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COURT OF APPEALS.

ANIMAL LAW, CONSTITUTIONAL LAW.

HAPPY, AN ELEPHANT IN THE BRONX ZOO, IS NOT A "PERSON" ENTITLED TO THE PROTECTION OF A WRIT OF HABEAS CORPUS; THE PETITION SOUGHT HAPPY'S TRANSFER TO AN ELEPHANT SANCTUARY; TWO DISSENTS.

The Court of Appeals, in a full-fledged opinion by Judge DiFiore, over two dissenting opinions, determined an elephant at the Bronx Zoo (Happy) was not entitled to the protection of a writ of habeas corpus. The petition sought Happy's transfer from the zoo to an elephant sanctuary: "For centuries, the common law writ of habeas corpus has safeguarded the liberty rights of human beings by providing a means to secure release from illegal custody. The question before us on this appeal is whether petitioner Nonhuman Rights Project may seek habeas corpus relief on behalf of Happy, an elephant residing at the Bronx Zoo, in order to secure her transfer to an elephant sanctuary. Because the writ of habeas corpus is intended to protect the liberty right of human beings to be free of unlawful confinement, it has no applicability to Happy, a nonhuman animal who is not a 'person' subjected to illegal detention. Thus, while no one disputes that elephants are intelligent beings deserving of proper care and compassion, the courts below properly granted the motion to dismiss the petition for a writ of habeas corpus ...". ***Matter of Nonhuman Rights Project, Inc. v. Breheny*, 2022 N.Y. Slip Op. 03859, CtApp 6-14-22**

APPEALS, CRIMINAL LAW.

THE VALIDITY OF A GUILTY PLEA IS NOT PROPERLY RAISED IN THE COURT OF APPEALS AFTER THE AFFIRMANCE OF A LEGAL SENTENCE BY THE APPELLATE DIVISION; WHERE THE SENTENCE IS LEGAL, AN EXCESSIVE-SENTENCE CLAIM IS BEYOND THE SCOPE OF THE COURT OF APPEALS.

The Court of Appeals, over an extensive two-judge dissenting opinion, determined (1) the validity of a guilty plea is not properly raised in the Court of Appeals after the appellate division has affirmed the defendant's legal sentence, and (2) where a sentence is legal, an excessive-sentence claim is beyond the scope of the Court of Appeals: "Defendant's challenge to the validity of his plea is not properly raised on this appeal from an Appellate Division order affirming a sentence, pursuant to 22 NYCRR § 670.11 (b) (see CPL 450.30 [1]; 470.35 [1]; People v Pagan, 19 NY3d 368, 370-371 [2012]). Defendant's sentence—an authorized prison term with post-release supervision—is not illegal, and any excessive sentence claim is beyond the scope of this Court's review (see People v Veale, 78 NY2d 1022, 1023-1024 [1991]). The many dissenting opinions cited by the dissent provide no support for a different result (see dissenting op at 6, 8-11)." ***People v. Laboriel*, 2022 N.Y. Slip Op. 03863, CtApp 6-14-22**

CIVIL PROCEDURE, SECURITIES.

ONLY THE ORIGINAL PLAINTIFF CAN TAKE ADVANTAGE OF CPLR 205(a) WHICH ALLOWS RE-COMMENCEMENT OF A LAWSUIT WITHIN SIX MONTHS OF A DISMISSAL WHICH WAS NOT ON THE MERITS.

The Court of Appeals, in a full-fledged opinion by Judge DiFiore, over a dissenting opinion, determined the plaintiff, HSBC, could not take advantage of the six-month extension for commencing an action after a dismissal which was not on the merits (CPLR 205(a)) because HSBC was not the original plaintiff: "When a timely-commenced action has been dismissed on certain non-merits grounds, CPLR 205 (a) allows 'the plaintiff' in that action 'or, if the plaintiff dies,' the 'executor or administrator' of the plaintiff's estate, six months to commence a new action based on the same transaction or occurrence. The new action will be deemed timely based on the commencement of the prior action. Here, after the dismissal of a prior action brought by two certificateholders ... —and after the statute of limitations expired—plaintiff HSBC Bank USA, National Association, in its capacity as trustee of a residential mortgage-backed securities (RMBS) trust, commenced this action against the sponsor, invoking CPLR 205 (a). Because HSBC was not 'the original plaintiff' in the prior dismissed action ... , we agree with the courts below that HSBC could not invoke CPLR 205 (a) to avoid dismissal of this time-barred claim ... .* * * HSBC is not 'the plaintiff' in the prior action and the benefit of CPLR 205 (a) is unavailable to save its untimely complaint. ... [T]his conclusion is consistent with the public policy underpinning the savings statute. CPLR 205 (a) is a remedial statute that ... is '"designed to insure to the diligent suitor"' an opportunity to have a claim heard on the merits ... when the suitor has 'initiated a suit in time' ... but the claim was dismissed on some technical, non-merits-based ground. While the savings statute undoubtedly has a 'broad and liberal purpose' ... to 'ameliorate the potentially harsh effect of the [s]tatute of [l]imitations' ... , '[t]he important consideration is that, by invoking judicial aid [in the first action], a litigant gives timely notice to [the] adversary of a present purpose to maintain [its] rights before the courts' ... . Where, as here, the litigant commencing the second action is not the original plaintiff, application of CPLR 205 (a) would protect the rights of a dilatory—not a diligent—suitor. By failing to bring the action within the statute of limitations, HSBC signaled that it had no intention to pursue its claims in court. CPLR 205 (a) does not apply

and HSBC's failure to commence an action within the statute of limitations is fatal." ***ACE Sec. Corp. v. DB Structured Prods., Inc.*, 2022 N.Y. Slip Op. 03927, CtApp 6-16-22**

CRIMINAL LAW, VEHICLE AND TRAFFIC LAW, APPEALS.

THE AMENDMENT TO THE SPEEDY TRIAL STATUTE WHICH EXTENDED THE STATUTE'S COVERAGE TO TRAFFIC INFRACTIONS JOINTLY CHARGED WITH CRIMES OR VIOLATIONS IS NOT TO BE APPLIED RETROACTIVELY.

The Court of Appeals, in a full-fledged opinion by Judge Rivera, determined the amendment to the speedy trial statute (CPL § 30.30(1)(e)) which made the statutory time-limits applicable to traffic infractions jointly charged with crimes or violations should not be applied retroactively. The amendment went into effect while defendant's appeal to the Appellate Term was pending. The Court of Appeals held that the defendant's motion to dismiss the accusatory instrument (which jointly charged misdemeanors and traffic infractions) on speedy-trial grounds should not have been granted by the Appellate Term: "Defendant was charged in 2014 in a single accusatory instrument with three misdemeanor counts and three traffic infractions under various sections of the Vehicle and Traffic Law. Approximately 17 months later, defendant moved to dismiss the accusatory instrument on speedy trial grounds pursuant to CPL 30.30. The court denied the motion, concluding that the statute did not apply to jointly charged traffic infractions and that the People did not exceed the 90-day statutory time limit applicable to the misdemeanor counts. Thereafter, a jury convicted defendant of two misdemeanors and two infractions and acquitted him of the remaining counts. ... The Appellate Term granted defendant's motion to dismiss the accusatory instrument, including the traffic infractions, concluding that the People exceeded the statutory time limit to state their readiness for trial on the misdemeanor counts and that the amendment applied retroactively ... . * * * ... [B]ecause the amended statute was not in effect when the criminal action against defendant was commenced, CPL 30.30 (1) (e) has no application to defendant's direct appeal from that judgment of conviction." ***People v. Galindo*, 2022 N.Y. Slip Op. 03928, Ct App 6-16-22**

CRIMINAL LAW, PUBLIC HEALTH LAW.

THE MISDEMEANOR COMPLAINT DID NOT ALLEGE SUFFICIENT FACTS TO DETERMINE WHETHER THE SYNTHETIC CANNABINOID DEFENDANT WAS CHARGED WITH POSSESSING WAS ONE OF THE SYNTHETIC CANNABINOIDS DESIGNATED AS CONTROLLED SUBSTANCES BY THE PUBLIC HEALTH LAW.

The Court of Appeals, in a full-fledged opinion by Judge Singas, reversing the Appellate Term and dismissing the accusatory instrument, determined the accusatory instrument did not allege that the synthetic cannabinoid defendant was charged possessing was a controlled substance pursuant to the Public Health Law: "Defendant ... was charged with criminal possession of a controlled substance in the seventh degree for allegedly possessing an illegal synthetic cannabinoid. The Public Health Law's controlled substance schedules criminalize possession of some, but not all, synthetic cannabinoids. Because the misdemeanor [complaint] to which defendant pleaded guilty failed to allege a sufficient factual basis to conclude that the substance defendant possessed was illegal, that count was facially deficient and should be dismissed. * * * The Public Health Law's statutory framework, which criminalizes only a subset of synthetic cannabinoids, renders it difficult for both the public and law enforcement alike to reasonably conclude whether a synthetic cannabinoid is a controlled substance without additional facts ... . Given this particular statutory framework, the misdemeanor count in this accusatory instrument contains a fundamental defect because it does not sufficiently allege that defendant committed a crime. ... The instrument's factual assertions gave no basis for concluding that the substance defendant possessed was a controlled substance; that is, an illegal synthetic cannabinoid as listed with precision in Public Health Law § 3306 (g), as opposed to one of the many synthetic cannabinoid substances that are not criminalized in the schedule." ***People v. Ron Hill*, 2022 N.Y. Slip Op. 03930, CtApp 6-16-22**

REAL PROPERTY TAX LAW, LANDLORD-TENANT, CONTRACT LAW.

THE TENANT (A NET LESSEE), WHICH WAS OBLIGATED BY THE TERMS OF THE LEASE TO PAY PROPERTY TAXES, CAN CHALLENGE A PROPERTY-TAX ASSESSMENT BY FILING A GRIEVANCE PURSUANT TO REAL PROPERTY TAX LAW (RPTL) 524(3); THE APPELLATE DIVISION HAD RULED ONLY THE PROPERTY OWNER COULD CHALLENGE THE ASSESSMENT.

The Court of Appeals, in a full-fledged opinion by Judge Wilson, reversing the Appellate Division, determined a tenant who is obligated to pay property taxes can properly file a grievance contesting a property-tax assessment: "RPTL 524 (3) presents an ambiguity. The clause "person whose property is assessed" is not defined in the RPTL, and it lends itself to more than one reasonable interpretation ... . * * * ... [W]e ... hold that a grievance complaint filed with the assessor or board of assessment review at the administrative level by a net lessee who is contractually obligated to pay real estate taxes on the subject property satisfies RPTL 524 (3)." ***Matter of DCH Auto v. Town of Mamaroneck*, 2022 N.Y. Slip Op. 03929, CtApp 6-16-22**

FIRST DEPARTMENT

CIVIL PROCEDURE.

THE COMPLAINT WAS NEVER PROPERLY AMENDED TO ADD DEFENDANT AS A PARTY PURSUANT TO CPLR 1003 OR CPLR 3025 REQUIRING DISMISSAL.

The First Department, reversing Supreme Court, determined the action against defendant (Adam) must be dismissed because the complaint was never properly amended to had Adam as a party: "This action must be dismissed as against Adam Max (Adam) because the complaint was

never properly amended to add him as a defendant. CPLR 1003 requires leave of court or a stipulation by all parties to add parties, at least where, as here, parties have previously been added. CPLR 3025(a)-(b) similarly requires leave of court or a stipulation by all parties to amend a complaint, at least when done so late in the case. Because this procedure was not followed, the amended complaint must be dismissed, at least as against the newly joined Adam ...". ***ALP, Inc. v. Moskowitz*, 2022 N.Y. Slip Op. 03962, First Dept 6-16-22**

FAMILY LAW, CONSTITUTIONAL LAW, CRIMINAL LAW, JUDGES.

APPELLANT, 16, WAS BEING INTERROGATED ABOUT A ROBBERY WHEN HE DRANK WATER FROM A DISPOSABLE CUP; THE INTERROGATING OFFICER SENT THE CUP FOR DNA ANALYSIS; THERE WAS NO INVESTIGATORY PURPOSE FOR THE DNA COLLECTION; APPELLANT'S MOTION TO EXPUNGE THE DNA EVIDENCE SHOULD HAVE BEEN GRANTED.

The First Department, in a full-fledged opinion by Justice Mendez, over a dissent, reversing Family Court, determined appellant's motion to expunge all DNA evidence collected from him in this juvenile delinquency proceeding should have been granted. When appellant,16, was being interrogated by the police about a robbery, he was given a disposable cup from which he drank water. The cup was then sent by the interrogating officer for DNA analysis. No DNA had been collected from the robbery scene, so there was no investigatory purpose for collection of appellant's DNA: "A juvenile delinquency adjudication, just as a youthful offender adjudication, is not a criminal conviction and a juvenile delinquent should not be denominated a criminal by reason of such adjudication ... . A juvenile delinquent is not and should not be afforded fewer adjudication protections than a youthful offender or an adult in the equivalent circumstances ... . Family Court, therefore, has the discretion to order the expungement of appellant's DNA and any other documents related to the testing of his DNA sample. * * * It has not been established that appellant purposefully divested himself of the cup or his DNA, thereby relinquishing his expectation of privacy. Nor has it been established that he waived, impliedly or explicitly, his constitutional rights to that expectation. * * * DNA evidence obtained after an arrest should be material and relevant and should have a link to the charges for which the individual is arrested. There must be an articulable basis to obtain this DNA evidence and a correlation to the investigation or prosecution of the charged offense. That articulable basis to obtain appellant's DNA is lacking here. * * * Under the totality of the circumstances, maintaining appellant's DNA profile in OCME's database in perpetuity is completely incompatible with the statutory goal and would result in a substantial injustice to the appellant ...". ***Matter of Francis O.*, 2022 N.Y. Slip Op. 03969, First Dept 6-16-22.**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

QUESTIONS OF FACT ABOUT WHETHER PLAINTIFF WAS INSTRUCTED TO WORK ONLY ON GROUND LEVEL AND NOT TO USE STILTS, AND WHETHER THE SOLE PROXIMATE CAUSE OF THE ACCIDENT WAS PLAINTIFF'S CONTINUED USE OF THE STILTS AFTER HE FELT THEM BECOME UNSTABLE, PRECLUDED SUMMARY JUDGMENT ON THE LABOR LAW § 240(1) CAUSE OF ACTION.

The First Department, reversing (modifying) Supreme Court, determined there were questions of fact which precluded summary judgment on plaintiff's Labor Law § 240(1) cause of action. Apparently, plaintiff fell while using stilts. There was a question of fact whether plaintiff's boss told him to work only on ground level without stilts. And there was a question of fact whether plaintiff was the sole proximate cause of his accident because he kept using the stilts when they became unstable and did not request another pair: "[G]iven the nature of the work plaintiff was performing at the time of his accident, the distance he fell presented a physically significant elevation within the meaning of Labor Law § 240(1) ... . While the distance may have been physically significant within the meaning of Labor Law § 240(1), evidence that plaintiff's boss ... specifically instructed him to only work on ground level and not to use stilts 'raises triable issues of fact as to whether plaintiff's duties were expressly limited to work that did not expose him to an elevation-related hazard within the purview of Labor Law § 240(1)' ... . Issues of fact also exist as to whether plaintiff was the sole proximate cause of the accident because when he felt the stilts become unstable his 'normal and logical response' should have been to request another pair rather than to keep working on them ... . While it is disputed whether plaintiff was using his own stilts or his employer provided them, and it is further unclear whether the stilts failed because a screw came out while they were in use or because they had been jerry-rigged with a wire threaded through a bolt hole, any use of defective stilts or failure to properly inspect them to discern any such defect was not the sole proximate cause of the accident where, as here, no proper safety devices were provided ...". ***Gonzalez v. DOLP 205 Props. II, LLC*, 2022 N.Y. Slip Op. 03868, First Dept 6-14-22**

LANDLORD-TENANT, CONTRACT LAW.

THE COVID EXECUTIVE ORDERS REQUIRING A SHUTDOWN AND REOPENING RESTRICTIONS DID NOT TERMINATE PLAINTIFF RETAIL STORE'S LEASE AS A MATTER OF LAW; THE DOCTRINES OF FRUSTRATION OF PURPOSE AND IMPOSSIBILITY DO NOT APPLY.

The First Department determined plaintiff retail store (GAP) was not entitled to a termination of its lease by operation of law based upon the New York governor's COVID shutdown order and subsequent reopening restrictions. Plaintiff relied on the doctrines of frustration of purpose and impossibility, neither of which was deemed applicable: "Plaintiffs admittedly were allowed to provide curbside and in-store pickup on June 8, 2020, and to reopen at half capacity, with masking and social distancing, on June 22, 2020. Moreover, they represent that they were allowed to reopen fully from June 2021, albeit with the mask requirements reimposed during the winter months. Contrary to plaintiffs' contention, 'frustration of purpose is not implicated by temporary governmental restrictions on in-person operations' ... . We have already rejected plaintiff Gap's contention that Executive Order No. 202.8 'rendered it objectively impossible to perform its operations as a retail store' where, as here, Gap filed its complaint after reopening was allowed (Gap, Inc. v 170 Broadway Retail Owner, LLC, 195 AD3d at 577). In addition, even if the reopening restrictions made plaintiffs' ability to provide a flagship store experience more difficult, the pandemic did not

render their performance impossible, as 'the leased premises were not destroyed' ...". ***Gap, Inc. v. 44-45 Broadway Leasing Co. LLC*, 2022 N.Y. Slip Op. 03980, First Dept 6-16-22**

SECOND DEPARTMENT

CIVIL PROCEDURE, NAVIGATION LAW, ENVIRONMENTAL LAW, EVIDENCE.

THE PLAINTIFF SHOULD NOT HAVE DESTROYED THE UNDERGROUND OIL TANKS WHICH WERE ALLEGED TO HAVE LEAKED, CONTAMINATING PLAINTIFF'S PROPERTY; HOWEVER, THE DEFENDANT OIL COMPANIES DID NOT DEMONSTRATE THE DESTRUCTION OF THE TANKS MADE IT IMPOSSIBLE TO PROVE A DEFENSE; THEREFORE, AN ADVERSE INFERENCE JURY INSTRUCTION, NOT THE STRIKING OF THE COMPLAINT, WAS THE APPROPRIATE SANCTION.

The Second Department, reversing (modifying) Supreme Court, determined that the plaintiff should have preserved the underground oil tanks which allegedly leaked and contaminated plaintiff's property, but that striking the complaint was not warranted under the doctrine of spoliation. Because the defendants did not demonstrate the destruction of the tanks made it impossible to mount a defense, an adverse inference instruction was the appropriate sanction: "The plaintiff commenced this action, inter alia, to recover damages for a violation of Navigation Law § 181, alleging that the defendants Chevron U.S.A., Inc., Getty Oil Company, Getty Refining and Marketing Company, and Getty Oil Company (Eastern Operations), Inc. (hereinafter collectively the defendants), discharged petroleum from underground storage tanks on the plaintiff's property. * * * ... [T]he defendants demonstrated that the plaintiff had an obligation to preserve the tanks at the time they were disposed of, which was before the defendants had an opportunity to inspect the tanks, that the tanks were destroyed with a culpable state of mind, and that the tanks were relevant to the litigation ... . However, the defendants failed to establish that their ability to prove a defense was fatally compromised by the destruction of the tanks, or that the destruction of the tanks was willful and contumacious ...". ***Dagro Assoc. II, LLC v. Chevron U.S.A., Inc.*, 2022 N.Y. Slip Op. 03884, Second Dept 6-15-22**

CRIMINAL LAW, VEHICLE AND TRAFFIC LAW, JUDGES.

IN ORDER TO DIRECT A DEFENDANT TO INSTALL AN IGNITION INTERLOCK DEVICE, THE DEFENDANT MUST BE SENTENCED TO A PERIOD OF PROBATION OR A CONDITIONAL DISCHARGE.

The Second Department, reversing County Court, determined defendant could not be directed to install an ignition interlock device in the absence of a sentence to probation or a conditional discharge. Matter remitted for resentencing: "Vehicle and Traffic Law § 1193(1)(b)(ii) provides that the court shall 'sentence such person convicted of . . . a violation of [Vehicle and Traffic Law § 1192(2), (2-a), or (3)] to a term of probation or conditional discharge, as a condition of which it shall order such person to install and maintain, in accordance with the provisions of [Vehicle and Traffic Law § 1198], an ignition interlock device in any motor vehicle owned or operated by such person.' In directing the defendant to install and maintain a functioning ignition interlock device, the County Court failed to also impose a sentence of probation or conditional discharge and therefore failed to comply with the requirements of the statute ...". ***People v. Dancy*, 2022 N.Y. Slip Op. 03904, Second Dept 6-15-22**

FAMILY LAW, JUDGES, EVIDENCE.

MOTHER FAILED TO APPEAR IN THE PROCEEDING TO DETERMINE FATHER'S PETITION FOR MODIFICATION OF CUSTODY; THE PETITION WAS GRANTED; BUT NO EVIDENCE WAS PRESENTED ON WHETHER MODIFICATION WAS IN THE BEST INTERESTS OF THE CHILDREN; MOTHER'S MOTION TO VACATE THE ORDER GRANTING FATHER'S PETITION SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Family Court, determined the judge should not have granted father's petition for a modification of custody upon mother's failure to appear. No evidence was taken on whether modification was in the best interests of the children. Mother's motion to vacate the order should have been granted: " 'A custody determination, whether made upon the default of a party or not, must always have a sound and substantial basis in the record' ... . Family Court ... granted the father's oral application and modified the order of custody and visitation ... , so as to grant the father relief which far exceeded that requested in his petition, without first receiving any testimony or other admissible evidence in the matter upon which it could determine whether modification was required to protect the best interests of the children. Under these circumstances, and in light of the policy favoring resolutions on the merits in child custody proceedings, the court improvidently exercised its discretion in denying the mother's motion to vacate the final order of custody and visitation ...". ***Matter of Hogan v. Smith*, 2022 N.Y. Slip Op. 03894, Second Dept 6-15-22**

FORECLOSURE, CIVIL PROCEDURE.

PLAINTIFF OFFERED NO EXPLANATION FOR THE SEVEN-YEAR DELAY BETWEEN THE ORDER OF REFERENCE AND THE MOTION FOR A JUDGMENT OF FORECLOSURE AND SALE; THE ACCRUAL OF INTEREST DURING THE DELAY SHOULD HAVE BEEN TOLLED.

The Second Department, reversing (modifying) Supreme Court, determined the defendant was prejudiced by the unexplained seven-year delay between the order of reference in 2009 and the motion for a judgment of foreclosure and sale in 2016, Therefore the accrual of interest

during the delay should have been tolled: "[A]pproximately seven years elapsed between the entry of the order of reference and the time the plaintiff moved for a judgment of foreclosure and sale. ... [Plaintiff] failed to offer any explanation for this delay or establish that the defendant caused this delay, as the record demonstrates that the defendant's motions and the stays due to the defendant's bankruptcy petitions did not occur during the period for which the defendant sought to toll the accrual of interest. Since the defendant was prejudiced by the plaintiff's unexplained delay of approximately seven years, during which time interest had been accruing, the interest on the loan should have been tolled from October 9, 2009, ... until September 21, 2016 ...". ***GMAC Mtge., LLC v. Yun*, 2022 N.Y. Slip Op. 03887, Second Dept 6-15-22**

FORECLOSURE, CIVIL PROCEDURE.

BECAUSE THE PRIOR FORECLOSURE ACTION WAS DISMISSED FOR LACK OF STANDING, THE PRIOR ACTION DID NOT ACCELERATE THE DEBT; THEREFORE, DEFENDANT DID NOT DEMONSTRATE THE INSTANT ACTION WAS TIME-BARRED.

The Second Department noted that the defendant in this foreclosure action did not demonstrate the foreclosure action was time barred. The initial foreclosure action was dismissed for lack of standing. Therefore, the debt was not accelerated by the prior action: "Since the prior action was dismissed for lack of standing, [defendant] failed to establish that the plaintiff had the authority to accelerate the debt through the complaint filed in the prior action ...". ***Wells Fargo Bank, N.A. v. Rutty*, 2022 N.Y. Slip Op. 03926, Second Dept 6-15-22**

FORECLOSURE, EVIDENCE.

ALTHOUGH THE LOAN SERVICER'S AFFIDAVIT MAY HAVE LAID A PROPER FOUNDATION FOR THE DOCUMENTS DEMONSTRATING DEFENDANTS' DEFAULT IN THIS FORECLOSURE ACTION, THE DOCUMENTS THEMSELVES WERE NOT PRODUCED, RENDERING THE AFFIDAVIT INADMISSIBLE HEARSAY.

The Second Department, reversing Supreme Court, determined the bank in this foreclosure action did not prove defendants' default. The affidavit from the loan servicer may have laid a proper foundation for the relevant documents, but the business records themselves were not attached: "Even assuming that the subject affidavit established a sufficient foundation for the records relied upon, 'it is the business record itself, not the foundational affidavit, that serves as proof of the matter asserted' ... . [T]he affiant's assertions regarding the defendants' default, without the business records upon which he relied in making those assertions, constituted inadmissible hearsay ...". ***U.S. Bank N.A. v. Kahn Prop. Owner, LLC*, 2022 N.Y. Slip Op. 03921, Second Dept 6-15-22**

FRAUD, REAL PROPERTY LAW, CONTRACT LAW.

PLAINTIFFS ALLEGED THEY WERE OVERWHELMED BY THE DOCUMENTS THEY SIGNED AND DID NOT REALIZE THE DOCUMENTS TRANSFERRED THEIR PROPERTY TO DEFENDANT; THOSE ALLEGATIONS DID NOT SUPPORT SUMMARY JUDGMENT IN PLAINTIFFS' FAVOR ON THEIR FRAUDULENT INDUCEMENT, UNJUST ENRICHMENT AND QUIET TITLE CAUSES OF ACTION.

The Second Department, reversing Supreme Court, determined plaintiffs' motion for summary judgment on their actions for fraudulent inducement, unjust enrichment and to quiet title should not have been granted. Plaintiffs alleged they were overwhelmed by the number of documents to sign and did not realize they documents transferred the property to the defendant: "[T]he plaintiffs ... each averred that the defendant misled them into believing that they were signing documents to arrange a short sale of the property when, in fact, they executed documents that transferred the property to the defendant. One of the documents ... was the deed to the property that the plaintiffs signed. The plaintiffs do not aver in their affidavits or in the complaint that they failed to read the documents they signed or that they were illiterate, blind, or did not read English, nor do they allege that they expressed any difficulty in understanding what they were signing ... . Instead, the plaintiffs contend that they were 'overwhelmed by the paperwork' but do not allege any facts that would suggest that they were prevented from reading the documents prior to signing them or that they were forced to sign ...". ***Holder v. Folsom PL Realty, Inc.*, 2022 N.Y. Slip Op. 03890, Second Dept 6-15-22**

REAL PROPERTY LAW, DEBTOR-CREDITOR, CONTRACT LAW.

THE STIPULATION ACKNOWLEDGING THE PRIOR DEBT DEMONSTRATED THAT THE DEED TRANSFERRING THE PROPERTY CREATED ONLY A SECURITY INTEREST AND DID NOT TRANSFER LEGAL TITLE.

The Second Department, reversing (modifying) Supreme Court, determined the transfer of property by deed did not transfer title, but rather was a security interest for a loan (a mortgage): "[T]he ... deed never conveyed legal title to the plaintiff, but merely created a security interest in the subject property. 'A deed conveying real property, which, by any other written instrument, appears to be intended only as a security in the nature of a mortgage, although an absolute conveyance in terms, must be considered a mortgage; and the person for whose benefit such deed is made, derives no advantage from the recording thereof, unless every writing, operating as a defeasance of the same, or explanatory of its being desired to have the effect only of a mortgage, or conditional deed, is also recorded therewith, and at the same time' (Real Property Law § 320). Here, the ... stipulation clearly recited the existence of a prior debt, authorized the decedent to continue occupying the property subject to certain terms and conditions, obligated her to maintain the property, and, most importantly, expressly authorized her to 'retain ownership of the subject [p]roperty' ... upon full repayment of the debt. Contrary to the plaintiff's contention, such characteristics bear all the hallmarks of a security interest—not an outright conveyance of legal title ...". ***RTT Holdings, LLC v. Nacht*, 2022 N.Y. Slip Op. 03916, Second Dept 6-15-22**

THIRD DEPARTMENT

CRIMINAL LAW, APPEALS.

THE PEOPLE CANNOT APPEAL THE GRANT OF DEFENDANT'S MOTION TO WITHDRAW HER PLEA, VACATE HER FELONY CONVICTION AND ALLOW HER TO PLEAD TO A MISDEMEANOR; DEFENDANT MADE THE MOTION AFTER SUCCESSFUL COMPLETION OF A DRUG-COURT TREATMENT PROGRAM.

The Third Department determined the People could not appeal County Court's granting defendant's motion to withdraw her plea, vacate her felony conviction and allow her to plead to a misdemeanor. Defendant made the motion after she completed a drug-court treatment program: " 'It is well settled that no appeal lies from a determination made in a criminal proceeding unless specifically provided for by statute' ... . 'CPL 450.20 delineates the instances in which the People may appeal as of right to an intermediate appellate court' ... . Here, judgment has not been entered. We find that County Court's order resolved to be a postsentence, prejudgment motion and no right to appeal lies under CPL 450.20 ... . We 'may not resort to interpretative contrivances to broaden the scope and application of [this] statute[]' ... , as the Legislature's policy is 'to limit appellate proliferation in criminal matters' ... . 'Absent a specific statute granting the People the right to appeal, . . . this Court is without jurisdiction to hear the appeal' ...". ***People v. Backus*, 2022 N.Y. Slip Op. 03949, Third Dept 6-16-22**

CRIMINAL LAW, EVIDENCE, APPEALS, VEHICLE AND TRAFFIC LAW.

THE INTOXICATED DEFENDANT'S DRIVING AS HE FLED FROM THE POLICE, WHILE RECKLESS, DID NOT DEMONSTRATE DEPRAVED INDIFFERENCE; DEPRAVED INDIFFERENCE MURDER CONVICTION NOT SUPPORTED BY THE WEIGHT OF THE EVIDENCE; CONVICTION REDUCED TO MANSLAUGHTER.

The Third Department, reducing defendant's conviction from depraved indifference murder to manslaughter, over a dissent, determined that the intoxicated defendant's driving when fleeing from the police did not evince a complete disregard for the safety of others. Therefore, the depraved indifference murder conviction was against the weight of the evidence: "[T]he credible evidence at trial made clear that defendant was extremely intoxicated, but his driving prior to police pursuit demonstrated that he was aware of his surroundings, obeyed multiple traffic signals and responded to the alerts of other drivers. Although he was traveling at an exceptionally high rate of speed during the pursuit, he did so 'on a roadway designed to accommodate greater rates of speed than residential roads, at an hour when lighter traffic conditions predominated' ... , and there is no evidence that he failed to abide by any traffic signals while he fled or that any vehicles were forced to pull over or move out of his way ... . According deference to the jury's credibility determinations, defendant did partially enter the lane of oncoming traffic for brief periods of time, but such 'episodic' conduct stands in stark contrast to cases where the defendant traveled in an oncoming lane 'as part of a deadly game' ... . Defendant in fact largely chose to evade police not by weaving in and out of the oncoming lane but instead by driving on a wide, paved shoulder, and, even if his 'attempted escape [was] carried out in a reckless manner,' he may 'simultaneously intend to flee police and avoid striking other cars' ... . 'No contact occurred between [defendant's] vehicle and any other vehicle before the accident' ... , and the limited evidence of his proximity to other vehicles prior to the collision falls short of establishing the sort of 'narrow[] miss[es]' the disregard of which could be some evidence of depraved indifference ...". ***People v. Williams*, 2022 N.Y. Slip Op. 03945, Third Dept 6-16-22**

EDUCATION-SCHOOL LAW, EMPLOYMENT LAW.

A GRADUATE OF AN ANTIGUA MEDICAL SCHOOL WHO HAD PASSED THE US MEDICAL LICENSING EXAMINATION WAS NOT ENTITLED TO LICENSURE AS A PHYSICIAN'S ASSISTANT IN NEW YORK.

The Third Department determined the appellant, who graduated from a medical school in Antigua (AUA) but was not licensed in New York, was not entitled to a license to practice in New York as a Physician's Assistant (PA): "In processing his application, SED [NYS Department of Education] requested documentation from petitioner that he had graduated from a PA education program and passed the Physician Assistant National Certifying Examination (hereinafter PANCE). Petitioner, who had not satisfied either requirement, objected to providing those credentials, asserting that his medical doctorate education and successful completion of all four steps of the United States Medical Licensing Examination (hereinafter USMLE) qualified him for a PA license. * * * The record supports a finding that, despite significant overlap in basic topics tested in the USMLE and the PANCE, the PANCE specifically tests PA-related practice topics. Noting that professional exam questions 'must be closely aligned with the specific knowledge and skills needed in the practice of the profession,' SED concluded that, '[w]hile many of the broad medical content categories included on the PANCE can be found on the USMLE, the USMLE does not present them within the context of the PA profession and specific PA job tasks' and, additionally, 'a portion of the PANCE covers topics related specifically to PA professional practice, which are not covered at all on the USMLE.' " ***Matter of Hammonds v. New York State Educ. Dept.*, 2022 N.Y. Slip Op. 03959, Third Dept 6-16-22**

FORECLOSURE, CIVIL PROCEDURE, EVIDENCE.

IN A FORECLOSURE ACTION, THE REFEREE'S FAILURE TO HOLD A HEARING DOES NOT REQUIRE REVERSAL OF THE JUDGMENT OF FORECLOSURE IF THE DEFENDANT HAD THE OPPORTUNITY TO CHALLENGE THE REFEREE'S REPORT BY SUBMITTING EVIDENCE DIRECTLY TO SUPREME COURT.

The Third Department noted that the referee's failure to hold a hearing in a foreclosure action does not require reversal of a judgment of foreclosure if the defendant had an opportunity the challenge the referee's report by submitting evidence directly to Supreme Court: " 'CPLR 4313 requires a referee to notify the parties of the date and place for a hearing. However, hearings may be performed either on paper or by the

taking of in-court evidence' ... . Generally, '[a]s long as a defendant is not prejudiced by the inability to submit evidence directly to the referee, a referee's failure to notify a defendant and hold a hearing is not, by itself, a basis to reverse a judgment of foreclosure and sale and remit the matter for a hearing and a new determination of amounts owed' ... . This is because 'the referee's findings and recommendations are advisory only; they have no binding effect and the court remains the ultimate arbiter of the dispute [as] CPLR 4403 expressly authorizes a court not only to reject the report but to make its own findings, to take or retake testimony or to order a new trial or hearing' ... . Here, defendants were provided with 'an opportunity to challenge the referee's report by submitting evidence directly to Supreme Court' upon plaintiff's motion to confirm the referee's report — an opportunity of which they did not avail themselves ...". ***Carrington Mtge. Servs., LLC v. Fiore*, 2022 N.Y. Slip Op. 03951, Third Dept 6-16-22**

PERSONAL INJURY, NEGLIGENCE, MEDICAL MALPRACTICE, NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS.

DEFENDANT REHABILITATION AND RECOVERY SERVICES DID NOT DEMONSTRATE IT DID NOT HAVE A DUTY TO PREVENT A PERSON UNDER ITS SUPERVISION AND CARE FROM HARMING MEMBERS OF THE GENERAL PUBLIC; PLAINTIFF WAS KIDNAPPED AND RAPED BY A PERSON WITH A VIOLENT PAST WHO WAS UNDER DEFENDANT'S CARE AND SUPERVISION.

The Third Department determined the defendant Rehabilitation Support Services' (RSS's) motion for summary judgment in this negligence, negligent supervision, medical malpractice, negligent infliction of emotional distress action was properly denied. Plaintiff was kidnapped and raped by Jose Marlett who was under the care and supervision provided by RSS, a rehabilitation and recovery program for persons who have mental illness and substance abuse issues: "Marlett had been an outpatient client at RSS for approximately one year and had been a resident in its apartment program for approximately one to three months prior to his receipt of personal recovery services. Marlett's application for RSS services included his diagnoses of bipolar disorder and schizoaffective disorder, and a history of delusions, hallucinations, paranoia, suicidal and homicidal ideations and incarceration. RSS identified Marlett's risks as suicide and violence, and noted that he had a history of physical altercations, threatening and attempting to harm others and was a danger to himself and others. In order to receive RSS services, Marlett was required to forego other psychiatric and mental health treatment and RSS essentially became the exclusive provider of Marlett's medication management, clinical counseling, therapy and psychiatric assessments. * * *... [W]e find that defendants failed to prove a lack of duty to take reasonable steps to prevent Marlett from harming members of the general public. * * * [Re: medical malpractice] Defendants failed to submit a competent expert medical opinion, instead submitting a speculative and conclusory affidavit by its nonphysician director that failed to provide any factual basis showing that they complied with professional standards ... .* * * 'A cause of action for negligent infliction of emotional distress generally requires the plaintiff to show a breach of a duty owed to him or her which unreasonably endangered his or her physical safety, or caused him or her to fear for his or her own safety' ... . 'Unlike intentional infliction of emotional distress, ... the Court of Appeals has not stated that extreme and outrageous conduct is an essential element of a cause of action to recover damages for negligent infliction of emotional distress' ...". ***Doe v. Langer*, 2022 N.Y. Slip Op. 03957, Third Dept 6-15-22**

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