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Editor: Bruce Freeman

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COURT OF APPEALS

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

ONLY AN EXPRESS ACKNOWLEDGEMENT OF THE MORTGAGE DEBT PURSUANT TO GENERAL OBLIGATIONS LAW § 17-105 COULD REVIVE OR TOLL THE STATUTE OF LIMITATIONS IN THIS FORECLOSURE ACTION; THE REFERENCES TO THE MORTGAGE DEBT IN FINANCIAL STATEMENTS AND TAX RETURNS PROVIDED TO THE MORTGAGOR BY THE MORTGAGEE WERE NOT ENOUGH.

The Court of Appeals, in a full-fledged opinion by Judge Troutman, over an extensive two-judge dissent, determined that the statute of limitations on the underlying foreclosure action was not tolled based upon acknowledgments of the mortgage debt in financial statements and tax returns. Rather, pursuant to General Obligations Law § 17-105, only and express promise to pay the debt would revive an otherwise expired statute of limitations: "The primary question presented by this appeal is which section of article 17 of the General Obligations Law governs the tolling or revival of the statute of limitations period in an action pursuant to Real Property Actions and Proceedings Law (RPAPL) § 1501 (4). RPAPL § 1501 (4) allows a party to cancel a mortgage where the limitations period for commencing a foreclosure action has expired. We hold that General Obligations Law section 17-105, not section 17-101, governs whether the statute of limitations has been tolled or revived in such an action. * * * Under General Obligations Law § 17-105 (1), the Partnership's (mortgagee's) actions in this case could only toll or revive the statute of limitations for the Council (mortgagor) to bring a foreclosure action if the Partnership made an 'express' 'promise to pay the mortgage debt.' Accordingly, the Appellate Division correctly concluded that the Partnership's delivery of its financial statements and tax returns to Council did not meet the requirements of section 17-105 (1) because they were not express promises to pay the mortgage debt (189 AD3d at 28)." ***Batavia Townhouses, Ltd. v. Council of Churches Hous. Dev. Fund Co., Inc.*, 2022 N.Y. Slip Op. 03361, CtApp 5-24-22**

CRIMINAL LAW, EVIDENCE.

EXCLUDING EVIDENCE WHICH CONTRADICTED AN IMPORTANT PROSECUTION-WITNESS'S ACCOUNT OF HIS ACTIONS RIGHT UP UNTIL THE TIME OF THE SHOOTING, AND THREE 911 CALLS WHICH QUALIFIED AS PRESENT SENSE IMPRESSIONS DEPRIVED DEFENDANT OF HIS RIGHT TO PUT ON A DEFENSE.

The Court of Appeals, in a full-fledged opinion by Judge Singas, reversing the Appellate Division in this murder case, determined evidentiary rulings excluding evidence which impeached an important witness and 911 calls admissible as present sense impressions deprived defendant of his right to present a defense. R.M. was a crucial prosecution witness. R.M. claimed to have been with his girlfriend, R.J. right up until the time of the shooting. But R.J. would have testified she was not with R.M. that day: "R.J.'s proffered testimony was probative of R.M.'s ability to observe and recall details of the shooting. At trial, R.M. testified that he was with R.J. until 'seconds' before he witnessed the shooting, and that he was at the scene to walk R.J. home. Upon the People's questioning, R.M. explained in detail his relationship with R.J., resulting in many pages of testimony as to where he met up with her that evening, the amount of time they spent together, and when they parted ways. This testimony, introduced and relied upon by the People, made R.J. an integral part of R.M.'s account of why he was in a position to witness the shooting, and placed her with him mere seconds before it occurred. Since the People's own theory of the case placed R.J. on the scene the instant before the shooting, her testimony cannot be characterized as collateral. ... The court also erred in excluding the three 911 calls. The calls were admissible as present sense impressions. The present sense impression exception to the hearsay rule applies to statements that are '(1) made by a person perceiving the event as it is unfolding or immediately afterward' and '(2) corroborated by independent evidence establishing the reliability of the contents of the statement' ... . '[D]escriptions of events made by a person who is perceiving the event as it is unfolding' are 'deemed reliable . . . because the contemporaneity of the communication minimizes the opportunity for calculated misstatement as well as the risk of inaccuracy from faulty memory' ...". ***People v. Deverow*, 2022 N.Y. Slip Op. 03362, CtApp 5-24-22**

CRIMINAL LAW, FRAUD.

THE ACCUSATORY INSTRUMENT CHARGING THE DEFENDANT WITH "FRAUDULENT ACCOSTING" WAS FACIALLY SUFFICIENT; IT WAS ENOUGH TO ALLEGE THAT DEFENDANT SPOKE FIRST TO PERSONS PASSING AROUND HIM ON THE SIDEWALK ASKING FOR DONATIONS FOR THE HOMELESS; THERE WAS NO NEED TO ALLEGE DEFENDANT WAS AGGRESSIVE OR PERSISTENT OR TARGETED AN INDIVIDUAL.

The Court of Appeals, in a full-fledged opinion by Judge Garcia, over an extensive three-judge dissent, determined the accusatory instrument charging defendant with "fraudulent accosting" was facially sufficient. Defendant set up a couple of milk crates as a table in the sidewalk and asked people for donations to the homeless as they walked around the table. Defendant unsuccessfully argued the term "accost" required an

element of aggressiveness or persistence directed toward an individual: "A person is guilty of fraudulent accosting when he or she 'accosts a person in a public space with intent to defraud him of money or other property by means of a trick, swindle or confidence game' (Penal Law § 165.30 [1]). * * * During the relevant period in 1952, when the legislature created the offense of fraudulent accosting ... contemporary dictionaries defined 'accost' to mean either to 'approach,' to 'speak to first,' or to 'address' ... .No dictionary cited from the relevant time period limits the term to an aggressive or persistent physical approach ...". ***People v. Mitchell*, 2022 N.Y. Slip Op. 03360, Ct App 5-24-22**

CRIMINAL LAW, IMMIGRATION LAW, CONSTITUTIONAL LAW.

DEFENDANT DID NOT DEMONSTRATE CONVICTION OF THE B MISDEMEANORS WITH WHICH HE WAS CHARGED WOULD RESULT IN DEPORTATION; THEREFORE, DEFENDANT WAS NOT ENTITLED TO A JURY TRIAL.

The Court of Appeals, over an extensive two-judge dissent, determined that the defendant did not demonstrate the misdemeanors with which he was charged triggered a right to a jury trial because conviction would result in deportation: "Defendant was originally charged with public lewdness, two counts of forcible touching, and two counts of sexual abuse in the third degree after police officers observed him masturbating on a subway platform and pressing himself against two women on a subway car. The People thereafter filed a prosecutor's information reducing the two class A misdemeanor charges of forcible touching to attempted forcible touching, so that the top charges against defendant were Class B misdemeanors obviating his right to a jury trial under state statute ... . After a bench trial, defendant was convicted of public lewdness and acquitted of all other charges. ... While the Appellate Term first improperly conducted the deportability analysis based only on the crime of conviction, that court went on to correctly analyze defendant's deportability based on all the charges he faced (see Suazo, 32 NY3d at 508). It remained, however, 'the defendant's burden to overcome the presumption that the crime charged is petty and establish a Sixth Amendment right to a jury trial' (id. at 507). ... [D]efendant's conclusory allegation that he was deportable if convicted 'on any of the charged B misdemeanors,' supported by a bare citation to 8 USC § 1227 (a) (2) (A) (ii), under which an alien is deportable if 'convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct,' was insufficient to establish his right to a jury trial." ***People v. Garcia*, 2022 N.Y. Slip Op. 03359, CtApp 5-24-22**

FIRST DEPARTMENT

CIVIL PROCEDURE, CRIMINAL LAW, PRIVILEGE, CONSTITUTIONAL LAW.

SUPREME COURT PROPERLY REFUSED TO QUASH SUBPOENAS ISSUED BY THE OFFICE OF THE ATTORNEY GENERAL (OAG) TO THE TRUMP ORGANIZATION IN THE OAG'S FRAUD INVESTIGATION; THE FACT THAT THERE IS A RELATED CRIMINAL INVESTIGATION DOES NOT PRECLUDE CIVIL DISCOVERY.

The First Department, in this civil investigation by the Office of Attorney General (OAG) into whether the respondent Trump Organization committed fraud in their financial practices and disclosure, determined Supreme Court properly refused to quash the OAG's subpoenas seeking depositions and documents. The fact that there is also a criminal investigation does not preclude civil discovery: "The existence of a criminal investigation does not preclude civil discovery of related facts, at which a party may exercise the privilege against self-incrimination ... . Individuals have no constitutional or statutory right to be called to testify before a grand jury under circumstances that would give them immunity from prosecution for any matter about which they testify; although subjects of a grand jury proceeding have a statutory right to appear and testify, this right is conditioned upon the witness waiving the right to immunity and giving up the privilege against self-incrimination (CPL 190.50[5] ...). The political campaign and other public statements made by OAG about appellants do not support the claim that OAG initiated, or is using, the subpoenas in this civil investigation to obtain testimony solely for use in a criminal proceeding or in a manner that would otherwise improperly undermine appellants' privilege against self-incrimination ... . Neither does the record suggest that, in the absence of a civil investigation, OAG would be likely to grant immunity to appellants — the primary subjects of the criminal investigation — to secure their grand jury testimony. Thus, the subpoenas did not frustrate any right to testify with immunity." ***Matter of People of the State of New York v. Trump Org., Inc*., 2022 N.Y. Slip Op. 03456, First Dept 5-26-22**

CIVIL PROCEDURE, PERSONAL INJURY.

PLAINTIFF WAS STRUCK BY A NEW JERSEY TRANSIT CORP (NJT) BUS IN NEW YORK; NJT IS AN ARM OF THE STATE OF NEW JERSEY AND THE SOVEREIGN IMMUNITY DOCTRINE APPLIES; HOWEVER, UNDER NEW JERSEY LAW PLAINTIFF CANNOT SUE IN NEW JERSEY BECAUSE THE CAUSE OF ACTION DID NOT ARISE THERE; APPLYING THE FORUM NON CONVENIENS DOCTRINE AS AN ANALYTICAL FRAMEWORK, PLAINTIFF'S NEW YORK LAWSUIT WAS ALLOWED TO GO FORWARD.

The First Department, in a full-fledged opinion by Justice Oing, over an extensive two-justice dissenting opinion, determined the doctrine of sovereign immunity did not require the dismissal of plaintiff's suit against the New Jersey Transit Corp. (NJT) in this bus-pedestrian accident case. Plaintiff was struck by the NJT bus in New York. The plaintiff, under New Jersey law, could not sue in New Jersey because the cause of action did not arise in New Jersey. The First Department held that the forum non coveniens criteria provided an appropriate analytical framework: "We have previously held that NJT is an arm of the State of New Jersey and that, as such, it is entitled to invoke the doctrine of sovereign immunity ... . * * * ... Should we dismiss a personal injury action on the ground of sovereign immunity when the action cannot be commenced in the sovereign's own courts because the injury arose outside of the sovereign's borders? We resolve this issue by analogizing it to the legal framework for the forum non conveniens doctrine. Among the factors to consider in determining whether to dismiss an action under

this doctrine, with no single factor controlling, are the burden on New York courts, the potential hardship to the defendant, the availability of an alternate forum in which the plaintiff may bring suit, the residency of the parties, the forum in which the cause of action arose, and the extent to which the plaintiff's interests may otherwise be properly served by pursing the claim in New York ...". ***Colt v. New Jersey Tr. Corp.*, 2022 N.Y. Slip Op. 03343, First Dept 5-24-22**

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA).

THE SEX OFFENDER LEVEL ADJUDICATION IN NEW YORK COUNTY REQUIRED THE DISMISSAL OF THE SORA PROCEEDING IN BRONX COUNTY WHICH WAS BASED ON THE SAME CONDUCT.9

The First Department, reversing Supreme Court, determined the Bronx County SORA proceeding should have been dismissed because New York County had entered a sex offender level adjudication based on the defendant's conduct in both counties: "[T]he proceeding in Bronx County should have been dismissed on defendant's motion where Supreme Court, New York County had entered a sex offender level adjudication based on defendant's criminal conduct in both counties, which constituted the "current offenses" under the risk assessment instrument ...". ***People v. Cisneros*, 2022 N.Y. Slip Op. 03454, First Dept 5-26-22**

FAMILY LAW.

A REJECTED PURCHASE OFFER WAS NOT ADMISSIBLE AT TRIAL TO PROVE THE FAIR MARKET VALUE OF THE MARITAL RESIDENCE.

The First Department, reversing (modifying) Supreme Court in this divorce case, determined a purchase offer was not admissible to show the fair market value of the marital residence: "Order ... which ... granted plaintiff's motion to set a minimum net value for marital real property located in Southampton, New York, at $20 million for equitable distribution purposes, unanimously reversed ... . With respect to the parties' Southampton marital property, we find that the court erred in imposing a minimum value based on a purchase offer of $20 million rejected by defendant, as evidence of an offer to purchase is generally inadmissible at trial to show fair market value ...". ***Lauren S. v. Alexander S.*, 2022 N.Y. Slip Op. 03462, First Dept 5-26-22**

FAMILY LAW.

PLAINTIFF HUSBAND WAS ENTITLED TO 15% OF THE APPRECIATION OF THE WIFE'S PREMARITAL ART-GALLERY BUSINESS IN THIS DIVORCE PROCEEDING REQUIRING THE DISTRIBUTION OF A NUMBER OF SUBSTANTIAL ASSETS.

The First Department, in a full-fledged opinion by Justice Gesmer, modified some of some of Supreme Court's distribution of marital assets in this divorce action. The opinion is too detailed, and addressed too many substantial assets to be fairly summarized here. With respect to the valuation of the husband's portion of the appreciation of the wife's art gallery, AWI, founded before the marriage, the First Department wrote: "[P]laintiff met his burden to show that the appreciation in value of defendant's pre-marital business, AWI, during the marriage constituted marital property subject to distribution ... . An award to plaintiff of significantly less than half of the marital portion of AWI is justified by the following facts: defendant started her business years before she met plaintiff; plaintiff was not involved with defendant's acquisition or sale of art; plaintiff's conduct was at times problematic and even a hindrance to defendant's business success; plaintiff's contributions to the marriage diminished over time; and defendant will bear substantial tax consequences when she sells art to pay plaintiff a distributive award (see Domestic Relations Law § 236[B][5][d][7], [8], [11]; see also Cotton, 170 AD3d at 596). * * * Considering all of the circumstances, we find that plaintiff's share of AWI's appreciation during the marriage should be 15%, or $3,486,821 ...". ***Culman v. Boesky*, 2022 N.Y. Slip Op. 03440, First Dept 5-26-22**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

PLAINTIFF FELL DOWN AN OPEN, UNGUARDED MANHOLE AS HE ATTEMPTED TO STEP OVER IT; PLAINTIFF'S ACTION WAS NOT THE SOLE PROXIMATE CAUSE OF THE FALL BECAUSE THERE WAS NO PROTECTIVE RAILING AROUND THE MANHOLE.

The First Department determined plaintiff was entitled to summary judgment on his Labor Law § 240(1) cause of action. Plaintiff fell into an unguarded, open manhole. Defendants argued plaintiff's attempting to step over the manhole was the sole proximate cause of the fall. But the fact that the manhole was unguarded (another cause of the fall) defeated the sole proximate cause argument: "Plaintiff established prima facie his entitlement to summary judgment on his Labor Law § 240(1) claim, it being undisputed that he was injured when he fell down an open and unguarded manhole that he had been attempting to cover, as instructed, while working on a construction site ... . In opposition, defendants, the operator of the subway facility and its general contractor on the project, failed to raise an issue of fact. Their argument that plaintiff was the sole proximate cause of the accident because he allegedly stepped over the open manhole — at which point he was accidentally bumped by another individual and fell into it — is unavailing, given the lack of protective railing around the manhole or any other safety devices ...". ***Piccone v. Metropolitan Tr. Auth.*, 2022 N.Y. Slip Op. 03458, First Dept 5-26-22**

LABOR LAW-CONSTRUCTION LAW, WORKERS' COMPENSATION, CIVIL PROCEDURE, PERSONAL INJURY.

PLAINTIFF'S SUMMARY JUDGMENT MOTION ON HIS LABOR LAW § 241(6) CAUSE OF ACTION SHOULD HAVE BEEN DENIED BECAUSE IT WAS BASED ON EVIDENCE FIRST PRESENTED IN REPLY; PLAINTIFF WAS COLLATERALLY ESTOPPED FROM CLAIMING TRAUMATIC BRAIN INJURY AND COGNITIVE DISORDER BY THE RULING IN HIS WORKERS' COMPENSATION CASE.

The First Department, reversing (modifying) Supreme Court in this construction accident case, determined plaintiff's motion for summary judgment on his Labor Law § 241(6) cause of action should not have been granted because it was based upon information raised for the first time in reply. The First Department noted that Supreme Court properly found that the ruling in plaintiff's Workers' Compensation case collaterally estopped plaintiff from claiming traumatic brain injury and cognitive disorder in this Labor Law action: "Supreme Court should have denied plaintiff's motion for summary judgment with respect to Labor Law § 241(6), which was based on an expert affidavit submitted in reply. The affidavit, which constituted the first time plaintiff asserted violations of 12 NYCRR 23-2.2(a) and (b), was not addressed to the arguments made in defendants' opposition, and instead sought to assert new grounds for the motion ... . Plaintiff is collaterally estopped from litigating his allegation that he sustained traumatic brain injury and cognitive disorder, since the allegation was previously raised and conclusively decided against him in a Workers' Compensation Board proceeding, where plaintiff had a full and fair opportunity to litigate the issue ...". ***Douglas v. Tishman Constr. Corp.*, 2022 N.Y. Slip Op. 03344, First Dept 5-24-22**

PERSONAL INJURY.

RARE SLIP AND FALL WON BY THE DEFENDANT AT SUMMARY JUDGMENT BY DEMONSTRATING A LACK OF CONSTRUCTIVE NOTICE OF THE PRESENCE OF THE BOX WHICH ALLEGEDLY CAUSED PLAINTIFF'S FALL.

The First Department, reversing Supreme Court, determined defendant demonstrated it did not have constructive notice of the presence of a cardboard box over which plaintiff allegedly tripped and fell---a rare slip and fall case where a lack of constructive notice was successfully demonstrated at the summary judgment stage: "Defendant sustained its initial burden of showing that it lacked notice of the presence of the cardboard box near the walkway of its building before the accident and that it observed a reasonable cleaning routine ... .. Plaintiff testified that she did not see the box when she left work at 4:00 p.m. on the day before her fall, and defendant's caretaker stated that it was not there when he left work at 4:30 p.m. on the same day. The caretaker also testified that he cleaned the area twice a day, first thing in the morning and last thing at night. Thus, the box could have been deposited near the walkway a few minutes before plaintiff's accident ... . Defendant is not required to patrol the area 24 hours a day ... , and plaintiff failed to show that the cleaning schedule described by the caretaker was 'manifestly unreasonable' ... Plaintiff's argument that the caretaker admitted that tenants regularly left garbage near the walkway and that it was a recurring problem is unavailing. The caretaker's testimony shows that defendant was aware of the general problem, not that it was aware of the specific presence of the cardboard box at issue, and that it addressed the problem by having the caretaker clean the area twice a day ...". ***Rodriguez v. New York City Hous. Auth.*, 2022 N.Y. Slip Op. 03461, First Dept 5-26-22**

SECOND DEPARTMENT

CRIMINAL LAW.

PRESUMABLY THE ROBBERY AND GRAND LARCENY CHARGES STEMMED FROM THE THEFT OF THE TAXI CAB (THE FACTS ARE NOT EXPLAINED); THE ACQUITTAL OF UNAUTHORIZED USE OF A MOTOR VEHICLE RENDERED THE ROBBERY AND GRAND LARCENY CONVICTIONS REPUGNANT.

The Second Department vacated defendant's robbery second and grand larceny fourth convictions as repugnant to the acquittal of unauthorized use of a vehicle third: "The defendant was charged with various crimes arising from an incident during which the defendant, a codefendant, and a third perpetrator who was never apprehended, robbed the complainant, a cab driver, at knife point. The jury convicted the defendant of robbery in the first degree (Penal Law § 160.15[3]), robbery in the second degree (id. § 160.10[3]), grand larceny in the fourth degree (id. § 155.30[8]), and menacing in the second degree (id. § 120.14[1]), and acquitted him of unauthorized use of a vehicle in the third degree (id. § 165.05[1]). 'A verdict is repugnant when, evaluated only in terms of the elements of the crimes as charged to the jury—and without regard to the evidence as to what actually occurred—acquittal on one count necessarily negates an . . . element of a crime of which the defendant was convicted' ... .. Here, as the crimes were charged to the jury, the acquittal on the charge of unauthorized use of a vehicle in the third degree rendered repugnant the convictions of robbery in the second degree and grand larceny in the fourth degree ...". ***People v. Rodriguez*, 2022 N.Y. Slip Op. 03403, Second Dept 5-25-22**

CRIMINAL LAW, EVIDENCE.

THE BURGLARY COUNT WAS JURISDICTIONALLY DEFECTIVE BECAUSE IT ALLEGED DEFENDANT WAS ARMED WITH A "KNIFE" WHICH IS NOT NECESSARILY A "DEADLY WEAPON;" THE ATTEMPT TO AMEND THE COUNT WAS NOT AUTHORIZED; THE SANDOVAL RULING WAS (HARMLESS) ERROR.

The Second Department dismissed a jurisdictionally defective count of the indictment, held the People's attempt to amend that count was not authorized, held that certain Sandoval evidence should not have been admitted, but deemed the Sandoval error harmless and upheld defendant's convictions on the other counts: "[C]ount 1 of the indictment alleged that 'in the course of effecting entry into said dwelling,'

the defendant 'was armed with a dangerous weapon, to wit: a knife.; Inasmuch as the offense of burglary in the first degree requires that the defendant be armed with a 'deadly weapon,' a term which is specifically defined in Penal Law § 10.00(12) and which definition includes only certain specified knives, count 1 of the indictment was jurisdictionally defective because it failed to effectively charge the defendant with the commission of a crime (see id. §§ 10.00, 140.30[1]). ... CPL 200.70(2)(a) prohibits any amendment of an indictment when the amendment is needed to cure '[a] failure thereof to charge or state an offense' ... . Although 'questioning concerning other crimes is not automatically precluded simply because the crimes to be inquired about are similar to the crimes charged' ... , 'cross-examination with respect to crimes or conduct similar to that of which the defendant is presently charged may be highly prejudicial, in view of the risk, despite the most clear and forceful limiting instructions to the contrary, that the evidence will be taken as some proof of the commission of the crime charged rather than be reserved solely to the issue of credibility' ...". ***People v. Bloome*, 2022 N.Y. Slip Op. 03398, Second Dept 5-25-22**

CRIMINAL LAW, EVIDENCE.

THE STOP OF THE TAXI IN WHICH DEFENDANT WAS A PASSENGER WAS NOT SUPPORTED BY PROBABLE CAUSE TO BELIEVE DEFENDANT HAD COMMITTED A CRIME; BECAUSE DEFENDANT PLED GUILTY TO ALL OFFENSES BASED UPON A PROMISE OF CONCURRENT SENTENCES, ALL CONVICTIONS REVERSED.

The Second Department, reversing defendant's convictions by guilty pleas, determined the police officer who stopped the taxi in which defendant was a passenger did not have probable cause to believe defendant had committed a crime. Because defendant pled guilty to several offenses based upon a promise of concurrent sentences, all convictions were reversed: "Upon our evaluation of the totality of the circumstances in this case, we conclude that, at the time the police officer stopped the taxi in which the defendant was a passenger, the officer lacked reasonable suspicion to believe that the defendant had committed a crime. The stop was based merely on the report of an identified citizen, made 40 minutes after the fight had occurred, that the neighbor with whom she was talking to on the phone was presently observing the defendant getting into a black taxi on the block where the fight occurred. There was no evidence that the informant or the neighbor saw the fight, and the neighbor, who testified at the hearing, did not state that she knew that the defendant was involved in the fight. Indeed, the police officer who stopped the taxi admitted that, when he made the stop, he did not know whether the defendant was a victim, a perpetrator, or involved 'in anything.' Under these circumstances, the gun recovered by that officer upon the vehicle stop should have been suppressed ... . The defendant correctly contends that the judgments relating to the drug cases also must be reversed inasmuch as his pleas of guilty in those cases were premised on the promise of sentences that would run concurrently with the sentence imposed on the weapon possession charge ...". ***People v. Gomez*, 2022 N.Y. Slip Op. 03399, Second Dept 5-25-22**

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

PLAINTIFF BANK DID NOT SEND THE 90-DAY FORECLOSURE NOTICE IN A SEPARATE ENVELOPE AS REQUIRED BY RPAPL 1304; THEREFORE THE BANK'S MOTION FOR SUMMARY JUDGMENT IN THIS FORECLOSURE ACTION SHOULD NOT HAVE BEEN GRANTED AND DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined plaintiff's motion for summary judgment in this foreclosure action should not have been granted because the plaintiff did not sent the RPAPL 1304 notice in a separate envelope. Defendants' motion for summary judgment should have been granted for the same reason: "[T]he copies of the 90-day notice submitted by the plaintiff in support of its motion included additional notices not contemplated by RPAPL 1304(2). The plaintiff acknowledged that the envelopes it sent to the defendants, which contained the requisite RPAPL 1304 notice, also included a separate notice pertaining to the rights of a debtor in military service and a debtor in bankruptcy, among others. This Court recently determined, in Bank of America, N.A. v Kessler (202 AD3d 10), that RPAPL 1304(2) requires that the requisite notice under its provision be mailed in an envelope separate from any other notice. Since the plaintiff failed to demonstrate that the RPAPL 1304 notice was 'served in an envelope that was separate from any other mailing or notice' ... . [A]s the defendants established their prima facie entitlement to judgment as a matter of law dismissing the complaint insofar as asserted against them 'by showing that the plaintiff failed to comply with RPAPL 1304 when it sent additional material in the same envelopes as the requisite notice under RPAPL 1304,' and as the plaintiff failed to raise a triable issue of fact in opposition, the Supreme Court should have granted the defendants' cross motion for summary judgment dismissing the complaint insofar as asserted against them ...". ***Wells Fargo Bank N.A. v Bedell*, 2022 N.Y. Slip Op. 03413, Second Dept 5-25-22**

PERSONAL INJURY, EVIDENCE.

PLAINTIFF IN THIS SLIP AND FALL CASE DID NOT SEE THE CONDITION THAT CAUSED HIM TO FALL NEAR A SINK IN DEFENDANTS' BATHROOM, BUT HIS PANTS WERE WET AFTER THE FALL; DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON THE GROUND THAT PLAINTIFF COULD NOT IDENTIFY THE CAUSE OF HIS FALL SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined defendants did not demonstrate plaintiff could not identify the cause of his slip and fall. Plaintiff fell near a sink in defendants' bathroom. Although he did not see the condition which caused him to fall, his pants were wet after the fall: "[T]he defendants failed to establish, prima facie, that the plaintiff did not know what had caused him to fall. The plaintiff testified at his deposition that he did not see the condition that caused him to fall prior to the accident. However, he testified that, after he fell, his pants became wet. 'Contrary to the defendants' contention, this testimony does not establish that the cause of the plaintiff's fall cannot

be identified without engaging in speculation' ...". ***Redendo v Central Ave. Chrysler Jeep, Inc.*, 2022 N.Y. Slip Op. 03411, Second Dept 5-25-22**

PERSONAL INJURY, VEHICLE AND TRAFFIC LAW.

DEFENDANT ATTEMPTED A LEFT TURN IN VIOLATION OF VEHICLE AND TRAFFIC LAW 1141; PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT IN THIS INTERSECTION TRAFFIC-ACCIDENT CASE SHOULD HAVE BEEN GRANTED.

The Second Department, reversing (modifying) Supreme Court, determined plaintiff's motion for summary judgment in this intersection traffic accident case should have been granted. Plaintiff was a passenger in a taxi cab when the cab collided with the Katz-defendants' vehicle which was making a left turn in front of the cab: " 'Pursuant to Vehicle and Traffic Law § 1141, '[t]he operator of a vehicle intending to turn left within an intersection must yield the right-of-way to any oncoming vehicle that is within the intersection or so close to it as to constitute an immediate hazard' ... . 'A violation of this statute constitutes negligence per se' ... . Here, the evidence submitted by the plaintiff in support of her motion, which included the deposition testimony of Gabriel Katz as to the happening of the accident, established, prima facie, that Gabriel Katz was negligent in making a left turn when it was not safe for him to do so in violation of Vehicle and Traffic Law §§ 1141 and 1163, and that his negligence was a proximate cause of the collision ... . While there are some discrepancies between the deposition testimony of the plaintiff and Gabriel Katz as to the relative position of the vehicles at the time of the impact, even under Gabriel Katz's account, he was 'negligent in attempting to make a left turn when the turn could not be made with reasonable safety' ... . In opposition, the Katz defendants failed to raise a triable issue of fact. Contrary to their contention, the evidence did not support the possible applicability of the emergency doctrine under the circumstances ...". ***Lindo v Katz*, 2022 N.Y. Slip Op. 03379, Second Dept 5-25-22**

THIRD DEPARTMENT

UNEMPLOYMENT INSURANCE.

GROUNDANYWHERE DRIVERS, LIKE UBER DRIVERS, ARE EMPLOYEES, NOT INDEPENDENT CONTRACTORS, ENTITLED TO UNEMPLOYMENT INSURANCE BENEFITS.

The Third Department determined drivers who work for Groundanywhere, like the drivers who work for Uber, are employees not independent contractors, entitled to unemployment insurance benefits: "Shortly after the [Unemployment Insurance Appeal] Board's decision here, we held that substantial evidence supported the Board's determination that drivers for Uber Technologies, Inc in upstate New York were employees of Uber ... . We find that the relationship between Groundanywhere and its drivers is not materially distinguishable from the employment relationship between Uber and its drivers. The record reflects that Groundanywhere uses a smartphone app that is essentially similar to the one used by Uber and exercises a comparable level of control over its drivers, providing substantial evidence to support the Board's finding that claimant and other similarly situated drivers were employees entitled to unemployment insurance benefits and for whom Groundanywhere was liable for additional contributions ... . The indicia of control include use of an app owned by Groundanywhere, which reviews and screens drivers' various credentials and inspects their vehicles for compliance with its standards, provides drivers with a GPS navigation system, tests their knowledge of geography and ability to use GPS, and handles both driver and client complaints and problems that arise during the transport. Groundanywhere coordinates and oversees all aspects of the ride through its app, tracking the drivers and the ride on GPS and running a help desk for the drivers and controlling the drivers' access to its clients. Groundanywhere sets and calculates the fares, keeps a set percent as a fee, charges the client a processing fee, adds a gratuity which, if disputed by the client, results in the driver getting a higher percent of the fare in lieu of a gratuity, collects the charges from the client and pays a percent of the base charge to the drivers, who are paid even if the client fails to show up for the trip or disputes the charges. Although drivers use and maintain their own vehicles and pay all vehicle expenses, they display a Groundanywhere logo and are reimbursed for tolls and parking costs. Clients are able to rate drivers, who are selected based upon their location, ratings and history of accepting offered fares." ***Matter of Hossain (Groundanywhere LLC--Commissioner of Labor)*, 2022 N.Y. Slip Op. 03424, Third Dept 5-26-22**

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