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FIRST DEPARTMENT

APPEALS, CIVIL PROCEDURE.

THE ORDER DENYING A MOTION TO VACATE OR MODIFY A PRIOR ORDER DID NOT MEET THE CRITERIA FOR AN ORDER "APPEALABLE AS OF RIGHT" AND THEREFORE WAS NOT CONSIDERED BY THE APPELLATE DIVISION; THE CRITERIA FOR AN "ORDER APPEALABLE AS OF RIGHT" WERE EXPLAINED.

The First Department noted that the order refusing to vacate or modify a prior order was not appealable : "[T]his Court lacks jurisdiction to consider the portion of defendants' appeal from the denial of the motion to vacate. Pursuant to CPLR 5701(a)(3), a party may appeal to this Court as of right from an order refusing to vacate or modify a prior order, but only where the prior order 'would have been appealable as of right' pursuant to CPLR 5701(a)(2) if it had been the result of a motion on notice. Here, the Extension Denial Order would not have been appealable as of right if it had been the result of a motion made on notice. The Extension Denial Order was not a substantive ruling, rather it denied defendants' request for an extension of its time to post a bond. The order did not 'involve[] some part of the merits' of the case (CPLR 5701[a][2][iv]) or 'affect[] a substantial right' (CPLR 5701[a][2][v]) of the parties, or otherwise fit within CPLR 5701(a)(2) such that it would be appealable as of right." ***Largo 613 Baltic St. Partners LLC v. Stern*, 2022 N.Y. Slip Op. 06168, First Dept 11-3-22**

FAMILY LAW, JUDGES.

BECAUSE THE JUDGE DEVIATED FROM THE STATUTORY CRITERIA FOR THE CALCULATION OF TEMPORARY MAINTENANCE, THE JUDGE SHOULD HAVE EXPLAINED THE REASONS FOR THE DEVIATION; THE TEMPORARY MAINTENANCE AND CHILD SUPPORT AWARDS WERE VACATED.

The First Department, vacating the award of pendente lite maintenance and child support, determined, because the temporary maintenance deviated from the statutory presumptive award, the judge should have explained the reasons for the deviation: "To determine temporary maintenance, the motion court was required to apply Domestic Relations Law § 236(B)(5-a). While the court appears to have followed the calculations provided in that section to arrive at a presumptive award of temporary maintenance, it then deviated from the presumptive amount by directing the continued payment of the wife's rent, cell phone bills, utilities, and other household expenses. This statutory formula is intended to cover all the spouse's basic living expenses, including housing costs ... . Where, as here, there is a deviation, the statute requires the court to explain the reasons for any deviation from the result reached by the formula factors ... . Accordingly, we vacate the pendente lite maintenance award and remand the matter for a reconsideration of the award in light of the directives of Domestic Relations Law § 236(B) (5-a), including the articulation of any other factors the court considers in deviating from the presumptive award ... As the amount of maintenance affects calculation of child support, we further vacate the child support award for recalculation based on the directives of Domestic Relations Law § 240(1-b)(b)(5) (iii)(I) and (vii)(C), which require, for child support purposes, income adjustments based on the amount of maintenance ordered." ***Severny v. Severny*, 2022 N.Y. Slip Op. 06094, First Dept 11-1-22**

LABOR LAW-CONSTRUCTION LAW, LANDLORD-TENANT, PERSONAL INJURY.

THE LESSEE OF THE PROPERTY, INFOR, CONTRACTED FOR THE WORK BEING DONE AT THE TIME OF PLAINTIFF'S INJURY IN THIS LABOR LAW § 240(1) ACTION; THEREFORE, INFOR WAS AN "OWNER" WITHIN THE MEANING OF THE LABOR LAW AND WAS A PROPER DEFENDANT.

The First Department, reversing (modifying) Supreme Court, determined the lessee of the property (Infor) was a proper party in this Labor Law § 240(1) action because it had contracted for the work done at the time of plaintiff's injury: "Plaintiff claims he was drilling metal tracks onto a wall when the Baker scaffold on which he was standing overturned, causing him to fall and sustain injuries. 635 owned the building in which plaintiff was working, and defendant SL Green Realty Corp. (SL Green) was 635's managing agent. Infor leased the premises from 635, and retained JRM as the general contractor to perform construction work. JRM, in turn, retained Montec and nonparty Premier Builders, Inc., plaintiff's employer, as subcontractors to perform various aspects of the work. * * * The Labor Law § 240(1) claim should be reinstated against Infor, as the court incorrectly concluded that Infor was not a proper Labor Law defendant. Although Infor leased the premises from 635, it may still be held liable as an 'owner' under the statute because it contracted for the construction work being performed at the time of plaintiff's accident ... . For the same reasons that plaintiff is entitled to partial summary judgment against 635 and JMR [*sic*], plaintiff's motion for partial summary on the Labor Law § 240(1) claim against Infor should be granted, and Infor's motion for summary judgment dismissing the claim against it should be denied." ***Otero v. 635 Owner LLC*, 2022 N.Y. Slip Op. 06172, First Dept 11-3-22**

LABOR LAW-CONSTRUCTION LAW, LANDLORD-TENANT, PERSONAL INJURY.

ALTHOUGH DEFENDANT PORT AUTHORITY OF NEW YORK AND NEW JERSEY (PANYNJ) WAS THE LESSOR OF THE PROPERTY WHERE PLAINTIFF WAS INJURED IN THIS LABOR LAW § 241(6) ACTION, IT WAS AN "OWNER" WITHIN THE MEANING OF THE LABOR LAW AND, THEREFORE, WAS A PROPER DEFENDANT; ALTHOUGH PLAINTIFF WAS NOT AT THE CONSTRUCTION SITE, SHE WAS IN AN AREA USED TO CREATE MATERIALS FOR THE CONSTRUCTION SITE, WHICH IS COVERED BY THE LABOR LAW.

The First Department, reversing Supreme Court, determined Port Authority of New York and New Jersey (PANYNJ), although the lessor of the property where plaintiff was injured in this Labor Law § 241(1) action, was an "owner" within the meaning of the Labor Law and therefore was a proper defendant. Although plaintiff was not injured at the construction site, she was injured where materials were being prepared for use in the construction: "PANYNJ failed to establish its entitlement to summary judgment, as the record presents issues of fact as to whether PANYNJ was liable to plaintiff under Labor Law § 241(6). Although PANYNJ leased control of the property to RHCT and transferred responsibility for the maintenance of the terminal to RHCT, PANYNJ was nevertheless the owner of property for purposes of Labor Law § 241(6). The operating agreement between PANYNJ and RHCT permitted RHCT to use the property, and set out conditions on RHCT's use of the property. The agreement also set forth the scope and manner of the work to be performed and provided that RHCT was required to provide PANYNJ with a monthly profit and loss report. The general manager for PANYNJ testified that RHCT was required to obtain PANYNJ's consent to sublicense any portion of the property. Additionally, under the purchase order between Tutor Perini and TBTA, the owner of the bridge project, PANYNJ was to be paid a port security charge, among other charges. As a result, the evidence created a sufficient nexus between PANYNJ and the project, and thus between PANYNJ and plaintiff, to support an imposition of liability under Labor Law § 241(6) ... . Plaintiff's task of grinding bevels on the deck panels to be installed on the bridge also falls under the Labor Law because the protections of the statute extend to areas where materials or equipment are being prepared to be used in construction ...". ***Musse v. Triborough Bridge & Tunnel Auth.*, 2022 N.Y. Slip Op. 06171, First Dept 11-3-22**

PERSONAL INJURY, EDUCATION-SCHOOL LAW.

THE PLAINTIFF-STUDENT FOOTBALL PLAYER DID NOT ASSUME THE RISK OF INJURY IN A FOOTBALL-RELATED WEIGHTLIFTING SESSION; THE RISK OF A WEIGHTLIFTING INJURY IS NOT INHERENT IN THE GAME OF FOOTBALL.

The Second Department, reversing Supreme Court, determined plaintiff-student, a high school sophomore varsity football player, did not assume the risk of injury during a weightlifting training-session when he voluntarily agreed to play football. The decision outlines the history of the assumption-of-the-risk doctrine: "Under the doctrine of primary assumption of risk, a person who voluntarily participates in a sport or recreational activity is deemed to consent to the risks inherent in that sport, thereby negating any duty on a defendant's part to safeguard the plaintiff from those risks ... . While the absolute defense of implied assumption of risk, which was abolished by the enactment of CPLR 1411 in 1975, barred recovery by a plaintiff who was aware of the risks of engaging in a specific act and engaged in that specific act nonetheless ..., the separate and distinct doctrine of primary assumption of risk posits that the risk is assumed by virtue of the plaintiff's voluntary participation in a sporting event, which indicates the plaintiff's consent to the risks that are inherent in that sport. Although a plaintiff's knowledge of the risk involved in the particular act that results in injury remains relevant, under CPLR 1411, in assessing his or her comparative fault, in the context of primary assumption of risk, 'knowledge plays a role but inherency is the sine qua non' ... . * * * Unlike a plaintiff subject to the pre-1975 defense of implied assumption of risk, the infant plaintiff in this case did not assume a risk at the moment he attempted to lift the 295-pound bar. Rather, his assumption of risk occurred when he joined the football team ..., and the risks he assumed were limited to those that are inherent in the sport of football. The risk of losing control of a 295-pound bar is not a risk inherent in the sport of football ...". ***Annitto v. Smithtown Cent. Sch. Dist.*, 2022 N.Y. Slip Op. 06098, Second Dept 11-2-22**

SECOND DEPARTMENT

APPEALS. FAMILY LAW.

CHANGED CIRCUMSTANCES RENDERED THE RECORD ON APPEAL INADEQUATE IN THIS CHILD CUSTODY CASE; MATTER SENT BACK TO FAMILY COURT FOR A HEARING.

The Second Department, reversing Family Court, determined that changed circumstances brought to the court's attention by the attorney for the child in this child custody matter rendered the record on appeal in sufficient. The matter was sent back for a hearing : "[N]ew developments have arisen since the orders appealed from were issued, which have been brought to this Court's attention by the attorney for the child and acknowledged by the father. These developments include the father's incarceration, allegations of neglect against the father, and the Family Court's issuance of an order temporarily placing the child in the custody of the child's paternal grandmother. As the Court of Appeals has recognized, changed circumstances may have particular significance in child custody matters and may render a record on appeal insufficient to review whether the Family Court's determination is still in the best interests of the child ... . In light of the new developments brought to this Court's attention, the record is no longer sufficient to review whether the Family Court's determination regarding custody and parental access is in the best interests of the child ...". ***Matter of Baker v. James*, 2022 N.Y. Slip Op. 06125, Second Dept 11-2-22**

CIVIL PROCEDURE, ATTORNEYS.

PLAINTIFF'S FAILURE TO COMPLY WITH DISCOVERY ORDERS WAS WILLFUL AND CONTUMACIOUS BUT DID NOT WARRANT SUPREME COURT'S STRIKING THE COMPLAINT; THE APPELLATE DIVISION IMPOSED EVIDENTIARY SANCTIONS AND ORDERED PLAINTIFF'S COUNSEL TO PAY DEFENDANT $3000.

The Second Department, reversing (modifying) Supreme Court, agreed plaintiff's failure to comply with discovery orders was willful and contumacious, but determined striking the complaint was too severe a sanction. The appellate division's sanctions included ordering plaintiff's counsel to pay defendant $3000 : "[T]he record demonstrates that the plaintiff violated court orders directing her to appear for a continued deposition by a certain date, to provide a full set of copies of photographs that she referenced during her first deposition or provide an affidavit as to the nonexistence of those photographs, and to execute authorizations for certain medical providers, a pattern that supports an inference of willful and contumacious behavior ... . Furthermore, the plaintiff's procedural objection to the defendant's motion was without merit. However, under the circumstances, we find that the striking of the complaint was too drastic a remedy ... . Accordingly, that branch of the defendant's motion which was pursuant to CPLR 3126 to strike the complaint should have been granted only to the extent of (1) precluding the plaintiff from using at trial any photograph that was not produced in response to the defendant's discovery demands, (2) directing the plaintiff to provide the defendant with medical authorizations for Jamaica Hospital, and (3) directing the plaintiff's counsel to personally pay the sum of $3,000 as a sanction to the defendant ...". ***Castillo v. Charles*, 2022 N.Y. Slip Op. 06103, Second Dept 11-2-22**

CIVIL PROCEDURE, CORPORATION LAW, CONTRACT LAW.

THE COMPLAINT ADEQUATELY ALLEGED FACTS SUPPORTING PIERCING THE CORPORATE VEIL; THE CAUSES OF ACTION FOR UNJUST ENRICHMENT AND BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING SHOULD NOT HAVE BEEN DISMISSED.

The Second Department, reversing Supreme Court, determined (1) the complaint sufficiently alleged the corporate veil should be pierced, and (2) the unjust enrichment and breach of the implied covenant of good faith and fair dealing causes of action should not have been dismissed: " '... [A] plaintiff seeking to pierce the corporate veil must show that (1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury' ... . 'The decision whether to pierce the corporate veil in a given instance depends on the particular facts and circumstances' ... . 'Factors to be considered in determining whether the owner has abused the privilege of doing business in the corporate form include whether there was a failure to adhere to corporate formalities, inadequate capitalization, commingling of assets, and use of corporate funds for personal use' ... . A cause of action under the doctrine of piercing the corporate veil is not required to meet any heightened level of particularity in its allegations ... . [T]he plaintiffs adequately pleaded allegations that [the individual defendants] dominated [the corporations], and that they engaged in acts amounting to an abuse of the corporate form to perpetrate a wrong or injustice against the plaintiffs ... . Where, as here, the existence of a contract, in this case, the alleged agreements [are] in dispute, a plaintiff may allege a cause of action to recover damages for unjust enrichment as an alternative to a cause of action alleging breach of contract (see CPLR 3014 ...). Consequently, the cause of action alleging unjust enrichment was not duplicative of the breach of contract cause of action ... . Furthermore, the cause of action alleging breach of the implied covenant of good faith and fair dealing was not duplicative of the breach of contract cause of action since it alleged that the defendants engaged in additional conduct to realize gains from the plaintiffs, while depriving the plaintiffs of the benefits of the parties' agreements ...". ***F&R Goldfish Corp. v. Furleiter*, 2022 N.Y. Slip Op. 06112. Second Dept 11-2-22**

CIVIL PROCEDURE, FRAUD.

IN AN ACTION ALLEGING FRAUDULENT INDUCEMENT, WHETHER THE PLAINTIFF REASONABLY RELIED ON THE ALLEGED MISREPRESENTATION IS USUALLY A QUESTION OF FACT WHICH CANNOT BE RESOLVED IN A MOTION TO DISMISS FOR FAILURE TO STATE A CAUSE OF ACTION.

The Second Department, reversing (modifying) Supreme Court, determined the complaint stated a cause of action for fraudulent inducement. Plaintiff radiologist alleged defendant induced him to open a radiology practice which, plaintiff said, already had a patient-referral system in place. Plaintiff alleged that, after expending funds to open the practice, he learned he would have to pay for the referrals and he shut the practice down. The appellate court held that whether plaintiff reasonably relied on the alleged misrepresentation usually is a question of fact for the jury: "Regarding reasonable reliance on a misrepresentation of a material fact, the 'plaintiff is expected to exercise ordinary diligence and may not claim to have reasonably relied on a defendant's representations [or silence] where he [or she] has means available to him [or her] of knowing, by the exercise of ordinary intelligence, the truth or the real quality of the subject of the representation' ... . The 'question of what constitutes reasonable reliance is always nettlesome because it is so fact-intensive' ... The resolution of the issue of whether a plaintiff reasonably relied on a defendant's misrepresentation in support of a cause of action alleging fraud in the inducement is ordinarily relegated to the finder of fact ... . [P]laintiffs adequately stated a cause of action to recover damages for fraudulent inducement insofar as the determination of the reasonableness of [plaintiff-radiologist's] reliance on [defendant's] alleged misrepresentations concerning, among other things, the source of the ... patient referrals itself entailed a question of fact not appropriate for summary disposition as a matter of law." ***Feldman v. Byrne*, 2022 N.Y. Slip Op. 06113, Second Dept 11-2-22**

CIVIL PROCEDURE, JUDGES. FORECLOSURE.

A MOTION TO VACATE AN ORDER SHOULD BE TRANSFERRED TO THE JUDGE WHO MADE THE ORDER; THE JUDGE SHOULD NOT HAVE, SUA SPONTE, DISMISSED THE COMPLAINT IN THIS FORECLOSURE ACTION.

The Second Department, reversing Supreme Court, determined: (1) a motion to vacate an order should be transferred to the judge who made the order; and (2) the judge should not have, sua sponte, dismissed the foreclosure complaint: "A motion to vacate an order 'shall be made, on notice, to the judge who signed the order, unless he or she is for any reason unable to hear it' (CPLR 2221[a]). 'A motion made to other than a proper judge . . . shall be transferred to the proper judge' (CPLR 2221[c]). Here, instead of denying the first motion with leave to renew before Justice Schulman, the Supreme Court should have transferred the first motion to Justice Schulman ... . 'A court's power to dismiss a complaint, sua sponte, is to be used sparingly and only when extraordinary circumstances exist to warrant dismissal' ... . Here, the plaintiff's failure to comply with the directives of the order ... was not a sufficient ground upon which to direct dismissal of the complaint in the first action ...". ***Citimortgage, Inc. v. Dedalto*, 2022 N.Y. Slip Op. 06105, Second Dept 11-2-22**

CIVIL PROCEDURE, PERSONAL INJURY, PRODUCTS LIABILITY.

DRIVER PURCHASED A GOODYEAR TIRE FOR HIS FORD FROM US TIRES, A NEW YORK CORPORATION; THE TIRE ALLEGEDLY FAILED LEADING TO A SERIOUS ACCIDENT IN VIRGINIA; DRIVER SUED US TIRES; US TIRES SUED GOODYEAR AND FORD, BOTH OUT-OF-STATE CORPORATIONS, SEEKING INDEMNIFICATION; NEW YORK HAS LONG-ARM JURISDICTION OVER GOODYEAR AND FORD IN THE US TIRES SUIT.

The Second Department, in a full-fledged opinion by Justice Genovesi, determined New York has long-arm jurisdiction over third-party defendants Ford and Goodyear in this suit by a New York corporation, US Tires. US Tires installed a Goodyear tire on a Ford. The tire allegedly failed in Virginia and three passengers died. The plaintiffs, including the driver, sued US Tires. US Tires sued Ford and Goodyear, both out-of-state corporations, seeking indemnification. The issue on appeal was whether Ford and Goodyear had sufficient contacts with New York to support long-arm jurisdiction: "Ford and Goodyear concede that they conducted sufficient activities to have transacted business in New York, thus satisfying the first prong of CPLR 302(a)(1). As to the second prong of CPLR 302(a)(1), US Tires demonstrated that Goodyear's and Ford's activities in New York have a sufficient connection with the claims herein. * * * When all the requirements of CPLR 302 are met, the exercise of personal jurisdiction still must comport with constitutional due process requirements ... . * * * Based on the record before us, the exercise of specific jurisdiction over Ford and Goodyear comports with due process ... . Ford and Goodyear concede that they had sufficient 'minimum contacts' with New York. ... [T]he only remaining question is whether Ford and Goodyear have met their burden of presenting 'a compelling case that the presence of some other considerations would render jurisdiction unreasonable' ... . We conclude that Ford and Goodyear have failed to meet this burden." ***Aybar v. US Tires & Wheels of Queens, LLC*, 2022 N.Y. Slip Op. 06099, Second Dept 11-2-11**

CRIMINAL LAW, APPEALS.

THE CONTENTION DEFENDANT WAS ILLEGALLY SENTENCED AS A SECOND VIOLENT FELONY OFFENDER NEED NOT BE PRESERVED FOR APPEAL; DEFENDANT COMMITTED THE INSTANT OFFENSE BEFORE HE WAS SENTENCED ON THE PRIOR VIOLENT FELONY CONVICTION; SECOND VIOLENT FELONY OFFENDER ADJUDICATION VACATED.

The Second Department, reversing (modifying) Supreme Court, noted that the contention defendant was illegally sentenced as a second violent felony offender need not be preserved for appeal: "As the People properly concede, the defendant's contention that he was illegally sentenced as a second violent felony offender is not subject to the preservation rule ... . Here, the defendant was illegally sentenced as a second violent felony offender since he committed the instant offense before he was sentenced on the prior violent felony conviction ... . Thus, the prior violent felony conviction cannot serve as a predicate violent felony offense for sentencing purposes (see Penal Law § 70.04[1][b][ii])." ***People v. Lynch*, 2022 N.Y. Slip Op. 06141, Second Dept 11-2-22**

CRIMINAL LAW, APPEALS, EVIDENCE.

AN APPELLATE COURT MAY CONSIDER A SUPPRESSION RULING GROUNDED ON A THEORY NOT RELIED UPON OR ARGUED BY THE PARTIES AS LONG AS THE RULING IS BASED UPON THE EVIDENCE AND IS FULLY LAID OUT AND EXPLAINED BY THE MOTION COURT; HERE THE AUTOMOBILE EXCEPTION TO THE WARRANT REQUIREMENT DID NOT APPLY AND THE EVIDENCE SEIZED FROM DEFENDANT'S VEHICLE SHOULD HAVE BEEN SUPPRESSED.

The Second Department, reversing Supreme Court, in a full-fledged opinion by Justice Chambers, determined: (1) the appellate court can consider an appeal of a suppression ruling which was not based on a theory argued by the parties below, but which was based upon the hearing evidence and fully laid out and explained by the motion court; and (2) the automobile exception to the warrant requirement did not apply and the evidence seized from defendant's vehicle should have been suppressed: "The narrow reading of *Tates* [189 AD3d 1088] advocated by the People is consistent with the approach taken by the Appellate Division, Fourth Department, and the Appellate Division, First Department, in comparable cases involving the suppression court's application of the automobile exception to the warrant requirement ... The general rule articulated in these cases is that the suppression court is 'entitled to consider legal justifications that were supported by the evidence, even if they were not raised explicitly by the People' ... . * * * '[A]bsent probable cause, it is unlawful for a police officer to invade the interior of a stopped vehicle once the suspects have been removed and patted down without incident, as any immediate threat to the officers' safety has consequently been eliminated' ... . Pursuant to the automobile exception to the warrant requirement, a warrantless search of a vehicle is

permitted when the police have probable cause to believe the vehicle contains contraband, a weapon, or evidence of a crime ... . Here, 'the circumstances known to the police at the time of the search did not rise to the level of probable cause' ...". ***People v. Marcial*, 2022 N.Y. Slip Op. 06142, Second Dept 11-2-22**

FAMILY LAW, ATTORNEYS.

IN THIS DIVORCE PROCEEDING, IT WAS AN ABUSE OF DISCRETION TO DENY INTERIM ATTORNEY'S FEES TO THE NONMONIED SPOUSE.

The Second Department, reversing (modifying) Supreme Court, determined interim attorney's fees should have been awarded to the nonmonied spouse: "Supreme Court improperly referred to the trial court that branch of the plaintiff's cross motion which was for an award of interim counsel fees (see Domestic Relations Law § 237[a] ...). 'Because of the importance of such awards to the fundamental fairness of the proceedings, . . . an application for interim counsel fees by the nonmonied spouse in a divorce action should not be denied—or deferred until after the trial, which functions as a denial—without good cause, articulated by the court in a written decision' ... . Here, the court erred in summarily referring that branch of the plaintiff's cross motion which was for an award of interim counsel fees to the trial court, which functioned as a denial of that relief, and failed to articulate any reasons, much less good cause, for that determination. The evidence submitted by the plaintiff demonstrates that she is the nonmonied spouse, as the defendant earned five to seven times more income than the plaintiff in recent years ... . While the defendant argues that the plaintiff has funds available to her, the plaintiff 'cannot be expected to exhaust all, or a large portion, of the finite resources available to her in order to pay her attorneys, particularly when the [defendant] is able to pay his own legal fees without any substantial impact upon his lifestyle' ...". ***Fugazy v. Fugazy*, 2022 N.Y. Slip Op. 06115, Second Dept 11-2-22**

MEDICAL MALPRACTICE, PERSONAL INJURY, EVIDENCE.

THE EXPERT DISCLOSURE COMBINED WITH THE BILL OF PARTICULARS GAVE SUFFICIENT NOTICE OF THE NATURE OF THE PLAINTIFF'S EXPERT'S OPINION; THE TESTIMONY SHOULD NOT HAVE BEEN PRECLUDED.

The Second Department, reversing Supreme Court, determined plaintiff's expert in this medical malpractice action should not have been precluded from testifying on the ground the expert disclosure did not provide notice of topic the expert was prepared to testify about. The notice, in combination, with the pleadings was deemed to have provided sufficient notice. The essence of the complaint was defendant doctor's (Ascencio's) alleged failure to diagnose and treat a surgery-related infection. Plaintiff's expert was going to testify the infection originated internally : "[T]he Supreme Court precluded the plaintiff's expert from testifying regarding his opinion that the plaintiff's infection originated internally during the surgery on the ground that the expert disclosure referenced only the alleged failure to timely diagnose and appropriately treat a postoperative wound infection. However, in light of the other allegations in the expert disclosure and the incorporated bills of particulars, including those that addressed the alleged failure to discover a 'festering infection' and/or a 'surgical site infection' prior to the plaintiff's discharge, 'the expert witness [disclosure] statement was not so inadequate or inconsistent with the expert's [proposed] testimony as to have been misleading, or to have resulted in prejudice or surprise' ... . Moreover, in this 'prototypical battle of the experts' ... , the preclusion of expert testimony concerning the origin of the plaintiff's infection, and its effect on Ascencio's alleged ability to discover the infection prior to the plaintiff's discharge, prejudiced the plaintiff in presenting her case, such that the error cannot be deemed harmless ...". ***Owens v. Ascencio*, 2022 N.Y. Slip Op. 06133, Second Dept 11-2-22**

PERSONAL INJURY, EVIDENCE.

SIX TO TWELVE INCHES OF SNOW FELL OVERNIGHT AND PLAINTIFF SLIPPED AND FELL AT AROUND 6:00 AM; DEFENDANTS' MOTION FOR SUMMARY JUDGMENT PURSUANT TO THE STORM-IN-PROGRESS DEFENSE SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined the defendants' motion for summary judgment in this slip and fall case should have been granted on the ground that the storm-in-progress defense applied: "On March 15, 2017, at approximately 5:55 a.m., the plaintiff ... allegedly was injured when he slipped and fell on snow and ice on premises owned by the defendants. ... 'Under the storm-in-progress rule, a property owner, tenant in possession, or, where relevant, a snow removal contractor will not be held responsible for accidents caused by snow or ice that accumulates during a storm until an adequate period of time has passed following the cessation of the storm to allow . . . an opportunity to ameliorate the hazards caused by the storm' ... . However, once a landowner or a tenant in possession elects to engage in snow removal during a storm in progress, 'it is required to act with reasonable care so as to avoid creating a hazardous condition or exacerbating a natural hazard created by the storm' ... . 'The mere failure of a defendant to remove all of the snow and ice, without more, does not establish that the defendant increased the risk of harm' ... . Here, in support of their motion, the defendants submitted ... [plaintiff's] deposition testimony, which established ... that snow began to fall the day before the incident and continued to fall into the overnight hours, producing 6 to 12 inches of snow, and that the defendants did not have a reasonably sufficient time to ameliorate the hazards caused by the storm ...". ***Henenlotter v. Union Free Sch. Dist. No. 23*, 2022 N.Y. Slip Op. 06116, Second Dept 11-2-22**

PERSONAL INJURY, EVIDENCE.

IN THIS REAR-END COLLISION CASE, THE DEFENDANT'S ALLEGATION HE DID NOT SEE PLAINTIFF'S BRAKE LIGHTS DID NOT RAISE A QUESTION OF FACT.

The Second Department, reversing Supreme Court, determined that allegation defendant did not see plaintiff's brake lights in this rear-end collision case did not raise a question of fact about whether brake lights were functioning : "[T]he defendant failed to raise a triable issue of fact. Contrary to the defendant's contention, his claim that he did not see brake lights on the plaintiffs' vehicle prior to the collision, standing alone, was insufficient to raise a triable issue of fact as to whether an alleged malfunction of the brake lights on the plaintiffs' vehicle proximately caused the accident ...". ***Quintanilla v. Mark*, 2022 N.Y. Slip Op. 06151, Second Dept 11-2-22**

PERSONAL INJURY, LANDLORD-TENANT. MUNICIPAL LAW.

IN THIS SLIP AND FALL CASE, THE LESSEE OF THE PROPERTY ABUTTING THE ALLEGEDLY DEFECTIVE SIDEWALK WAS NOT LIABLE FOR PLAINTIFF'S SLIP AND FALL; THERE WAS NO EVIDENCE THE CONDITION WAS CREATED BY THE LESSEE AND NO EVIDENCE OF AN AGREEMENT CREATING A DUTY ON THE PART OF THE LESSEE TO MAINTAIN THE SIDEWALK.

The Second Department, reversing (modifying) Supreme Court in this slip and fall case, determined 7-Eleven. the lessee of the property abutting the sidewalk where plaintiff allegedly fell, could not be held liable for the allegedly dangerous condition of the sidewalk: "Administrative Code of the City of New York § 7-210(a) imposes a duty upon 'the owner of real property abutting any sidewalk . . . to maintain such sidewalk in a reasonably safe condition.' '[A] lessee of property which abuts a public sidewalk owes no duty to maintain the sidewalk in a safe condition, and liability may not be imposed upon it for injuries sustained as a result of a dangerous condition in the sidewalk, except where the abutting lessee either created the condition, voluntarily but negligently made repairs, caused the condition to occur because of some special use, or violated a statute or ordinance placing upon the lessee the obligation to maintain the sidewalk which imposes liability upon the lessee for injuries caused by a violation of that duty' ... . Additionally, '[a]s a general rule, the provisions of a lease obligating a tenant to repair the sidewalk do not impose on the tenant a duty to a third party' ... . Only 'where a lease agreement is so comprehensive and exclusive as to sidewalk maintenance as to entirely displace the landowner's duty to maintain the sidewalk, [may] the tenant . . . be liable to a third party' ... . Here, the plaintiff failed to establish, prima facie, that 7-Eleven had any duty to maintain the sidewalk abutting the property it leased." ***Brady v. 2247 Utica Ave. Realty Corp.*, 2022 N.Y. Slip Op. 06100, Second Dept 11-2-22**

PERSONAL INJURY, MUNICIPAL LAW, EVIDENCE.

IN THIS SLIP AND FALL CASE, PLAINTIFF'S § 50-H EXAMINATION TESTIMONY DIRECTLY CONTRADICTED HIS AFFIDAVIT OPPOSING THE CITY'S SUMMARY JUDGMENT MOTION; THE "FEIGNED ISSUE OF FACT" DID NOT RAISE A QUESTION OF FACT.

The Second Department, reversing Supreme Court, determined the city's motion for summary judgment in this slip and fall case should have been granted. Plaintiff's affidavit in opposition directly contradicted his testimony at the General Municipal Law § 50-h examination: " '[A] defendant who moves for summary judgment in a slip-and-fall case has the initial burden of making a prima facie showing, inter alia, that it did not create the alleged hazardous condition' ... . Here, the defendant made a prima facie showing that it did not engage in any snow removal activity within the subject triangular area, and therefore was not responsible for creating the icy condition that caused the plaintiff to fall. In opposition to the defendant's motion, the plaintiff submitted an affidavit in which he averred that, in the afternoon of the day before his accident, he 'observed City personnel shoveling the snow from the [subject triangular area] and making piles of snow upon the perimeters.' Yet, at his examination pursuant to General Municipal Law § 50-h, the plaintiff had been asked 'At any point between the snowfall and the morning before the accident happened, had you seen anyone clearing snow from that [triangular area],' and he had responded 'No, no.' Since the assertion made for the first time in the plaintiff's affidavit directly contradicted the testimony he had given at his General Municipal Law § 50-h examination, and he has not provided a plausible explanation for the inconsistency between the two statements, the assertion made in his affidavit must be viewed as presenting a feigned factual issue designed to avoid the consequences of his earlier testimony, and it is insufficient to raise a triable issue of fact ...". ***Nass v. City of New York*, 2022 N.Y. Slip Op. 06132, Second Dept 11-2-22**

THIRD DEPARTMENT

ELECTION LAW, CIVIL PROCEDURE.

PETITIONERS' CHALLENGE TO THE NEW PROVISIONS OF THE ELECTION LAW ADDRESSING THE NEW PROCESS OF CANVASSING ABSENTEE BALLOTS WAS PRECLUDED BY THE DOCTRINE OF LACHES.

The Third Department, reversing (modifying) Supreme Court, determined the challenge to the new process of canvassing absentee ballots was precluded by the doctrine of laches: "Petitioners commenced this proceeding/action challenging the constitutionality of the new process of canvassing absentee ballots in Election Law § 9-209 nine months after it was enacted, after the process was in effect for two primary elections and several special elections, and at the time that canvassing of absentee ballots using the new process began in the 2022 general election. The amendment to Election Law § 8-400 was enacted in 2020 and has been in effect for multiple general, primary and special elections but petitioners did not challenge the statute until nine months after the sunset clause was extended and after the mailing of absentee ballots had already begun. ... In short, petitioners delayed too long in bringing this proceeding/action. To the extent that petitioners contend that they

did not bring the challenges until they were ripe, the action constitutes facial challenges to the statutes, implicating their text, not their applications, and, therefore, the action was ripe at the time of the enactment of the statutes ...". ***Matter of Amedure v. State of N.Y.*, 2022 N.Y. Slip Op. 06096, Third Dept 11-1-22**

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