CasePrepPlus

February 10, 2023

An advance sheet service summarizing recent and significant New York appellate cases

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FIRST DEPARTMENT

CIVIL PROCEDURE, EVIDENCE, FRAUD.

MATTER REMITTED FOR CONSIDERATION OF EXPERT EVIDENCE ABOUT WHICH ECUADORIAN STATUTE IS MOST CLOSELY ANALOGOUS TO NEW YORK'S FRAUDULENT-CONVEYANCE CRITERIA FOR PURPOSES OF NEW YORK'S BORROWING STATUTE; HERE THE ACTION ACCRUED IN ECUADOR; THE SHORTER OF THE APPLICABLE ECUADORIAN AND NEW YORK STATUTES OF LIMITATIONS WILL APPLY.

The First Department, reversing Supreme Court and remitting the matter for consideration of the expert evidence, determined Supreme Court may have applied the wrong Ecuadorian statute in the analysis of the statute of limitations under the borrowing statute: "Under CPLR 202, New York's 'borrowing statute,' where a nonresident plaintiff sues on causes of action that accrued outside of New York, the claims must be timely under the limitations period of both New York and the jurisdiction where the action accrued ... . In effect, the shorter of the two states' statutes of limitations controls the timeliness of the action ... . If the foreign state does not have causes of action directly analogous to the New York causes of action, the limitations period of the foreign causes of action that are most closely analogous to the New York claims are to be applied ... . In performing the foregoing analysis, the motion court found applicable Ecuador's default statute, which has a 10-year statute of limitations, and thereby found plaintiff's claims timely filed, despite the expert testimony establishing that Ecuador's default statute is not directly applicable to plaintiff's fraudulent conveyance claims and not the Ecuadorian cause of action most closely analogous to the New York causes of action." ***Andes Petroleum Ecuador Ltd. v. Occidental Petroleum Co.*, 2023 N.Y. Slip Op. 00481, First Dept 2-2-23**

CIVIL PROCEDURE, TOXIC TORTS.

DEFENDANT MANUFACTURED VALVES CONTAINING ASBESTOS; ALTHOUGH DEFENDANT HAD A SMALL OFFICE IN NYC THE VALVES WERE MANUFACTURED AND SOLD IN CONNECTICUT, WHERE PLAINTIFF LIVED AND WORKED; THE RELATIONSHIP BETWEEN NEW YORK AND PLAINTIFF'S CLAIMS WAS NOT SUFFICIENT FOR NEW YORK JURISDICTION.

The First Department, reversing Supreme Court, determined New York did not have jurisdiction over plaintiff's asbestos exposure. Although the defendant manufacturer of valves containing asbestos had a small office in New York, defendant demonstrated that all the activity which related to the manufacture, sale and use of the valves took place in Connecticut. Plaintiff lived and worked exclusively in Connecticut as well: "[T]here was no record evidence suggesting that defendant's minimal activity in New York had an articulable nexus to plaintiff's injury. ... ... [In addition] plaintiff did not offer a sufficient basis to justify jurisdictional discovery ... . To the extent that defendant operated an executive and sales office out of the 100 Park Avenue office, this limited activity was not substantially related to plaintiff's alleged exposure to asbestos while working with and around defendant's valves in Connecticut and plaintiff does not identify any other activity by defendant in New York that could provide a sufficient nexus to his injury. Instead, all conduct giving rise to plaintiff's claims occurred in Connecticut, as he was not a New York resident, did not purchase or work with defendant's valves in New York, and does not claim to have suffered harm in this State ... . Without an adequate relationship between New York and plaintiff's claims, 'specific jurisdiction is lacking regardless of the extent of a defendant's unconnected activities in the State' ...". ***Matter of New York Asbestos Litig.*, 2023 N.Y. Slip Op. 00402, First Dept 1-31-23**

CRIMINAL LAW, ATTORNEYS.

DEFENSE COUNSEL MOVED TO SUPPRESS AN UNNOTICED EYEWITNESS IDENTIFICATION OF THE DEFENDANT AFTER BEING TOLD THE IDENTIFICATION WOULD BE PRECLUDED IF HE DID NOT MOVE TO SUPPRESS; DEFENSE COUNSEL INTRODUCED DEFENDANT'S MUG SHOT DESPITE THE SUPPRESSION OF THE PHOTO ID; DEFENSE COUNSEL DID NOT OBJECT TO A DETECTIVE'S IMPROPER IDENTIFICATION OF THE DEFENDANT IN A BLURRY VIDEO; THE MOTION TO VACATE DEFENDANT'S CONVICTION ON INEFFECTIVE ASSISTANCE GROUNDS SHOULD HAVE BEEN GRANTED.

The First Department, reversing Supreme Court, determined defendant's motion to vacate his conviction on ineffective assistance grounds should have been granted. Defense counsel moved to suppress an unnoticed eyewitness identification knowing that the evidence would have been precluded had he not moved to suppress. Defense counsel introduced the mug shot of the defendant, despite the suppression of the photo identification. Defense counsel did not object to the improper identification of the defendant in a blurry video by a detective: "The record does not support the hearing court's determination that counsel's waiver of preclusion of the unnoticed identification made by the sole eyewitness to the shooting was a legitimate trial strategy ... . [T]rial counsel initially did not appreciate that by moving to suppress the

identification, he waived preclusion of the unnoticed identification under CPL 710.30(3). ... [A]lthough the suppression hearing court had suppressed this witness's photo identification of defendant, counsel nevertheless introduced at trial the mug shot shown to the witness. ... [T]rial counsel did not object to a detective's improper identification of defendant in a blurry video ...". ***People v. McCray*, 2023 N.Y. Slip Op. 00502, First Dept 2-2-23**

CRIMINAL LAW, CONSTITUTIONAL LAW, CORRECTION LAW, SEX OFFENDER REGISTRATION ACT (SORA).

THE CORRECTION LAW REQUIRING A SEX OFFENDER TO VERIFY HIS OR HER ADDRESS EVERY NINETY DAYS IS VOID FOR VAGUENESS AS APPLIED TO HOMELESS SEX OFFENDERS.

The First Department, vacating defendant's guilty pleas, in a full-fledged opinion by Justice Renwick, determined the Correction-Law requirement that a sex offender verify his or her address every 90 days is void for vagueness as applied to homeless sex offenders: "[T]he question is whether the reporting requirements of Correction Law § 168-f(3) provided sufficient notice to defendant of what conduct was mandated by the statute when he left his previous residence address, a homeless shelter, but possessed no new permanent or temporary residence with an address. According to its plain language, Correction Law § 168-f(3) mandates that offenders register a change of residence by providing a specific new 'address.' The statute, however, contains no objective standard or guidelines that would put homeless sex offenders without an address on notice of what conduct is required of them. Under these circumstances, such transient offenders can only guess at what is meant by the requirement that they register their new 'address.' Similarly, the change of address reporting requirement fails to provide even minimal guidelines for the registering authorities in these regards, thus encouraging arbitrary enforcement." ***People v. Allen*, 2023 N.Y. Slip Op. 00496, First Dept 2-2-23**

DEBTOR-CREDITOR, CONTRACT LAW, UNIFORM COMMERCIAL CODE (UCC).

THE ACTION BY PLAINTIFF SELLER TO RECOVER ON A SECURITY INTEREST IN COLLATERAL FOR A LOAN TAKEN OUT BY THE BUYER AS CONSIDERATION FOR THE PURCHASE BARRED BY THE STANDSTILL AGREEMENT WHICH ASSIGNED PRIORITY TO TWO OTHER SECURITY INTERESTS.

The First Department, reversing Supreme Court, in a full-fledged opinion by Justice Manzanet-Daniels, determined the language of a so-called standstill provision barred the action by plaintiff Intrepid seeking to recover a security interest in collateral for the $28.7 million loan taken out by the buyer, Selling Source, as consideration for the purchase. Plaintiff was a third priority lender and the standstill agreement provided plaintiff could not seek a remedy until payment was made to the first and second priority lenders: "... Selling Source agreed to acquire a number of Internet businesses from plaintiff Intrepid. In partial consideration, Selling Source executed a $28.7 million junior secured promissory note ... . In connection with the transaction, the parties executed an intercreditor and subordination agreement (ICA) delineating the priority of each party's security interest in the collateral pledged by the guarantors. Plaintiff, as the 'third priority representative' of the 'third priority lenders,' received third priority liens as security for the repayment of the $28.7 million note ... . The ICA contains standstill provisions that circumscribe Intrepid's ability to exercise its remedies in the event of a default by Selling Source, providing, inter alia, that '[n]o Third Priority Lender shall commence or exercise any Remedies in respect of any default or event of default. . . until such time as the Payment-in-Full of the First Priority Obligations and Second Priority Obligations' ... . * * * This action is barred by the plain language of the standstill provision, which states that '[n]o Third Priority Lender shall commence or exercise any Remedies in respect of any default or event of default . . . until such time as the Payment-in-Full of the First Priority Obligations and Second Priority Obligations' ...". ***Intrepid Invs., LLC v. Selling Source, LLC*, 2023 N.Y. Slip Op. 00396, First Dept 1-31-23**

SECOND DEPARTMENT

CIVIL PROCEDURE, EMPLOYMENT LAW, MEDICAL MALPRACTICE.

PLAINTIFF IN THIS MEDICAL MALPRACTICE ACTION SOUGHT TO ADD TWO PHYSICIAN'S ASSISTANTS (PAs) AS DEFENDANTS AFTER THE STATUTE OF LIMITATIONS HAD EXPIRED; PLAINTIFF DID NOT DEMONSTRATE THE DEFENDANT DOCTORS WERE THE PAs' EMPLOYERS OR SUPERVISORS; PLAINTIFF DID NOT DEMONSTRATE THE PAS HAD TIMELY KNOWLEDGE OF THE ACTION; THEREFORE THE RELATION-BACK DOCTRINE SHOULD NOT HAVE BEEN APPLIED.

The Second Department, reversing Supreme Court, determined plaintiff did not demonstrate the relation-back doctrine applied such that two physician's assistants (PAs) could be added as defendants after the statute of limitations had expired. There was no evidence the PA and the doctors were united in interest and no evidence the PAs had timely notice of the suit: "In a negligence or malpractice action 'the defenses available to two defendants will be identical, and thus their interests will be united, only where one is vicariously liable for the acts of the other' ... . As the PA defendants were employed by the practice, not the individual doctor defendants, there is no vicarious liability based on respondeat superior ... . [T]he plaintiff failed to set forth sufficient facts to demonstrate that the PA defendants were directly supervised or controlled by the doctor defendants in their care and treatment of the decedent. ... The record is devoid of evidence that the PA defendants had notice that an action had been commenced against the doctor defendants prior to the expiration in 2014 of the statute of limitations for the medical malpractice and wrongful death causes of action." ***Sanders v. Guida*, 2023 N.Y. Slip Op. 00455, Second Dept 2-1-23**

CRIMINAL LAW, JUDGES.

A PRESENTENCE REPORT MUST BE CREATED FOR EACH OFFENSE; HERE THE JUDGE USED A PRESENTENCE REPORT PREPARED FOR A DIFFERENT UNRELATED OFFENSE; THE SENTENCE WAS ILLEGALLY IMPOSED.

The Second Department, vacating defendant's sentence, determined the sentencing court should not have used a presentence report created for an earlier, unrelated offense. A unique presentence report for each offense is mandatory: "CPL 390.20 provides that '[i]n any case where a person is convicted of a felony, the court must order a pre-sentence investigation of the defendant and it may not pronounce sentence until it has received a written report of such investigation' (CPL 390.20[1]). This statutory language is mandatory ... and a sentencing court's failure to obtain a presentence report renders the sentence imposed invalid as a matter of law ... . Here, the County Court sentenced the defendant on the murder conviction without ordering or receiving a presentence report relating to the murder conviction. Instead, the court relied on a presentence report prepared in connection with the defendant's conviction of attempted criminal possession of a controlled substance in the third degree, the facts and circumstances of which were not related to the facts and circumstances of the murder conviction. ... [T]his did not satisfy the requirements of CPL 390.20, and therefore the sentence was illegally imposed." ***People v. Shearer*, 2023 N.Y. Slip Op. 00445, Second Dept 2-1-23**

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA).

DEFENDANT WAS ENTITLED TO A DOWNWARD DEPARTURE TO LEVEL ONE; THE PRIOR RAPE (THE JUSTIFICATION FOR COUNTY COURT'S LEVEL THREE DESIGNATION) STEMMED FROM AN ONGOING RELATIONSHIP WITH THE VICTIM WHO WAS UNABLE TO CONSENT SOLELY BECAUSE OF HER AGE.

The Second Department, reversing County Court, determined defendant was entitled to a downward departure to a level one sex offender designation. County Court had designated defendant a lever three offender because of a prior rape-third conviction. The rape-third conviction was based solely on the victim's inability to consent due to her age. The defendant and the victim had been in a long-term relationship: "[T]he unusual circumstances established by the defendant ... are not accounted for by the Guidelines and tend to demonstrate a lower likelihood of reoffense and danger to the community. With respect to the first felony conviction serving as a predicate for the override, rape in the third degree, the People acknowledged that the victim's lack of consent was solely by reason of inability to consent because of her age. Further, the record reflects that conduct underlying this crime was an ongoing relationship between the defendant and the victim. During this relationship, a video depicting sexual conduct between the defendant and the victim was taken. This video, depicting the same conduct for which the defendant was convicted of rape in the third degree and designated a level one sex offender, was discovered by a probation officer approximately a year later, and served as the basis for the defendant's second sex-related felony conviction, possessing a sexual performance by a child." ***People v. Hernandez*, 2023 N.Y. Slip Op. 00451, Second Dept 2-1-23**

FORECLOSURE, EVIDENCE, REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL), UNIFORM COMMERCIAL CODE (UCC).

THE BANK IN THIS FORECLOSURE ACTION DID NOT SUBMIT SUFFICIENT PROOF OF STANDING OR COMPLIANCE WITH THE NOTICE REQUIREMENTS OF RPAPL 1304.

The Second Department, reversing Supreme Court, determined the bank in this foreclosure action did not demonstrate standing or compliance with the notice requirements of RPAPL 1304: " '[A] plaintiff may demonstrate its standing in a foreclosure action through proof that it was in possession of the subject note endorsed in blank, or the subject note and a firmly affixed allonge endorsed in blank, at the time of commencement of the action' ... . Although the plaintiff attached to the complaint copies of the note and a chain of purported allonges ending with an undated purported allonge endorsed in blank, the plaintiff did not demonstrate that the purported allonges, which were on pieces of paper completely separate from the note, were 'so firmly affixed thereto as to become a part thereof,' as required by UCC 3-202(2) ... . Johnson's [the foreclosure specialist's] affidavit did not establish proof of a standard office mailing procedure designed to ensure that items are properly addressed and mailed ... Further, Johnson's affidavit failed to address the nature of Fay's [plaintiff's loan servicer's] relationship with LenderLive [third-party vendor which sent the RPAPL 1304 notice] and whether LenderLive's records were incorporated into Fay's own records or routinely relied upon in its business ... . Thus, Johnson's affidavit failed to lay a foundation for admission of the transaction report generated by LenderLive (see CPLR 4518[a] ...). Finally, the tracking numbers on the copies of the 90-day notices submitted by the plaintiff, standing alone, did not suffice to establish, prima facie, proper mailing under RPAPL 1304 ...)". ***US Bank N.A. v. Okoye-Oyibo*, 2023 N.Y. Slip Op. 00457, Second Dept 2-1-23**

THIRD DEPARTMENT

CRIMINAL LAW, ATTORNEYS, APPEALS.

THE JUDGE'S LAW CLERK WHEN DEFENDANT'S MOTION TO VACATE HIS CONVICTION WAS MADE WAS THE DISTRICT ATTORNEY WHEN DEFENDANT WAS INDICTED AND PROSECUTED; THE APPEARANCE OF A CONFLICT OF INTEREST REQUIRED REVERSAL AND REMITTAL; ALTHOUGH THE ISSUE WAS NOT BEFORE COUNTY COURT, THE ISSUE WAS CONSIDERED ON APPEAL IN THE INTEREST OF JUSTICE.

The Third Department, reversing the denial of defendant's motion to vacate his conviction, determined the fact that the judge's law clerk was District Attorney at the time of defendant's indictment and prosecution presented the appearance of a conflict of interest: "[T]he law clerk

here does not appear to have been directly involved in defendant's case during her term as District Attorney, nor do the allegations contained within defendant's CPL 440.10 motion implicate the law clerk's conduct in her former capacity as District Attorney. That said, it has been observed that '[a] law clerk is probably the one participant in the judicial process whose duties and responsibilities are most intimately connected with the judge's own exercise of the judicial function' ... , and it is well settled that '[n]ot only must judges actually be neutral, they must appear so as well' ... . Accordingly, it was an improvident exercise of County Court's discretion to rule upon defendant's CPL 440.10 motion under these circumstances ...". ***People v. Thornton*, 2023 N.Y. Slip Op. 00460, Third Dept 2-2-23**

CRIMINAL LAW, ATTORNEYS, APPEALS, EVIDENCE.

THE MAJORITY HELD THE RECORD WAS SILENT ON WHETHER THE POLICE, WHO DID NOT APPLY FOR A NO-KNOCK WARRANT, ENTERED THE APARTMENT WITHOUT PROPER NOTICE TO THE OCCUPANTS AND THE ISSUE WAS NOT PRESERVED FOR APPEAL; THE DISSENT ARGUED THE ISSUE CAN BE ADDRESSED ON APPEAL UNDER INEFFECTIVE ASSISTANCE (FAILURE TO MOVE TO SUPPRESS), THE RECORD SUPPORTED AN UNAUTHORIZED NO-KNOCK ENTRY AND THE SEIZED EVIDENCE SHOULD HAVE BEEN SUPPRESSED.

The Third Department, over a two-justice dissent, determined the issue whether the police did not give proper notice to the occupants prior to entering and searching premises was not preserved for appeal. The two dissenters argued the issue can be addressed by the appellate court under the ineffective-assistance argument (no motion to suppress based on failure to provide proper notice before entering) and the seized evidence should have been suppressed. The police did not apply for a no-knock warrant and, according to the dissent, entered the apartment using a battering ram before announcing their presence: "[T]he record is silent as to what the police said or did prior to effectuating entry into the apartment. Thus, without resort to inappropriate speculation, it simply cannot be concluded from the record before us that the police failed to knock and announce their presence before forcefully entering the apartment. * * * **From the dissent:** In our view, the record confirms, by the police officers' own trial testimony, that they did not provide any advance notice prior to entering the apartment where defendant was ultimately apprehended. The record shows that members of the involved emergency response team (hereinafter ERT) entered the apartment through a rear door into a kitchen area that led to a living room. When asked how the door was opened, Jason Blowers — a police officer with the City of Johnstown Police Department — explained that 'the breacher opened the door, the mechanical breach . . . . He hit the door with a ram.' Sergeant Michael Pendrick, the first member of the ERT to enter the apartment, confirmed as much, testifying: '[a]s we approached the rear apartment door . . . another officer had breached the door, the door popped open.' " ***People v. Hayward*, 2023 N.Y. Slip Op. 00461, Third Dept 2-2-23**

UNEMPLOYMENT INSURANCE.

THE BOARD'S RULING THAT CLAIMANT WAS AN EMPLOYEE OF THE DELIVERY SERVICE WAS UPHELD; THE DISSENT ARGUED THE FACTS WERE MOST SIMILAR TO ANOTHER DECISION INVOLVING THE SAME EMPLOYER WHERE THE COURT FOUND NO EMPLOYER-EMPLOYEE RELATIONSHIP.

The Third Department, over a dissent, upheld the Unemployment Insurance Board's ruling that claimant was an employee of the delivery service (NEL) entitled to unemployment insurance benefits: "[A]fter claimant applied to be a delivery driver, NEL conducted a screening process that included a verification of claimant's driver's license, a Department of Motor Vehicles background check and proof by claimant of relevant insurance coverage. Thereafter, NEL and claimant executed a written 'Owner Operator Agreement,' wherein claimant was required, among other things, to provide a safe vehicle, maintain relevant licenses and insurance and to provide NEL with invoices for completed client engagements in order to be paid. Claimant and NEL negotiated a set rate of pay and claimant was responsible for all expenses, including the cost of fuel and equipment, but NEL provided that claimant's pay could be increased during times of high fuel prices by way of a fuel surcharge. Claimant was required to pay an administrative fee to NEL for each day of provided services. Claimant could refuse any assignment and could subcontract out an accepted assignment. If an accepted assignment could not be completed, claimant was required to notify NEL, and it was then NEL that provided another delivery driver. NEL also provided claimant with the client's address and the time that claimant was to report there. Any complaints made to NEL's client regarding claimant were forwarded to NEL, which NEL handled. It is true that claimant bears some similarities to the claimant in *Matter of Pasini (Northeast Logistics, Inc.—Commissioner of Labor)* (204 AD3d 1187 [3d Dept 2022]). The facts here, however, are more in line with *Matter of Legros (Northeast Logistics, Inc.—Commissioner of Labor)* (205 AD3d 1245 [3d Dept 2022]) and *Matter of Rivera (Northeast Logistics, Inc.—Commissioner of Labor)* (204 AD3d 1185 [3d Dept 2022]), where the finding of an employment relationship was upheld. That said, although there is evidence in the record that could support a contrary determination, in view of the evidence credited by the Board, substantial evidence supports the finding that an employment relationship exists ... . **From the dissent**: Given the distinct similarity between the circumstances here and in Pasini, it is my view that the record lacks substantial evidence of the requisite control to establish an employer-employee relationship." ***Matter of McIntyre (Northeast Logistics, Inc.)*, 2023 N.Y. Slip Op. 00465.Third Dept 1-2-23**

FOURTH DEPARTMENT

CIVIL PROCEDURE, CONSTITUTIONAL LAW, EDUCATION-SCHOOL LAW, NEGLIGENCE.

THE REVIVED STATUTE OF LIMITATIONS FOR LAWSUITS ALLEGING SEXUAL ABUSE PURSUANT TO THE CHILD VICTIMS ACT (CVA) DOES NOT VIOLATE DUE PROCESS.

The Fourth Department, in a full-fledged opinion by Justice Bannister, determined the revived statute of limitations for law suits based upon sexual abuse under the Child Victims Act (CVA) did not violate due process: "[I]t is well settled that 'a claim-revival statute will satisfy the Due Process Clause of the [New York] State Constitution if it was enacted as a reasonable response in order to remedy an injustice' ... . Addressing the second prong of that standard first—i.e., whether the statute 'remed[ied] an injustice'—the Court of Appeals recognized that, '[i]n the context of a claim-revival statute, there is no principled way for a court to test whether a particular injustice is 'serious' or whether a particular class of plaintiffs is blameless; such moral determinations are left to the elected branches of government' ... . Here, as evidenced by the legislative history of the CVA, the legislature considered the need for 'justice for past and future survivors of child sexual abuse' and the need to 'shift the significant and lasting costs of child sexual abuse to the responsible parties' ... . Specifically, the legislative history noted the significant barriers those survivors faced in coming forward with their claims, including that child sexual abuse survivors may not be able to disclose their abuse until later in life after the relevant statute of limitations has run because of the mental, physical and emotional injuries sustained as a result of the abuse ... . As explained in the Senate Introducer's Memorandum in Support, 'New York currently requires most survivors to file civil actions . . . against their abusers by the age of 23 at most, long before most survivors report or come to terms with their abuse, which has been estimated to be as high as 52 years old on average' ... .. Because the statutes of limitations left 'thousands of survivors' of child sexual abuse unable to sue their abusers, the legislature determined that there was an identifiable injustice that needed to be remedied ...". ***PB-36 Doe v. Niagara Falls City Sch. Dist.*, 2023 N.Y. Slip Op. 00598, Fourth Dept 2-3-23**

CIVIL PROCEDURE, JUDGES, MUNICIPAL LAW, ZONING.

THE LACK-OF-STANDING DEFENSE WAS NOT RAISED IN THE ANSWER OR THE PREANSWER MOTION TO DISMISS; IT IS NOT A JURISDICTIONAL DEFECT; THEREFORE THE JUDGE SHOULD NOT HAVE, SUA SPONTE, DISMISSED THE ACTION ON THAT GROUND.

The Fourth Department, reversing Supreme Court, determined the judge should not have, sua sponte, dismissed petitioners' declaratory judgment action against the town for lack of standing. The petitioners sought a ruling that the town had failed to enforce a zoning code provision which prohibited respondent-defendant from operating a commercial business out of his residence. Although the town moved to dismiss the action, it did not raise lack-of-standing in its answer or its motion. Therefore the judge did not have the authority to dismiss on that ground: " 'Standing 'is an aspect of justiciability which, when challenged, must be considered at the outset of any litigation' ... . Nonetheless, 'a party's lack of standing does not constitute a jurisdictional defect' ... , and therefore a challenge to a party's standing is waived if the defense is not asserted in either the answer or a preanswer motion to dismiss ... . Here, the Town's motion with respect to the second cause of action was not based on petitioners' alleged lack of standing. Thus, we conclude that the court erred in sua sponte reaching the issue of standing with respect to that cause of action ...". ***Matter of Cayuga Nation v. Town of Seneca Falls*, 2023 N.Y. Slip Op. 00575. Fourth Dept 2-3-23**

CRIMINAL LAW, JUDGES. APPEALS.

THE JUDGE'S FAILURE TO INFORM DEFENDANT OF POSTRELEASE SUPERVISION RENDERED DEFENDANT'S ADMISSION TO A PROBATION VIOLATION INVALID; THE ISSUE WAS CONSIDERED ON APPEAL DESPITE THE ABSENCE OF A MOTION TO WITHDRAW THE ADMISSION.

The Fourth Department, reversing County Court, determined the judge's failure to inform defendant of postrelease supervision rendered the admission invalid. The issue may be raised on appeal despite the absence of a motion to withdraw the plea: "Defendant contends that his admission was not knowing, voluntary and intelligent because County Court failed to inform him at any time that he would be subject to postrelease supervision if the court sentenced him to prison. We agree. The People contend that defendant's challenge to the voluntariness of his admission is not preserved for our review, inasmuch as he failed to move to withdraw his admission, but we reject that contention. Although defendant pleaded guilty to a probation violation, as opposed to a crime, 'where a trial judge does not fulfill the obligation to advise a defendant of postrelease supervision during the plea allocution, the defendant may challenge the plea as not knowing, voluntary and intelligent on direct appeal, notwithstanding the absence of a postallocution motion' ...". ***People v. Bell*, 2023 N.Y. Slip Op. 00594, Fourth Dept 2-3-23**

CRIMINAL LAW, JUDGES, EVIDENCE, MUNICIPAL LAW.

BASED ON THE PEOPLE'S THEORY, THE JURY SHOULD NOT HAVE BEEN INSTRUCTED POSSESSION OF A WEAPON IS PRESUMPTIVE EVIDENCE OF AN INTENT TO USE IT UNLAWFULLY AGAINST ANOTHER; DEFENDANT'S REQUEST TO CALL A WITNESS SHOULD NOT HAVE BEEN DENIED; DEFENDANT'S REQUEST FOR $1000 TO HIRE A PSYCHIATRIC EXPERT SHOULD NOT HAVE BEEN DENIED; NEW TRIAL ORDERED.

The Fourth Department, reversing defendant's conviction, determined the judge (1) should not have instructed the jury that possession of a weapon is presumptive evidence of an intent to use it unlawfully against another (2) should not have prevented defendant from calling as a witness a nurse practitioner who treated him at a psychiatric facility and (3) should have granted defendant's request pursuant to the County

Law for $1000 to hire a psychiatric expert: "County Court erred in charging the jury with respect to the presumption set forth in Penal Law § 265.15 (4) concerning the possession of weapons, i.e., that the possession by any person of any weapon is presumptive evidence of intent to use the same unlawfully against another. Pursuant to the statute, that presumption applies only where the defendant possesses the weapon in question (see Penal Law § 265.15 [4] ...). Here, the People did not proceed on any theory that defendant had possession of the weapon at issue. ... ... [T]he court abused its discretion by precluding defendant from calling a proposed witness at trial, namely, a nurse practitioner who treated him at the Mohawk Valley Psychiatric Center prior to the incident, on the grounds that her testimony was not relevant and that defendant failed to give timely notice under CPL 250.10 (1) (c). It is well settled that '[a criminal] defendant has a fundamental right to call witnesses in his [or her] own behalf' ... . Here, defendant established that the proposed witness would have provided relevant testimony with respect to his defense and also established good cause for the delay in the notice, and the People failed to establish any prejudice ... . 'Pursuant to County Law § 722-c, upon a finding of necessity, a court shall authorize expert services on behalf of a defendant, and only in extraordinary circumstances may a court provide for compensation in excess of $1,000 per expert' ... . Here, we conclude that the court abused its discretion by denying defendant's application on the sole ground that defendant had a retained attorney ...". ***People v. Osman*, 2023 N.Y. Slip Op. 00581, Fourth Dept 2-3-23**

EMINENT DOMAIN, MUNICIPAL LAW.

THE TOWN DID NOT OFFER PROOF THE ROAD LEADING TO PLAINTIFF'S HOME, WHICH WAS WIDENED BY THE TOWN, HAD BEEN USED BY THE PUBLIC AND MAINTAINED BY THE TOWN FOR 10 YEARS; THEREFORE THE TOWN DID NOT PROVE THE ROAD WAS A PUBLIC HIGHWAY; THEREFORE PLAINTIFF'S EMINENT DOMAIN UNLAWFUL TAKING ACTION SHOULD NOT HAVE BEEN DISMISSED.

The Fourth Department, reversing Supreme Court, determined defendant municipality's motion for summary judgment in this eminent domain "unlawful taking" action should not have been granted. Apparently the municipality did some work which widened the road leading to plaintiff's home. Whether the work constituted an "unlawful taking" of plaintiff's property turned on whether the road could be classified as a public highway. In order to demonstrate the road was a public highway the municipality had to prove the road was used by the public for at least 10 years. But the proof offered by the municipality only went back two years: "As the parties seeking summary judgment dismissing the eminent domain cause of action, defendants were required to establish, under these circumstances, that no unlawful taking occurred because Miller Road was a public highway by use pursuant to Highway Law § 189 and that all work that they performed was maintenance that did not have the effect of improperly widening the road. We agree with plaintiff that defendants failed to submit evidence establishing that Miller Road is a public highway within the meaning of section 189. 'In order for a private road to be deemed a public highway by use, it must be show[n] that, for a period of at least 10 years, the road at issue was used by the public and the municipality exercised dominion and control over the road . . . Such a showing . . . requires more than intermittent use by the public and more than occasional road work by the municipality' ... . Here, in support of their motion, defendants submitted plaintiff's testimony at a General Municipal Law § 50-h hearing, at which plaintiff repeatedly testified that the Town had, until shortly before the commencement of this action, refused to maintain the part of the road at issue, and the affidavit of defendant Highway Superintendent Joseph Wasilewski, who had personal knowledge of the facts concerning only the two years that preceded the filing of the motion. Consequently, we conclude that defendants failed to 'make a prima facie showing of entitlement to judgment as a matter of law [by] tendering sufficient evidence to eliminate any material issues of fact from the case' ...". ***Federman v. Town of Lorraine*, 2023 N.Y. Slip Op. 00553. Fourth Dept 2-3-23**

FAMILY LAW, JUDGES.

ALTHOUGH FAMILY COURT CAN DIRECT MOTHER TO ENGAGE IN COUNSELING, SUBMIT TO DRUG TESTS AND TAKE MEDICATION, FAMILY COURT CAN NOT MAKE THE DIRECTIVES A PREREQUISITE FOR VISITATION.

The Fourth Department determined Family Court did not have the authority to make mother's compliance with drug-test, medication and counseling directives a prerequisite for visitation: "[T]he court erred in requiring the mother to participate in counseling, take her medications as prescribed, and provide proof of a negative hair follicle test prior to having therapeutic visitation with the children. Although the court may include such directives as a component of visitation, it does not have the authority to make them a prerequisite to visitation ... . We therefore modify the orders accordingly, and we remit the matters to Family Court to fashion schedules for the mother's therapeutic visitation with each child." ***Matter of Sharlow v. Hughes*, 2023 N.Y. Slip Op. 00518, Fourth Dept 2-3-23**

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