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FIRST DEPARTMENT

CRIMINAL LAW, JUDGES

THE JUDGE ASKED THE JUROR WHETHER HE COULD DISREGARD A POLICE OFFICER'S TESTIMONY IF HE FELT THE OFFICER WAS LYING AND THE JUROR SAID HE COULD; THE QUESTION AND ANSWER DID NOT PROVIDE AN UNEQUIVOCAL ASSURANCE THE JUROR COULD RENDER A VERDICT SOLELY ON THE EVIDENCE; NEW TRIAL ORDERED.

The First Department, reversing defendant's conviction and ordering a new trial, determined the judge's questions for the juror, who expressed a bias in favor of police officer, did not elicit an unequivocal assurance the juror could put aside the bias and render a verdict solely on the evidence: "The challenged panelist, who had many connections to law enforcement, stated 'I'm definitely bias[ed] toward law enforcement, toward police officers. I know a lot of cops. If you ask me a plain question, I'll say yes.' … [T]he court asked if the panelist could 'evaluate the testimony,' and if a witness was 'not telling the truth' and 'happen[ed] to be a police officer,' would he 'disregard that just because [his] best friend is a cop?' The court's question was not properly framed to elicit an assurance of impartiality. When the panelist, somewhat confused by the court's inquiry, replied, 'No, if I'm understanding your question, I wouldn't,' he did no more than confirm that in the event he actually found an officer's testimony to be perjurious, the panelist would not overlook that fact because of his pro-police bias. The court's next question — 'You would be able to evaluate?' — and the panelist's response that he 'would be able to,' likewise fell short of the required express and unequivocal declaration … . 'If there is any doubt about a prospective juror's impartiality, trial courts should err on the side of excusing the juror, since at worst the court will have replaced one impartial juror with another' …". ***People v. Tate*, 2022 N.Y. Slip Op. 05286, First Dept 9-27-22**

INSURANCE LAW, EVIDENCE, CONTRACT LAW.

THE INSURED MISREPRESENTED HER HOME ADDRESS AND THE INSURERS DISCLAIMED COVERAGE; THE CONCLUSORY AFFIDAVIT SUBMITTED BY THE INSURERS WAS NOT SUPPORTED BY DOCUMENTARY EVIDENCE (UNDERWRITING MANUALS, RULES, BULLETINS) AND THEREFORE DID NOT DEMONSTRATE THE MISREPRESENTATION WAS MATERIAL.

The First Department, reversing Supreme Court, determined the insurers which disclaimed coverage did not demonstrate the insured's misrepresentation of her address was material. The insurers' motion for summary judgment should not have been granted: "[T]he insurers filed this action for a declaration of no-coverage and an injunction barring defendant medical providers from seeking any no-fault reimbursement under the claimant's automobile insurance policy. The insurers alleged that the claimant had intentionally and materially misrepresented her home address in procuring the policy, as the proper policy address was not the Wappingers Falls address she had stated, but rather, an address in the Bronx. The insurers submitted undisputed evidence that the claimant misrepresented her address based on her testimony at the Examination Under Oath (EUO). However, the insurers failed to establish, as a matter of law, that the alleged misrepresentation as to the correct address was a material misrepresentation. The affidavit of the insurers' underwriter is conclusory and not supported by relevant documentary evidence such as underwriting manuals, rules, or bulletins ...". ***Liberty Mut. Ins. Co. v. Valera*, 2022 N.Y. Slip Op. 05277, First Dept 9-27-22**

INSURANCE LAW, FIDUCIARY DUTY, FRAUD, CIVIL PROCEDURE, MEDICAL MALPRACTICE, CONTRACT LAW.

THE COMPLAINT STATED CAUSES OF ACTION FOR BREACH OF FIDUCIARY DUTY, FRAUD, CONSTRUCTIVE FRAUD AND MUTUAL MISTAKE; PLAINTIFFS-PHYSICIANS ALLEGED THE FORMS THE EMPLOYER REQUIRED THEM TO SIGN CONSENTING TO THE DISTRIBUTION (TO THE EMPLOYER) OF THE PROCEEDS OF THE DEMUTUALIZATION OF THE MEDICAL MALPRACTICE INSURER WERE INVALID.

The Frist Department, reversing (modifying) Supreme Court, determined the complaint by physicians against their employer/malpractice-insurance-policy-administrator stated causes of action for breach of fiduciary duty, fraud and mutual mistake. The dispute centers on whether the physicians or the employer which paid the malpractice insurance premiums are/is entitled to the proceeds when the insurer (MLMIC) demutualized. The employer had the physicians sign forms consenting to distributing the proceeds to the employer. The physicians allege the consent forms are invalid: "Plaintiffs allege that the forms by which they authorized MLMIC to distribute their demutualization proceeds to defendant are invalid because defendant obtained them in breach of its fiduciary duty, by fraud, or due to mutual mistake. If these forms are

invalid, then the demutualization proceeds belong to plaintiffs ... . Transactions between a fiduciary and beneficiary are voidable if the fiduciary acts in its own interest and does not fully disclose all material facts ... . Defendant is alleged not only to have withheld the policyholder information statement from plaintiffs, but to have significantly misrepresented their contents for its own gain. These allegations, which are not conclusively refuted by the documentary evidence, are sufficient to survive a motion to dismiss. Fraud is another basis for rescinding the consent forms ... . Plaintiffs also properly allege constructive fraud, because they were owed a fiduciary duty by defendant and so were 'warranted to . . . relax the care and vigilance they would ordinarily exercise in the circumstances' ... . Mutual mistake 'may not be invoked by a party to avoid the consequences of its own negligence' ... . For the purposes of this motion to dismiss, however, it cannot be said as a matter of law that plaintiffs were negligent ...". ***Cordaro v. AdvantageCare Physicians, P.C.*, 2022 N.Y. Slip Op. 05267, First Dept 9-27-22**

PERSONAL INJURY, VEHICLE AND TRAFFIC LAW.

ONLY THE SPECIFIC CONDUCT ENUMERATED IN VEHICLE AND TRAFFIC LAW § 1104(e) IS SUBJECT TO THE HIGHER "RECKLESS DISREGARD" STANDARD OF CARE FOR EMERGENCY VEHICLES; OTHER INJURY-CAUSING ACTIONS INVOLVING THE EMERGENCY VEHICLE ARE SUBJECT TO THE ORDINARY NEGLIGENCE STANDARD.

The First Department, reversing (modifying) Supreme Court, noted that while parking in a "no standing" zone maybe subject to the "reckless disregard" standard for emergency vehicles, other injury-causing actions may not be exempt from the ordinary negligence standard: " '[T]he reckless disregard standard of care in Vehicle and Traffic Law § 1104(e) only applies when a driver of an authorized emergency vehicle involved in an emergency operation engages in the specific conduct exempted from the rules of the road by Vehicle and Traffic Law § 1104(b)' ... . 'Any other injury-causing conduct of such a driver is governed by the principles of ordinary negligence' ... . Here, although defendants established that they engaged in conduct covered by Vehicle and Traffic Law § 1104(b)(1) by parking in a 'No Standing' area, there were, at a minimum, questions of fact whether the ambulance had its emergency lights and sirens activated as required by Vehicle and Traffic Law § 1104(c)." ***Taveras v. Almodovar*, 2022 N.Y. Slip Op. 05385, First Dept 9-29-22**

SECOND DEPARTMENT

CRIMINAL LAW, EVIDENCE, APPEALS.

TINTED WINDOWS CONSTITUTED A VALID REASON FOR THE VEHICLE STOP; THE VALIDITY OF THE IMPOUNDMENT OF DEFENDANT'S VEHICLE AND THE INVENTORY SEARCH WERE NOT PRESERVED FOR APPEAL; THE DISSENT ARGUED THE TINTED-WINDOWS STOP, THE IMPOUNDMENT AND THE INVENTORY SEARCH WERE INVALID.

The Second Department, over an extensive two-justice dissent, determined (1) the vehicle stop based upon tinted windows was valid, (2) the impoundment of defendant's vehicle (defendant did not have a license); was proper, and (3) the inventory search of the vehicle was valid: Marijuana and a firearm were found in the search of the vehicle: "[W]indow tint violations are a recognized basis for stopping a motor vehicle. The legal test, according to the Court of Appeals, is whether the police officer reasonably believes the windows to be over-tinted in violation of Vehicle and Traffic Law § 375(12-a)(b) ... . Officer Sepulveda's testimony that he could not see into the defendant's vehicle meets that test. ... The defendant's contention on appeal that the impoundment and initial inventory search of the Nissan was unlawful was not raised before the Supreme Court and is therefore unpreserved for appellate review (see CPL 470.05[2] ...), and we decline to reach that contention in the exercise of our interest of justice jurisdiction.... . **From the dissent:** I respectfully dissent in part and vote to reverse the judgment insofar as reviewed for several reasons. First, the People failed to establish a sufficient basis for the police stop of the defendant's vehicle. Second, the People failed to establish the legality of the impoundment of the defendant's vehicle. Third, the People failed to establish the validity of the purported inventory search of the defendant's vehicle." ***People v. Biggs*, 2022 N.Y. Slip Op. 05328, Second Dept 9-28-22**

FORECLOSURE, CIVIL PROCEDURE.

THE POINT AT WHICH LEAVE OF COURT AND THE STIPULATION OF ALL PARTIES IS REQUIRED TO DISCONTINUE A FORECLOSURE ACTION IS THE RETURN DATE FOR THE MOTION TO CONFIRM THE REFEREE'S REPORT.

The Second Department, in a matter of first impression, in a full-fledged opinion by Justice Dillon, in the context of a foreclosure action, determined the point at which leave of court and the stipulation of all parties is required to discontinue the action is the return date for the motion to confirm the referee's report: "CPLR 3217(b) permits the discontinuance of an action by a party with leave of court or by a stipulation of the parties before the cause is submitted to the trier of fact for a determination of the facts; but once the cause has been submitted for a determination of the facts, a discontinuance may only be granted upon both leave of court and a stipulation of all parties appearing in the action. While the mechanics of the statute are clear when an action is tried before a judge or jury, no appellate case has yet addressed the question of when an action is considered 'submitted to the court' under CPLR 3217(b) when the matter is referred to a referee to hear and report, and the report is thereafter subject to confirmation, rejection, or modification by the Supreme Court. We hold that the operative date for requiring both leave of court and for the parties to stipulate to the discontinuance is the return date of a motion to confirm, reject, or modify the assigned referee's report, as that is the moment when the factual issues of a case are submitted to the court for the determinative deliberative process. * * * We find, as a matter of first impression, that where an action is referred to a court attorney referee to hear and report, the time that is most akin to the submission of the case to the court or the jury for a determination of the facts is the return date of the motion to confirm the referee's report. Prior to that time, the conclusion of the trial before the referee is not final as the referee, while setting

forth his or her findings of fact and conclusions of law, has no authority to determine the matter ...". ***Emigrant Bank v. Solimano*, 2022 N.Y. Slip Op. 05311, Second Dept 9-28-22**

MUNICIPAL LAW, PERSONAL INJURY.

THE DEFENDANT "DORMITORY AUTHORITY OF NEW YORK STATE'S" INSURERS HAD ACTUAL KNOWLEDGE OF THE ESSENTIAL FACTS OF PLAINTIFF'S SLIP AND FALL WITHIN 90 DAYS OF THE ACCIDENT; THE PETITION FOR LEAVE TO SERVE THE LATE NOTICE OF CLAIM SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined the petition for leave to serve a late notice of claim in this slip and fall case against the Dormitory Authority for the State of New York (DASNY) should have been granted because DASNY's insurers had actual knowledge of the facts of the within 90 days of the accident: "[T]he petitioner's submissions demonstrated that DASNY's insurers had actual notice of the essential facts constituting the claim within 90 days of the petitioner's accident. The petitioner annexed to the petition a copy of a certificate of liability insurance stating that his employer was insured under a number of policies in connection with the construction project at the premises and identifying both DASNY and the State as 'Additional Insureds' with respect to the project. The petitioner also annexed to the petition a letter dated July 8, 2019, approximately 70 days after the accident, in which the State informed the insurers named in the certificate of liability insurance that a notice of claim concerning the petitioner's accident had been served on the State on or about June 14, 2019. The notice of claim that had been served on the State identifies the date, time, and location of the petitioner's accident, describes the petitioner's injuries, and specifies construction debris on the stairwell as the dangerous condition which caused the petitioner's accident. Thus, DASNY's insurers acquired actual notice of the essential facts constituting the petitioner's claim within 90 days of his accident (see General Municipal Law § 50-e[5] ...)." ***Matter of Joseph v. City of New York*, 2022 N.Y. Slip Op. 05318, Second Dept 9-28-22**

REAL PROPERTY LAW.

THE CERTIFICATES OF ACKNOWLEDGMENT FOR THE DEED AND OTHER DOCUMENTS DEMONSTRATING PLAINTIFF'S OWNERSHIP OF THE REAL PROPERTY CREATED A PRESUMPTION OF DUE EXECUTION WHICH WAS NOT OVERCOME BY DEFENDANTS' ALLEGATIONS OF FORGERY.

The Second Department, reversing Supreme Court, determined plaintiff's motion for summary judgment declaring she was the sole owner of real property should have been granted. The certificates of acknowledgment for the deed and other documents created a presumption of due execution which the defendants' allegations of forgery did not overcome: " 'A certificate of acknowledgment attached to an instrument such as a deed or a mortgage raises the presumption of due execution, 'which presumption . . . can be rebutted only after being weighed against any evidence adduced to show that the subject instrument was not duly executed' ... . '[A] certificate of acknowledgment should not be overthrown upon evidence of a doubtful character, such as the unsupported testimony of interested witnesses, nor upon a bare preponderance of evidence, but only on proof so clear and convincing as to amount to a moral certainty' ... . [T]he defendants failed to raise a triable issue of fact. The affidavits of interested parties submitted by the defendants were insufficient to rebut the presumption of due execution arising from the notarized certificates of acknowledgment accompanying the 1950 documents and the 1952 deed ...". ***Oro v. Figeroa*, 2022 N.Y. Slip Op. 05327, Second Dept 9-28-22**

FOURTH DEPARTMENT

CRIMINAL LAW, APPEALS, ATTORNEYS.

APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO MAKE A MOTION ALERTING THE APPELLATE COURT TO A COURT OF APPEALS DECISION WHICH CAME DOWN AFTER THE BRIEFS WERE FILED BUT BEFORE THE APPELLATE RULING; MOTION FOR WRIT OF ERROR CORAM NOBIS GRANTED.

The Fourth Department granted the defendant's motion for writ of error coram nobis granted on the ground appellate counsel was ineffective. Although the Court of Appeals decision mandating that sentencing judges consider youthful offender status came down after the briefs were filed, appellate counsel should have made a motion to raise the issue: "Defendant contends that he was denied effective assistance of appellate counsel because counsel failed to raise an issue on direct appeal, specifically, whether Supreme Court failed to determine whether defendant should be afforded youthful offender status. Upon our review of the motion papers and under the circumstances presented here, we conclude that appellate counsel's representation was not constitutionally adequate. 'As held by the Court of Appeals in ***People v Rudolph* (21 NY3d 497**, 501 [2013]), CPL 720.20 (1) requires 'that there be a youthful offender determination in every case where the defendant is eligible, even where the defendant fails to request it, or agrees to forgo it as part of a plea bargain' ... Here, there is nothing in the record demonstrating that the court considered whether to adjudicate defendant a youthful offender, even though defendant, who was convicted of manslaughter in the first degree (Penal Law § 125.20 [1]) was presumably eligible ... . Although the Court of Appeals decided Rudolph after appellate counsel filed the briefs on appeal and shortly before this Court affirmed defendant's judgment on appeal, the standard of meaningful representation required appellate counsel to, after Rudolph was decided, seek to file an appropriate motion in this Court in order to raise the argument that Rudolph requires that the sentence must be vacated and the matter remitted for determination of defendant's youthful offender status ... The order of July 5, 2013 is vacated and this Court will consider the appeal de novo ... . Defendant is directed to file and serve his records and brief with this Court on or before January 23, 2023." ***People v. Nathan*, 2022 N.Y. Slip Op. 05479, Fourth Dept 9-30-22**

CRIMINAL LAW, EVIDENCE, ATTORNEYS, JUDGES.

DEFENSE COUNSEL MISTAKENLY FAILED TO NOTIFY THE PROSECUTION OF AN ALIBI WITNESS; DEFENSE COUNSEL ADMITTED HE HAD NO EXCUSE FOR HIS MISTAKE; BECAUSE THE FAILURE WAS NOT DELIBERATE AND WAS NOT AN ATTEMPT TO GAIN A TACTICAL ADVANTAGE, THE DEFENSE MOTION FOR PERMISSION TO SERVE A LATE NOTICE OF ALIBI SHOULD HAVE BEEN GRANTED.

The Fourth Department, reversing defendant's conviction on the two relevant counts, determined defense counsel's failure to timely notify the prosecution of an alibi witness was not deliberate and the defense motion to serve a late notice of alibi should have been granted: "[O]n the day prior to jury selection, defendant filed a motion to permit the late service of a notice of alibi with respect to the first two counts of the indictment. In an affirmation in support of the motion, defense counsel explained that, just days after defendant's arraignment on the indictment, defendant informed him of the existence of a potential alibi witness, and defense counsel's investigator confirmed the alibi with the witness a week later. Defense counsel averred that, despite his awareness of that witness, he failed to notify the court and the prosecutor of the existence of the witness simply through his own negligence. Defense counsel had no objection to a brief adjournment for the People to investigate the alibi. Defense counsel's averments and statements to the court established that his failure to comply with the time limits of CPL 250.20 was not willful or motivated by a desire to obtain a tactical advantage but simply a mistake ... and, under these circumstances, defendant's constitutional right to offer the testimony of the alibi witness outweighed any prejudice to the People or their interest in having the trial begin as scheduled ... . The court therefore abused its discretion in precluding the testimony of the alibi witness (see Green, 70 AD3d at 45-46). The evidence against defendant was not overwhelming, and thus the harmless error doctrine is inapplicable here ...". ***People v. Thomas*, 2022 N.Y. Slip Op. 05430, Fourth Dept 9-30-22**

CRIMINAL LAW, JUDGES.

THE JUDGE INCORRECTLY PARAPHRASED THE JURY NOTE; CONVICTION REVERSED.

The Fourth Department, reversing defendant's condition, determined that the judge did not adequately inform counsel of the contents of a jury note: "The record reflects that the court received the note from the jury and properly marked it as a court exhibit. The jury note stated, in relevant part, '[p]lease go over manslaughter vs murder 2 elements of the charges from your instructions' ... . The court did not read the note verbatim and the record does not reflect that the court showed the note to the parties. Rather, the record reflects that the court informed the parties that the jury wanted the court to 'go over the instructions for manslaughter and [m]urder in the [s]econd [d]egree' ... . We conclude that by improperly paraphrasing the jury note, the court failed to give meaningful notice of the note ... . Contrary to the People's contention, the difference between the content of the note and the court's words altered the meaning of the jury's request ...". ***People v. Zenon*, 2022 N.Y. Slip Op. 05446, Fourth Dept 9-30-22**

PERSONAL INJURY, EVIDENCE.

THE DEFENDANT GROCERY STORE DID NOT DEMONSTRATE IT DID NOT HAVE CONSTRUCTIVE NOTICE OF THE CONDITION WHICH CAUSED PLAINTIFF'S SLIP AND FALL; THE STORE DID NOT SUBMIT EVIDENCE THAT THE AREA HAD BEEN INSPECTED CLOSE IN TIME TO THE FALL.

The Fourth Department, reversing (modifying) Supreme Court, determined the defendant grocery store in this slip and fall case did not demonstrate it did not have constructive notice of the condition which caused the fall: "[T]the court erred in granting the motion with respect to the claim that defendant had constructive notice of the dangerous condition … . Defendant failed to meet its initial burden on that issue inasmuch as its own submissions raise triable issues of fact whether the wet floor 'was visible and apparent and existed for a sufficient length of time prior to plaintiff's fall to permit [defendant's employees] to discover and remedy it' … . Although defendant submitted the affidavit and deposition testimony of its former store manager, in which he indicated that store employees routinely frequented the area and would have looked for dangerous conditions, defendant's evidence failed to establish that the employees actually performed any security sweeps on the day of the incident, or that anyone actually inspected the area in question before plaintiff's fall. Consequently, defendant failed to eliminate all issues of fact with respect to constructive notice …". ***Andrews v. JCP Groceries, Inc.*, 2022 N.Y. Slip Op. 05422, Fourth Dept 9-30-22**

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