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SECOND DEPARTMENT

CIVIL PROCEDURE.

DEFENDANT DID NOT ADEQUATELY EXPLAIN HER FAILURE TO RECEIVE THE SUMMONS AND COMPLAINT WHICH WERE MAILED TWICE; THEREFORE, DEFENDANT'S MOTION TO VACATE THE DEFAULT JUDGMENT SHOULD NOT HAVE BEEN GRANTED; STRONG DISSENT.

The Second Department, reversing Supreme Court, over an extensive dissent, determined defendant's motion to vacate the default judgment should not have been granted. Defendant, Cupid, alleged she was on vacation and did not learn of the action until the motion for a default judgment. The Second Department concluded Cupid may have adequately explained why she did not see the summons and complaint affixed to her door, but failed to explain why she did not receive the summons and complaint by mail: "Cupid claimed that her denial of receipt was not bare and conclusory, based upon evidence that she was away on vacation when the summons and complaint were left at her door pursuant to CPLR 308(4). However, even assuming that that explanation was sufficient for her alleged failure to receive the summons and complaint left at her door, Cupid did not explain why she did not receive notice by mail—which was effected twice. The bare conclusory denial of receipt was insufficient to establish a reasonable excuse for the default, or lack of notice of the action ... . In light of that determination, it is not necessary to determine whether Cupid demonstrated the existence of a potentially meritorious defense for purposes of either CPLR 5015(a)(1) or 317 ...". ***Gray v. Goodluck-Hedge*, 2022 N.Y. Slip Op. 05204, Second Dept 9-21-22**

CRIMINAL LAW, ATTORNEYS, IMMIGRATION LAW.

DEFENDANT WAS ENTITLED TO A HEARING ON WHETHER COUNSEL WAS INEFFECTIVE FOR FAILING TO INFORM HIM OF THE IMMIGRATION CONSEQUENCES OF HIS GUILTY PLEA AND FOR FAILING TO NEGOTIATE A PLEA TO AN OFFENSE WHICH DID NOT MANDATE DEPORTATION.

The Second Department, reversing Supreme Court, determined defendant was entitled to a hearing on his motion to vacate his conviction by guilty plea on ineffective assistance ground. Defendant alleged counsel was ineffective (1) for failing to inform him deportation would be mandatory and (2) for not negotiating a plea to an offense which would not mandate deportation: "[T]he defendant's contention that his counsel misadvised him as to the immigration consequences of his plea of guilty is not contradicted by the record, and is arguably supported by the representations made by counsel on the record ... , which suggest that counsel did not realize that the defenses to deportation which the defendant might have raised in immigration court would be barred by his plea. In any event, the record does not support a conclusion that there is 'no reasonable possibility' that the defendant's allegations are true (CPL 440.30[4][d] ...). Furthermore, the defendant's averments, including that he has resided in the United States since he was 16 years old, and that he had a child when he entered his plea of guilty, sufficiently demonstrate the existence of a question of fact as to whether it was reasonably probable that the defendant would not have entered a plea of guilty if he had been correctly advised of the deportation consequences of the plea ... . [T]he defendant was entitled to a hearing on his contention that he was denied the effective assistance of counsel based upon his counsel's failure to attempt to negotiate a more favorable plea. The defendant's allegation that the People offered another plea which would not have constituted an aggravated felony under federal immigration law demonstrated 'a reasonable possibility that his plea counsel could have secured a plea deal with less severe immigration consequences' ...". **People v. Alexander, 2022 N.Y. Slip Op. 05215, Second Dept 9-21-22**

CRIMINAL LAW, CONSTITUTIONAL LAW.

RETROACTIVE IMPOSITION OF THE SUPPLEMENTAL SEX OFFENDER VICTIM FEE DOES NOT VIOLATE THE EX POST FACTO CLAUSE.

The Second Department, in a full-fledged opinion by Justice Christopher, determined the retroactive imposition of the supplemental sex offender victim fee did not violate the Ex Post Facto Clause of the US Constitution. The fee was deemed to have a revenue-generating purpose, not a punitive purpose, and was not so punitive in effect as to negate the revenue-generating purpose. The court noted two decisions (*People v. Bradshaw*, 76 AD3d 566, *People v. Diggs*, 73 AD3d 1210).should no longer be followed: "[A] review of the legislative history of the 2004 amendment pursuant to which the supplemental sex offender victim fee was added to Penal Law § 60.35, reveals that it was part of an act entitled 'Appropriations-Budgets,' that enacted 'into law major components of legislation which are necessary to implement the state fiscal plan for the 2004-2005 state fiscal year' ... . Next, we proceed to the second step of the inquiry, and consider whether the statute is punitive in effect ... . In so doing, we consider the following factors articulated in Kennedy v. Mendoza-Martinez (372 US 144): '[1] whether the sanction involved an affirmative disability or restraint, [2] whether it has historically been regarded as a punishment, [3] whether it comes into

play only on a finding of scienter, [4] whether its operation will promote the traditional aims of punishment—retribution and deterrence, [5] whether the behavior to which it applies is already a crime, [6] whether an alternative purpose to which it may rationally be connected is assignable for it, and [7] whether it appears excessive in relation to the alternative purpose assigned' ...". **People v. Bradshaw, 2022 N.Y. Slip Op. 05216, Second Dept 9-21-22**

FAMILY LAW.

WHERE NEITHER PARENT CAN BE SAID TO HAVE CUSTODY OF THE CHILDREN FOR THE MAJORITY OF THE TIME, THE PARENT WITH THE GREATER RESOURCES SHOULD BE DEEMED THE NONCUSTODIAL PARENT FOR CHILD SUPPORT PURPOSES.

The Second Department, reversing Family Court, in a full-fledged opinion by Justice Iannacci, in a matter of first impression in the Second Department, determined that where custody is effectively shared equally the parent with the greater resources should be deemed the noncustodial parent for child support purposes: "We conclude, to the contrary, that the court-ordered custody arrangement in this case splits the parents' physical custody of the children in such a manner that 'neither can be said to have physical custody of the children for a majority of the time' ... . In such circumstances, the parent having the higher income and thus bearing the greater pro rata share of the child support obligation, here, allegedly, the father, is deemed the noncustodial parent for child support purposes ... . * * * .. [W]hile counting custodial overnights may suffice in most shared custody cases, that approach should not be applied where it does not reflect the reality of the situation. Similarly, while it may be clear in most cases which parent's share of the parenting time constitutes the majority of custodial time ... , the reality of the situation must also be considered where there is a closer division of parenting time. * * * ... [T]his is a case in which the 'custodial arrangement splits the children's physical custody so that neither can be said to have physical custody of the children for a majority of the time' ... . Thus, 'the parent having the greater pro rata share of the child support obligation, determined after application of the three-step statutory formula of the CSSA, should be identified as the 'noncustodial' parent' ...". ***Matter of Smisek v. DeSantis*, 2022 N.Y. Slip Op. 05210, Second Dept 9-21-22**

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

THE BANK DID NOT SUPPLY THE DOCUMENTS RELIED ON TO SHOW DEFENDANT'S DEFAULT AND DID NOT LAY A PROPER FOUNDATION FOR THE DOCUMENTS RELIED ON TO SHOW COMPLIANCE WITH THE MAILING REQUIREMENTS OF RPAPL 1304; THE BANK'S MOTION FOR SUMMARY JUDGMENT IN THIS FORECLOSURE ACTION SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined plaintiff bank did not attach the business records relied on to prove defendant's default and did not lay a proper foundation for the records purporting to show compliance with the mailing requirements of RPAPL 1304. Therefore, the bank's motion for summary judgment should not have been granted: "The plaintiff failed to demonstrate, prima facie, the defendant's default in payment under the note. In her affidavit, Wallace [employee of the loan servicer] stated that the defendant failed to make certain payments due under the terms of the note and mortgage, but she failed to identify the records that she relied upon and did not attach those records to her affidavit ... . The plaintiff relied upon Wallace's affidavit, in which she averred that the RPAPL 1304 notice was sent to the defendant by certified and first-class mail. Although Wallace averred that she had personal knowledge of [the loan servicer's] record-keeping practices and procedures, the business records she relied upon and attached to the affidavit were created by other entities. Wallace did not aver that she had personal knowledge of those entities' business practices and procedures, or otherwise provide a proper foundation for the admission of those records ...". ***U.S. Bank N.A. v. Zakarin*, 2022 N.Y. Slip Op. 05229, Second Dept 9-21-22**

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

AN AFFIDAVIT WITHOUT THE RELEVANT BUSINESS RECORDS ATTACHED DID NOT DEMONSTRATE THE BANK'S COMPLIANCE WITH THE MAILING REQUIREMENTS OF RPAPL 1304 IN THIS FORECLOSURE ACTION.

The Second Department, reversing Supreme Court, determined plaintiff bank did not demonstrate compliance with the mailing requirements of RPAPL 1304 and therefore should not have been awarded summary judgment: "[A]lthough the plaintiff submitted a copy of the 90-day notice purportedly sent to the defendant by Green Tree [the loan servicer], it failed to demonstrate, prima facie, that the notice was actually mailed, either through an affidavit of mailing, other proof of mailing by the post office, or evidence of a standard office mailing procedure. Instead, the plaintiff merely submitted an affidavit from a representative of its attorney-in-fact, averring that the 90-day notice was sent by Green Tree in accordance with RPAPL 1304. That conclusory, unsubstantiated averment, standing alone, was insufficient to establish that the notice was actually mailed to the defendant by first-class and certified mail ... . Moreover, the affiant based his assertions upon his review of unspecified business records without attaching any such business records to his affidavit ... . 'It is the business record itself, not the foundational affidavit, that serves as proof of the matter asserted' ...". ***Wilmington Sav. Fund Socy., FSB v. Fernando*, 2022 N.Y. Slip Op. 05231, Second Dept 9-21-22**

MEDICAL MALPRACTICE, PERSONAL INJURY, EVIDENCE.

PLAINTIFF'S EXPERT AFFIDAVIT WAS SPECULATIVE AND WAS NOT SUPPORTED BY MEDICAL RECORDS; DEFENDANT PODIATRIST'S MOTION FOR SUMMARY JUDGMENT IN THIS MEDICAL MALPRACTICE CASE SHOULD HAVE BEEN GRANTED; EXTENSIVE DISSENT.

The Second Department, reversing Supreme Court, over an extensive dissent, determined plaintiff's expert affidavit in this medical malpractice case did not raise a question of fact. Plaintiff's decedent presented with burns on his foot which were treated by defendant podiatrist, Papathomas. When the wound didn't heal, defendant podiatrist referred plaintiff's decedent to a wound clinic, which continued the same treatment given by defendant podiatrist until an infection was later detected: "The [plaintiff's] expert relied upon certain photographs of the decedent's foot, which were taken by the decedent's daughter ... and which allegedly showed signs that the wound was a third-degree burn, and not a second-degree burn as diagnosed by Papathomas ... . According to the plaintiff's expert, the failure to undertake 'aggressive procedures,' including debridement of necrotic tissue as seen in the photographs, 'predisposed' the decedent to a wound infection, which ultimately led to the partial amputation of his right foot, the stress of which caused the decedent to suffer a heart attack and die. ... ... [I]t is undisputed that the defendants established their prima facie entitlement to judgment as a matter of law dismissing the complaint by submitting, inter alia, the affirmation of a board-certified podiatrist, who opined within a reasonable degree of podiatric certainty that the care Papathomas rendered to the decedent was in accordance with good and accepted practice, and did not proximately cause or contribute to any injuries ... . * * * ... [S]ince the opinion of the plaintiff's expert is entirely speculative and unsupported by the decedent's medical records, the expert's affidavit was insufficient to raise a triable issue of fact. Specifically, the decedent's medical records establish that ... after Papathomas observed that the decedent's wound had not improved, Papathomas referred the decedent to a wound care clinic. ... [At the wound clinic] the decedent received the same course of treatment prescribed by Papathomas. Moreover, the decedent's medical records from his admissions to Plainview Hospital ... contain no causal connection between the amputation of the decedent's foot and his subsequent death, and the care the decedent received from Papathomas." ***Templeton v. Papathomas*, 2022 N.Y. Slip Op. 05228, Second Dept 9-21-22**

PERSONAL INJURY, MUNICIPAL LAW, EVIDENCE, CIVIL PROCEDURE.

IN THIS SLIP AND FALL CASE AGAINST NYC, AT THE SUMMARY JUDGMENT STAGE, ONCE THE CITY DEMONSTRATED IT DID NOT HAVE WRITTEN NOTICE OF THE CONDITION WHICH CAUSED THE FALL, THE PLAINTIFF MUST COME FORWARD WITH EVIDENCE AN EXCEPTION TO THE WRITTEN-NOTICE REQUIREMENT APPLIES, EVEN IF, AS HERE, THE COMPLAINT ALLEGES NO EXCEPTION APPLIES; CASE LAW TO THE CONTRARY SHOULD NO LONGER BE FOLLOWED.

The Second Department, reversing Supreme Court, in a full-fledged opinion by Justice Miller, clarified the burdens of proof at the summary judgment stage where the municipality demonstrates it did not have written notice of the condition which allegedly caused plaintiff's slip and fall. Once the city demonstrates a lack of written notice, the plaintiff must come forward with proof of an applicable exception to the written-notice requirement, even where, as here, the complaint alleged no exception applies. Precedent to the contrary should no longer be followed: "[W]here, as here, 'the City establishes that it lacked prior written notice under [Administrative Code § 7-201(c)(2)], the burden shifts to the plaintiff to demonstrate the applicability of one of two recognized exceptions to the rule—that the municipality affirmatively created the defect through an act of negligence or that a special use resulted in a special benefit to the locality' ... Furthermore, we clarify that the burden-shifting standard ... is applicable even where, as here, the complaint alleged that the defendants created the allegedly dangerous condition ... . To the extent that this Court's case law conflicts with the burden-shifting standard set forth in *Groninger* or *Yarborough* [*Yarborough v City of New York*, 10 NY3d at 728; ... *Groninger v Village of Mamaroneck*, 17 NY3d 125], it should no longer be followed ... . * * * Applying the correct standard here, the City sustained its initial burden on that branch of its motion which was for summary judgment dismissing the first cause of action. In opposition, the plaintiff failed to raise a triable issue of fact as to whether the City affirmatively created the allegedly dangerous condition. The expert affidavit proffered by the plaintiff was not supported by the record and, thus, was speculative and conclusory, and insufficient to raise a triable issue of fact ... . Under the circumstances, those branches of the City's motion which were for summary judgment dismissing the first cause of action and all cross claims insofar as asserted against it should have been granted." ***Smith v. City of New York*, 2022 N.Y. Slip Op. 05226, Second Dept 9-21-22**

THIRD DEPARTMENT

CRIMINAL LAW.

THE RECORD OF THE GRAND JURY PROCEEDINGS DID NOT EXPLAIN OR JUSTIFY THE SHACKLING OF DEFENDANT'S HANDS DURING HIS TESTIMONY; EVEN IF HIS HANDS WERE UNDER THE TABLE, THE INABILITY TO USE HIS HANDS DURING HIS TESTIMONY WAS PREJUDICIAL; CONVICTION REVERSED.

The Third Department, reversing the conviction by guilty plea and dismissing the indictment, in a full-fledged opinion by Justice Garry, determined the record did not explain or otherwise support the shackling of defendant's hands when he testified before the grand jury: "An actual justification for the use of physical restraints, specific to the defendant, is ... necessary when a defendant testifies before a grand jury; in such context, the People are required to articulate a reasonable basis on the record for their use ... . That threshold showing must be made on the record at the commencement of the proceeding, outside the presence of the grand jury ... . Review of the confidential grand jury minutes reveals that there was no relevant information offered to support the use of restraints. Shackling incarcerated defendants before the

factfinder without revealing an adequate basis for doing so cannot be countenanced. ... Although the People assert that the hand shackles were hidden by the table at which defendant sat, this is disputed and was similarly unaddressed upon the record of proceedings. It bears noting that it is customary for many people to use hand gestures in the course of describing events; for this reason, the inability to show one's hands may connote or communicate that one is not trustworthy. Put another way, hiding one's hands may be interpreted as withholding, may communicate in body language that one has 'something to hide.' ... ... [T]here were no cautionary instructions addressing the shackles ... , and the evidence presented was not so overwhelming as to eliminate the potential for prejudice ...". ***People v. Cain*, 2022 N.Y. Slip Op. 05239, Third Dept 9-22-22**

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA), ATTORNEYS.

EVEN THOUGH DEFENDANT WAIVED HIS RIGHT TO BE PRESENT AT THE SORA RISK-LEVEL ASSESSMENT PROCEEDING, HE DID NOT WAIVE HIS RIGHT TO EFFECTIVE COUNSEL; COUNSEL DID NOT COMMUNICATE WITH DEFENDANT AND DID NOT PRESENT A DEFENSE; ORDER REVERSED.

The Third Department, reversing County Court, determined that, although defendant waived his right to be present at the SORA risk-assessment proceeding, he did not waive his right to effective assistance of counsel. Counsel did not communicate with the defendant and did not present a defense at the hearing: " 'SORA defendants have the right to the effective assistance of counsel, pursuant to the Due Process Clauses contained in the 14th Amendment of the US Constitution and article I, § 6 of the NY Constitution, because the statutory right to counsel in such proceedings ... would otherwise be rendered meaningless, and because SORA determinations affect a defendant's liberty interest' ... . Moreover, '[a] fundamental aspect of the attorney-client relationship is communication' and 'we have noted that an attorney's responsibility in the representation of any client requires consulting with and counseling the client' ... . Defendant waived his right to be present at the hearing but did not waive his right to challenge the Board's risk assessment and the People's proof ... . During the hearing, counsel admitted that he lacked 'the benefit of [defendant's] input' in proceeding with the matter and County Court acknowledged that counsel was at a 'disadvantage' because he had not had a chance to speak with defendant. The record further reflects that counsel failed to present a defense or raise any objections and did not require the People to present any proof at the hearing." ***People v. Moore*, 2022 N.Y. Slip Op. 05242, Third Dept 9-22-22**

DISCIPLINARY HEARINGS (INMATES), EVIDENCE.

THE VIDEO DID NOT SUPPORT THE CREATING-A-DISTURBANCE CHARGE, DETERMINATION ANNULLED.

The Third Department, annulling the misbehavior determination, found that the video evidence did support the charge: "[S]ubstantial evidence was lacking to support the charge of creating a disturbance ... . As relevant here, an incarcerated individual 'shall not engage in conduct which disturbs the order of any part of the facility . . .[, which] includes . . . loud talking in a mess hall, program area or corridor' (7 NYCRR 270.2 [B] [5] [iv]). The misbehavior report stated that petitioner was talking to another incarcerated individual and that, after refusing to produce his identification card to a correction officer, 'the other 38 [incarcerated individuals] began to take notice.' However, video of the incident does not reflect that petitioner's conduct disturbed the order of the commissary bullpen area(see 7 NYCRR 270.2 [B] [5] [iv]), nor did it demonstrate that he was engaging in loud talk or other misconduct indicative of a disruption ...". ***Matter of Ramos v. Annucci*, 2022 N.Y. Slip Op. 05255, Third Dept 9-22-22**

MUNICIPAL LAW, LANDLORD-TENANT, CONSTITUTIONAL LAW, CIVIL PROCEDURE, ATTORNEYS.

A CITY CODE ENFORCEMENT OFFICER ORDERED PETITIONER-TENANT TO VACATE HER APARTMENT AFTER FINDING SOME WINDOWS DID NOT OPEN; PENDING THE INSTANT APPEAL, THE CITY AMENDED THE CODE TO ALLOW A HEARING IN THIS CIRCUMSTANCE (RELIEF REQUESTED BY THE PETITIONER); THE CODE ENFORCEMENT OFFICER WAS AN AGENT OF THE STATE AND PETITIONER WAS ENTITLED TO COSTS, DISBURSEMENTS AND COUNSEL FEES AS THE PREVAILING PARTY IN THIS ACTION AGAINST THE STATE.

The Third Department, in a full-fledged opinion by Justice Fisher, determined petitioner-tenant was entitled to costs, disbursements and counsel fees in petitioner's action against the city for ordering petitioner to vacate her apartment without first affording a hearing. The order to vacate was made after the code enforcement officer found windows in the apartment which could not be opened and an electrical problem. Before the appeal was heard, the city amended to code to provide an administrative hearing to those ordered to vacate their apartments. Petitioner was deemed to be a prevailing party and was therefore entitled to costs, disbursements and counsel fees: "Petitioner entered into a lease agreement for a second-floor apartment in the City of Schenectady ... . [P]etitioner contacted respondent City of Schenectady Code Enforcement Office and reported problems with the apartment including, among other things, that only three of the windows in the apartment could be opened. Following this complaint, the owner hired a repairperson to fix the windows ... . [A] code enforcement officer conducted an inspection of said premises. Upon finding that several of the second-floor windows still could not be opened and there was an electrical violation, the code enforcement officer issued an order to 'immediately vacate' the second floor of the premises due to 'sealed emergency rescue openings' and 'unsafe conditions.' The order to vacate listed multiple violations of the Property Maintenance Code of New York State (19 NYCRR part 1226 [hereinafter PMCNYS]) and violations of the Code of the City of Schenectady. * * * ... [R]espondents argue that Supreme Court erred in awarding petitioner counsel fees because this matter is not a civil action against the state within the meaning of CPLR 8601 (a) and, nonetheless, respondents were substantially justified in their acts. We disagree. 'CPLR 8601 (a) mandates an award of fees and other expenses to a prevailing party in any civil action brought against the state, unless the position of the state was determined to be substantially justified or that special circumstances render an award unjust' ... . [G]iven [the] statutory and regulatory framework, we are satisfied that

respondents' code enforcement officer acted as a state agent in issuing the order in the course of his enforcement of the PMCNYS ... . [P]etitioners were expressly entitled to a post-deprivation administrative hearing pursuant to Property Maintenance Code of New York State § 103.2.1. That provision contemplates a prompt forum for a dispossessed occupant to address his or her concerns with the involved municipal officials. ... [R]espondents' disregard of petitioner's repeated requests for such a hearing effectively deprived her of a meaningful opportunity to be heard. Respondents' failure to follow up on the code violations only compounded the problem." ***Matter of Brown v. City of Schenectady*, 2022 N.Y. Slip Op. 05245, Third Dept 9-21-22**

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