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COURT OF APPEALS

CONSTITUTIONAL LAW.

THE ENABLING ACT WHICH TASKED A LEGISLATIVE COMMITTEE WITH DECIDING WHETHER THE SALARIES OF LEGISLATORS AND STATE OFFICIALS SHOULD BE INCREASED IS CONSTITUTIONAL.

The Court of Appeals, in a full-fledged opinion by Judge Cannataro, over an extensive concurring opinion and a two-judge dissent, determined the enabling act which empowered a committee to decide whether to increase the salaries of legislators and state officials was constitutional. The opinions are far too comprehensive to fairly summarize here: "In this declaratory judgment action, plaintiffs challenge the constitutionality of part HHH of chapter 59 of the Laws of 2018 (the enabling act), in which the Legislature tasked the Committee on Legislative and Executive Compensation with determining, after consideration of various factors, whether 'the salary and allowances of the members of the [L]egislature' and certain other state officials 'warrant an increase' ... . The enabling act further provided that the Committee's recommendation with respect to any salary changes would become effective unless modified or abrogated by statute. Inasmuch as defendants have failed to overcome the presumption of constitutionality afforded to the enabling act as a duly enacted state statute ... , we affirm." ***Delgado v. State of New York*, 2022 N.Y. Slip Op. 06538, CtApp 11-17-22**

CRIMINAL LAW, APPEALS.

THE APPELLATE DIVISION AFFIRMED DEFENDANT'S CONVICTION BY GUILTY PLEA AFTER A FLAWED SPEEDY-TRIAL ANALYSIS OF THE EIGHT-YEAR PRE-INDICTMENT DELAY; THE COURT OF APPEALS REVERSED, EXPLAINED THE FLAWS AND REMITTED THE MATTER FOR A NEW ANALYSIS.

The Court of Appeals, reversing the appellate division's affirmance of defendant's (Johnson's) conviction by guilty plea and remitting the matter for another analysis, in a full-fledged opinion by Judge Wilson, determined the appellate division did not properly apply the "*Taranovich*" criteria to the eight-year pre-indictment delay in this rape/sexual abuse case. "In *People v Taranovich*, we established the following five factors for assessing speedy trial claims: (1) the extent of the delay; (2) the reasons for the delay; (3) the nature of the underlying charge; (4) whether there has been an extended period of pretrial incarceration; and (5) whether there is any indication that the defense has been impaired by reason of the delay ... . Although this case concerns pre-indictment delay and is analyzed as a due process claim, we nevertheless apply the test established in *Taranovich* ... . The Appellate Division 'assume[d], arguendo, that the People failed to establish 'good cause' for the 'protracted' preindictment delay' ... . However, some examination of the reason for the delay is required. Instead of attempting to evaluate the good faith reasons for the various periods of delay, the Appellate Division's conclusion that the second factor favored Mr. Johnson is based upon an assumption for the sake of argument. ... Turning to the third factor, the 'nature' of the underlying crime can refer to both its severity and, relatedly, the complexity and challenges of investigating the crime and gathering evidence to support a prosecution ... . Here, the Appellate Division held that its assumption that the People lacked good cause compelled the result that the 'third factor[ ] favors[s] the defendant.' The crime here—the sexual assault of a minor found unresponsive on a city street—is quite serious. The nature of the crime here is directly related to the issues of complexity and may, therefore, account for some of the delay: the victim's severe intoxication and lack of memory of the assault rendered her unable to identify her attacker. It is not clear on what basis the court concluded that its assumption of lack of good faith led to the conclusion that the third factor favored Mr. Johnson, but that conclusion, apparently based solely on that assumption with no analysis of the relevant concerns, is not supportable. ... In analyzing factor five, the Appellate Division held that because Mr. Johnson pled guilty only to rape in the second degree ... , which depends solely on the age difference between the defendant and the victim, 'the preindictment delay could not have 'impaired' defendant's ability to defend himself on the charge of which he was convicted' ... . This was error. When an indictment contains multiple counts, if delay impacts the defendant's ability to defend one count, it may weaken that defendant's position in plea bargaining, potentially adversely impacting the resulting plea ... . Thus, the appellate court must consider prejudice measured against all counts pending when the dismissal motion is made, not merely against the crime of conviction." ***People v. Johnson*, 2022 N.Y. Slip Op. 06537, CtApp 11-17-22**

CRIMINAL LAW, EVIDENCE.

DEFENDANT, WHO WAS CHARGED WITH STRIKING A SMALL DOG WITH A BROOM HANDLE, WAS NOT ENTITLED TO THE "CHOICE OF EVILS" INSTRUCTION TO THE GRAND JURY; DEFENDANT ARGUED HE STRUCK THE DOG TO PREVENT A "GREATER EVIL," I.E., AN INFECTION FROM A BITE; THE EVIDENCE DID NOT SUPPORT THE DEFENDANT'S ARGUMENT BECAUSE DEFENDANT TESTIFIED STRIKING THE DOG WAS AN ACCIDENT.

The Court of Appeals, in a full-fledged opinion by Judge Rivera, determined the defendant was not entitled to a "choice of evils" instruction in the grand jury proceedings. Defendant was charged with criminal mischief under Penal Law § 145.10, aggravated cruelty to animals under Agriculture and Markets Law § 353-a, and Overdriving, Torturing, or Injuring an Animal under Agriculture and Markets Law § 353. During a confrontation with a person, a small dog (Gigi) started biting at defendant's pant leg and defendant struck the dog with a broom handle. Defendant argued the grand jury should have been instructed on the "choice of evils" defense because he struck the dog to prevent an infection from a dog bite: "Section 35.05 (2) of the Penal Law provides that conduct that would otherwise be criminal may be justifiable when '[s]uch conduct is necessary as an emergency measure to avoid an imminent . . . private injury which is about to occur by reason of a situation occasioned or developed through no fault of the actor, and which is of such gravity that, according to ordinary standards of intelligence and morality, the desirability and urgency of avoiding such injury clearly outweigh the desirability of avoiding the injury sought to be prevented by the statute defining the offense in issue.' * * * ... [D]efendant testified before the grand jury that he was not afraid of Gigi, that he never intended to hurt her, and that he struck her by mistake during his struggle with the uncle and as a reaction to the surrounding circumstances. Thus, by his own account, defendant made no choice at all to strike Gigi, but acted without intending to hit anything or specifically to hurt her. The record, including defendant's own testimony and the surveillance video, forecloses defendant's argument that he chose to strike Gigi as an 'emergency measure to avoid an imminent . . . private injury' ... . Accordingly, the prosecutor was not obligated to instruct the grand jury on the "choice of evils" defense under section 35.05 (2) ...". ***People v. Jimenez*, 2022 N.Y. Slip Op. 06541, CtApp 11-17-22**

FORECLOSURE, DEBTOR-CREDITOR, CIVIL PROCEDURE.

IN THIS FORECLOSURE ACTION DEFENDANT DEBTOR ENTERED A MORTGAGE MODIFICATION AGREEMENT WHICH CALLED FOR THREE PAYMENTS; DEFENDANT DEBTOR MADE FOUR ADDITIONAL PAYMENTS IN AMOUNTS HIGHER THAN CALLED FOR IN THE MORTGAGE; THE PAYMENTS AMOUNTED TO AN ACKNOWLEDGMENT OF THE MORTGAGE DEBT WHICH STARTED THE STATUTE OF LIMITATIONS FOR FORECLOSURE ON THE DATE OF THE LAST PAYMENT.

The Court of Appeals, reversing the appellate division, determined the defendant debtor acknowledged the mortgage debt by paying more than was required by the Home Affordable Modification Trial Payment Plan. Therefore the statute of limitations for foreclosure started running when defendant debtor made the last payment: "In this mortgage foreclosure action, plaintiff contends that Supreme Court erred in concluding that the complaint was timely inasmuch as Maxi Jeanty (debtor) made four payments between August 2009 and March 2010 on account of the mortgage debt which were effective pursuant to General Obligations Law § 17-107 (1) to make the statute of limitations begin running anew on the date of the last such payment. We agree. Plaintiff met its prima facie burden on its motion ... by submitting evidence that, after entering a Home Affordable Modification Trial Payment Plan (the Plan), the debtor made a total of seven payments from April 2009 through March 2010, each in an amount exceeding that of the regular installment payments required under the loan documents prior to the acceleration of the debt in August 2008. The first three payments were required pursuant to the Plan, but the remaining four were not. Those four payments established 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' (... see General Obligations Law § 17-107 [1])." ***Federal Natl. Mtge. Assn. v. Jeanty*, 2022 N.Y. Slip Op. 06539, CtApp 11-17-22**

FIRST DEPARTMENT

CIVIL PROCEDURE, JUDGES.

BOTH PARTIES MOVED TO EXTEND THE DEADLINE FOR FILING A NOTE OF ISSUE BECAUSE DISCOVERY WAS NOT COMPLETE; DENYING THE MOTION MADE IT IMPOSSIBLE FOR THE CASE TO PROGRESS; SUPREME COURT REVERSED.

The First Department, reversing Supreme Court, determined the motion to extend the deadline for filing the note of issue should not have been denied because discovery was incomplete: "The motion court improvidently denied the motions of both parties to extend the deadline to file the note of issue and to complete discovery since discovery was not complete. Under the circumstances, the court's denial of plaintiff's motion left the parties in limbo where they could neither move forward to trial nor complete the discovery necessary to move forward to trial, thereby frustrating the strong public policy favoring open disclosure to allow the parties to adequately prepare (CPLR 3101[a] ...). Additionally, as defendant demonstrated a need for additional discovery and to depose plaintiff's expert, who was hired to calculate damages in this commercial case, its motion should have been granted (see 22 NYCRR 202.70, Rule 13[c] ...)." ***361 Broadway Assoc. Holdings, LLC v. Foundations Group I, Inc.*, 2022 N.Y. Slip Op. 06571, First Dept 11-17-22**

CIVIL PROCEDURE, PRODUCTS LIABILITY, NEGLIGENCE.

NEW YORK DOES NOT HAVE GENERAL OR LONG-ARM JURISDICTION OVER A UK CORPORATION WHICH ALLEGEDLY MANUFACTURED A DEFECTIVE PART OF AN EXCAVATOR.

The First Department, reversing Supreme Court, determined the Miller defendants, a UK corporation, were not amenable to general or long-arm jurisdiction in New York. Plaintiff alleged a part (a coupler) made by Miller failed causing an excavator bucket to detach and fall: "General jurisdiction exists over a corporate entity only in the state(s) in which it is incorporated and has its principal place of business ... . *** Defendants have also failed to establish specific jurisdiction over the Miller parties pursuant to CPLR 302(a)(1), CPLR 302 (a)(3)(i) or CPLR 302 (a)(3)(ii). Although the Miller parties might have placed the coupler involved in plaintiff's accident into the stream of commerce, and while they tout having a global customer base and business model, the Supreme Court of the United States has made clear that "the 'fortuitous circumstance' that a product sold in another state later makes its way into the forum jurisdiction through no marketing or other effort of [the] defendant,' or 'the mere likelihood that a product will find its way into the forum[,]' cannot establish the requisite connection between [the] defendant and the forum' to support an exercise of specific personal jurisdiction ...". ***Cruz v. City of New York*, 2022 N.Y. Slip Op. 06546, First Dept 11-17-22**

CRIMINAL LAW, CIVIL PROCEDURE,

IT IS ONLY PURSUANT TO EXECUTIVE LAW § 63(3) THAT THE ATTORNEY GENERAL (AS OPPOSED TO A COUNTY PROSECUTOR) IS EMPOWERED BRING A CRIMINAL PROSECUTION; THE EXECUTIVE LAW ALLOWS REQUESTS FOR AN AG PROSECUTION ONLY FROM THE EXECUTIVE BRANCH, NOT THE JUDICIAL BRANCH; HERE THE CHIEF JUDGE REQUESTED THE PROSECUTION; A WRIT OF PROHIBITION ENJOINING THE PROSECUTION WAS GRANTED.

The First Department, in a full-fledged opinion by Justice Higgitt, determined the petitioner's request for a writ of prohibition to enjoin the attorney general (AG) from prosecuting him for alleged criminal offenses should be granted. The request for the prosecution came from a judge. Executive Law § 63(3) does not authorize a request for prosecution from the judicial, as opposed to the executive, branch: "This CPLR article 78 proceeding seeking a writ of prohibition raises an issue of apparent first impression: whether the Attorney General may criminally prosecute an individual based on an Executive Law § 63(3) referral from the Chief Administrative Judge of the Unified Court System. Executive Law § 63(3) authorizes the Attorney General of the State of New York, '[u]pon request of the governor, comptroller, secretary of state, commissioner of transportation, superintendent of financial services, commissioner of taxation and finance, commissioner of motor vehicles, or the state inspector general, or the head of any other department, authority, division or agency of the state,' to investigate and prosecute criminality relating to any matter connected with the referring entity. Petitioner, the subject of the criminal prosecution initiated and maintained by the AG based on the purported Executive Law § 63(3) referral by an officer within the Unified Court System, commenced this special proceeding for a writ of prohibition challenging the validity of the referral and the legality of the AG's authority to prosecute him. We hold that an Executive Law § 63(3) referral can come only from an agency within the executive branch. Therefore, a referral from an officer within the Unified Court System — that is, the judicial branch of government — is not permitted by the statute, and, for the reasons discussed below, we grant prohibition relief to petitioner." ***Matter of Makhani v. Kiesel*, 2022 N.Y. Slip Op. 06556, First Dept 11-17-22**

EMPLOYMENT LAW, HUMAN RIGHTS LAW, CIVIL PROCEDURE.

THE THREE-YEAR STATUTE OF LIMITATIONS FOR AGE DISCRIMINATION CLAIMS UNDER THE NYS AND NYC HUMAN RIGHTS LAW IS TOLLED BY FILING A CHARGE FOR AGE DISCRIMINATION WITH THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (EEOC).

The First Department, reversing Supreme Court, determined the age discrimination claims under the NYS and NYC Human Rights Law were timely brought because the three-year statute of limitations was tolled when plaintiff filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC): "Plaintiff's action, asserting claims of age discrimination under the New York State Human Rights Law (Executive Law § 296[1][a]) and the New York City Human Rights Law (Administrative Code § 8-107), was timely commenced, as the three-year statute of limitations was tolled by her filing of a charge of discrimination with the Equal Employment Opportunity Commission (EEOC) ... . The filing of an EEOC charge constitutes a simultaneous and automatic filing with the New York State Division of Human Rights (SDHR) due to a work-sharing agreement between the two agencies ... . Moreover, Administrative Code § 8-502(d) provides, '[u]pon the filing of a complaint with the city commission on human rights or the state division of human rights and during the pendency of such complaint and any court proceeding for review of the dismissal of such complaint, such three-year limitations shall be tolled.' The interplay between the EEOC/SDHR work-sharing agreement and the tolling provision in § 8-502(d) 'indicates that a charge filed with the EEOC would also toll the statute of limitations period for [City HRL] claims' ...". ***Gabin v. Greenwich House, Inc.*, 2022 N.Y. Slip Op. 06428, First Dept 11-15-22**

EMPLOYMENT LAW, NEGLIGENCE, CONTRACT LAW.

DEFENDANT'S EMPLOYER (TOMS) WAS NOT LIABLE FOR THE ACTS OF DEFENDANT EMPLOYEE (ROSNER) WHICH WERE NOT DONE WITHIN THE SCOPE OF ROSNER'S EMPLOYMENT OR TO FURTHER TOMS' BUSINESS.

The First Department, reversing Supreme Court, determined that defendant Rosner, an employee of defendant TOMS Capital Management, was clearly not acting within the scope of his employment with TOMS when advising plaintiff on investments, allegedly as part of a scheme to deplete plaintiff's assets. Therefore, plaintiff's unjust enrichment and negligence causes of action against TOMS based upon respondeat su-

perior should have been dismissed: "In or about June 2020, Rosner allegedly began an affair with plaintiff's wife. They then allegedly conspired to develop a scheme to deplete plaintiff's assets. In furtherance of this scheme, Rosner began to advise plaintiff to invest in high-risk stock options which Rosner knew were not suitable for plaintiff and would not be profitable for him. Plaintiff followed the advice and sustained trading losses in excess of $300,000. Plaintiff alleges that this investment advice was part of a scheme by TOMS and Rosner to 'better position the stock options,' in which TOMS was also allegedly participating, to benefit TOMS and Rosner and their clients. The motion court incorrectly determined that the allegations in the complaint sufficiently supported claims for unjust enrichment and negligence against TOMS under a theory of respondeat superior. Even construed in the light most favorable to plaintiff ... , the alleged acts by Rosner clearly were not made within the scope of his employment or in furtherance of TOMS's business, but rather, for his own personal gain ...". ***Courtois v. TOMS Capital Mgt. LP*, 2022 N.Y. Slip Op. 06545, First Dept 11-17-22**

MEDICAL MALPRACTICE, PERSONAL INJURY, CONTRACT LAW, PUBLIC HEALTH LAW.

FAILURE TO FOLLOW DECEDENT'S DIRECTIVES IN A LIVING WILL OR HEALTHCARE PROXY CAN CONSTITUTE MEDICAL MALPRACTICE; HERE THERE WERE QUESTIONS OF FACT ABOUT WHICH HEALTHCARE PROXY APPLIED, WHETHER A PROXY WAS REVOKED BY DECEDENT, AND WHETHER THE TREATMENT GIVEN TO DECEDENT WAS APPROVED.

The First Department, reversing Supreme Court, determined there were questions of fact concerning which of two contradictory healthcare proxies applied and whether one of the healthcare proxies was revoked by decedent's conversations: "Plaintiff commenced an action against defendants alleging medical malpractice based on the various health proxies and forms. Plaintiff claims that defendants breached their agreement with the decedent by administering antibiotics and IV Hydration from April 15, 2017 onwards that prolonged his life. Here, there are issues of fact that preclude summary judgment. It is unclear whether the 1993 healthcare proxy (and the living will), the 2016 healthcare proxy or the 2017 FLST [Forgoing Life-Sustaining Treatment Including DNR] governed this dispute and whether the 2016 health care proxy was revoked by decedent through conversations with his agents, pursuant to Public Health Law § 2985(a). Significantly, it is not clear from the record whether the treatment prolonged decedent's life, as neither side submits an expert affidavit. There is also a question as to whether decedent's health care agents approved the very treatment for which they now seek to hold defendants liable." ***Lanzetta v. Montefiore Med. Ctr.*, 2022 N.Y. Slip Op. 06554, First Dept 11-17-22**

MENTAL HYGIENE LAW, FAMILY LAW.

THE GUARDIAN OF THE PERSON AND PROPERTY OF THE INCAPACITATED PERSON (IP) AND THE ATTORNEY APPOINTED TO REPRESENT THE IP WERE PROPERLY REMOVED AND DISCHARGED WITHOUT A TESTIMONIAL HEARING, WHICH IS NOT REQUIRED BY THE MENTAL HYGIENE LAW; THE GUARDIAN AND THE ATTORNEY FAILED TO INVESTIGATE THE BONA FIDES OF THE IP'S MARRIAGE AND THE PRENUPTIAL AGREEMENT.

The First Department, in a full-fledged opinion by Justice Gische, determined the temporary guardian of the person and property (Mock) and the attorney appointed represent the incapacitated person (IP), Edgar, were properly removed and discharged without a testimonial hearing. The opinion is rich with allegations Edgar was being victimized financially which cannot be fairly summarized here: "On October 2, 2018, Alison Loew, the sister and only sibling of Edgar Valentine Loew, brought a petition for the appointment of an article 81 guardian for her then 74-year-old brother. The petition alleged that Edgar, who is wealthy, but suffers from mental health issues and has some physical limitations, was the victim of systematic financial exploitation by Rachida Naciri. ... A court evaluator (Britt Burner) was appointed on October 2, 2018, appellant Gary Elias was appointed as Edgar's attorney, and appellant Judy S. Mock was appointed as Edgar's temporary guardian of the person and property. * * * The Mental Hygiene Law does not support appellants' contention that they were entitled to a testimonial hearing in this case before being removed. Mental Hygiene Law § 81.35 provides that a guardian may be removed when she or he 'fails to comply with an order, is guilty of misconduct, or for any other cause which to the court shall appear just' ... . A motion on notice, served on the persons specified in Mental Hygiene Law § 81.16 (c), is required but there is no statutory right to a hearing (see Mental Hygiene Law §§ 81.16[c]; 81.35). This relaxed requirement stands in distinction to Mental Hygiene Law § 81.11 (a), which provides that the petition for the appointment of a guardian for an alleged IP, whose liberty interests are at stake, 'shall be made only after a hearing' ... . The reason a guardian has 'no due process right to a full hearing,' nor is a 'full blown' hearing necessary for their removal, is that a guardian has no 'property interest' to protect ... . Although a guardian cannot be summarily removed in the absence of a fully developed record or without any findings, and a hearing may be required where material facts are disputed ... , here the parties had not only fully briefed [the] motion, but the salient facts were also known to the court and largely undisputed. A decision to remove a guardian of the person and property of an IP is within the sound discretion of the trial court ...". ***Matter of Loew*, 2022 N.Y. Slip Op. 06436, First Dept First Dept 11-15-22**

PERSONAL INJURY.

IN THIS SIDEWALK SLIP AND FALL CASE, THE SUPPORT POLE FOR THE SIDEWALK TENT FURNISHED THE OCCASION FOR THE SLIP AND FALL BY REQUIRING PLAINTIFF TO CHOOSE WHICH SIDE OF THE POLE TO WALK ON BUT WAS NOT THE PROXIMATE CAUSE OF THE SLIP AND FALL.

The First Department, reversing Supreme Court, determined the support pole for the sidewalk shed furnished a condition for the sidewalk slip and fall but was not the proximate cause of the fall: "The record established as a matter of law that the sidewalk shed was not a proximate cause of plaintiff's injuries. Plaintiff testified that the support pole for the sidewalk shed was placed in the middle of the sidewalk, dividing the

area into two paths that were three feet wide on each side, and that she and her husband elected to walk side-by-side on the path to the left nearest the tree well. Plaintiff stated that her husband 'nudged' her to the left, and her foot touched the edge of the tree well, which was not level with the sidewalk, causing her to fall. This testimony established that the placement of the sidewalk shed support pole did not compel plaintiff to step into the tree well to proceed forward, but that its placement merely facilitated the accident or furnished the occasion for it ...". ***Kalnit v. 141 E. 88th St., LLC*, 2022 N.Y. Slip Op. 06552, First Dept 11-17-22**

PERSONAL INJURY, MUNICIPAL LAW.

PLAINTIFF PEDESTRIAN ALLEGED THE NEGLIGENCE OF A TRAFFIC OFFICER IN DIRECTING TRAFFIC CAUSED THE ACCIDENT; PLAINTIFF DID NOT DEMONSTRATE A SPECIAL RELATIONSHIP BETWEEN THE CITY AND PLAINTIFF, A PREREQUISITE FOR MUNICIPAL LIABILITY.

The First Department, reversing Supreme Court, determined plaintiff-pedestrian's complaint against the city in this traffic accident case should have been dismissed. Plaintiff alleged the traffic officer's negligence in directing traffic caused the accident. The First Department found there was no demonstration of a "special relationship" between plaintiff and the city, a prerequisite for municipal liability: "Neither the notice of claim nor the complaint alleges the factual predicate for the special relationship theory between plaintiff and the City, as required to hold the City liable for plaintiff's injuries based on a traffic officer's alleged negligence in directing traffic and pedestrians at an intersection where plaintiff was crossing the street ... . Plaintiff also did not sufficiently allege that the officer, in directing traffic, took control of 'a known and dangerous safety condition' so as to set forth the existence of a special duty ... . Plaintiff alleged only that the traffic officer negligently directed a vehicle at the intersection, causing the vehicle to hit her, thereby creating a dangerous condition; however, the dangerous condition must exist prior to the traffic officer's assumption of any duty ... . Plaintiff did not assert that the intersection was inherently dangerous or that the drivers of the cars at the intersection were violating any safety laws before the officer was directing pedestrians." ***Polito v. Escorcia*, 2022 N.Y. Slip Op. 06447, First Dept 11-15-22**

PERSONAL INJURY, MUNICIPAL LAW, CIVIL PROCEDURE.

THE BIG APPLE MAP RAISED A QUESTION OF FACT ABOUT WHETHER THE CITY HAD WRITTEN NOTICE OF THE SIDEWALK DEFECT WHICH ALLEGEDLY CAUSED PLAINTIFF'S SLIP AND FALL; PLAINTIFF'S COMPLAINT WAS AMENDED TO FIX A DEFICIENCY IN PLEADING THAT THE CITY HAD WRITTEN NOTICE OF THE DEFECT.

The First Department, reversing Supreme Court, determined: (1) there was a question of fact whether the Big Apple map provided the city with written notice of the sidewalk defect alleged to have caused plaintiff's slip and fall; (2) the city's evidence to the contrary was improperly first submitted in reply; (3) the plaintiff was entitled to amend the complaint to correct the deficiency in pleading the city had written notice of the sidewalk defect: "In support of its summary judgment motion, the City submitted evidence, including the most recent Big Apple Map received by the City prior to plaintiff's accident, and argued that the Map did not depict the type of sidewalk defect that plaintiff testified caused her accident. Based on all the evidence submitted, including the Big Apple Map and photographs of the sidewalk defect, plaintiff raised a triable issue of fact as to whether the City had prior written notice of the alleged dangerous condition ... . The City's contention that the Big Apple Map had been rendered inapplicable by subsequent sidewalk repairs is unavailing. Aside from the fact that this argument was improperly raised for the first time on reply, the City's submissions indicated that the defect remained unchanged. Further, the issue of whether the Big Apple Map was sufficiently close in time to provide prior written notice, and whether the area had remained unchanged, was a question for the jury ...". ***Bchakjan v. City of New York*, 2022 N.Y. Slip Op. 06543, First Dept 11-17-22**

SECOND DEPARTMENT

ATTORNEYS, AGENCY, CONTRACT LAW.

ABSENT FRAUD, COLLUSION OR A MALICIOUS OR TORTIOUS ACT, DEFENDANT ATTORNEYS COULD NOT BE LIABLE FOR ACTING WITHIN THE SCOPE OF THEIR AUTHORITY AS AGENTS OF THE CLIENTS AND ALLEGEDLY ADVISING THEIR CLIENTS TO BREACH A CONTRACT WITH PLAINTIFFS.

The Second Department, reversing Supreme Court, determined the defendant attorneys (Jin Hu defendants) could not be liable to third parties (plaintiffs) for allegedly advising their clients (DeVito defendants) to breach a real estate purchase contract: "... '[I]nasmuch as the relationship created between an attorney and his client is that of principal and agent, an attorney is not liable for inducing his [or her] principal to breach a contract with a third person, at least where he [or she] is acting on behalf of his principal within the scope of his [or her] authority' ... . 'Absent a showing of fraud or collusion, or of a malicious or tortious act, an attorney is not liable to third parties for purported injuries caused by services performed on behalf of a client or advice offered to that client' ... . Here, the allegations in the complaint regarding the conduct of the Jin Hu defendants were impermissibly vague and conclusory ... . Additionally, the complaint failed to sufficiently allege that the Jin Hu defendants acted outside the scope of their authority as counsel for the DeVito defendants or engaged in any conduct that could make them liable to the plaintiffs ...". ***Asamblea De Iglesias Christianas, Inc. v. DeVito*, 2022 N.Y. Slip Op. 06456, Second Dept 11-16-22**

CIVIL PROCEDURE, ATTORNEYS.

HERE, THE FAILURE TO OPPOSE THE MOTION FOR SUMMARY JUDGMENT WAS DUE TO NEGLECT, WHICH DOES NOT WARRANT VACATUR; THE MOTION TO VACATE THE ORDER ENTERED ON PLAINTIFF'S DEFAULT SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined plaintiff's motion to vacate the order entered upon plaintiff's default should not have been granted: "Pursuant to CPLR 5015(a)(1), '[t]he court which rendered a judgment or order may relieve a party from it upon such terms as may be just, on motion of any interested person . . . upon the ground of . . . excusable default.' 'A party seeking to vacate an order entered upon his or her default in opposing a motion must demonstrate both a reasonable excuse for the default and a potentially meritorious opposition to the motion' . 'Law office failure may qualify as a reasonable excuse for a party's default if the claim of such failure is supported by a credible' and detailed explanation of the default ... . The determination as to what constitutes a reasonable excuse is a matter of the court's discretion, but mere neglect will not suffice ... . [A] managing attorney at the law firm representing the plaintiff was notified of the February 28, 2018 adjourned deadline to submit opposition papers to the defendants' motion, and a member of the firm entered a 'follow up docket date' for February 7, 2018, 'to ensure that the opposition was being handled' ... . However, instead of 'follow[ing] up with the managing attorney to make sure the opposition was assigned,' the member of the law firm returned the file to the file room. As the member of the law firm affirmed, '[i]t simply was not addressed properly.' ... [T]he plaintiff did not move to vacate the order dated August 29, 2018, for approximately eight months, or 253 days, after being served with the order and notice of entry ... . [T]he plaintiff's failure to oppose the defendants' motion was the equivalent of mere neglect and was therefore insufficient to warrant vacatur ...". ***Sauteanu v. BJ's Wholesale Club, Inc.*, 2022 N.Y. Slip Op. 06509, Second Dept 11-16-22**

CIVIL PROCEDURE, CORPORATION LAW, LIMITED LIABILITY COMPANY LAW.

THE ADDITIONAL NOTICE REQUIREMENT IN CPLR 3215(G)(4) DOES NOT APPLY TO SERVICE UPON A LIMITED LIABILITY COMPANY, AS OPPOSED TO A CORPORATION.

The Second Department, reversing Supreme Court, determined the plaintiff was not required to comply with the additional notice requirement in CPLR 3215(g)(4) which does not apply to service upon a limited liability company (the defendant here), as opposed to corporations: "The court [in denying plaintiff's motion for a default judgment] determined that the plaintiff had failed to comply with CPLR 3215(g)(4) and that the respondent had a reasonable excuse for failing to answer the complaint in that it had not been served with process. ... Contrary to the Supreme Court's determination, the plaintiff was not required to demonstrate compliance with the additional notice requirement of CPLR 3215(g)(4) ... . 'By its express terms, the notice requirement is limited to situations where a default judgment is sought against a 'domestic or authorized foreign corporation' which has been served pursuant to Business Corporation Law § 306(b), and does not pertain to a limited liability company' ...". ***Mitchell v. Kingsbrook Jewish Med. Ctr.*, 2022 N.Y. Slip Op. 06477, Second Dept 11-16-22**

CIVIL PROCEDURE, PERSONAL INJURY, JUDGES.

IF A TRIAL JUDGE DECIDES THE DAMAGES AWARDED BY THE JURY ARE EXCESSIVE, THE PROPER PROCEDURE IS TO ORDER A NEW TRIAL UNLESS PLAINTIFF STIPULATES TO THE REDUCED AWARD.

The Second Department agreed with the trial judge's reduction of damages awarded by the jury in this wrongful death case but noted that the judge should have ordered a new trial unless plaintiff stipulated to the lower damages amount: "[W]hile the 21-year-old Bohdan [plaintiff's decedent], who worked in the family business, lived with his parents, and cared for his younger sibling, was described as a wonderful, loving son who was especially helpful around the home, based on the record, the Supreme Court properly concluded that the jury awards for past pecuniary loss and future pecuniary loss were excessive. ... . [I]t was procedurally improper for the court to reduce the awards of damages for past pecuniary loss and future pecuniary loss without granting a new trial on those issues unless the plaintiff stipulated to reduce the verdict ...". ***Vitenko v. City of New York*, 2022 N.Y. Slip Op. 06515, Second Dept 11-16-22**

CRIMINAL LAW, APPEALS.

THE SUPERIOR COURT INFORMATION (SCI) DID NOT INCLUDE AN OFFENSE CHARGED IN THE FELONY COMPLAINT OR A LESSER INCLUDED OFFENSE; THE SCI WAS THEREFORE JURISDICTIONALLY DEFECTIVE; THE ERROR NEED NOT BE PRESERVED FOR APPEAL.

The Second Department, reversing defendant's conviction and vacating the plea, determined the superior court information (SCI) was jurisdictionally defective because it did not include an offense charged in the felony complaint or a lesser included offense of an offense charged in the felony complaint: "The defendant was charged, by felony complaint, with one count of course of sexual conduct against a child in the first degree under Penal Law § 130.75(1)(b), and one count of endangering the welfare of a child under Penal Law § 260.10(1). He waived indictment by a grand jury and entered a plea of guilty under a superior court information to one count of course of sexual conduct against a child in the second degree under Penal Law § 130.80(1)(a). ... The single count in the superior court information was not an 'offense for which the defendant [had been] held for action of a grand jury' (CPL 195.20), in that it was not an offense charged in the felony complaint or a lesser included offense of an offense charged in the felony complaint ... . Thus, the superior court information was jurisdictionally defective. This defect survives the defendant's failure to raise this claim in the Supreme Court, his plea of guilty, and his waiver of the right to appeal ...". ***People v. Mendoza*, 2022 N.Y. Slip Op. 06499, Second Dept 11-16-22**

FAMILY LAW, JUDGES, ATTORNEYS, EVIDENCE.

ATTORNEY'S FEES AND EXPERT WITNESS FEES IN THIS MAINTENANCE-ARREARS ACTION SHOULD NOT HAVE BEEN AWARDED WITHOUT AN EVIDENTIARY HEARING.

The Second Department, reversing (modifying) Supreme Court, determined that the award of attorney's fees and expert witness fees to defendant-wife who sued for and was awarded maintenance arrears: "... Supreme Court erred in awarding attorneys' fees and expert witness fees requested by the defendant without evaluating the defendant's claims concerning the extent and value of those services at an evidentiary hearing ... . Accordingly, the matter must be remitted to the Supreme Court, Westchester County, for a hearing on those issues and a new determination thereafter of those branches of the defendant's motions which were for an award of attorneys' fees and expert fees." ***Leung v. Gose*, 2022 N.Y. Slip Op. 06476, Second Dept 11-16-22**

FORECLOSURE, EVIDENCE.

FAILURE TO SUBMIT THE BUSINESS RECORDS NECESSARY TO DEMONSTRATE DEFENDANTS' DEFAULT IN THIS FORECLOSURE ACTION REQUIRED DENIAL OF THE BANK'S SUMMARY JUDGMENT MOTION.

The Second Department, reversing Supreme Court, determined the bank's failure to submit the business records necessary to establish the defendants' default in this foreclosure action precluded summary judgment in favor of the bank: "In support of the motion, the plaintiff submitted an affidavit from Helen Fraser, a vice president of document control of CitiMorgage, Inc. (hereinafter CitiMortgage), the plaintiff's loan servicer. Fraser stated that she was familiar with the records and record-keeping practices of both CitiMortgage and the plaintiff. Fraser stated that the defendants 'have defaulted under the terms and conditions of the above stated Note by failing to make the July 12, 2016 payment and all successive payments thereafter.' She did not attach any business records to her affidavit. * * * ... '[I]t is the business record itself, not the foundational affidavit, that serves as proof of the matter asserted' ... . Here, Fraser's assertion in her affidavit regarding the defendants' default, without attaching the business records upon which she relied in making that assertion, constituted inadmissible hearsay ...". ***Citibank, N.A. v. Potente*, 2022 N.Y. Slip Op. 06464, Second Dept 11-16-22**

Similar issues and result in ***Wells Fargo Bank, N.A. v. Pane***, 2022 N.Y. Slip Op. 06516, Second Dept 11-16-22

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

THE BANK IN THIS FORECLOSURE ACTION FAILED TO DEMONSTRATE COMPLIANCE WITH THE NOTICE-OF-DEFAULT MAILING REQUIREMENTS OF RPAPL 1304.

The Second Department, reversing Supreme Court, determined the bank in this foreclosure action did not demonstrate compliance with the notice-of-default mailing requirements of RPAPL 1304: " 'RPAPL 1304(1) provides that, 'at least ninety days before a lender, an assignee or a mortgage loan servicer commences legal action against the borrower . . . , including mortgage foreclosure, such lender, assignee or mortgage loan servicer shall give notice to the borrower.' The statute further provides the required content for the notice and provides that the notice must be sent by registered or certified mail and also by first-class mail to the last known address of the borrower' (... see RPAPL 1304[2]). 'Proper service of RPAPL 1304 notice on the borrower or borrowers is a condition precedent to the commencement of a foreclosure action, and the plaintiff has the burden of establishing satisfaction of this condition' ... . [T]he plaintiff failed to demonstrate, prima facie, that it strictly complied with the mailing requirements of RPAPL 1304. The affidavit of Daniel Delpesche, a contract management coordinator for the plaintiff's attorney-in-fact, Ocwen Loan Servicing, LLC ..., did not make the requisite showing that Delpesche was familiar with Ocwen's mailing practices and procedures, and 'therefore did not establish proof of a standard office practice and procedure designed to ensure that items are properly addressed and mailed' ...". ***HSBC Bank USA, N.A. v. Martin*, 2022 N.Y. Slip Op. 06471, Second Dept 11-16-22**

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

IN THIS FORECLOSURE DEFICIENCY-JUDGMENT CASE, THE FAIR VALUE OF THE PROPERTY WAS CONSIDERABLY HIGHER THAN THE LIQUIDATION VALUE USED BY THE COURT TO CALCULATE THE DEFICIENCY JUDGMENT.

The Second Department, reversing Supreme Court, determined the fair market value of the property in this foreclosure-deficiency-judgment proceeding was considerably greater than the liquidation valued used by the court: " 'RPAPL 1371(2) permits the mortgagee in a mortgage foreclosure action to recover a deficiency judgment for the difference between the amount of indebtedness on the mortgage and either the auction price at the foreclosure sale or the fair market value of the property, whichever is higher' ... . 'It is the lender who bears the initial burden of demonstrating, prima facie, the property's fair market value as of the date of the auction sale' ... . 'When a lender moves to secure a deficiency judgment against a borrower, 'the court . . . shall determine, upon affidavit or otherwise as it shall direct, the fair and reasonable market value of the mortgaged premises as of the date such premises were bid [o]n at auction or such nearest earlier date as there shall have been any market value thereof' ... . Here, the record does not support a finding that the estimated liquidation value of $620,000 constituted the fair and reasonable market value of the property at the time of the foreclosure sale ... . Rather, the record supports a determination that the higher estimated value of $1,060,000 presented by the plaintiff's appraiser constituted the fair and reasonable market value of the property at the time of the foreclosure sale." ***Rhinebeck Bank v. WA 319 Main, LLC*, 2022 N.Y. Slip Op. 06507, Second Dept 11-16-22**

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

THE BANK IN THIS FORECLOSURE ACTION FAILED TO LAY A FOUNDATION FOR THE BUSINESS RECORDS REQUIRED TO SHOW STANDING TO BRING THE ACTION AND DID NOT SUBMIT SUFFICIENT PROOF OF COMPLIANCE WITH THE NOTICE-OF-DEFAULT MAILING REQUIREMENTS OF RPAPL 1304.

The Second Department, reversing Supreme Court, determined the bank in this foreclosure did not demonstrate standing the bring the action and compliance with the notice-of-default mailing requirement of RPAPL 1304: "A plaintiff has standing to maintain a mortgage foreclosure action where it is the holder or assignee of the underlying note at the time the action is commenced ... . Here, in support of its motion, the plaintiff submitted the affidavit of Shamona Marisa Truesdale, a vice president of loan documentation for Wells Fargo Bank, N.A. (hereinafter Wells Fargo), the plaintiff's loan servicer. Truesdale stated that she was familiar with Wells Fargo's records and record-keeping practices. She further stated that the plaintiff was in possession of the note on October 8, 2009, the date this action was commenced. Truesdale's statement that the plaintiff had possession of the note at the time this action was commenced was inadmissible hearsay. Although Truesdale stated that she was familiar with the records and record-keeping practices of Wells Fargo, the plaintiff's loan servicer, she failed to state that she was familiar with the records and record-keeping practices of the plaintiff itself. Thus, Truesdale failed to lay a proper foundation for the admission of any of the plaintiff's business records ... . * * * The plaintiff can establish strict compliance with RPAPL 1304 by submitting domestic return receipts, proof of a standard office procedure designed to ensure that items are properly addressed and mailed, or an affidavit from someone with personal knowledge that the mailing of the RPAPL 1304 notice actually happened ... . Here, the plaintiff relied on the affidavit of Jack Whitmarsh, a vice president of loan documentation for Wells Fargo, who averred that, based on his review of Wells Fargo's records, the required notice was sent by both certified mail and first-class mail. The plaintiff also submitted a copy of the RPAPL 1304 notice, which was sent to the defendants at the mortgaged premises, and which was stamped with a certified mailing number, as well as a printout of a record purportedly evidencing certified mailing of the notice. However, these documents were insufficient to prove the mailing of the notice by certified mail actually occurred ... . Moreover, the plaintiff failed to submit any evidence that the notice was mailed by first-class mail ... . Further, Whitmarsh did not aver that he had personal knowledge of the mailing and did not describe any standard office procedure designed to ensure that the notices are mailed ...". ***HSBC Bank USA, N.A. v. Gordon*, 2022 N.Y. Slip Op. 06473, Second Dept 11-16-22**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

DEFENDANT CITY DEMONSTRATED IT DID NOT EXERCISE ANY SUPERVISORY CONTROL OVER THE MANNER OF PLAINTIFF'S WORK IN THIS LABOR LAW § 200 ACTION; THEREFORE, THE CITY'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED.

The Second Department, reversing (modifying) Supreme Court, determined the city's motion for summary judgment on the Labor Law § 200 cause of action in this construction accident case should have been granted. The city did not exercise any control over the manner of plaintiff's work: " 'Labor Law § 200 is a codification of the common-law duty of property owners and general contractors to provide workers with a safe place to work' ... . 'Where, as here, the plaintiff's injuries arise from the manner in which the work is performed, to be held liable under Labor Law § 200, 'a defendant must have the authority to exercise supervision and control over the work' ... . Evidence of mere general supervisory authority to oversee the progress of the work, to inspect the work product, or to make aesthetic decisions is insufficient to impose liability under Labor Law § 200 ... . Here, the City established, prima facie, that it did not exercise any supervision or control over the method or manner in which the plaintiff's work was performed ...". ***Jarnutowski v. City of Long Beach*, 2022 N.Y. Slip Op. 06474, Second Dept 11-16-22**

MUNICIPAL LAW, EMPLOYMENT LAW, ARBITRATION.

WHETHER THE VILLAGE POLICE WERE ENTITLED TO ADDITIONAL COMPENSATION FOR WORK DURING THE EARLY DAYS OF THE COVID-19 PANDEMIC IS ARBITRABLE.

The Second Department, reversing Supreme Court, determined the issue whether the village police were entitled to additional compensation for work during the early days of the COVID-19 pandemic is arbitrable: "Where the relevant arbitration provision is broad, a court 'should merely determine whether there is a reasonable relationship between the subject matter of the dispute and the general subject matter of the CBA' [collective bargaining agreement] ... . If such a relationship exists, 'the court should rule the matter arbitrable, and the arbitrator will then make a more exacting interpretation of the precise scope of the substantive provisions of the CBA, and whether the subject matter of the dispute fits within them' ... . [T]he Village's petition was grounded on its contention that the dispute in this case is not arbitrable because article V, § 4 of the CBA provides for additional compensation when the mayor of the Village declares 'a holiday for Village employees due to an emergency,' and no such declaration was made by the mayor here. The petition further asserted that arbitration would be against public policy because the 'members of the PBA are seeking to extract a benefit to which they clearly are not entitled and which is not contained in their contract.' These contentions are without merit, since the applicability of article V, § 4 of the CBA does not affect the arbitrability of the dispute, but only the merits of the dispute, and the merits are to be determined by the arbitrator and not by the courts ...". ***Matter of Incorporated Vil. of Floral Park v. Floral Park Police Benevolent Assn.*, 2022 N.Y. Slip Op. 06481, Second Dept 11-16-22**

THIRD DEPARTMENT

UNEMPLOYMENT INSURANCE, INSURANCE LAW, LABOR LAW, CONTRACT LAW.

EVEN IF THE CONTRACT BETWEEN THE INSURER AND CLAIMANT INSURANCE BROKER INCLUDED ALL THE STATUTORY FACTORS IN LABOR LAW § 511, THE BROKER WILL BE CONSIDERED AN EMPLOYEE IF THE SERVICES ACTUALLY PROVIDED BY THE BROKER ARE NOT CONSISTENT WITH THE CONTRACT PROVISIONS.

The Third Department determined the insurance company, Paul Revere, did not demonstrate that claimant insurance broker was not an employee. Claimant was entitled to unemployment insurance benefits: "Labor Law § 511 (21) provides that '[t]he term 'employment' shall not include the services of a licensed insurance agent or broker if,' among other things, 'the services performed by the agent or broker are performed pursuant to a written contract' ... that, in turn, contains seven statutorily enumerated provisions ... . Here, the Board concluded that two of the seven statutory requirements were absent from the written agreement entered into between claimant and Paul Revere — specifically, provisions demonstrating that claimant was 'permitted to work any hours he . . . chooses' ... and was 'permitted to work out of his . . . own office or home or the office of the person for whom services are performed' ... . Paul Revere disagrees, contending that article XI (A) of the written contract satisfies such requirements by providing that 'Paul Revere shall not exercise nor have the right to exercise direction or control over [claimant's] time, when or how [claimant] may work, or over the activities of [claimant].' ... [W]e agree with the Board that the conclusory and sweeping language employed in article XI (A) of the contract does not satisfy the requirements of Labor Law § 511 (21) (d) (iii) and (iv). ... [E]ven assuming, without deciding, that the written agreement between Paul Revere and claimant did ... fulfill all of the statutory requirements, we agree with the Board's further conclusion that the parties' conduct was inconsistent with the provisions of Labor Law § 511 (21) and, therefore, the services performed by claimant do not fall within the statutory exclusion.... . ... [T]he statute requires both that the contract at issue contain the seven enumerated provisions and 'that the services performed by the insurance agent or broker actually be consistent with those provisions' ...". ***Matter of Hoyt (Paul Revere Life Ins. Co.--Commissioner of Labor)*, 2022 N.Y. Slip Op. 06518, Third Dept 11-17-22**

FOURTH DEPARTMENT

APPEALS, FAMILY LAW.

A MALFUNCTION OF THE AUDIO RECORDING DEVICE MADE IT IMPOSSIBLE TO TRANSCRIBE PORTIONS OF THE TRIAL; THE APPELLATE COURT SENT THE MATTER BACK FOR A RECONSTRUCTION HEARING.

The Fourth Department, sending the matrimonial action back for a reconstruction hearing, determined the inability to transcribe portions of the audio recording prejudiced the parties: " 'Parties to an appeal are entitled to have that record show the facts as they really happened at trial, and should not be prejudiced by an error or omission of the stenographer' or the audio recording device ... . Here, contrary to the court's determination, the record establishes that significant portions of the testimony of plaintiff and defendant, including testimony related to child custody and certain other issues, could not be transcribed due to malfunctions of the audio recording system, which would preclude meaningful appellate review of those issues . To the extent that they are properly before us, we have considered and rejected the parties' remaining contentions. We therefore reverse the order, grant the motion, and remit the matter to Supreme Court to hold a reconstruction hearing with the parties and any witnesses or evidence the court deems helpful in reconstructing, if possible, those portions of the testimony of plaintiff and defendant that could not be transcribed …". ***Wagner v. Wagner*, 2022 N.Y. Slip Op. 06600, Fourth Dept 11-18-22**

CIVIL PROCEDURE, JUDGES.

THE JUDGE SHOULD NOT HAVE LOOKED BEYOND THE PLEADINGS IN CONSIDERING THE MOTION TO AMEND THE COMPLAINT; THE MOTION SHOULD HAVE BEEN GRANTED.

The Fourth Department, reversing Supreme Court, determined the court abused its discretion by denying the motion to amend the complaint: " 'Leave to amend a pleading should be freely granted in the absence of prejudice to the nonmoving party where the amendment is not patently lacking in merit' (... see CPLR 3025 [b]). 'A court should not examine the merits or legal sufficiency of the proposed amendment unless the proposed pleading is clearly and patently insufficient on its face' ... . Here, we conclude that the court erred in denying the motion inasmuch as there was no showing of prejudice arising from the proposed amendments ... and the proposed amended complaint adequately asserts causes of action for slander of title ... and removal of a cloud on title by reformation or cancellation of a deed ... . In making its determination that the proposed causes of action were palpably insufficient, the court improperly looked beyond the face of the proposed pleading to the documents establishing the chain of title to plaintiffs' properties and a 2011 deed from the Trustees of Grenell Island Chapel to defendant." ***DiGiacco v. Grenell Is. Chapel*, 2022 N.Y. Slip Op. 06576, Fourth Dept 11-18-22**

CRIMINAL LAW, APPEALS, JUDGES.

THE SUPPRESSION COURT DID NOT RULE ON DEFENDANT'S ARGUMENT THE INITIAL PURSUIT BY THE POLICE WAS NOT JUSTIFIED; AN APPELLATE COURT CANNOT CONSIDER AN ISSUE NOT RULED UPON; MATTER REMITTED.

The Fourth Department, remitting the matter for a ruling, determined the appellate court could not consider the suppression argument which was not ruled upon by the motion court. Defendant argued the police did not have reasonable suspicion such that the initial pursuit of the

suspect was justified: "At the suppression hearing, the People presented evidence that on the night in question, a police officer was flagged down by an unnamed citizen, who stated that shots had been fired in that area. During that conversation, the officer himself heard a gunshot. He went immediately to the location and observed several people hiding or running into a nearby store. One man took flight, grabbing his waistband with both hands. According to the officer, such a gesture was indicative of a person 'holding a very heavy object or a handgun.' That individual was the only person not attempting to hide or seek cover. At that point, the officer began his pursuit, but lost sight of the individual. The officer broadcast a description of the suspect, including specifics of his clothing, over the radio, at which point other officers in the area observed a man fitting that description and pursued him, eventually arresting him at a residence and bringing him to the location of the shooting, where he was identified by two eyewitnesses as the person who had fired the shots. Surveillance video from the store and body camera footage from the officers involved confirms the sequence of events. Following the hearing, the court ruled, inter alia, that there was 'more than adequate probable cause.' However, the court did not explain when probable cause existed or rule on whether the officer who initially observed the suspect had reasonable suspicion to pursue him." ***People v. Anderson*, 2022 N.Y. Slip Op. 06575, Fourth Dept 11-18-22**

CRIMINAL LAW, EVIDENCE, APPEALS.

ALTHOUGH THE ISSUE WAS NOT PRESERVED FOR APPEAL, THE FAILURE TO GIVE THE CIRCUMSTANTIAL-EVIDENCE JURY INSTRUCTION WAS REVERSIBLE ERROR.

The Fourth Department, reversing defendant's conviction of criminal possession of a weapon, determined the evidence was entirely circumstantial requiring that the jury be instructed on the circumstantial-evidence standard of proof. The issued had not been preserved for appeal: "Supreme Court erred in failing to give a circumstantial evidence instruction. The evidence against defendant with respect to his possession of the .22 caliber revolver was entirely circumstantial, and the court's jury instructions failed to convey to the jury in substance that it must appear that the inference of guilt is the only one that can fairly and reasonably be drawn from the facts, and that the evidence excludes beyond a reasonable doubt every reasonable hypothesis of innocence' ... . Inasmuch as the proof of defendant's guilt is not overwhelming, the inadequacy of the charge was prejudicial error requiring reversal of those parts of the judgment convicting defendant under counts one and two of the superseding indictment and a new trial with respect thereto, notwithstanding defendant's failure to request such a charge or to except to the charge as given ...". ***People v. Soto*, 2022 N.Y. Slip Op. 06589, Fourth Dept 11-18-22**

CRIMINAL LAW, EVIDENCE, ATTORNEYS, APPEALS.

DEFENSE COUNSEL INEFFECTIVE FOR FAILING TO FILE A SUPPRESSION MOTION; THE FAILURE "INFECTED" THE GUILTY PLEA BECAUSE SUPPRESSION COULD HAVE LED TO DISMISSAL OF SOME OF THE INDICTMENT.

The Fourth Department, reversing defendant's conviction, determined defense counsel's failure to make a suppression motion constituted ineffective assistance: "[W]e conclude that the record establishes that defense counsel could have presented a colorable argument that defendant's detention was illegal and thus that any evidence obtained as a result thereof should have been suppressed as the fruit of the poisonous tree. One of the officers who initially detained defendant testified at a Huntley/Wade hearing that, prior to defendant's arrest, one of the victims of a home invasion had described the suspects as two black men in their twenties, one of whom was wearing a hoodie 'with some kind of emblem on the front.' About a half-hour later, the officer heard a broadcast of a tip from an unidentified retired police officer. The tip, as testified to at the hearing, reported 'two [black] males [in their twenties] inside [a] corner store that possibly looked suspicious' with one that 'might' have had 'a handgun on his side' and another that was wearing a 'teddy bear type hoodie,' which was later described as a hoodie with a teddy bear on the front. Based on that tip, officers responded to the corner store, entered with weapons drawn, and immediately ordered the two men, one of whom was defendant, to raise their hands. The officer testified, however, that the men were not acting suspiciously nor did she observe a weapon when she and her partner entered the store. While handcuffing defendant, the officer for the first time observed a handgun in defendant's waistband, saw blood on defendant's hoodie, and obtained statements from defendant. Defendant was thereafter taken for show-up identifications, during which the victims of the prior home invasion identified him as one of the men involved in that incident. ... [I]t cannot be said that a motion seeking suppression on the ground that defendant was unlawfully detained would have had 'little or no chance of success' ... , and instead those facts demonstrate that defense counsel failed to pursue a 'colorable claim[]' that could have led to suppression ... . [D]efense counsel prepared such a motion to suppress evidence on that basis, indicated an intent to make that motion, and simply failed to file the motion despite having been twice informed by the court of the need to do so given the People's refusal to consent to a hearing regarding the legality of the detention without such a motion. ... [D]efendant's contention survives his guilty plea inasmuch as the error in failing to seek suppression on that basis infected the plea bargaining process because suppression of the challenged evidence would have resulted in dismissal of at least some of the indictment ...". ***People v. Roots*, 2022 N.Y. Slip Op. 06617, Fourth Dept 11-18-22**

FAMILY LAW, ATTORNEYS.

A CHILD IN A CUSTODY PROCEEDING IS ENTITLED TO EFFECTIVE ASSISTANCE OF COUNSEL BY THE ATTORNEY-FOR-THE-CHILD (AFC), WHICH INCLUDES ADVOCATING THE CHILD'S POSITION EVEN IF THE AFC DISAGREES.

The Fourth Department, reversing Family Court, determined the child received ineffective assistance in this modification of custody proceeding. With a couple of exceptions, even if the attorney-for-the-child (AFC) doesn't agree with it, he or she must argue the child's position: "[T]he AFC 'must zealously advocate the child's position' (22 NYCRR 7.2 [d]). '[I]n ascertaining the child's position, the [AFC] must consult with and advise the child to the extent of and in a manner consistent with the child's capacities, and have a thorough knowledge of the child's circumstances' (22 NYCRR 7.2 [d] [1]). '[I]f the child is capable of knowing, voluntary and considered judgment, the [AFC] should

be directed by the wishes of the child, even if the [AFC] believes that what the child wants is not in the child's best interests' (22 NYCRR 7.2 [d] [2]). There are two exceptions, not relevant here, where the child lacks the capacity for knowing, voluntary and considered judgment, or following the child's wishes is likel... y to result in a substantial risk of imminent, serious harm to the child (see 22 NYCRR 7.2 [d] [3]). ... [A] child in an article 6 custody proceeding is entitled to effective assistance of counsel ... , which requires the AFC to take an active role in the proceeding ... . Here, the AFC at trial made his client's wish that there be a change in custody known to the court, but he did not 'zealously advocate the child's position' (22 NYCRR 7.2 [d] ...). He did not cross-examine the mother, the police officers, or the school social worker called by the father, and we agree with the AFC on appeal that the trial AFC's cross-examination of the father was designed to elicit unfavorable testimony related to the father, thus undermining the child's position . His questioning also seemed designed to show that there was no change in circumstances since the entry of the last order. Further, he submitted an email to the court in response to the mother's motion to dismiss in which he stated his opinion that there had been no change in circumstances, which again went against his client's wishes .". . ***Matter of Sloma v. Saya*, 2022 N.Y. Slip Op. 06587, Fourth Dept 11-18-22**

FAMILY LAW, JUDGES, ATTORNEYS, EVIDENCE.

THE JUDGE IN THIS POST-DIVORCE PROCEEDING ENCOMPASSING FIVE APPEALS WAS DEEMED TO HAVE MADE MANY RULINGS NOT SUPPORTED BY THE RECORD, IN PART BECAUSE NECESSARY HEARINGS WERE NOT HELD; THE IMPROPER RULINGS INCLUDED A RESTRICTION OF THE ATTORNEY-FOR-THE-CHILD'S (AFC'S) INTERACTIONS WITH THE CHILDREN.

The Fourth Department, reversing (and modifying) Supreme Court in this post-divorce proceeding encompassing several appeals, determined many of the court's rulings were not supported by the record, due in part to the court's failure to hold hearings. The court had imposed "house rules" for the children, refused to hold a Lincoln hearing, made contempt findings, modified father's visitation, suspended father's child support obligations, ordered family unification therapy, limited the attorney-for-the-child's interactions with the children, and made several other rulings with which the appellate division found fault. The decision is far too detailed to fairly summarize here: "The mother and the AFC contend in appeal Nos. 1, 3, and 5 that the court erred in altering the terms of the parties' custody and visitation arrangement and in imposing its house rules without conducting a hearing to determine the children's best interests. We agree. We therefore modify the orders in appeal Nos. 1, 3, and 5 accordingly, and we reinstate the provisions of the agreement and remit the matter to Supreme Court for a hearing, including a Lincoln hearing, to determine whether modification of the parties' custody and visitation arrangement is the children's best interests. Where there is 'a dispute between divorced parents, the first concern of the court is and must be the welfare and the interests of the children' ... , and '[a]ny court in considering questions of child custody must make every effort to determine what is for the best interest of the child[ren], and what will best promote [their] welfare and happiness' ... . Consequently, visitation and 'custody determinations should '[g]enerally' be made 'only after a full and plenary hearing and inquiry' '... , '[u]nless there is sufficient evidence before the court to enable it to undertake a comprehensive independent review of' the children's best interests ...". ***Burns v. Grandjean*, 2022 N.Y. Slip Op. 06577, Fourth Dept 11-18-22**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

THE MAJORITY HELD THE INSTALLATION OF AN AIR TANK ON A FLATBED TRAILER WAS NOT A COVERED ACTIVITY UNDER LABOR LAW § 240(1); THE DISSENT ARGUED THE TRAILER WAS A "STRUCTURE" WITHIN THE MEANING OF THE STATUTE.

The Fourth Department, over a two-justice dissent, determined plaintiff was not engaged in an activity protected by Labor Law § 240(1) when he was injured. Plaintiff, a diesel technician, was injured installing an air tank on a flatbed trailer at a recycling plant. The majority concluded the plaintiff was not involved in construction, renovation or alteration of the recycling plant. The two dissenting justices argued that the truck was a "structure" within the meaning of the Labor Law: "[P]laintiff, a certified diesel technician, was injured while installing an air tank on a flatbed trailer on the premises of a recycling plant. Inasmuch as plaintiff was 'engaged in his 'normal occupation' of repairing [vehicles] . . . , a task not a part of any construction project or any renovation or alteration to the [recycling plant] itself,' he was not engaged in a protected activity within Labor Law § 240 (1) at the time of the accident ... . **From the dissent:** " 'Labor Law § 240 (1) provides special protection to those engaged in the 'erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure' ' ... . 'Over a century ago, the Court of Appeals made clear that the meaning of the word 'structure,' as used in the Labor Law, is not limited to houses or buildings . . . The Court stated, in pertinent part, that 'the word 'structure' in its broadest sense includes any production or piece of work artificially built up or composed of parts joined together in some definite manner' " ... . [W]e [have] held that it was error to dismiss a Labor Law § 240 (1) claim because the crane upon which the plaintiff's decedent was working fit "squarely within" the definition of a 'structure' as set forth by the Court of Appeals ... . We have also held that a plaintiff engaged in the conversion of a utility van into a cargo van 'was engaged in a protected activity at the time of the accident' and that the van was 'a structure' ... . 'Indeed, courts have applied the term 'structure' to several diverse items such as a utility pole with attached hardware and cables . . . , a ticket booth at a convention center . . . , a substantial free-standing Shell gasoline sign . . . , a shanty located within an industrial basement used for storing tools . . . , a power screen being assembled at a gravel pit . . . , a pumping station . . . , and a window exhibit at a home improvement show'… . Here, the flatbed trailer upon which plaintiff was working also fits 'squarely within' the definition of a 'structure' ...". ***Stoneham v. Joseph Barsuk, Inc.*, 2022 N.Y. Slip Op. 06583, Fourth Dept 11-18-22**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

SUPREME COURT PROPERLY DISMISSED DEFENDANTS' SOLE-PROXIMATE-CAUSE AFFIRMATIVE DEFENSE IN THIS LABOR LAW § 240(1) LADDER-FALL CASE; TWO JUSTICE DISSENT.

The Fourth Department, over a two-justice dissent, determined plaintiff was entitled to summary judgment dismissing defendants' sole-proximate-cause affirmative defense to the Labor Law § 240(1) cause of action. Plaintiff used an eight-foot A-frame ladder to work on an overhead door mechanism and stood on the second to the highest step. The dissenters argued there was a question of fact whether the plaintiff's own negligence (standing on the second to the highest step) was the sole proximate cause of the fall. The majority found Supreme Court properly dismissed the sole-proximate-cause affirmative defense. Plaintiff submitted expert evidence that the eight-foot ladder was not an adequate safety device. And plaintiff's standing on the second to the highest step spoke to comparative negligence, which is not a defense to a Labor Law § 240(1) cause of action. With respect to plaintiff's motion for summary judgment on liability, Supreme Court properly held there was a question of fact whether plaintiff was performing routine maintenance, which is not covered under Labor Law § 240(1): "[T]here is no evidence in the record that contradicts the opinion of plaintiff's expert that the eight-foot A-frame ladder provided to plaintiff was inadequate because it could not have been placed so as to provide proper protection to plaintiff during his work on the bearing and shaft of the car wash overhead door at the time of the accident (see generally Labor Law § 240 [1]). Plaintiff therefore established his entitlement to judgment as a matter of law dismissing the sole proximate cause affirmative defense; any failure by plaintiff to refrain from standing on the top steps of the ladder amounts to no more than comparative negligence, which is not a defense under Labor Law § 240 (1) ... . * * * **From the dissent:** Inasmuch as unnecessarily standing on the second step from the top of an A-frame ladder constitutes misuse of such a ladder, and plaintiff was depicted standing on the ladder in that manner just before the fall, we conclude that plaintiff's submissions raised an issue of fact whether it was necessary for plaintiff to be on that step in order to perform his work on the 10-foot overhead door and, if not, whether plaintiff's own actions were the sole proximate cause of the accident ...". ***Green v. Evergreen Family Ltd. Partnership*, 2022 N.Y. Slip Op. 06588, Fourth Dept 11-18-22**

PERSONAL INJURY, CONTRACT LAW.

HERE THE LANGUAGE IN THE RELEASE WAS CLEAR AND UNAMBIGUOUS AND NONE OF THE TRADITIONAL FACTORS WHICH INVALIDATE A CONTRACT WERE PRESENT; DEFENDANT'S MOTION TO DISMISS THE COMPLAINT SHOULD HAVE BEEN GRANTED.

The Fourth Department, reversing Supreme Court, determined the release signed by plaintiff in this snowmobile accident case was enforceable and the complaint should have been dismissed. Plaintiff was a passenger on the snowmobile and she and the driver were represented by the same law firm. The settlement was for $25,000. Plaintiff signed the release but allegedly did not receive any compensation. The decision is comprehensive and well worth consulting; it addresses substantive issues not summarized here: "[D]efendant met his initial burden of establishing that he was released from any claims by submitting the release executed by plaintiff ... . As defendant contends, 'the language of [the] release is clear and unambiguous' and plaintiff's action against defendant to recover for personal injuries is barred ... . * * * The release in this case contains preliminary broad language releasing defendant from 'any and all claims, demands, damages, costs, expenses, loss of services, actions, and causes of action whatsoever . . . arising from any act or occurrence up to the present time and particularly on account of BODILY INJURY, loss or damages of any kind' that plaintiff sustained or may sustain as a consequence of the accident, which is later narrowed by the language stating that the 'agreement only releases the parties named above with respect to BODILY INJURY damages arising out of the accident' and that the 'agreement does not waive any other party or parties from making any other claims that are not discharged or settled by this release' ... . It is well established that where the language of a release is 'limited to only particular claims, demands, or obligations, the instrument will be operative as to those matters alone, and will not release other claims, demands or obligations' ... . Even so, the release of defendant for any "bodily injury damages" arising from the accident clearly and unambiguously encompasses plaintiff's action against defendant to recover for personal injuries sustained in the accident ...". ***Putnam v. Kibler*, 2022 N.Y. Slip Op. 06574, Fourth Dept 11-18-22**

PERSONAL INJURY, MUNICIPAL LAW, CIVIL PROCEDURE.

PLAINTIFF BICYCLIST ALLEGED HE STRUCK A FALLEN SIGNPOST WHICH WAS OBSTRUCTING THE SIDEWALK; THE TOWN DID NOT DEMONSTRATE IT DID NOT HAVE NOTICE OF THE CONDITION; PLAINTIFF DEMONSTRATED HE WAS ENTITLED TO DISCOVERY OF TOWN DOCUMENTS RELATED TO THE REPAIR OF TOWN SIGNS.

The Fourth Department, reversing (modifying) Supreme Court, determined (1) the town did not demonstrate it did not have written notice of the fallen signpost on the sidewalk (which plaintiff bicyclist allegedly struck), and (2) plaintiff demonstrated the town should comply with discovery demands for documents relating to the existence and repair of signs by the town: "The Town had the initial burden on the motion of establishing that no prior written notice of the alleged condition was given to either the Town Clerk or the Town Superintendent of Highways ... . In support of its motion, the Town submitted, inter alia, the deposition testimony of an administrative aide in the Town Highway Department and the Town's sign shop fabricator, each of whom testified that he did not learn of the fallen sign until he received the police report for the incident. However, neither employee testified that he searched the Highway Department's or the Town Clerk's records. Thus, the Town failed to establish as a matter of law that neither the Town Clerk nor the Town Superintendent of Highways received prior written notice of the alleged condition ... . * * * ... [W]e conclude that plaintiff met his burden of establishing that the discovery documents were

material and necessary to the prosecution of the action (see generally CPLR 3101 [a]). In opposing the motion, the Town failed to establish that the discovery requests were unduly burdensome ...". ***Garcia v. Town of Tonawanda*, 2022 N.Y. Slip Op. 06584, Fourth Dept 11-18-22**

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