworkers at the time of each assault. Plaintiff was entitled to documents not protected by the quality assurance privilege. The doctor-patient privilege did not extend to the identities of the other assaulted patients. And the names of the doctor's coworkers were in a statement prepared by the Health and Human Services Department to which plaintiff was entitled: "We reject Mount Sinai's assertion that privilege excuses it from complying with plaintiff's discovery demands regarding the identities of the other three patients that defendant Newman assaulted. The doctor-patient privilege provided for by CPLR 4504(a) protects information relevant to a patient's medical treatment, but the privilege does not cover incidents of abuse not part of a patient's treatment ... . Moreover, while the court stated that disclosure would violate HIPAA, federal regulations provide for disclosure of HIPAA-protected documents subject to a showing that the party seeking disclosure has made a good faith effort to secure a qualified protective order, and plaintiff has done so in each of her motions (45 CFR 164.512[e][ii], [v] ...). ... [T]he identities of defendant Newman's coworkers at the times of each of the assaults are relevant and must be disclosed, as those coworkers may have information concerning his conduct ... . The names of the coworkers were contained in a statement of deficiencies prepared by Department of Health and Human Services, Center for Medicare and Medicaid Services, and plaintiff is entitled to production of that statement, redacted to remove conclusions of law and opinions of the Department of Health and Human Services ...". ***Newman v. Mount Sinai Med. Ctr., Inc.*, 2022 N.Y. Slip Op. 03327, First Dept 5-19-22**

SECOND DEPARTMENT

CIVIL PROCEDURE.

WHEN A PARTY BRINGS A MOTION TO CHANGE VENUE IN THE COUNTY TO WHICH THE PARTY WANTS VENUE CHANGED, AS OPPOSED TO THE COUNTY WHERE THE ACTION WAS STARTED, THE PARTY MUST USE THE SPECIAL PROCEDURE IN CPLR 511 (A) AND (B), WHICH REQUIRES MAKING A DEMAND ON THE OTHER PARTY BEFORE BRINGING A MOTION; HERE THE SPECIAL PROCEDURE WAS NOT USED, THE MOTION TO CHANGE VENUE WAS MADE IN THE "WRONG COUNTY" AND SHOULD HAVE BEEN DISMISSED.

The Second Department, reversing Supreme Court, determined the defendant nursing home's motion to change venue should have been denied. Unless a party follows the special procedure in CPLR 511(a) and (b), which requires making a demand on the other party before bringing a motion, a motion to change venue must be brought in the county where the action was started. Here the defendant did not use the special procedure and brought the motion to change venue in the county where defendant sought to move the proceedings. That was the wrong county for the motion: "This Court has stated that '[w]here . . . a motion to change venue . . . is made in the 'wrong county' and timely objection is raised to the improper venue of the motion itself, Special Term should deny the motion' ... . Contrary to the defendant's conten-

tion, neither CPLR 501 nor CPLR 511(b) provided a basis for it to notice the motion in Nassau County." ***Allen v. Morningside Acquisition I, LLC*, 2022 N.Y. Slip Op. 03219, Second Dept 5-18-22**

CIVIL PROCEDURE, ATTORNEYS.

A MONETARY PENALTY IMPOSED UPON PLAINTIFF'S ATTORNEY, AS OPPOSED TO DISMISSAL OF THE COMPLAINT, WAS THE APPROPRIATE SANCTION FOR PLAINTIFF'S FAILURE TO PROVIDE DISCOVERY.

The Second Department, reversing Supreme Court, determined sanctioning plaintiff's attorney for failing to provide discovery, rather than dismissal of the complaint, was the best way to handle plaintiff's inaction: "[T]he plaintiff's attorneys failed to comply with the defendants' demands for a bill of particulars and discovery, did not object to those demands, and did not respond in any way to follow-up communications from the defendants' attorneys until opposition to the motions was filed. Moreover, in response to the motions, the plaintiff's attorneys failed to articulate any excuse for this series of failures ... . Notwithstanding this dereliction of responsibility, at the time the defendants moved ... to dismiss the complaint insofar as asserted against each of them, the plaintiff was not in violation of any court-ordered deadlines ... . In fact, the defendants also both moved ... to compel the plaintiff to comply with their respective discovery demands by a date certain. And ... not long after the defendants' motions were filed, the plaintiff began to produce the requested materials, albeit with some alleged deficiencies. Under these circumstances, we are of the view that reinstatement of the complaint conditioned upon the payment of a penalty by the plaintiffs' trial counsel personally to both defendants would be more appropriate than the outright denial of the plaintiff's right to a day in court ...". ***Cook v. SI Care Ctr.*, 2022 N.Y. Slip Op. 03225, Second Dept 5-18-22**

CIVIL PROCEDURE, FORECLOSURE.

WHEN THE FAILURE TO PRESENT FACTS IN A PRIOR MOTION IS NOT JUSTIFIED, THE SECOND MOTION DOES NOT FIT THE CRITERIA FOR A MOTION TO RENEW OR AN ALLOWABLE SUCCESSIVE SUMMARY JUDGMENT MOTION.

The Second Department, reversing Supreme Court, determined the bank's motion in this foreclosure action did not fit the criteria for a motion to renew or an allowable successive summary judgment motion. The judgment of foreclosure should not have been granted; " 'When no reasonable justification is given for failing to present new facts on the prior motion, the Supreme Court lacks discretion to grant renewal' ... . Here, the plaintiff failed to provide any justification for its failure to present the new evidence supporting its renewal motion as part of its prior motion. Even considered as a successive motion for summary judgment, such a motion 'should not be entertained in the absence of good cause, such as a showing of newly discovered evidence' ...". ***Wells Fargo Bank, N.A. v. Osias*, 2022 N.Y. Slip Op. 03275, Second Dept 5-18-22**

CIVIL PROCEDURE, JUDGES.

ABSENT "EXTRAORDINARY CIRCUMSTANCES," A JUDGE DOES NOT HAVE THE AUTHORITY TO, SUA SPONTE, DISMISS A COMPLAINT.

The Second Department, reversing Supreme Court, determined the judge should not have, sua sponte, dismissed the complaint because there were no "extraordinary circumstances:" "The Supreme Court erred ... in, sua sponte, directing dismissal of the complaint ... . 'A court's power to dismiss a complaint, sua sponte, is to be used sparingly and only when extraordinary circumstances exist to warrant dismissal' ... . Here, although the plaintiff's submissions were insufficient to demonstrate his entitlement to a default judgment, no extraordinary circumstances existed to warrant dismissal of the complaint ...". ***Binder v. Tolou Realty Assoc., Inc.*, 2022 N.Y. Slip Op. 03223, Second Dept 5-18-22**

CIVIL PROCEDURE, JUDGES.

PETITIONER DEMONSTRATED A GOOD FAITH EFFORT TO TIMELY FILE AND SERVE HIS OPPOSITION PAPERS AND DEMONSTRATED A POTENTIALLY MERITORIOUS CAUSE OF ACTION; SUPREME COURT HAD REFUSED TO CONSIDER THE OPPOSITION PAPERS BEFORE ISSUING ITS ORDER DISMISSING THE PETITION; THE ORDER SHOULD HAVE BEEN VACATED.

The Second Department, reversing Supreme Court, determined petitioner's motion to vacate an order dismissing the petition issued after Supreme Court refused to consider petitioner's opposition papers should have been granted. Petitioner had made a good faith effort to timely file and serve the papers and demonstrated a potentially meritorious cause of action: "The petitioner, who had until July 13, 2018, to submit opposition papers to the respondents' motion, filed pro se opposition papers with the court on July 13, 2018. He failed, however, to properly serve the respondents with a copy of the opposition papers, or to provide the court with proper proof of service. Nonetheless, the petitioner did file with the court a defective affidavit of service, in which dates of service were blank and which was neither signed nor notarized. Moreover, a copy of the opposition papers that the petitioner had emailed to the respondents was later discovered in the 'junk' email folder of the respondents' counsel. 'Clearly, the [petitioner] made a good faith, albeit unsuccessful, attempt to timely . . . respond to the motion,' and the court 'should have considered the absence of any evidence that the [petitioner's] default was intentional, made in bad faith, or with an intent to abandon the action' ... . [T]he petitioner's arguments in support of the amended petition demonstrate a potentially meritorious cause of action ... . Lastly, the respondents have 'neither alleged nor established that [they] would be prejudiced by vacating the default and hearing the matter on the merits' ...". ***Matter of Brennan v. County of Rockland*, 2022 N.Y. Slip Op. 03240, Second Dept 5-16-22**

CONTEMPT, ATTORNEYS.

PLAINTIFF'S COUNSEL SHOULD HAVE BEEN HELD IN CRIMINAL CONTEMPT FOR ISSUING SUBPOENAS IN DEFIANCE OF AN ORDER STAYING THE PROCEEDINGS; DIFFERENCE BETWEEN CIVIL AND CRIMINAL CONTEMPT EXPLAINED.

The Second Department, reversing (modifying) Supreme Court, determined plaintiff's counsel should have been found in criminal contempt for issuing subpoenas in defiance of Supreme Court order staying any further action in the case: "In contrast to civil contempt, because the purpose of criminal contempt is to vindicate the authority of the court, no showing of prejudice is required ... . Instead, '[a]llegations of willful disobedience of a proper judicial order strike at the core of the judicial process and implicate weighty public and institutional concerns regarding the integrity of and respect for judicial orders' ... . Notwithstanding [the court's order], the plaintiff's counsel issued subpoenas on six separate occasions. When ... the Supreme Court reiterated the terms of the stay, both via interim relief granted in the order to show cause and in a separate order, the plaintiff's counsel did not desist but instead served four more subpoenas and moved to compel the production of subpoenaed documents. This conduct evidences a lack of 'respect for judicial orders' and warranted holding the plaintiff's counsel in criminal contempt ... . Under the circumstances of this case, we deem the statutory maximum sanction of $1,000 per offense warranted and therefore impose a total sanction of $10,000." ***Madigan v. Berkeley Capital, LLC*, 2022 N.Y. Slip Op. 03237, Second Dept 5-18-22**

COURT OF CLAIMS, LABOR LAW-CONSTRUCTION LAW.

CLAIMANTS' MOTION FOR LEAVE TO FILE AND SERVE A LATE NOTICE OF CLAIM IN THIS CONSTRUCTION-ACCIDENT CASE SHOULD HAVE BEEN GRANTED.

The Second Department, reversing the Court of Claims, determined claimants' should have been allowed to file a late notice of claim in this construction accident case. The delay in filing was minimal, claimants made a sufficient showing the defendants were not prejudiced by the delay and defendants did not demonstrate prejudice: "The claimants showed that any delay in ascertaining actual notice of all of the essential facts underlying the claims was minimal ... , and that the defendants were provided with an adequate opportunity to investigate the circumstances underlying the claims in light of, among other things, the information contained in an accident report and a medical release, which were both prepared by the defendants' general contractor on the date of the accident.... . ... [T]he defendants failed to come forward with 'a particularized evidentiary showing that [they] will be substantially prejudiced' if the late claims are permitted ...". ***Schnier v. New York State Thruway Auth.*, 2022 N.Y. Slip Op. 03267, Second Dept 5-18-22**

CRIMINAL LAW.

BECAUSE DEFENDANT OBJECTED TO THE AMOUNT OF RESTITUTION A HEARING TO DETERMINE THE AMOUNT SHOULD HAVE BEEN HELD.

The Second Department, reversing County Court, determined, because the defendant objected to the restitution-amount, a hearing to determined the amount was required: " 'Before a defendant may be directed to pay restitution a hearing must be held if either: (1) the defendant objects to the amount of restitution and the record is insufficient to establish the proper amount; or (2) the defendant requests a hearing' ... . Here, the defendant objected to the amount of restitution payable to the complainant, and the record was insufficient to establish the value of damages to the complainant's property in the amount of $7,630 ...". ***People v. Jensen*, 2022 N.Y. Slip Op. 03250, Second Dept 5-18-22**

FAMILY LAW, CONTRACT LAW.

THE DIVORCE STIPULATION OF SETTLEMENT REQUIRED DEFENDANT TO PAY THE CHILDREN'S COLLEGE EXPENSES FOR FOUR YEARS AND DID NOT MENTION AN AGE CUT-OFF; SUPREME COURT SHOULD NOT HAVE DETERMINED DEFENDANT'S OBLIGATION CEASED AT AGE 21.

The Second Department, reversing Supreme Court, determined the stipulation of settlement in the divorce stated that defendant would pay the children's college expenses for four years with no mention of a cut-off at age 21. Supreme Court should not have ruled that the obligation ceased when the child turned 21: "[T]he stipulation clearly and unambiguously required the defendant to pay 50% of the costs and expenses for each child's college education for a total of four years, though his obligation to contribute to room and board expenses would be offset by any child support payments he made during that time. Contrary to the defendant's contention, no age limitation or restriction was placed on his obligation to pay his share of these costs and expenses, and the stipulation cannot be fairly interpreted to provide that this obligation terminated upon the child's emancipation ...". ***Pape v. Pape*, 2022 N.Y. Slip Op. 03246, Second Dept 5-18-22**

FORECLOSURE, EVIDENCE.

THE PLAINTIFF IN THIS FORECLOSURE ACTION DID NOT DEMONSTRATE THE INTEREST CALCULATION WAS DONE USING THE METHOD REQUIRED BY THE NOTE AND THE RELEVANT BUSINESS RECORDS WERE NOT SUBMITTED; THE REFEREE'S REPORT SHOULD NOT HAVE BEEN CONFIRMED.

The Second Department, reversing Supreme Court, determined the referee's report in this foreclosure action should not have been confirmed. There was no evidence the interest calculation was done in the manner required by the note and the relevant business records were not submitted: "... Supreme Court should have denied the plaintiff's motion to confirm the referee's report and for a judgment of foreclosure and sale because the plaintiff failed to present evidence that the interest on the loan was calculated using the method set forth in the note, and the referee's computations, including the amount due and owing and payments for taxes, insurance, and other advances, were premised upon unproduced business records ...". ***Bank of N.Y. Mellon v. Singh*, 2022 N.Y. Slip Op. 03221, Second Dept 5-18-22**

FORECLOSURE, EVIDENCE.

THE BANK'S PROOF OF DEFENDANT'S DEFAULT, MAILING OF THE NOTICE OF DEFAULT, AND COMPLIANCE WITH THE NOTICE REQUIREMENTS OF THE MORTGAGE IN THIS FORECLOSURE ACTION WAS INSUFFICIENT.

The Second Department, reversing Supreme Court, determined the bank's proof of defendant's default and mailing of the notice of default was insufficient in this foreclosure action: "[T]he plaintiff failed to establish its prima facie entitlement to judgment as a matter of law, as it failed to submit evidence demonstrating the defendant's default and that it complied with the notice of default provisions in the mortgage. In support of its motion, the plaintiff submitted an affidavit of Sonja Manderville, who averred that, in her position as a contract management coordinator of ... the plaintiff's loan servicer, she has access to and is familiar with the business records related to the mortgage loan at issue. She averred that the records 'were made at or near the time of the Transactions documented thereby by a person with knowledge of the Transactions . . . and are maintained in the regular and usual course of business.' However, Manderville failed to aver to familiarity with the record-keeping practices and procedures of the entity that generated the records or establish that the records provided by the maker were incorporated into the recipient's own records and routinely relied upon by the recipient in its own business ... . Manderville failed to identify the records upon which she relied, and the plaintiff failed to submit copies of the records themselves. ... Manderville's assertions regarding the purported mailing of the notice of default were insufficient to establish a mailing ... .Manderville failed to allege familiarity with the mailing practices and procedures of the third party that allegedly sent the notice of default in 2009 ... . Since the 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 that the notice of default was sent in accordance with the terms of the mortgage ...". ***Deutsche Bank Natl. Trust Co. Ams. v. Banu*, 2022 N.Y. Slip Op. 03231, Second Dept 5-18-22**

FORECLOSURE, EVIDENCE, CIVIL PROCEDURE.

ALTHOUGH A FORECLOSURE ACTION USUALLY ACCELERATES THE DEBT AND STARTS THE STATUTE OF LIMITATIONS CLOCK, HERE THE DEFENDANTS-BORROWERS DID NOT DEMONSTRATE THAT THE 2009 FORECLOSURE ACTION SOUGHT THE ENTIRE AMOUNT DUE (THE 2009 COMPLAINT WAS NOT SUBMITTED); THEREFORE, THE DEFENDANTS DID NOT DEMONSTRATE THE INSTANT ACTION IS UNTIMELY.

The Second Department, reversing Supreme Court, determined the defendants-borrowers in this foreclosure action did not demonstrate the debt was accelerated by the 2009 foreclosure action. Therefore, the complaint in the instant action should not have been dismissed as untimely: "[T]he defendants failed to demonstrate that the debt was validly accelerated by the commencement of the 2009 action. In support of their respective motions, the defendants submitted only the summons with notice from the 2009 action, which did contain a statement that BAC sought 'payment of the full balance due,' and a printout of the WebCivil Supreme-Case Detail related to the instant action ... . Since the defendants did not submit the complaint or the notice of pendency filed in the 2009 action, it cannot be determined whether those documents elected to accelerate the mortgage loan ...". ***GSR Mtge. Loan Trust v. Epstein*, 2022 N.Y. Slip Op. 03232, Second Dept 5-18-22**

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

THE BANK DID NOT DEMONSTRATE COMPLIANCE WITH THE "SEPARATE ENVELOPE" RULE AND THEREFORE DID NOT DEMONSTRATE COMPLIANCE WITH THE NOTICE REQUIREMENTS OF RPAPL 1304; THE BANK'S SUMMARY JUDGMENT MOTION SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined the bank in this foreclosure action failed to demonstrate the 90-day notice required by RPAPL 1304 was sent to the defendant in a separate envelope: "RPAPL 1304(2) also provides, in relevant part, that '[t]he notices required by this section shall be sent by the lender, assignee or mortgage loan servicer in a 'separate envelope from any other mailing or notice.' The plaintiff failed to establish, prima facie, that it sent 90-day notices to the defendant 'in a separate envelope from any other mailing or notice' ... . Since the plaintiff failed to establish, prima facie, its strict compliance with RPAPL 1304, 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 dismissing his answer with affirmative defenses and for an order of reference, regardless of the sufficiency of the opposing papers ...". ***Deutsche Bank Natl. Trust Co. v. Bonal*, 2022 N.Y. Slip Op. 03230, Second Dept 5-18-22**

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

IN THIS FORECLOSURE ACTION, THE RPAPL 1304 NOTICE DID NOT INCLUDE THE REQUIRED INFORMATION AND THE PROOF OF MAILING OF THE NOTICE WAS DEFICIENT; PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined proof of mailing of the RPAPL 1304 notice and failure to comply with the content-requirements for the RPAPL 1304 notice in this foreclosure action warranted denial of the plaintiff's motion for summary judgment: "The respondent failed to establish the plaintiff's strict compliance with RPAPL 1304. The respondent submitted an affidavit of Alfreda Johnson, a 'Foreclosure Specialist' of Fay Servicing, LLC (hereinafter Fay), the plaintiff's servicer. Johnson did not have personal knowledge of the purported mailing ... . Furthermore, while Johnson averred that she was familiar with Fay's mailing practices and procedures, the record indicates that the notices were not mailed by Fay. The record indicates that the notices were mailed by an entity known as 'Seterus' ... . Johnson does not address this fact at all, let alone demonstrate that she was familiar with Seterus's mailing practices and procedures. Thus, the respondent failed to establish that the 90-day notices were properly mailed in strict compliance with RPAPL 1304 ... . Moreover, the content of the

90-day notices did not strictly comply with RPAPL 1304 ... . Here, the 90-day notices omitted information that was required by RPAPL 1304 ...". ***Prof-2014-S2 Legal Tit. Trust II v. DeMarco*, 2022 N.Y. Slip Op. 03263, Second Dept 5-18-22**

THIRD DEPARTMENT

CRIMINAL LAW, APPEALS.

ALTHOUGH THE RELEVANT DECISION [*PEOPLE VS RUDOLPH*] CAME DOWN AFTER DEFENDANT WAS SENTENCED, THE DECISION CAME DOWN BEFORE DEFENDANT'S APPELLATE PROCESS WAS COMPLETE; THEREFORE, DEFENDANT WAS ENTITLED TO CONSIDERATION WHETHER HE SHOULD BE AFFORDED YOUTHFUL OFFENDER STATUS; SENTENCE VACATED AND MATTER REMITTED FOR RESENTENCING.

The Third Department, noting that the relevant law was announced after defendant's sentencing but while the appeal was pending, determined County Court's failure to consider whether defendant should be afforded youthful offender status required vacation of the sentence and remittal for resentencing: "There is no dispute that *Rudolph* [21 NY2d at 499], which was decided after defendant was sentenced but before the appellate process was complete, required County Court to make a determination as to whether defendant, as an eligible youth, should be adjudicated a youthful offender, notwithstanding that no request was made for such treatment (see CPL 720.20 [1] ...). Whether to grant youthful offender status lies within the discretion of the sentencing court and cannot be dispensed with through the plea-bargaining process ... . Although this Court is 'vested with the broad, plenary power to modify a sentence in the interest of justice, . . . and, if warranted, exercise our power to adjudicate [a] defendant a youthful offender' ... , we decline defendant's invitation to do so here, in the complete absence of any consideration by the sentencing court, either summarily or otherwise, as to whether defendant should be adjudicated a youthful offender. As such, we deem it appropriate, under such circumstances, to remit the matter to permit County Court the opportunity to make the initial discretionary determination as to whether youthful offender status for defendant is warranted, after the parties fully set forth their positions for and against such treatment ... . Without expressing any opinion as to whether youthful offender adjudication should be afforded defendant, in the event that County Court grants such status upon remittal, which would result in the court imposing a lower sentence than the parties negotiated[*2], the People must be given an opportunity to withdraw consent to the plea bargain ...". ***People v. Simon*, 2022 N.Y. Slip Op. 03277, Third Dept 5-19-22**

DISCIPLINARY HEARINGS (INMATES), EVIDENCE.

PETITIONER-INMATE WAS DENIED DUE PROCESS WHEN HE WAS NOT ALLOWED TO VIEW A VIDEO OF THE INCIDENT WHICH RESULTED IN THE MISBEHAVIOR CHARGE; NEW HEARING ORDERED.

The Third Department, annulling the petitioner-inmate's misbehavior determination, held that the petitioner was denied due process by not being given the opportunity to see the video of the incident: " '[A]n [incarcerated individual] 'should be allowed to call witnesses and present documentary evidence in his [or her] defense when permitting him [or her] to do so will not be unduly hazardous to institutional safety or correctional goals' ... . The videotaped incident occurred while petitioner was incarcerated at a different facility. The Hearing Officer informed petitioner that, due to the format of the video, it could not be played in the hearing room and could only be played on equipment located in a secure area of the facility from which petitioner was barred entry. The Hearing Officer stated that he had viewed the video in the secure area, and he described what he believed the video depicted. Petitioner objected, arguing that he was being prevented from providing exculpatory testimony as to what occurred in the video. The Hearing Officer denied the objection, stating that 'the video speaks for itself,' and the record reflects that he relied, in part, on the video in reaching the determination of guilt. Contrary to respondent's contention, the explanation that the only video equipment capable of playing the video was in a secure area, without any apparent attempt to either move the equipment or find other equipment capable of playing the video for petitioner, did not articulate institutional safety or correctional goals sufficient to justify denying petitioner's right to reply to evidence against him ... . Similarly, the fact that petitioner may have seen the video at his former facility during a prior hearing on these charges before a different Hearing Officer, a hearing that resulted in a determination that was administratively reversed, does not excuse the denial of petitioner's right to view the video during the new hearing and offer exculpatory testimony as to its contents ... . As to the remedy, we conclude that a new hearing, not expungement, is appropriate." ***Matter of Proctor v. Annucci*, 2022 N.Y. Slip Op. 03298, Third Dept 5-18-22**

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