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# FIRST DEPARTMENT

## ATTORNEYS, CONTRACT LAW.

THE COMPLAINT STATED A CAUSE OF ACTION FOR BREACH OF CONTRACT ALLEGING BILLING FOR SERVICES RENDERED BY ATTORNEYS NOT ADMITTED IN NEW YORK.

The First Department, reversing Supreme Court, determined the complaint stated a cause of action against defendant attorneys (BSF) alleging BSF billed for expenses associated with attorneys not admitted in New York: "The complaint stated a limited cause of action for breach of contract against BSF. The complaint sufficiently alleged that BSF overbilled or billed for unnecessary expenses associated with attorneys not admitted to practice law in, or based out of, New York, and the documentary submissions do not utterly refute those allegations ...". ***Kaufman v. Boies Schiller Flexner, LLP*, 2022 NY Slip Op 06883, First Dept 12-6-22**

## CONTRACT LAW, LANDLORD-TENANT.

THERE CAN BE NO REPUDIATION WHERE THERE HAS BEEN A BREACH OF CONTRACT, TWO JUSTICE DISSENT.

The First Department, over a two-justice dissent, determined plaintiff in this landlord-tenant dispute could not seek separate redress on a theory of repudiation for the breach of contract cause of action. The decision is fact-specific and cannot be fairly summarized here: "[B]ecause a party cannot repudiate a contract it has already breached, if the landlord is found to have breached the lease in 2015, there can be no repudiation in 2021 ... . * * * **From the dissent:** A party 'cannot simultaneously pursue a breach of contract claim and an anticipatory breach claim premised on the same underlying conduct' ... . However, where an obligation is ongoing or serial in nature, a subsequent material breach can support a claim on a theory of repudiation notwithstanding earlier claims for partial breach ...". ***Audthan LLC v. Nick & Duke, LLC*, 2022 NY Slip Op 06880, First Dept 12-6-22**

## CRIMINAL LAW, ATTORNEYS.

THE EVIDENCE AT THE HEARING ON DEFENDANT'S MOTION TO VACATE HIS CONVICTION DID NOT SUPPORT THE ALLEGATION DEFENDANT'S FRIEND PAID DEFENDANT'S LEGAL FEES CREATING A CONFLICT OF INTEREST FOR DEFENDANT'S ATTORNEY.

The First Department determined Supreme Court properly denied defendant's motion to vacate his conviction on the ground his attorney had a conflict of interest which deprived him of effective assistance of counsel. The case had gone to the Court of Appeals which held the defendant was entitled to a hearing on the motion: "The record supports the hearing court's factual determination that defendant's friend Salaam, whom his counsel represented on an unrelated criminal case, and who had initially been a suspect in the murder of which defendant was convicted, did not pay defendant's legal fees. At the hearing, defendant did not meet his burden of proving the necessary facts by a preponderance of the evidence ... . The hearing evidence showed that Salaam physically handed cash to defendant's attorney for his retainer and for much of the balance of the fee, but that there was no proof as to the ultimate source of the cash. Counsel credibly testified that he viewed Salaam as his contact person and believed that the legal fees were being collectively raised by a group of defendant's friends and relatives, including Salaam. The court's finding was also supported by defendant's recorded calls made while incarcerated, and the fact that Salaam always delivered cash to the attorney while accompanied by other friends of defendant. The evidence also shows that defendant chose and hired the attorney." ***People v. Brown*, 2022 NY Slip Op 06889, First Dept 12-6-22**

## CRIMINAL LAW, ATTORNEYS, EVIDENCE.

DEFENSE COUNSEL DID NOT WAIVE HIS CLIENT'S RIGHT TO HAVE HIM ATTEND THE LINEUP IDENTIFICATION BY SENDING HIS PARALEGAL, WHO WAS TURNED AWAY; DEFENSE COUNSEL SHOULD HAVE BEEN TOLD HIS PRESENCE WAS REQUIRED.

The First Department, reversing defendant's conviction, determined defense counsel did not waive his client's right to have his attorney attend the lineup identification procedure by sending his paralegal. The paralegal was turned away: "Defendant was deprived of his right to have counsel present at a ... postindictment lineup. It is undisputed that defendant had a right to counsel at this lineup, which was conducted at a time when he already had representation. Although defendant's counsel was notified of the lineup and did not attend, a paralegal employed by counsel attempted to attend the lineup but was turned away by the police. The attorney did not waive his client's right to counsel at the lineup by failing to appear. The police should have briefly paused this nonexigent, postindictment lineup, conducted long after the crime ... ,

in order to advise the attorney he needed to attend personally, or to have the paralegal so advise counsel." ***People v. Bennett*, 2022 NY Slip Op 07007, First Dept 12-8-22**

## CRIMINAL LAW, EVIDENCE.

DEFENDANT'S TESTIMONY ABOUT HIS FELONY CONVICTIONS DID NOT OPEN THE DOOR TO A MODIFICATION OF THE COURT'S SANDOVAL RULING TO ALLOW QUESTIONING ABOUT THE FACTS UNDERLYING THE CONVICTIONS; CONVICTION REVERSED.

The First Department, reversing defendant's conviction, determined the court should not have modified its original Sandoval ruling. The initial Sandoval ruling allowed defendant to be questioned about the number of felony conviction on his record but not about any of the underlying facts. When defendant was on the stand the court allowed the prosecutor to ask about the underlying facts: "On direct examination, when asked if he had ever been convicted of a crime in New York, defendant answered, '[y]es.' When asked,'[d]o you know how many,' he testified, '[a]pproximately maybe two or three felonies. Maybe four or five misdemeanors.' On cross-examination, when the prosecutor asked defendant if he had been convicted of three felonies, defendant replied, 'I guess so.' In response to the prosecutor's next question, defendant said he was not sure how many felony convictions he had. The court then modified its Sandoval ruling and permitted the People to exceed the scope of the initial Sandoval ruling by inquiring about the underlying facts of those felony convictions, which included drug and theft-related crimes. Defendant's trial testimony did not open the door to a prejudicial modification of the court's Sandoval ruling. Defendant was entitled to rely on the trial court's original Sandoval ruling as a matter of 'plain fairness' ... . None of defendant's responses on direct or cross-examination were so incorrect or misleading as to permit the court's modification ...". ***People v. Henderson*, 2022 NY Slip Op 07009, First Dept 12-8-22**

## LABOR LAW-CONSTRUCTION LAW, EVIDENCE.

THE ALLEGATION THE A-FRAME LADDER SHIFTED FOR NO APPARENT REASON WARRANTED SUMMARY JUDGMENT ON THE LABOR LAW § 240(1) CAUSE OF ACTION, NOTWITHSTANDING DEFENDANT'S EXPERT'S OPINION THE ACCIDENT WAS NOT THE PROXIMATE CAUSE OF PLAINTIFF'S INJURIES.

The First Department, reversing Supreme Court in this A-frame ladder-fall case, determined plaintiff was entitled to summary judgment based upon the allegation the ladder shifted for no apparent reason. The facts that plaintiff inspected the ladder before using it, there were no witnesses and defendant's expert opined the accident was not the proximate cause of plaintiff's injuries did not preclude summary judgment on liability: "It is irrelevant that plaintiff inspected the ladder and found it to be in good order before using it, as plaintiff is not required to demonstrate that the ladder was defective in order to make a prima facie showing of entitlement to summary judgment on his Labor Law § 240(1) claim ... . ... [P]laintiff is entitled to summary judgment in his favor even though he was the only witness to his accident, as 'nothing in the record controverts his account of the accident or calls his credibility into question' ... . While the opinions of defendants' expert engineer might relate to the issue of proximate causation of plaintiff's damages, i.e., whether plaintiff's claimed injuries were proximately caused by his accident ... , they do not raise material issues ... as to liability on the Labor Law § 240(1) claim." ***Pinzon v. Royal Charter Props., Inc.*, 2022 NY Slip Op 06891, First Dept 12-6-22**

## LANDLORD-TENANT, MUNICIPAL LAW.

PLAINTIFF-TENANT'S COMPLAINT ALLEGED DEFENDANT-LANDLORD'S STIPULATION WITH THE PRIOR TENANT IN 2000 ILLEGALLY DECONTROLLED THE APARTMENT; THE MAJORITY DISMISSED THE COMPLAINT; TWO-JUSTICE DISSENT.

The First Department, reversing Supreme Court, over a two-justice dissent, determined plaintiff's complaint should have been dismissed. "Plaintiff, the current tenant of the subject apartment, commenced this action seeking a declaration that her tenancy is subject to the Rent Stabilization Law (RSL) and that the premises were illegally decontrolled in 2000 when defendant owner and nonparty Edward McKinney reached a 'private agreement' circumventing initial rent registration procedures for decontrolling the apartment." The decision and the dissent are detailed and fact-specific and cannot be fairly summarized here: "An agreement by a tenant to waive the benefit of any provision of the rent control law is expressly prohibited and void (9 NYCRR 2200.15 ...). However, when McKinney and defendant settled their dispute over McKinney's status, McKinney was not a tenant ... . He was not on the lease and had no evident rights, other than being an occupant of the apartment who claimed that he had succession rights when Brown died. ... Defendant, on the other hand, denied that McKinney was anything other than a squatter/licensee or possible roommate of the deceased. By entering into the 2000 stipulation, both sides, represented by counsel, resolved their dispute as to whether McKinney had any statutory right to the apartment. By doing so, McKinney and defendant chose the certainty of settlement, rather than the uncertainty of a judicial declaration about McKinney's status ... . **From the dissent:** ... I would find that plaintiff has sufficiently pleaded that the stipulation that McKinney and defendant executed in 2000 (the 2000 stipulation) was void under applicable statutes, as interpreted by our Court and the Court of Appeals. Accordingly, I would vote to affirm the portion of the motion court's decision that denied defendant's motion to dismiss the first, third and fourth causes of action." ***Liggett v. Lew Realty LLC*, 2022 NY Slip Op 07000, First Dept 12-8-22**

### SECURITIES, CIVIL PROCEDURE.

PLAINTIFF-INVESTOR'S COMPLAINT ALLEGING THE REGISTRATION STATEMENT FILED BY DEFENDANT PHARMACEUTICAL COMPANY ABOUT THE EFFICACY OF ITS DRUG WAS MISLEADING AND VIOLATED THE FEDERAL SECURITIES ACT SHOULD HAVE BEEN DISMISSED.

The First Department, in a full-fledged opinion by Justice Gische, reversing Supreme Court, determined defendant pharmaceutical company Genfit's motion to dismiss the complaint, alleging the company misrepresented the efficacy of a drug in violation of the Federal Securities Act, should have been granted. The court noted that the pleading requirements for misrepresentation in this context are not the heightened pleading requirements for fraud: "The gravamen of plaintiff's complaint is that Genfit made misrepresentations and/or omissions in the registration statement and prospectus (collectively offering documents) it filed with the Securities and Exchange Commission in connection with the IPO (initial public offering). Before a company may sell securities in interstate commerce, it must file a registration statement with the SEC. Pursuant to section 11 of the 1933 Securities Act, if ... the registration statement contains an untrue statement of material fact or omits a material fact necessary to make the statement therein not misleading, a purchaser of the stock may sue for damages (15 USC § 77 [k] ...). * * * Plaintiff ... objects to certain statements in the offering documents, which we characterize as opinions. ... Opinions in offering documents are subject to an analysis under the Supreme Court Decision in Omnicare, Inc. v Laborers Dist. Council Constr. Indus. Pension Fund (575 US 175, 184 [2015]). Under Omnicare, an opinion is actionable if (1) the speaker does not actually hold the stated belief ... ; or (2) the opinion affirms an underlying fact ... a registration statement omits material facts about the issuer's inquiry into or knowledge concerning a statement of opinion, and if those facts conflict with what a reasonable investor would take from the statement itself ... . [The] statements of opinion do not affirm underlying facts. ... ... Plaintiff claims ... [the] statements are misleading because Genfit does not actually believe the opinions stated and that the offering documents omit material facts and knowledge. The complaint, however, alleges no facts supporting these conclusions." ***Schwartz v. Genfit, S.A.*, 2022 NY Slip Op 06892, First Dept 12-6-22**

# SECOND DEPARTMENT

### ARBITRATION, CONTRACT LAW, EVIDENCE.

PLAINTIFF, DECEDENT'S SON, SIGNED THE NURSING HOME ADMISSION AGREEMENT WHEN HIS FATHER, WHO HAD DEMENTIA, WAS ADMITTED; THE NURSING HOME DID NOT DEMONSTRATE PLAINTIFF, BY SIGNING THE ADMISSION AGREEMENT, HAD THE AUTHORITY TO BIND DECEDENT TO ARBITRATION OF DECEDENT'S NEGLIGENCE/PERSONAL INJURY ACTION AGAINST THE NURSING HOME.

The Second Department, reversing Supreme Court, determined defendant nursing home did not demonstrate plaintiff had the authority to bind the decedent to arbitration concerning the decedent's negligence/personal injury action against the nursing home. Plaintiff is the decedent's son who signed the admission agreement when his father, who suffered from dementia, was admitted. The nursing home did not present sufficient proof of plaintiff's authority to sign the admission agreement on decedent's behalf: "A party seeking to compel arbitration must establish 'the existence of a valid agreement to arbitrate' ... . Here, the defendants failed to meet that burden because they did not submit sufficient evidence of the plaintiff's authority to bind the decedent to arbitration at the time he signed the admission agreement on the decedent's behalf. Most significantly, the defendants failed to submit the instrument through which the plaintiff allegedly derived his authority to bind the decedent to arbitration ... . Evidence showing that the plaintiff represented to the defendants that he held a power of attorney when signing the admission agreement was insufficient to establish that he, in fact, held such authority as a matter of law ... . Contrary to the defendants' further contention, neither the plaintiff's status as the decedent's son ... , nor his apparent willingness to be the decedent's 'responsible party' under the terms of the admission agreement ... , have any bearing on his authority to bind the decedent to arbitration....". ***Wolf v. Hollis Operating Co., LLC*, 2022 NY Slip Op 06954, Second Dept 12-7-22**

### ARBITRATION, INSURANCE LAW, CONTRACT LAW.

THE ARBITRATOR'S RULING IN THIS STATUTORY, COMPULSORY ARBITRATION WAS ARBITRARY AND CAPRICIOUS, CRITERIA EXPLAINED.

The Second Department, reversing Supreme Court, determined the arbitrator's ruling in this no=fault insurance case was arbitrary and capricious, noting that judicial review of statutory, compulsory arbitration is more stringent than review of a voluntary agreement to arbitrate. Plaintiff GEICO paid the injured driver's no-fault benefits and sought reimbursement from the insurer of the loaner car involved in the accident. The arbitrator denied reimbursement and the Second Department reversed: "Where, as here, the obligation to arbitrate arises through a statutory mandate, the arbitrator's determination is subject to 'closer judicial scrutiny' under CPLR 7511(b) than it would receive had the arbitration been conducted pursuant to a voluntary agreement between the parties ... . To be upheld, an award in a compulsory arbitration proceeding 'must have evidentiary support and cannot be arbitrary and capricious' ... . 'Moreover, with respect to determinations of law, the applicable standard in mandatory no-fault arbitrations is whether 'any reasonable hypothesis can be found to support the questioned interpretation' ... . ... The arbitrator's interpretation of the rental agreement ... as relieving [defendant insurance company] of its obligation to provide mandatory personal injury protection (hereinafter PIP) coverage was contrary to 11 NYCRR part 65, which provides ... that all motor vehicle insurance policies must contain a mandatory PIP endorsement; expressly sets forth the language of the PIP endorsement; permits deviations from the prescribed language only upon prior approval; and prohibits any release, express or implied, from mandatory or optional PIP benefits ...". ***Matter of GEICO Gen. Ins. Co. v. Wesco Ins. Co.*, 2022 NY Slip Op 06926, Second Dept 12-7-22**

Similar issues and result in ***Matter of Wesco Ins. Co. v. GEICO Indem. Co.***, 2022 NY Slip Op 06933, Second Dept 12-7-22

## CIVIL PROCEDURE.

DEFENDANT DID NOT MEET THE CRITERIA FOR VACATION OF A DEFAULT JUDGMENT UNDER EITHER CPLR 5015 OR 317; CRITERIA EXPLAINED.

The Second Department, reversing Supreme Court, determined defendant's motion to vacate the default judgment did not meet the criteria of either CPLR 5015(a)(1) or CPLR 317: " 'A defendant seeking to vacate a judgment pursuant to CPLR 5015(a)(1) must demonstrate a reasonable excuse for the default and a potentially meritorious defense to the action' ... . * * * Here, the defendant failed to provide a 'detailed and credible explanation' for the default ... . Rather, the defendant submitted only an affidavit of an employee of its loan servicer averring that the defendant's agent for process had emailed the summons and complaint to the servicer, and the complaint had been 'routed in error to the incorrect email address within' the servicer, which prevented the servicer from 'timely notify[ing] its counsel of the [instant] action.' That conclusory and nondetailed allegation does not constitute a reasonable excuse warranting vacatur of the default ... . * * * Although the defendant expressly moved pursuant to CPLR 5015(a)(1) only, the Supreme Court properly considered whether the defendant set forth grounds to vacate its default pursuant to CPLR 317 ... . CPLR 317 provides, in relevant part, that a party served with a summons other than by personal delivery and who does not appear 'may be allowed to defend the action within one year after he [or she] obtains knowledge of entry of the judgment . . . upon a finding of the court that he [or she] did not personally receive notice of the summons in time to defend and has a meritorious defense.' A defendant moving pursuant to CPLR 317 is not required to set forth a reasonable excuse for the delay in answering the complaint ... . However, 'to support a determination granting relief under CPLR 317, a party must still demonstrate, and the Court must find, that the party did not receive actual notice of the summons and complaint in time to defend the action' ... . ... [T]he defendant did not even deny receipt of the summons and complaint." ***259 Milford, LLC v. FV-1, Inc.*, 2022 NY Slip Op 06898, Second Dept 12-7-22**

## FAMILY LAW, EVIDENCE.

THE EVIDENCE FATHER NEGLECTED THREE OF THE CHILDREN BY THROWING AN OBJECT AT MOTHER AND YELLING AT MOTHER WAS INSUFFICIENT.

The Second Department, reversing Family Court, determined the evidence father neglected three of the children by throwing an object at mother and yelling at mother was insufficient: "Family Court providently exercised its discretion in determining that the out-of-court statements of Tawdrea G., Terel R., and Micah M. G. to an ACS caseworker that the father threw an object at the mother cross-corroborated each other, and that the record as a whole demonstrated by a preponderance of the evidence that the physical, mental, or emotional condition of Tawdrea G., Terel R., and Micah M. G. was impaired or was in danger of becoming impaired when the father threw an object at the mother in their presence ... . However, the Family Court erred in determining that a preponderance of the evidence established that the father neglected Tyresse M., Makai G., Tamera P.-C. M., or Divine K. M., based on the father throwing an object at the mother. There was no evidence that Tyresse M., Makai G., Tamera P.-C. M., or Divine K. M. witnessed that event. Moreover, there was insufficient evidence to establish that the physical, emotional, or mental condition of Tyresse M., Makai G., Tamera P.-C. M., or Divine K. M., was impaired or placed in imminent danger of impairment based on that incident ... . The Family Court also erred in determining that a preponderance of the evidence established that the father neglected any of the children by verbally abusing the mother in the presence of the children. While it was inappropriate for the father to yell at the mother in the presence of the children, the evidence concerning those arguments was insufficient to establish that the children's physical, mental, or emotional condition was impaired or in imminent danger becoming impaired ...". ***Matter of Divine K. M. (Andre G.)*, 2022 NY Slip Op 06929, Second Dept 12-7-22**

## FAMILY LAW, EVIDENCE.

THE AMENDMENT TO THE FAMILY COURT ACT WHICH PRECLUDES A FINDING OF NEGLECT BASED SOLELY ON MARIJUANA USE SHOULD BE APPLIED RETROACTIVELY; HOWEVER HERE THERE WAS SUFFICIENT EVIDENCE OF MOTHER'S NEGLECT OF THE CHILD BASED UPON HER "ABUSE" (AS OPPOSED TO "USE") OF MARIJUANA.

The Second Department, in a full-fledged opinion by Justice Zayas, determined (1) the amendment to the Family Court act precluding a finding of neglect based solely on marijuana use should be applied retroactively, and (2) the evidence mother neglected the child based upon abuse of marijuana was sufficient: "The 2021 amendment should not be interpreted as preventing any reliance on the misuse of marihuana, no matter how extensive or debilitating, to establish a prima facie case of neglect. After all, the statute still encompasses the misuse of other legal substances, such as alcoholic beverages and prescription drugs. Based on the plain language of the statute, the 2021 amendment does not prevent a court from finding that there has been a prima facie showing of neglect where the evidence establishes that the subject parent has, in fact, repeatedly misused marihuana in a manner that 'has or would ordinarily have the effect of producing in the user thereof a substantial state of stupor, unconsciousness, intoxication, hallucination, disorientation, or incompetence, or a substantial impairment of judgment, or a substantial manifestation of irrationality' ... . Such a finding is not based on 'the sole fact' that the parent 'consumes cannabis' ... . ... In its order, the Family Court expressly determined that the mother had misused marihuana and 'clearly had a substantial impairment of judgment, and/or substantial manifestation of irrationality and was disoriented and/or incompetent.' Since this finding was not based on 'the sole fact' that the mother 'consumes cannabis' (Family Ct Act § 1046[a][iii]), it provided a sufficient basis on which to apply the presumption of neglect arising from repeated misuse of drugs that is articulated in the statute, as amended ...". ***Matter of Mia S. (Michelle C.)*, 2022 NY Slip Op 06932, Second Dept 12-7-22**

## FORECLOSURE, EVIDENCE.

THE AFFIDAVIT RELIED UPON BY PLAINTIFF IN THIS FORECLOSURE ACTION TO PROVE DEFENDANT'S DEFAULT DID NOT IDENTIFY OR ATTACH THE RELEVANT BUSINESS RECORDS AND THEREFORE THE AFFIDAVIT HAD NO PROBATIVE VALUE.

The Second Department, reversing Supreme Court, determined the bank's motion for summary judgment in this foreclosure action should not have been granted. The affidavit attesting to defendant's default did not identify or attach the business records relied upon: " '... [A] plaintiff can establish a default by submission of an affidavit from a person having personal knowledge of the facts, or other evidence in admissible form' ... . Here, in support of its motion, the plaintiff submitted an affidavit from Elizabeth A. Ostermann, a vice president of the plaintiff's loan servicer, who attested to the borrower's default in payment. However, Ostermann's knowledge was based upon her review of unidentified business records, which she failed to attach to her affidavit, and therefore, her assertions regarding the borrower's alleged default constituted inadmissible hearsay and lacked probative value ...". ***Deutsche Bank Natl. Trust Co. v. Unlimited Assets*, 2022 NY Slip Op 06907, Second Dept 12-7-22**

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

THE BANK IN THIS FORECLOSURE ACTION DID NOT DEMONSTRATE COMPLIANCE WITH THE MAILING REQUIREMENTS OF RPAPL 1304 OR THE NOTICE REQUIREMENTS OF RPAPL 1303.

The Second Department, reversing (modifying) Supreme Court, determined plaintiff in this foreclosure action did not demonstrate compliance with the notice (mailing) requirements of RPAPL 1304 or the notice requirements of RPAPL 1303: "[T]he letter log submitted by the plaintiff and relied upon by the employee of the plaintiff's alleged loan servicer in his affidavit failed to establish that the 90-day notice was actually mailed to the defendant by both certified mail and first-class mail ... . '[I]t is the business record itself, not the foundational affidavit, that serves as proof of the matter asserted' ... . None of the other documents submitted by the plaintiff, considered individually or together, including the copies of the 90-day notice letters themselves, provided any information as to whether the notice was sent to the defendant by regular first-class mail ... . ... [T]he plaintiff's submissions did not demonstrate that the notice served upon the defendant complied with the type-size requirements in RPAPL 1303 ...". ***Federal Natl. Mtge. Assn. v. Raja*, 2022 NY Slip Op 06912, Second Dept 12-7-22**

## MEDICAL MALPRACTICE, PERSONAL INJURY, EVIDENCE, EMPLOYMENT LAW.

PLAINTIFF'S EXPERT'S AFFIDAVIT IN THIS MEDICAL MALPRACTICE ACTION WAS NOT CONCLUSORY AND THE ACTION SHOULD NOT HAVE BEEN DISMISSED ON THAT GROUND; A HOSPITAL WILL NOT BE VICARIOUSLY LIABLE FOR SURGERY COMPETENTLY PERFORMED BY HOSPITAL STAFF AT THE DIRECTION OF THE PRIVATE PHYSICIANS WHO DID THE PRIMARY SURGERY.

The Second Department, reversing (modifying) Supreme Court, determined the medical malpractice action against the defendant surgeons should not have been dismissed on the ground plaintiff's expert's affidavit was conclusory. The affidavit raised questions of fact about whether defendant surgeon deviated from the requisite standard of care. The court noted that the plaintiff's expert did not review the pleadings and all the evidence was irrelevant. The court also noted that the action against the hospital based upon the surgical procedures performed by hospital staff was properly dismissed. A hospital will not be vicariously liable where hospital staff competently carry out the orders of the private physicians who did the primary surgery: "[T]he plaintiffs' expert's opinion did not consist of merely general and conclusory allegations unsupported by competent evidence. The plaintiffs' expert made specific allegations based upon the operative reports and CT scan which were part of the medical records, and addressed specific assertions made [defendants'] expert. ... Although the plaintiffs' expert did not review the pleadings, and all the evidence, that failure went to the weight, not the admissibility of his opinion . The operative report regarding the hysterectomy was part of the injured plaintiff's hospital records, was electronically signed by Germain [defendant surgeon], and was relied upon by [defendants'] expert ... . Therefore, the plaintiffs' expert properly relied upon that report in reaching his conclusions. * * * At the conclusion of the surgery, the physician assisting Germain was replaced by an employee of the hospital. However, by that time, the surgery was over, and the doctors were closing up the injured plaintiff. There is no allegation or evidence that the hospital physician committed malpractice or could have had any influence on the course of the surgery at that juncture. 'Where hospital staff, such as resident physicians and nurses, have participated in the treatment of the patient, the hospital may not be held vicariously liable for resulting injuries where the hospital employees merely carried out the private attending physician's orders,' except when the hospital staff follows orders knowing that the doctor's orders are so clearly contraindicated by normal practice that ordinary prudence requires inquiry into the correctness of the orders, the hospital's employees have committed independent acts of negligence, or the words or conduct of the hospital give rise to the appearance and belief that the physician possesses the authority to act on behalf of the hospital ...". ***Bhuiyan v. Germain*, 2022 NY Slip Op 06901, Second Dept 12-7-22**

## MEDICAID, CIVIL PROCEDURE.

PLAINTIFF NURSING HOME CAN BRING A PLENARY ACTION TO DETERMINE A RESIDENT'S MEDICAID ELIGIBILITY WITHOUT BEING BOUND BY THE RESIDENT'S FAILURE TO REQUEST AN ADMINISTRATIVE APPEAL OR THE FOUR-MONTH STATUTE OF LIMITATIONS.

The Second Department, reversing Supreme Court, held plaintiff nursing home can bring a plenary action in its own right to determine the Medicaid eligibility of a resident. The nursing home is not bound by the resident's failure to request an administrative appeal and is not con-

strained by the four-month statute of limitations in CPLR 217: "The plaintiff, an operator of a nursing home facility, commenced this action seeking a judgment declaring that one of its residents was entitled to Medicaid coverage for the period February 7, 2013, through August 31, 2014, with an appropriate transfer penalty. The defendant moved to dismiss the complaint on the grounds, inter alia, that the plaintiff failed to exhaust its administrative remedies, the statute of limitations had expired, and the plaintiff failed to join a necessary party. In an order dated November 26, 2019, the Supreme Court granted the motion. The plaintiff appeals. The Supreme Court erred in granting the defendant's motion pursuant to CPLR 3211(a) to dismiss the complaint. 'It is well established that a nursing home may, as here, bring a plenary action in its own right against the agency designated to determine Medicaid eligibility' ... . In such a plenary action, the nursing home is 'not bound by the patient's failure to request an administrative appeal of the local agency's denial of medical assistance' or 'by the four-month Statute of Limitations contained in CPLR 217' ... . Moreover, authorizations executed by the resident allowing designated employees of the plaintiff to represent him 'during the Medicaid eligibility process' and during 'any Fair Hearings' did not impair the plaintiff's right to commence its own plenary action ...". ***Kings Harbor Multicare Ctr. v. Pierre*, 2022 NY Slip Op 06920, Second Dept 12-7-22**

### PERSONAL INJURY.

IN THIS SLIP AND FALL CASE, DEFENDANT DID NOT DEMONSTRATE THE FOUR-AND-ONE-HALF-INCH RISER AT THE ENTRANCE TO A SHOWER WAS OPEN AND OBVIOUS AS A MATTER OF LAW.

The Second Department, reversing Supreme Court, determined the 4 1/2 inch riser at the entrance to a shower, over which plaintiff tripped and fell, was open and obvious as a matter of law: "[T]he plaintiff allegedly tripped and fell on a tiled single-step riser while entering a shower stall in the locker room at the defendant's fitness club. The single-step riser was approximately 4½ inches high and was tiled in the same color and pattern as the floor tiles which bordered the top and bottom of the step. * * * '[T]he issue of '[w]hether a hazard is open and obvious cannot be divorced from the surrounding circumstances' ... . In addition, 'whether a dangerous condition is open and obvious is fact-specific, and usually a question of fact for the jury' ... . Here, contrary to the Supreme Court's determination, the defendant failed to establish, prima facie, that the single-step riser was open and obvious and not inherently dangerous under the surrounding circumstances, including the lighting conditions at the time of the accident ...". ***Lore v. Fitness Intl., LLC*, 2022 NY Slip Op 06922, Second Dept 12-7-22**

### PERSONAL INJURY, EVIDENCE, CIVIL PROCEDURE.

ALTHOUGH DEFENDANTS' MOTION TO SET ASIDE THE VERDICT AS A MATTER OF LAW IN THIS TRAFFIC ACCIDENT CASE WAS PROPERLY DENIED, THE MOTION TO SET ASIDE THE VERDICT AS AGAINST THE WEIGHT OF THE EVIDENCE SHOULD HAVE BEEN GRANTED; NEW TRIAL ORDERED.

The Second Department, reversing Supreme Court and ordering a new trial, determined defendants' motion to set aside the verdict in this traffic accident case as against the weight of the evidence should have been granted. The evidence, including video evidence, demonstrated defendant's bus had a green left-turn arrow when the bus collided with plaintiff's oncoming vehicle as the bus was turning. The court also found the damages for future pain and suffering excessive: "[V]iewing the evidence in the light most favorable to the plaintiff, there was a 'valid line of reasoning' that could lead a rational person to the liability verdict in this case ... . Accordingly, the Supreme Court properly denied that branch of the defendants' motion which was pursuant to CPLR 4404(a) to set aside the jury verdict on the issue of liability and for judgment as a matter of law. However, the jury verdict on the issue of liability was contrary to the weight of the evidence, as 'the evidence preponderate[d] so heavily in the [defendants'] favor that it could not have been reached on any fair interpretation of the evidence' ... . * * * ... [W]e remit the matter to the Supreme Court ... for a new trial on the issue of liability." ***Blair v. Coleman*, 2022 NY Slip Op 06902, Second Dept 12-7-22**

## THIRD DEPARTMENT

### CRIMINAL LAW.

IN REVIEWING THE GRAND JURY MINUTES, COUNTY COURT SHOULD NOT HAVE DISMISSED THE CONCURRENT INCLUSORY COUNTS; RATHER THOSE COUNTS SHOULD BE SENT TO THE JURY IN THE ALTERNATIVE.

The Third Department, reversing County Court and reinstating three counts of the indictment, determined that inclusory concurrent counts in an indictment should not be dismissed prior to trial: "[T]he parties entered a stipulation in lieu of motions authorizing County Court to review the grand jury minutes to determine whether there was legally sufficient evidence, adequate instructions or any defects in the proceedings. The court thereafter dismissed those counts charging criminal sexual act in the first degree as inclusory concurrent counts of the predatory sexual assault counts pursuant to CPL 300.30 (4), occasioning this appeal by the People. 'In assessing whether dismissal of an indictment is warranted under CPL 210.20 (1) (b), a reviewing court must assess whether the People presented legally sufficient evidence to establish the offense or offenses charged' ... . Although asked to review the indictment to ensure that the evidence submitted to the grand jury was legally sufficient, the court dismissed the counts at issue as inclusory. Even if certain counts charged in the indictment are inclusory concurrent counts, that does not require dismissal of those counts prior to trial or, upon trial, bar the submission of both the greater and the lesser counts to the jury for consideration. Rather, '[w]hen inclusory counts are submitted for consideration, they must be submitted in the alternative since a conviction on the greater count is deemed a dismissal of every lesser count' ...". ***People v. Provost*, 2022 NY Slip Op 06966, Third Dept 12-8-22**

## CRIMINAL LAW.

THE FELONY WHICH WAS THE BASIS FOR DEFENDANT'S SECOND FELONY OFFENDER STATUS DID NOT MEET THE CRITERIA FOR A PREDICATE FELONY.

The Third Department, reversing County Court, determined the felony which was the basis of defendant's second felony offender status did not meet the criteria for a predicate felony: "In order for a prior conviction to constitute a predicate felony, the 'sequentiality requirement' must be satisfied, which means 'that the 'sentence upon such prior conviction must have been imposed before commission of the present felony" ... . Defendant was sentenced on the predicate felony forming the basis for her second felony status on the same day that she was sentenced on the instant offense. As such, that felony offense — referenced in the predicate felony information as an August 27, 2020 conviction for criminal sale of a controlled substance in the fifth degree — could not be used to meet the requirements for sentencing defendant as a second felony offender on the instant offense." ***People v. Hayes*, 2022 NY Slip Op 06965, Third Dept 12-8-22**

## CRIMINAL LAW, APPEALS, JUDGES.

BEFORE SENTENCING DEFENDANT AS A SECOND VIOLENT FELONY OFFENDER, THE COURT DID NOT MAKE A FINDING WHETHER THE TEN-YEAR LOOK-BACK FOR ANY PREDICATE VIOLENT FELONY WAS TOLLED BY A PERIOD OF INCARCERATION; THE ISSUE SURVIVES A WAIVER OF APPEAL AND WAS PROPERLY RAISED FOR THE FIRST TIME ON APPEAL; MATTER REMITTED FOR RESENTENCING.

The Third Department, remitting the matter for resentencing, determined the court did not make a finding about whether the 10-year look-back for a predicate violent felony was tolled by periods of incarceration. The issue survives a waiver of appeal and, because the issue is clear from the record, was properly raised for the first time on appeal: "To qualify as a predicate violent felony, the sentence for the prior violent felony 'must have been imposed not more than [10] years before commission of the felony of which the defendant presently stands convicted' (Penal Law § 70.04 [1] [b] [iv]). 'In calculating this 10-year look-back period, 'any period of time during which the person was incarcerated for any reason between the time of commission of the previous felony and the time of commission of the present felony shall be excluded and such 10-year period shall be extended by a period or periods equal to the time served under such incarceration" ... . The instant offense occurred on March 3, 2018. Prior to sentencing, the People filed a predicate statement indicating that defendant had previously been convicted of a violent felony in 2004 ... . The People also submitted a presentence report which demonstrated that defendant was convicted of additional felonies in 2010 and 2014, but — as the People concede — neither the predicate statement nor the presentence report established the time periods during which defendant was incarcerated during the time between the two violent felonies in order to toll the 10-year look-back period ...". ***People v. Faulkner*, 2022 NY Slip Op 06957, Third Dept 12-8-22**

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

DEFENDANT IN THIS SORA RISK-ASSESSMENT PROCEEDING REQUESTED A DOWNWARD DEPARTURE WHICH WAS NOT ADDRESSED BY COUNTY COURT; THE ORDER WAS REVERSED AND THE MATTER SENT BACK FOR THE RELEVANT FINDINGS OF FACT AND CONCLUSIONS OF LAW.

The Third Department, reversing County Court, determined defendant's request for a downward departure in the SORA risk-assessment proceeding was not addressed by the court. The matter was sent back for the relevant findings of fact and conclusions of law: "County Court failed to address his request for a downward departure. We agree and, inasmuch as County Court did not set forth on the record any findings or conclusions on the request, we are unable to assess the court's reasoning for the implicit denial thereof. 'Consequently, we reverse and remit so that County Court may determine whether or not to order a departure from the presumptive risk level indicated by the offender's guidelines factor score and to set forth its findings of fact and conclusions of law as required' ...". ***People v. Howland*, 2022 NY Slip Op 06967, Third Dept 12-8-22**

## DISCIPLINARY HEARINGS (INMATES), EVIDENCE.

THE RECORD DOES NOT REFLECT THE MEASURES TAKEN BY THE HEARING OFFICER TO DETERMINE THE BODY CAMERA FOOTAGE REQUESTED BY THE PETITIONER DID NOT EXIST; DETERMINATION ANNULLED AND NEW HEARING ORDERED.

The Third Department, annulling the misbehavior determination, held that petitioner-inmate's request for body camera footage was improperly denied: "We ... find merit to petitioner's contention that his request for body camera footage was improperly denied. Upon petitioner's request for such footage at the hearing, the Hearing Officer responded that the correction officer's body camera was turned off and, therefore, such footage did not exist. The record does not reflect the measures taken or the basis upon which the Hearing Officer concluded that the footage did not exist ... . As such, petitioner's request for the body camera footage was improperly denied and, under these circumstances, the appropriate remedy is remittal for a new hearing ...". ***Matter of Dorcinvil v. Miller*, 2022 NY Slip Op 06972, Third Dept 12-8-22**

## INSURANCE LAW, CONTRACT LAW.

THE INSURANCE POLICY EXCLUDED COVERAGE FOR BODILY INJURY INTENDED OR EXPECTED BY THE INSURED; HERE THE INSURED UNINTENTIONALLY STRUCK COLE, WHO WAS ATTEMPTING TO BREAK UP A FIGHT BETWEEN THE INSURED AND A THIRD PERSON; BECAUSE THE INJURY TO COLE WAS UNINTENDED, THE INSURER WAS REQUIRED TO DEFEND THE INSURED IN COLE'S PERSONAL INJURY ACTION AGAINST THE INSURED.

The Third Department determined plaintiff insurer was required, under the terms of the policy, to defend the insured, LePore, in the personal injury action by Cole against LePore. LePore was fighting with another person and Cole was injured attempting to break it up. The policy excluded coverage for bodily injury intended or expected by the insured. The complaint alleged LePore negligently and carelessly struck Cole when LePore was trying to strike another person: "Plaintiff contends that no coverage exists under the insurance policy because LePore intended to cause physical harm to another person. An insured, however, may be indemnified for an intentional act that causes an unintended injury ... . To determine whether a result was accidental, 'it is customary to look at the casualty from the point of view of the insured, to see whether or not, from [the insured's] point of view, it was unexpected, unusual and unforeseen' ... . In describing the incident at issue, LePore stated that she did not intend to hit Cole. The record also contains evidence that Cole was inadvertently hit. In view of this, a sufficient basis exists to conclude that Cole's injuries were not expected or intended within the embrace of the policy exclusion ... . To that end, LePore can be indemnified under the policy, not because she acted negligently, but because her intentional act caused unintended harm. ... Plaintiff may be correct that LePore committed an intentional tort based upon [the transferred-intent] doctrine. ... Plaintiff, however, erroneously conflates tort principles with contract principles — the latter of which governs the interpretation of insurance policies ...". ***Vermont Mut. Ins. Group v. LePore*, 2022 NY Slip Op 06978, Third Dept 12-8-22**

## REAL PROPERTY LAW, TRUSTS AND ESTATES, CIVIL PROCEDURE, JUDGES.

IN THIS COMPLEX CASE INVOLVING ALLEGED MISUSE OF LAND GIFTED TO THE AUDUBON SOCIETY AS "FOREVER WILD" AND SUBSEQUENTLY SOLD, THE ATTORNEY GENERAL'S ARGUMENT THE DEED WAS VOID AB INITIO AND THEREFORE NEVER TRIGGERED THE STATUTE OF LIMITATIONS WAS REJECTED; THE DEED WAS DEEMED "VOIDABLE" AND THE STATUTE HAD THEREFORE RUN; THE TWO-JUSTICE DISSENT ARGUED THE MAJORITY SHOULD NOT HAVE SENT THE MATTER BACK TO BE HEARD BY A DIFFERENT JUDGE.

The Third Department, in a full-fledged opinion by Justice Garry, determined the deed which was the subject of the action was not void ab initio, but rather was voidable, such that the statute of limitations had run on the action. Had the deed been void ab initio, the statute of limitations would not have run. This complex case, which involves alleged misuse of land gifted to the Audubon Society and subsequently sold is fact-specific and cannot be fairly summarized here. There was a two-justice partial dissent which argued the majority should not have ordered the matter be transferred to a different judge: "[W]e find that the 2013 conveyance of parcel B, held by the Audubon Society in fee simple absolute, was not void but instead merely voidable for any resultant diversion of the subject gift. The Attorney General's recission claim was thus required to be brought within the applicable limitations period. It was not. We therefore agree with Supreme Court that this challenge to the validity of the 2013 conveyance is time-barre ... . **From the dissent:** According to the majority, when deciding the motions at issue, Supreme Court offered its interpretation of the pertinent gift instruments and made certain findings and, therefore, cannot be impartial in resolving the merits ... . In our view, it is premature at this stage to conclude that the court has predetermined and/or already addressed central issues in that action such that it cannot be fair. When the time comes, the parties can offer their competing interpretations of the gift instruments. At that time, the parties may rely on the court's rationale and findings made in the April 2021 order. Alternatively, the parties might not do so. Regardless, any remaining issues to be resolved concerning the gift instruments will be better developed and briefed for the court to make an informed decision. Given that 'every court retains continuing jurisdiction to reconsider its prior interlocutory orders during the pendency of the action' ... , it cannot be presumed how the court will decide any remaining issues. Moreover, no party has requested that a new judge be assigned. There have been no claims of hostility, bias or lack of impartiality by Supreme Court. Nor does the record bear out any such behavior. Accordingly, the parties seemingly have no qualms with the current judge. In view of the foregoing, we see no basis to assign a new judge for the underlying actions." ***Rockwell v. Despart*, 2022 NY Slip Op 06971, Third Dept 12-8-22**

## RETIREMENT AND SOCIAL SECURITY LAW.

PETITIONER POLICE OFFICER'S SLIP AND FALL WHEN LEAVING A BATHROOM MET THE DEFINITION OF AN "ACCIDENT" IN THE RETIREMENT AND SOCIAL SECURITY LAW; SHE WAS THEREFORE ENTITLED TO ACCIDENTAL DISABILITY RETIREMENT BENEFITS.

The Third Department, annulling the comptroller's ruling, determined the police officer's slip and fall was an accident within the meaning of the Retirement and Social Security Law entitling her to accidental disability retirement benefits: "Petitioner's slip and fall while exiting the bathroom was sudden and unexpected, and the precipitating event was not a risk of the work performed by her, i.e., was not the result of activity undertaken in the performance of her ordinary employment as a police officer ... . Petitioner was not required to demonstrate that the slippery substance was not readily observable ... . The Retirement System conceded at the hearing that the 2012 accident rendered petitioner permanently incapacitated and on appeal respondent — in conceding that petitioner was entitled to performance of duty disability retirement based upon the 2012 incident — necessarily conceded causation, i.e. that the 2012 fall caused her permanent incapacitation." ***Matter of Bucci v. DiNapoli*, 2022 NY Slip Op 06968, Third Dept 12-8-22**

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