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FIRST DEPARTMENT

CIVIL PROCEDURE, INSURANCE LAW, EVIDENCE, NEGLIGENCE.

PASSING REFERENCES TO DEFENDANTS' INSURANCE COVERAGE IN THE TRAFFIC ACCIDENT CASE DID NOT WARRANT SETTING ASIDE PLAINTIFF'S VERDICT.

The First Department, reversing Supreme Court, determined the passing references to defendants' insurance coverage in this traffic accident case did not warrant setting aside plaintiff's verdict: "Plaintiff sustained injuries ... , when a livery cab in which he was a passenger collided with an SUV driven by defendant Williams. During direct examination by plaintiff's counsel and cross-examination by Williams's counsel, no objection was raised when Williams testified that she spoke to her 'insurance company' immediately after the accident. On cross-examination, when Williams stated that she 'might have asked [codefendant Agyemang] for his insurance information,' Agyemang's counsel moved to strike. The court did not respond, and counsel made no further objection. On redirect examination, when plaintiff's counsel asked Williams what she had done with videos of the accident, Williams replied, 'I thought I sent everything to Geico.' ... Evidence that a defendant carries liability insurance is generally inadmissible due to its potential for prejudice, as a jury's awareness of insurance coverage might make it easier for it to render an adverse verdict against the defendant ... . A passing reference to insurance, however, does not necessarily warrant reversal ... . Two of the insurance references at issue were elicited by defense counsel, from his own client, and counsel lodged no objection to the reference elicited by plaintiff's counsel. The record indicates no intention on plaintiff's part to prompt such information ...". ***Gbadehan v. Williams***, 2022 N.Y. Slip Op. 04703, First Dept 7-26-22

CONTRACT LAW, CIVIL PROCEDURE, REAL PROPERTY LAW.

RENOVATION WORK ON DEFENDANTS' TOWNHOUSE RENDERED PLAINTIFFS' TOWNHOUSE, WHICH WAS NEXT DOOR, UNINHABITABLE; A LICENSE AGREEMENT WHICH GRANTED DEFENDANTS ACCESS TO PLAINTIFFS' TOWNHOUSE INCLUDED A LIQUIDATED DAMAGES PROVISION WHICH WAS VALID AND ENFORCEABLE; PLAINTIFFS' ACTION SOUGHT SOME EQUITABLE RELIEF BUT PRIMARILY SOUGHT MONEY DAMAGES; THEREFORE, PLAINTIFFS' DEMAND FOR A JURY TRIAL SHOULD NOT HAVE BEEN STRUCK.

The First Department determined, among many other issues not summarized here, the liquidated damages provision in the license agreement was enforceable and plaintiffs' demand for a jury trial should not have been struck. Defendants purchased an historic townhouse next to plaintiffs' townhouse. In the course of the defendants' major renovations, plaintiffs' townhouse was damaged. High levels of lead dust infiltrated plaintiffs' townhouse forcing plaintiffs to move out. They never returned. The plaintiffs and defendants entered a license agreement giving defendants access to plaintiffs' townhouse for 18 months. The liquidated damages provision entitled plaintiffs to $1000 a day for every day a temporary certificate of occupancy (TCO) was not obtained after the expiration of the license. The TCO was not obtained for 318 days entitling plaintiffs to $318,000. Although some equitable relief was requested, the suit primarily sought money damages. Therefore plaintiffs' demand for a jury trial should not have been struck: " 'Liquidated damages constitute the compensation which, the parties have agreed, should be paid in order to satisfy any loss or injury flowing from a breach of their contract' ... . These provisions 'have value in those situations where it would be difficult, if not actually impossible, to calculate the amount of actual damage' ... . Liquidated damages will be sustained if, at the time of the contract, 'the amount liquidated bears a reasonable proportion to the probable loss and the amount of actual loss is incapable or difficult of precise estimation' ... . * * * The court erred in granting [defendants'] motion to strike plaintiffs' jury demand. The equitable relief sought by plaintiffs was incidental to their demand for money damages ... ; to the extent plaintiffs seek to compel [defendants] to perform certain remediation work, monetary damages will afford full and complete relief ... . Further, the claim for 'abatement of and damages for a nuisance' is triable by a jury (CPLR 4101[2])." ***Seymour v. Hovnanian*, 2022 N.Y. Slip Op. 04705, First Dept 7-26-22**

EMPLOYMENT LAW, CONTRACT LAW, CIVIL PROCEDURE, MUNICIPAL LAW.

ACTIONS PURSUANT TO NEW YORK CITY'S "FREELANCE ISN'T FREE ACT" (FIFA) WHICH ALLEGED DEFENDANTS FAILED TO PAY PLAINTIFFS-FREELANCERS SURVIVED MOTIONS TO DISMISS.

The First Department, in a full-fledged opinion by Justice Moulton, in matters of first impression, interpreted New York City's Freelance Isn't Free Act (FIFA) in the context of motions to dismiss. The opinion is detailed and fact-specific and cannot be fairly summarized here. The plaintiffs alleged they were hired by defendants as freelancers and defendants' failure pay was the basis of the lawsuits pursuant to FIFA. Most of the actions survived the motions to dismiss: "Enacted November 16, 2016 and effective May 15, 2017, FIFA is the first act of its kind in this country to provide legal protections for freelance workers against nonpayment for work performed ... . FIFA defines a 'freelance worker'

as 'any natural person or any organization composed of no more than one natural person, whether or not incorporated or employing a trade name, that is hired or retained as an independent contractor by a hiring party to provide services in exchange for compensation' ... . A central issue in this case is whether plaintiffs fit within this definition." ***Chen v. Romona Keveza Collection LLC*, 2022 N.Y. Slip Op. 04702, First Dept 7-26-22**

SECOND DEPARTMENT

ADMINISTRATIVE LAW, MUNICIPAL LAW, CIVIL PROCEDURE, ZONING, LAND USE.

THE TOWN BOARD OF APPEALS' FAILURE TO ISSUE A DECISION ON PETITIONER'S APPLICATION FOR A SPECIAL EXCEPTION PERMIT AND AN AREA VARIANCE WITHIN THE 62 DAYS PRESCRIBED BY THE TOWN LAW WAS NOT A DENIAL BY DEFAULT; THEREFORE, SUPREME COURT DID NOT HAVE SUBJECT MATTER JURISDICTION AND THE MATTER WAS NOT RIPE FOR REVIEW; SUPREME COURT SHOULD NOT HAVE ANNULLED THE "DEFAULT DENIAL" AND ORDERED THE TOWN TO ISSUE THE PERMIT AND VARIANCE.

The Second Department, reversing Supreme Court, determined: (1) the town Board of Appeals' failure to issue a decision on petitioner's application for a special exception permit and an area variance within the 62 days prescribed by the Town Law was not a denial of the application by default; (2) Supreme Court should not have treated the failure to issue a timely decision as a denial by default. which it then annulled, ordering the town to issue the permit and the variance; and (3) Supreme Court should not have denied the Board's motion to vacate Supreme Court's order and judgment (ordering the issuance of the permit and variance): "Pursuant to Town Law § 267-a(8), the Board must render a decision within 62 days after the close of the hearing. The Town Law also contains a default provision which provides that if the Board, in exercising its appellate jurisdiction, fails to render a decision within 62 days of the hearing, the application is deemed denied (see id. § 267-a[13][b]). ... A proceeding to annul a determination by an administrative body 'should not be concluded in the petitioner's favor merely upon the basis of a failure to answer the petition on the return date thereof, unless it appears that such failure to plead was intentional and that the administrative body has no intention to have the controversy determined on the merits' ... . Here, there was no evidence demonstrating a deliberate default by the Board ... . Contrary to the petitioner's contention, its application for a special exception permit was not denied by default. The Board's failure to comply with the time period prescribed by Town Law § 267-a(8) only results in a denial by default when the Board exercises its appellate jurisdiction (see id. § 267-a[13][b]). The Board exercises its original jurisdiction in special exception cases ... , and thus, there was no denial by default of the petitioner's application for a special exception permit ... . With no final determination having been rendered on the application for a special exception permit, that issue was not ripe for judicial review, and the Supreme Court lacked subject matter jurisdiction over that issue ... . We note that ripeness 'is a matter pertaining to subject matter jurisdiction which may be raised at any time, including sua sponte' ...". ***Matter of 999 Hempstead Turnpike, LLC v. Board of Appeals of the Town of Hempstead*, 2022 N.Y. Slip Op. 04721, Second Dept 7-27-22**

CRIMINAL LAW.

BURGLARY SECOND IS AN INCLUSORY CONCURRENT COUNT OF BURGLARY SECOND AS A SEXUALLY MOTIVATED FELONY.

The Second Department vacated the burglary second conviction as an inclusory concurrent count of burglary second as a sexually motivated felony: "The People correctly concede that the defendant's conviction of burglary in the second degree and the sentence imposed thereon, must be vacated, and that count of the indictment dismissed, as it is an inclusory concurrent count of burglary in the second degree as a sexually motivated felony ...". ***People v. Hay*, 2022 N.Y. Slip Op. 04737, Second Dept 7-27-22**

CRIMINAL LAW.

FAILURE TO INFORM THE DEFENDANT OF THE SPECIFIC OR MAXIMUM PERIOD OF POSTRELEASE SUPERVISION RENDERED THE GUILTY PLEA INVOLUNTARY.

The Second Department, vacating defendant's guilty plea, determined the plea was not voluntary because defendant was not informed of the specific or maximum period of postrelease supervision to which defendant would be sentenced: " 'To meet due process requirements, a defendant must be aware of the postrelease supervision component of that sentence in order to knowingly, voluntarily and intelligently choose among alternative courses of action [and,] [w]ithout such procedures, vacatur of the plea is required' ... . 'It is not enough for a court to generally inform a defendant that a term of postrelease supervision will be imposed as a part of the sentence' ... . 'Rather, for a plea of guilty to be knowing, intelligent, and voluntary, the court must inform the defendant of either the specific period of postrelease supervision that will be imposed or, at the least, the maximum potential duration of postrelease supervision that may be imposed' ...". ***People v. Wolfe*, 2022 N.Y. Slip Op. 04745, Second Dept 7-27-22**

CRIMINAL LAW, CONSTITUTIONAL LAW.

THE PEOPLE WERE CHARGED WITH THE DELAY IN RESPONDING TO DEFENDANT'S OMNIBUS MOTION ENTITLING DEFENDANT TO RELEASE ON BAIL PURSUANT TO THE SPEEDY TRIAL STATUTE.

The Second Department determined defendant's habeas corpus petition seeking release on bail based upon the speedy-trial statute should have been sustained: "When making a motion pursuant to CPL 30.30(2)(a) to be released on bail or his or her own recognizance, a defendant

who has been committed to the custody of the sheriff has the initial burden of demonstrating, by sworn allegations of fact, that there has been an inexcusable delay beyond the time set forth in the statute ... . Once a defendant has alleged that more than the statutorily prescribed time has elapsed without a declaration of readiness by the People, the People bear the burden of establishing sufficient excludable delay ... . The burden is on the People 'to ensure, in the first instance, that the record of the proceedings . . . is sufficiently clear to enable the court considering the . . . CPL 30.30 motion to make an informed decision as to whether the People should be charged' with any delay ... . [T]he petitioner adequately raised before the Supreme Court the issue of whether the People should be charged with their delay in responding to the defendant's omnibus motion. ... [B]ecause the People did not seek and receive an extension of time to respond to the omnibus motion, or provide any explanation for the delayed response, they are 'chargeable with the time between the court-imposed deadline to respond to the omnibus motion and the date on which the People actually filed a response' ... . Here, the 13 days chargeable to the People due to their unexplained delay in responding to the omnibus motion, when coupled with the 86 days between the date of arraignment and the date upon which the People filed their certificate of compliance pursuant to CPL 245.50, totals more than 90 days ...". ***People v. Molina*, 2022 N.Y. Slip Op. 04778, Second Dept 7-29-22**

CRIMINAL LAW, EVIDENCE.

THE EVIDENCE THE COMPLAINANT SUFFERED "SERIOUS PHYSICAL INJURY" FROM MULTIPLE STAB WOUNDS WAS LEGALLY INSUFFICIENT; CONVICTIONS REDUCED TO ATTEMPTED GANG ASSAULT, ASSAULT AND ROBBERY.

The Second Department reduced defendant's convictions to attempted gang assault first, attempted assault first, attempted robbery first and attempted assault second because the proof the complainant suffered "serious physical injury" was lacking: "[W]e find that the evidence was not legally sufficient to establish the defendant's guilt on these counts. Although the complainant was stabbed multiple times, there was no evidence of serious and protracted disfigurement, protracted impairment of health, or protracted loss or impairment of the function of any bodily organ ... . However, the evidence at trial established beyond a reasonable doubt that the defendant acted with the intent to inflict serious physical injury and came 'dangerously near' to committing the completed crimes ...". ***People v. Mayancela*, 2022 N.Y. Slip Op. 04741, Second Dept 7-27-22**

CRIMINAL LAW, EVIDENCE, APPEALS.

ALTHOUGH DEFENDANT WAS SPEEDING AT THE TIME HE LOST CONTROL OF THE CAR, WENT DOWN AN EMBANKMENT AND STRUCK A TREE, KILLING A PASSENGER, THE EVIDENCE DID NOT DEMONSTRATE "DANGEROUS SPEEDING;" THE EVIDENCE WAS NOT LEGALLY SUFFICIENT TO SUPPORT THE CRIMINALLY NEGLIGENT HOMICIDE AND RECKLESS DRIVING CHARGES; ALTHOUGH THE ISSUE WAS NOT PRESERVED, THE APPEAL WAS CONSIDERED IN THE INTEREST OF JUSTICE.

The Second Department, reversing defendant's criminally negligent homicide conviction in this traffic accident case, determined the evidence was not legally sufficient. Although the issue was not preserved, it was considered in the interest of justice. Defendant attempted to exit a highway at 74 miles per hour where the ramp speed limit was 45 miles per hour and the highway speed limit was 65 miles per hour. Defendant lost control, went down an embankment, and hit a tree. A passenger was killed: "[T]he evidence was legally insufficient to establish 'the kind of seriously condemnatory behavior' ... in addition to speeding that is necessary to 'transform 'speeding' into 'dangerous speeding' ... . The People's evidence established only that the defendant attempted to navigate the curved profile of the exit ramp at an excessive speed, and was late in attempting corrective measures by manually steering the wheel. While this conduct reflected poor judgment in the defendant's operation of his vehicle given the roadway environment ... , it failed to establish that the defendant engaged in 'some additional affirmative act aside from driving faster than the posted speed limit,' as required to support a finding of criminal negligence or recklessness ... . Accordingly, we vacate the convictions of criminally negligent homicide and reckless driving ...". ***People v. Cardona*, 2022 N.Y. Slip Op. 04733, Second Dept 7-27-22**

FAMILY LAW.

GRANDMOTHER'S PETITION TO MODIFY THE VISITATION ARRANGEMENT SHOULD HAVE BEEN GRANTED; MOTHER'S VIOLATION OF THE ORDER ALLOWING VISITATION BY GRANDMOTHER CONSTITUTED A CHANGE IN CIRCUMSTANCES.

The Second Department, reversing Family Court, determined the mother's refusal to allow visitation with the child by the paternal grandmother, in violation of a court order, constituted and change in circumstances warranting the granting of grandmother's petition to modify the visitation arrangement: "[T]he paternal grandmother filed a petition to modify the order ... , so as to establish a visitation schedule ... , as well as a petition alleging that the mother was in violation of the order ... . Following a hearing ... the Family Court denied the modification petition and the violation petition ... . [C]ontrary to the Family Court's determination, the mother's refusal to consent to any visitation between the child and the paternal grandmother pursuant to the March 19, 2018 order constituted a sufficient change in circumstances for the court to determine whether modification of the existing visitation arrangement was in the child's best interests ... . Moreover, the court's determination that visitation with the paternal grandmother was not in the best interests of the child lacked a sound and substantial basis in the record. Although there is some history of animosity between the parties, '[a]nimosity alone is insufficient to deny visitation' ... , and there is no indication in the record that the poor relationship between the parties had any adverse effect on the child such that the resumption of visitation would not be in the child's best interests ... . We therefore remit the matter to the Family Court ... to establish an appropriate visitation schedule ...". **Matter of Dubose v. Jackson, 2022 N.Y. Slip Op. 04723, Second Dept 7-27-22**

FORECLOSURE, CIVIL PROCEDURE, DEBTOR-CREDITOR.

THE BANK DID NOT PRESENT EVIDENCE IN ADMISSIBLE FORM TO SUPPORT ITS CLAIM THAT DEFENDANT ACKNOWLEDGED THE MORTGAGE DEBT, STARTING THE STATUTE OF LIMITATIONS ANEW; DEFENDANT'S MOTION TO DISMISS THE FORECLOSURE ACTION AS UNTIMELY SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined the foreclosure action was commenced after the statute of limitations had run. The bank claimed the defendant acknowledged the debt in a loan modification agreement, starting the statute of limitations anew. But the bank did not present evidence of the agreement in admissible form: "The plaintiff argues that the defendant entered into a loan modification agreement, which constituted an acknowledgment of the mortgage debt under General Obligations Law § 17-101 sufficient to reset the statute of limitations to commence a future foreclosure action on the mortgage. 'General Obligations Law § 17-101 effectively revives a time-barred claim when the debtor has signed a writing which validly acknowledges the debt' ... . 'To constitute a valid acknowledgment, a 'writing must be signed and recognize an existing debt and must contain nothing inconsistent with an intention on the part of the debtor to pay it' ... . 'In order to demonstrate that the statute of limitations has been renewed by a partial payment, it must be shown that the payment was accompanied by circumstances amounting to an absolute and unqualified acknowledgment by the debtor of more being due, from which a promise may be inferred to pay the remainder' ...". ***Bayview Loan Servicing, LLC v. Paniagua*, 2022 N.Y. Slip Op. 04708, Second Dept 7-27-22**

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

THE BANK IN THIS FORECLOSURE ACTION DID NOT DEMONSTRATE COMPLIANCE WITH THE MAILING REQUIREMENTS OF RPAPL 1304.

The Second Department, reversing Supreme Court, determined plaintiff bank in this foreclosure action did not demonstrate compliance with the notice requirements of RPAPL 1304: "[P]laintiff failed to submit an affidavit of service or proof of mailing by the United States Postal Service evidencing that it properly served the defendants. Instead, the plaintiff relied on the affidavit of Carlos Bernal, an authorized representative of the plaintiff's loan servicing company. Although Bernal averred to have personal knowledge of the company's record keeping systems, he did not purport to be familiar with the office procedure for mailing notices once they have been generated, and, therefore, he did not establish proof of a standard office practice and procedure designed to ensure that items are properly addressed and mailed ... . Further, the unsigned certified mail receipts, bearing no postmark from the United States Postal Service, do not prove that the notices were actually mailed ... , and, in any event, the plaintiff produced no evidence that the notices were mailed by regular first-class mail ... . Since the plaintiff failed to provide proof of the actual mailing, or proof of a standard office mailing procedure designed to ensure that items are properly addressed and mailed, sworn to by someone with personal knowledge of the procedure, the plaintiff failed to establish its strict compliance with RPAPL 1304...". ***Pennymac Corp. v. Levy*, 2022 N.Y. Slip Op. 04732, Second Dept 7-27-22**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

PLAINTIFF FELL THROUGH PLANKING WHICH DID NOT ADEQUATELY PROTECT A SHAFT OPENING; THE FACT THAT PLAINTIFF'S FOREMAN INSTRUCTED PLAINTIFF NOT TO ENTER THE SHAFT SPEAKS TO COMPARATIVE NEGLIGENCE WHICH IS NOT A BAR TO SUMMARY JUDGMENT ON A LABOR LAW § 240(1) CAUSE OF ACTION.

The Second Department, reversing (modifying) Supreme Court, determined plaintiff's motion for summary judgment on his Labor Law § 240(1) cause of action should have been granted. The fact that plaintiff's employer instructed him not to enter the shaft where plaintiff fell to the floor below spoke to comparative negligence which is not a bar to summary judgment on a Labor Law § 240(1) cause of action: "The injured plaintiff allegedly was injured when he stepped onto aluminum planks that lay across the unobstructed shaft opening on the sixteenth floor. The planks gave way beneath him and caused him to fall to a platform across the shaft on the fifteenth floor. * * * ... [Deposition testimony] established that the shaft opening was not properly protected so as to prevent workplace accidents ... . [Defendants] failed to establish, as a matter of law, that the injured plaintiff's failure to heed the instructions of the ... foreman ... not to enter the shaft constituted the sole proximate cause of his injuries because 'an instruction by an employer or owner to avoid using unsafe equipment or engaging in unsafe practices is not a 'safety device' in the sense that plaintiff's failure to comply with the instruction is equivalent to refusing to use available, safe and appropriate equipment' ... . 'A worker's injury in an area of the work site where the worker was not supposed to be amounts to comparative negligence, which is not a defense to a Labor Law § 240(1) claim' ...". ***Zong Wang Yang v. City of New York*, 2022 N.Y. Slip Op. 04761, Second Dept 7-27-22**

PERSONAL INJURY, BATTERY.

DEFENDANT HOMEOWNER DID NOT HAVE THE OPPORTUNITY TO CONTROL THE CONDUCT OF HER ESTRANGED HUSBAND WHO ALLEGEDLY ASSAULTED PLAINTIFF IN DEFENDANT'S HOME; THE SOLE PROXIMATE CAUSE OF PLAINTIFF'S INJURIES WAS THE ESTRANGED HUSBAND'S ACT; DEFENDANT HOMEOWNER'S MOTION TO DISMISS SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined defendant homeowner's (Portelli's) motion to dismiss the negligence action against her based upon an assault upon plaintiff by Portelli's estranged husband at Portelli's home should have been dismissed: "The plaintiff commenced this action to recover damages for personal injuries she allegedly sustained as the result of an assault by the defendant Robert DiGesu that took place at a house owned by his estranged wife, the defendant Susan M. Portelli. * * * Homeowners have a duty to act in a

reasonable manner to prevent harm to those on their property ... . This includes 'the duty to control the conduct of third persons on their premises when the homeowners have the opportunity to control such persons and are reasonably aware of the need for such control' ... . Portelli did not have the opportunity to control DiGesu's conduct ... , nor would it have been reasonable for her to have known of the need to control DiGesu's conduct so as to protect the plaintiff from DiGesu's unexpected assault ... . Portelli's alleged acts or omissions were not a proximate cause of the plaintiff's injuries but 'merely furnished the conditions for the event's occurrence' ... . The sole proximate cause of the plaintiff's injuries was DiGesu's assault ...". ***Maruca v. DiGesu*, 2022 N.Y. Slip Op. 04719, Second Dept 7-27-22**

PERSONAL INJURY, CIVIL PROCEDURE.

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT IN THIS PEDESTRIAN-VEHICLE ACCIDENT CASE SHOULD HAVE BEEN GRANTED: ALTHOUGH A PLAINTIFF'S COMPARATIVE NEGLIGENCE IS NOT A BAR TO SUMMARY JUDGMENT, THE ISSUE CAN BE DECIDED AT THE SUMMARY JUDGMENT STAGE WHERE PLAINTIFF MOVES FOR SUMMARY JUDGMENT DISMISSING DEFENDANT'S COMPARATIVE-NEGLIGENCE AFFIRMATIVE DEFENSE; PLAINTIFF'S MOTION WAS NOT PREMATURE.

The Second Department, reversing Supreme Court, determined: (1) plaintiff pedestrian was entitled to summary judgment in this pedestrian-vehicle accident case; and (2) plaintiff's motion for summary judgment was not premature, The court noted that, although plaintiff's comparative negligence is not a bar to summary judgment, the issue can still be considered at the summary judgment stage when plaintiff moves for summary judgment dismissing defendant's comparative-negligence affirmative defense: "The plaintiff submitted evidence demonstrating that she was approximately halfway across the street in a crosswalk with the pedestrian signal in her favor when the defendant, who was making a right turn, failed to yield the right-of-way and struck her, and that the defendant did not see the plaintiff in the crosswalk while making his turn ... . The plaintiff also established, prima facie, that she was not at fault in the happening of the accident by demonstrating that, exercising due care, she had confirmed that she had the pedestrian signal in her favor and checked in both directions for approaching vehicles before entering the crosswalk ... . In opposition, the defendant failed to raise a triable issue of fact as to his negligence or whether the plaintiff was comparatively at fault in the happening of the accident ... . [P]laintiff's motion was not premature, as the defendant failed to offer an evidentiary basis to suggest that additional discovery may lead to relevant evidence, or that facts essential to opposing the motion were exclusively within the knowledge and control of the plaintiff ... .The 'mere hope or speculation' that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is an insufficient basis for denying the plaintiff's motion ...". ***Xiuying Cui v. Hussain*, 2022 N.Y. Slip Op. 04759, Second Dept 7-27-22**

THIRD DEPARTMENT

CRIMINAL LAW.

IN A PARTIAL CONCURRENCE/PARTIAL DISSENT TWO JUSTICES WOULD HAVE REDUCED DEFENDANT'S SENTENCE TO TIME SERVED IN THE INTEREST OF JUSTICE BECAUSE OF THE EVIDENCE THAT DEFENDANT'S LIFE-EXPECTANCY AFTER REMOVAL OF A BRAIN TUMOR IS TWO TO THREE YEARS, THE DEFENDANT'S AGE AT THE TIME OF THE OFFENSE (18), AND THE DEFENDANT'S ABSENCE FROM THE ROOM WHERE THE VICTIM WAS STABBED.

The Third Department, over a two-justice dissent, determined County Court properly declined to adjudicate defendant a youthful offender and properly denied defendant's motion to vacate his conviction on the ground he was suffering from the effects of an undiagnosed brain tumor at the time he pled guilty. The dissenters would have reduced defendant's sentence because defendant was 18 at the time of the robbery/murder, the shotgun he possessed was unloaded, and he was not in the room when the victim was stabbed. The neurosurgeon testified that, although defendant's tumor had been removed and he was in remission, the cancer could return and the five-year survival rate is 36%: **From the partial concurrence and partial dissent:** "With what was known at the time of the plea and sentencing, we agree with the majority that Supreme Court acted within its discretion by imposing the negotiated sentence, without according defendant youthful offender status. On the record presented, we further agree that County Court did not abuse its discretion in denying defendant's CPL 440.10 (1) (e) motion. That said, under the unusual circumstances of this case, we would reduce the sentence in the interest of justice. Without minimizing defendant's actual role in the criminal incident, two facts warrant particular attention. The shotgun that defendant utilized was unloaded and defendant was not in the victim's room when the stabbing took place. Defendant, who was 18 years old at the time of the incident, underwent a significant medical procedure in January 2014 to remove a malignant tumor from his brain. Defendant's neurosurgeon explained that the tumor was a 'very aggressive form of brain cancer' and averred that the '[u]sual median survival with such a tumor is customarily 2.3 years,' with two- and five-year survival rates of 64% and 36% respectively. As of June 2020, the neurosurgeon indicated that defendant was in remission, but noted that the tumor could recur. He further observed that defendant 'is fortunate that he has not succumbed to his tumor.' Given this prognosis, and considering that defendant has been incarcerated since 2013, we would exercise our interest of justice jurisdiction to modify the sentence from 12 years to time served ...". ***People v. McGill*, 2022 N.Y. Slip Op. 04762, Third Dept 7-28-22**

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT, APPEALS.

PETITIONER SEX OFFENDER'S APPEAL FROM THE DENIAL OF HIS HABEAS CORPUS PETITION WAS MOOT BECAUSE APPROPRIATE HOUSING HAD BEEN FOUND WHILE THE APPEAL WAS PENDING; THE THIRD DEPARTMENT CONSIDERED THE APPEAL UNDER THE EXCEPTION-TO-THE-MOOTNESS-DOCTRINE AND REITERATED THAT WHEN A LEVEL THREE SEX OFFENDER HAS COMPLETED HIS MAXIMUM PRISON TIME AND SUITABLE HOUSING IS NOT AVAILABLE, HE MUST BE TRANSFERRED TO A RESIDENTIAL TREATMENT FACILITY (RTF).

The Third Department, finding the appeal from the denial of petitioner's habeas corpus petitioner moot, over a dissent, considered the appeal as an exception to the mootness doctrine. The Third Department held that when a level three sex offender has completed his maximum prison time, and Sexual Assault Reform Act (SARA) compliant housing cannot be found, the inmate must be placed in a residential treatment facility (RTF) to await housing. Here, while the appeal was pending, proper housing was found for petitioner. The dissent argued there was nothing novel about the case and invoking the exception-to-the-mootness-doctrine to hear the appeal was not necessary: "This Court has previously held, and we reiterate, that 'when a risk level three sex offender reaches his or her maximum expiration date, [the Department of Corrections and Community Supervision] must release the individual to either an approved residence or to an [appropriate] RTF' ...". ***People ex rel. Jones v. Collado*, 2022 N.Y. Slip Op. 04768, Second Dept 7-28-22**

DISCIPLINARY HEARINGS (INMATES).

PETITIONER WAS PROVIDED WITH THE WRONG MISBEHAVIOR REPORT THEREBY PREVENTING HIM FROM FORMULATING A DEFENSE AND QUESTIONS FOR THE WITNESSES; THE MISBEHAVIOR DETERMINATION WAS ANNULLED AND A NEW HEARING ORDERED.

The Third Department, annulling the misbehavior determination and ordering a new hearing, determined the petitioner was not provided with the relevant "unusual behavior" report: "We agree with petitioner that he was denied relevant documentary evidence. The record reflects that petitioner received an unusual incident report from his employee assistant and, upon petitioner's objection at the hearing that he did not receive the whole unusual incident report, the Hearing Officer provided petitioner with the to/from reports relevant to the incident at issue. At the conclusion of the hearing, however, and in response to the Hearing Officer's statement of the evidence, petitioner objected that the unusual incident report that he had been given related to a March 2020 incident and not the one related to the June 2020 incident at issue. Based upon the objection raised by petitioner, as well as both the March 2020 and June 2020 unusual incident reports being included with the in camera exhibits, it appears that petitioner was, in fact, given an irrelevant unusual incident report. Inasmuch as the June 2020 unusual incident report is 'relevant to formulating petitioner's defense and effectuating his questioning' of witnesses, the determination must be annulled ...". ***Matter of Saunders v. Annucci*, 2022 N.Y. Slip Op. 04772, Third Dept 7-28-22**

FAMILY LAW.

30-YEAR-OLD ALLEGATIONS OF FATHER'S SEXUAL ABUSE OF HIS 10-YEAR-OLD NIECE DID NOT JUSTIFY THE LIMITED PARENTING TIME AWARDED FATHER; FATHER HAD DEMONSTRATED HIS ABILITY TO PROVIDE FOR THE CHILDREN'S WELL-BEING AND THE CASEWORKERS HAD NO CONCERNS ABOUT FATHER.

The Third Department, reversing (modifying) Family Court, determined limiting father's parenting time to six hours of supervised visits biweekly was not supported by the record. Presumably Family Court's ruling was based upon sexual abuse allegations made by father's 10-year-old niece 30 years ago: "[T]he record contains evidence of the father's demonstrated ability to provide for the children's well-being. As established by the evidence, after the children exhibited concerning behavior, the father took overt and appropriate steps to address such behavior by, among other things, engaging in preventative services with the Ulster County Department of Social Services, enrolling the children in counseling and establishing boundaries with the children's online activity. Child protective caseworkers testified on the father's behalf and stated that they did not have any concerns regarding the father. Considering all of the foregoing, we find that the record lacks a sound and substantial basis to support Family Court's determination to provide the father with only six hours of biweekly, supervised parenting time ...". **Matter of Benjamin V. v. Shantika W., 2022 N.Y. Slip Op. 04774, Third Dept 7-28-22**

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