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FIRST DEPARTMENT

EDUCATION-SCHOOL LAW, EMPLOYMENT LAW, ARBITRATION, ADMINISTRATIVE LAW, CIVIL PROCEDURE, CONTRACT LAW.

THE CHALLENGES TO THE PROCEDURES FOR RELIGIOUS AND MEDICAL EXEMPTIONS FROM THE COVID-19 VACCINE MANDATE FOR NYC TEACHERS, AS WELL AS "LEAVE WITHOUT PAY" FOR THOSE WHO DID NO APPLY FOR AN EXEMPTION, WERE PROPERLY REJECTED.

The First Department, over a dissent, determined the COVID-19 vaccine mandates imposed by the arbitrator for NYC Department of Education (DOE) employees properly survived the hybrid Article 75/78 challenge. The arbitration initiated by the United Federation of Teachers (UFT) resulted in the September 10, 2021 Impact Award which established procedures for religious and medical exemptions: "The article 75 claims were properly dismissed, as petitioners lack standing to challenge the Impact Award and failed to join UFT as a necessary party. The article 75 claims also fail on the merits. As to the article 78 claims, petitioners are unable to show that DOE made an error of law or acted irrationally. * * * Petitioners are similarly situated teachers employed by DOE. All received notification by email that they were being placed on Leave Without Pay (LWOP) status because they were not in compliance with DOE's COVID-19 Vaccine Mandate. They were informed that they could not report to their school sites as of Monday, October 4, and that, in order to return to work, they were required to upload proof of having received the first vaccine shot and 'E-sign the attestation stating that you are willing to return to your worksite within seven calendar days of submission.' The notifications also summarized the options for separation and leave extensions. Petitioners, with the exception of Loiacono, did not submit proof of vaccination or request religious or medical exemptions. * * * When a union represents employees during arbitration, only that union — not individual employees — may seek to vacate the resulting award ... . Petitioners also failed to join UFT as a party. UFT advocated successfully for the exemptions, accommodations, and extended benefits for teachers otherwise unwilling to be vaccinated, all of which were prescribed in the Impact Award. Accordingly, UFT would be adversely impacted by a judgment favorable to petitioners and is thus a necessary party (CPLR 1001[a] ...)." ***Matter of O'Reilly v. Board of Educ. of the City Sch. Dist. of the City of N.Y.*, 2023 N.Y. Slip Op. 00957, First Dept 2-21-23**

INSURANCE LAW, AGENCY.

THE ALLEGATIONS DID NOT RAISE A QUESTION OF FACT WHETHER THERE WAS A SPECIAL RELATIONSHIP BETWEEN PLAINTIFF AND DEFENDANT INSURANCE AGENT SUCH THAT PLAINTIFF COULD RELY ON THE AGENT TO CORRECT ANY MISREPRESENTATIONS IN THE INSURANCE APPLICATION.

The First Department, reversing Supreme Court, determined the insurance agent's (Brownstone's) motion for summary judgment in this insurance-coverage dispute should have been granted. The insurer disclaimed coverage for damage caused by a fire on plaintiff's property. Plaintiff alleged there was a special relationship between plaintiff and the agent and plaintiff relied on the agent to correct any misrepresentations in plaintiff's insurance application. The First Department held the allegations did not raise a question of fact about the existence of a special relationship: "Brownstone established its prima facie entitlement to summary judgment dismissing plaintiff's lone claim against it, based on an affidavit of its representative that coverage on the policy was disclaimed due to plaintiff's alleged material misrepresentations in its application for insurance. ... There were no allegations, let alone evidence, to support a triable issue that plaintiff made a specific request for Brownstone to review its insurance application for any inaccuracies, or that a special relationship existed between plaintiff and Brownstone solely on the basis that the parties had an extended relationship as to insurance dealings ... . Plaintiff's general requests for coverage will not satisfy the requirement of a specific request for a certain type of coverage ... . The property coverage provided was not shown to be insufficient for purposes of the insurance application that plaintiff submitted. Absent evidence of a special relationship, it remained plaintiff insured's responsibility to both review the insurance policy issued, and to correct any inaccuracies present on the insurance application ...". ***354 Chauncey Realty, LLC v. Brownstone Agency, Inc.*, 2023 N.Y. Slip Op. 00941, First Dept 2-21-23**

LABOR LAW - CONSTRUCTION LAW, PERSONAL INJURY.

BECAUSE LOOSE PLANKS ON A SCAFFOLD CONSTITUTED A PROXIMATE CAUSE OF PLAINTIFF'S FALL IN THIS LABOR LAW § 240(1) ACTION, PLAINTIFF'S ACTS OR OMISSIONS COULD NOT BE THE SOLE PROXIMATE CAUSE OF THE FALL AND THE RECALCITRANT WORKER DEFENSE WAS NOT AVAILABLE.

The First Department, reversing (modifying) Supreme Court, determined plaintiff was entitled to summary judgment on his Labor Law § 240(1) cause of action stemming from a fall from a scaffold. Because the scaffold was defective, plaintiff's actions or omissions could not be

the sole proximate cause of the accident. The "recalcitrant worker" defense was also rejected: "Plaintiff made a prima facie showing of entitlement to summary judgment on his claim pursuant to Labor Law § 240 (1). His deposition testimony established that a proximate cause of his injury was the unsecured outrigger scaffold's planks, which collapsed when he stepped on it with his boss, causing them to fall approximately 16 feet to the ground. Contrary to the court's finding, defendants did not raise a triable issue of fact as to whether plaintiff was the sole proximate cause of his injuries. Since the statutory violation of a defective scaffold was a proximate cause of the accident, plaintiff cannot be the sole proximate cause of his accident and defendants cannot avail themselves of the recalcitrant worker defense ...". ***Francis v. 3475 Third Ave. Owner Realty, LLC*, 2023 N.Y. Slip Op. 00951, First Dept 2-21-23**

SECOND DEPARTMENT

ARBITRATION, CIVIL PROCEDURE, INSURANCE LAW, PERSONAL INJURY.

THE PETITION TO STAY ARBITRATION PENDING A FRAMED ISSUE HEARING SHOULD HAVE BEEN GRANTED IN THIS UNINSURED MOTORIST TRAFFIC ACCIDENT CASE; PROCEDURAL CRITERIA EXPLAINED.

The Second Department, reversing Supreme Court, determined the motion for a stay of arbitration pending a framed issue hearing should have been granted in this uninsured motorist traffic accident case: " 'The party seeking a stay of arbitration has the burden of showing the existence of sufficient evidentiary facts to establish a preliminary issue which would justify the stay' ... . 'Thereafter, the burden shifts to the party opposing the stay to rebut the prima facie showing' ... . 'Where a triable issue of fact is raised, the Supreme Court, not the arbitrator, must determine it in a framed-issue hearing, and the appropriate procedure under such circumstances is to temporarily stay arbitration pending a determination of the issue' ... . Here, the appellants concede that Infinity [petitioner insurer] satisfied its prima facie burden of showing sufficient evidentiary facts to establish a preliminary issue that would justify a stay of arbitration. In support of its petition, Infinity submitted, inter alia, an affidavit from its investigator, who stated that he found that a claim for property damage was previously made to GEICO arising out of the subject accident ... . In opposition, the appellants raised issues of fact as to whether GEICO's insured was involved in the accident ...". ***Matter of Infinity Indem. Ins. Co. v. Leo*, 2023 N.Y. Slip Op. 01003, Second Dept 2-22-23**

CIVIL PROCEDURE, EVIDENCE, REAL PROPERTY LAW.

IF PLAINTIFF MOVED FOR SUMMARY JUDGMENT IN THIS ACTION TO SET ASIDE A DEED PLAINTIFF WOULD HAVE HAD TO PROVE THE DEED WAS FORGED; TO WIN A MOTION TO DISMISS BASED ON DOCUMENTARY EVIDENCE, HOWEVER, THE DEFENDANT MUST UTTERLY REFUTE PLAINTIFF'S ALLEGATION THE DEED WAS FORGED WHICH DEFENDANT FAILED TO DO HERE.

The Second Department, reversing Supreme Court, determined defendant's (Golden Bridge's) motion to dismiss this action to set aside a deed (allegedly forged) should not have been granted. The decision clearly lays out the subtle but crucial differences in proof requirements between a defendant's motion to dismiss based on documentary evidence and a plaintiff's motion for summary judgment. "On February 3, 2004, the plaintiff acquired title to real property located in Brooklyn. In 2017, the property was transferred to the defendant Rutland Development Group, Inc. (hereinafter Rutland), by the deed that is the subject of this action. Rutland granted the defendant Golden Bridge, LLC (hereinafter Golden Bridge), a mortgage on the property in exchange for the sum of $625,000. * * * 'On a motion to dismiss the complaint pursuant to CPLR 3211(a)(7) for failure to state a cause of action, the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory' ... . Where evidentiary material is submitted and considered on a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), and the motion is not converted into one for summary judgment, the question becomes whether the plaintiff has a cause of action, not whether the plaintiff has stated one, and, unless it has been shown that a material fact as claimed by the plaintiff to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, dismissal should not eventuate ... . A motion to dismiss a complaint based upon CPLR 3211(a)(1) may be granted 'only where the documentary evidence utterly refutes [a] plaintiff's factual allegations, conclusively establishing a defense as a matter of law' ... . Here, in support of its motion, Golden Bridge submitted ... a notary's certificate of acknowledgment attesting that the plaintiff had appeared before him ... , and executed the subject deed or acknowledged her execution thereof, a resolution by Rutland authorizing the plaintiff to borrow a sum of money from Golden Bridge on Rutland's behalf, and bank checks ... . Although Golden Bridge did proffer some evidence that the plaintiff may have received consideration as a result of the transfer of the property, Golden Bridge's evidentiary submissions were insufficient to utterly refute the plaintiff's allegations that the deed and other relevant documents were forged, she received no consideration, and she did not have any relationship to Rutland (see CPLR 4538 ...). On a motion for summary judgment, the plaintiff would have had to proffer evidence so clear and convincing as to amount to a moral certainty, in order to rebut the presumption, based on the notary's certificate of acknowledgment, that the deed was duly executed (see CPLR 4538 ...). Here, however, on a motion to dismiss the complaint pursuant to CPLR 3211(a), the questions are whether the plaintiff has a cause of action and whether Golden Bridge conclusively established a defense as a matter of law." ***Aleyne v. Rutland Dev. Group, Inc.*, 2023 N.Y. Slip Op. 00975, Second Dept 2-22-23**

CIVIL PROCEDURE, EVIDENCE, REAL PROPERTY LAW.

A JUDGE HAS DISCRETION TO DENY A MOTION FOR A DEFAULT JUDGMENT ON THE GROUND THE CAUSE OF ACTION HAS NOT BEEN SHOWN TO BE VIABLE; HERE THE ALLEGATIONS IN THE COMPLAINT, WHICH ARE DEEMED ADMITTED, STATED A VIABLE CAUSE OF ACTION AND THE MOTION FOR A DEFAULT JUDGMENT SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court in a case related to *Aleyne v. Rutland Dev. Group, Inc.*, 2023 N.Y. Slip Op 00975, Second Dept 2-22-23 (also summarized in CasePrepPlus), determined plaintiff's motion for a default judgment in this action to set aside a deed as forged should have been granted: "[T]he plaintiff correctly contends that the motion for leave to enter a default judgment against Rutland was timely filed. The plaintiff served Rutland with the summons and complaint on March 25, 2019, pursuant to Business Corporation Law § 306 via service on the Secretary of State. Rutland defaulted by failing to appear or answer the complaint within 30 days (see CPLR 320[a]; 3012[c]). The plaintiff would have been required to take proceedings for the entry of a default judgment against Rutland within one year of the default, by April 24, 2020 (see id. § 3215[c]). However, time limitations in civil actions were tolled by executive order from March 20, 2020, until November 3, 2020 ... . Since the plaintiff filed the motion on October 6, 2020, it was timely. ... 'A plaintiff seeking leave to enter a default judgment under CPLR 3215 must file proof of: (1) service of a copy or copies of the summons and the complaint, (2) the facts constituting the claim, and (3) the defendant's default' (...See CPLR 3215[f]). '[D]efaulters are deemed to have admitted all factual allegations contained in the complaint and all reasonable inferences that flow from them' ... . However, 'a court does not have a mandatory, ministerial duty to grant a motion for leave to enter a default judgment, and retains the discretionary obligation to determine whether the movant has met the burden of stating a viable cause of action' ... . [Plaintiff's] submissions, including her affidavit in which she denied signing the deed and other documents related to the transfer of the property, were sufficient to demonstrate that her causes of action, insofar as asserted against Rutland, were viable ...". ***Alleyne v. Rutland Dev. Group, Inc.*, 2023 N.Y. Slip Op. 00976,Second Dept 2-22-23**

CIVIL PROCEDURE, FORECLOSURE, JUDGES.

WHERE ONE OF TWO RELATED FORECLOSURE ACTIONS IS SUBJECT TO A MERITORIOUS MOTION TO DISMISS AS TIME-BARRED, IT IS AN ABUSE OF DISCRETION TO GRANT A MOTION TO CONSOLIDATE THE TIME-BARRED ACTION WITH THE TIMELY ACTION.

The Second Department, in a full-fledged opinion by Justice Dillon, reversing Supreme Court, determined that where one action is subject to a meritorious motion to dismiss as time-barred, it is an abuse of discretion for a judge to grant a motion to consolidate that action with another which is timely: "[B]oth actions are to foreclose on the same mortgage securing the same debt owed by the same defendant. However, in our view, a precondition for merging two or more actions is that each action should itself be viable, meaning that neither is confronted with a pending—and apparently meritorious—motion to dismiss. Once the defendant here met her burden of establishing, prima facie, that the time in which to commence the 2017 action had expired, it became the plaintiff's burden to raise a question of fact as to whether the statute of limitations was tolled or otherwise inapplicable, or whether the plaintiff actually commenced the action within the applicable limitations period. The plaintiff could not meet that shifted burden by merely asserting that the 2017 action will become timely once it is merged with the timely 2008 action. The purpose of consolidation under CPLR 602(a) is not to provide a party with a procedural end run around a legal defense applicable to one of the actions. In our opinion, in such instances, judicial discretion should not be used to cure the untimeliness of one action by tethering it to a related timely action. We hold, as an issue of apparent first impression that, in this case, the Supreme Court improvidently exercised its discretion in granting consolidation and that, in general, consolidation should be denied where one of the cases to be consolidated is subject to a meritorious motion to dismiss ...". ***HSBC Bank USA, N.A. v. Francis*, 2023 N.Y. Slip Op. 00992, Second Dept 2-22-23**

CIVIL PROCEDURE, FORECLOSURE, JUDGES.

DEFENDANT IN THIS FORECLOSURE ACTION SHOULD HAVE BEEN ALLOWED TO AMEND THE ANSWER DESPITE THE FAILURE TO MAKE A PRE-ANSWER MOTION TO DISMISS; THE DEFENDANT GETS A SECOND CHANCE TO ADD AN AFFIRMATIVE DEFENSE IF THE COURT GRANT'S LEAVE TO AMEND.

The Second Department, reversing Supreme Court, determined defendant in this foreclosure action should have been allowed to amend the answer: "... Supreme Court ... should not have denied that branch of the defendant's cross-motion which was for leave to amend his answer to assert an affirmative defense alleging lack of compliance with the condition precedent in the mortgage agreement requiring a notice of default. In the absence of prejudice or surprise to the opposing party, leave to amend a pleading should be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit (see CPLR 3025[b] ...). Lateness alone is not a barrier to the amendment ... . 'It must be lateness coupled with significant prejudice to the other side, the very elements of the laches doctrine' ... . Moreover, although a defense is generally waived under CPLR 3211(e) where not raised in an answer or made the subject of a motion to dismiss, it can be interposed in an answer amended by leave of court pursuant to CPLR 3025(b) ...". ***Wall St. Mtge. Bankers, Ltd. v. Berquin*, 2023 N.Y. Slip Op. 01025, Second Dept 2-22-23**

CIVIL PROCEDURE, FORECLOSURE, JUDGES.

AN "INTEREST OF JUSTICE" EXTENSION OF TIME TO SERVE A DEFENDANT HAS DIFFERENT CRITERIA THAN A "GOOD CAUSE" EXTENSION; CRITERIA EXPLAINED.

The Second Department, reversing Supreme Court, determined plaintiff's request for more time to serve the defendant in this foreclosure action should have been granted. The different criteria for an "interest of justice" versus a "good cause" request for an extension is explained: "Pursuant to CPLR 306-b, a court may, in the exercise of its discretion, grant a motion for an extension of time within which to effect service for good cause shown or in the interest of justice ... . 'Good cause requires a showing of reasonable diligence in attempting to effect service' ... . '[I]n deciding whether to grant a motion to extend the time for service in the interest of justice, the court must carefully analyze the factual setting of the case and a balancing of the competing interests presented by the parties. Unlike an extension request premised on good cause, a plaintiff need not establish reasonably diligent efforts at service as a threshold matter' ... . Under the interest of justice standard, 'the court may consider diligence, or lack thereof, along with any other relevant factor in making its determination, including expiration of the Statute of Limitations, the meritorious nature of the cause of action, the length of delay in service, the promptness of a plaintiff's request for the extension of time, and prejudice to [the] defendant' ... . .. The plaintiff demonstrated that the action was timely commenced, that service was timely attempted and was believed by the plaintiff to have been made within 120 days after the commencement of the action but was subsequently found to be defective, that the statute of limitations had expired, and that the extension of time would not prejudice the defendant as the defendant had actual notice of the action ...". ***Wells Fargo Bank, N.A. v. Boakye-Yiadom*, 2023 N.Y. Slip Op. 01026, Second Dept 2-22-23**

CIVIL PROCEDURE, JUDGES. ATTORNEYS.

PLAINTIFF'S COUNSEL EXPLAINED THAT THE RETURN DATE FOR DEFENDANT'S SUMMARY JUDGMENT MOTION WAS MISCALENDARED AS THE DATE FOR SUBMISSION OF OPPOSITION PAPERS; IT WAS AN ABUSE OF DISCRETION TO DENY PLAINTIFF'S MOTION TO VACATE THE SUMMARY JUDGMENT ORDER.

The Second Department, reversing Supreme Court, determined the court abused its discretion in denying plaintiff's motion to vacate the order granting summary judgment to defendant in this slip and fall case. Plaintiff's counsel explained that the return date had been mistakenly calendared as the date for the submission of opposition papers: "In order to vacate a default in opposing a motion pursuant to CPLR 5015(a)(1), the moving party is required to demonstrate a reasonable excuse for the default as well as a potentially meritorious opposition to the motion ... . Here, the plaintiff's excuse of law office failure was reasonable ... , and she also demonstrated that she had a potentially meritorious opposition to the defendant's motion ... . Under the circumstances of this case, including that the scheduling error by counsel for the plaintiff was brief, isolated, and unintentional, with no evidence of wilful neglect ... , and considering the strong public policy in favor of resolving cases on the merits ... , the Supreme Court improvidently exercised its discretion in denying that branch of the plaintiff's motion which was to vacate the ... order ...". ***Valesquez v. Landino*, 2023 N.Y. Slip Op. 01023, Second Dept 2-22-23**

CIVIL PROCEDURE, SOCIAL SERVICES LAW, FAMILY LAW.

IN THIS CHILD VICTIMS ACT LAWSUIT ALLEGING PLAINTIFF WAS ABUSED BY A SCHOOL JANITOR, THE SOCIAL SERVICES LAW 413 CAUSE OF ACTION SHOULD HAVE BEEN DISMISSED BECAUSE THE JANITOR WAS NOT "A PERSON LEGALLY RESPONSIBLE" FOR PLAINTIFF'S CARE; THEREFORE THE SCHOOL HAD NO DUTY TO REPORT THE ABUSE PURSUANT TO THE SOCIAL SERVICES LAW.

The Second Department, reversing (modifying) Supreme Court, determined the Social Services Law cause of action in this Child Victims Act complaint should have been dismissed. Plaintiff alleged she was abused by a school janitor and the defendant school violated Social Services Law 413 by not reporting the abuse. Social Services Law 413 applies only to a "person legally responsible" for the plaintiff's care: "[T]he Supreme Court should have granted that branch of the defendants' motion which was pursuant to CPLR 3211(a)(7) to dismiss the third cause of action, alleging a violation of Social Services Law § 413. Since the janitor was not a 'person legally responsible' for the plaintiff's care within the meaning of Family Court Act § 1012(e), the defendants had no duty under Social Services Law § 413(1)(a) to report the alleged abuse of the plaintiff by the janitor (see Social Services Law § 412[1] ...)." ***Sullivan v. Port Wash. Union Free Sch. Dist.*, 2023 N.Y. Slip Op. 01022, Second Dept 2-22-23**

CONTRACT LAW, CIVIL PROCEDURE, EDUCATION-SCHOOL LAW.

THIS BREACH OF CONTRACT, QUASI CONTRACT, UNJUST ENRICHMENT COMPLAINT SHOULD HAVE BEEN DISMISSED; PLAINTIFF SCHOOL BUS COMPANY WAS SEEKING PAYMENT FOR THE MONTHS THE SCHOOLS WERE CLOSED DUE TO COVID-19.

The Second Department, reversing Supreme Court, determined this breach of contract, quasi contract, unjust enrichment complaint should have been dismissed. Defendant school-bus company was demanding payment for those months the schools were closed due to COVID-19: "[T]he complaint failed to specify the provision of the parties' contract that was allegedly breached ... . [N]o provision was identified which would permit the plaintiff to demand payment from the defendant in exchange for merely remaining available to provide transportation services ... . In addition, the evidentiary material submitted by the plaintiff in opposition to the defendant's motion failed to remedy this defect in the complaint ... . '[T]he existence of a valid contract governing the subject matter generally precludes recovery in quasi contract for events arising out of the same subject matter' ... . '[T]he theory of unjust enrichment lies as a quasi-contract claim. It is an obligation the law

creates in the absence of an agreement' ... . 'An unjust enrichment claim is not available where it simply duplicates, or replaces, a conventional contract or tort claim' ... . 'The essential inquiry in any action for unjust enrichment or restitution is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered' ... . 'A plaintiff must show that (1) the other party was enriched, (2) at the plaintiff's expense, and (3) that it is against equity and good conscience to permit the [defendant] to retain what is sought to be recovered' ... . Here, the complaint fails to sufficiently allege that the defendant was enriched or otherwise received a benefit at the plaintiff's expense to support a cause of action for quasi contract sounding in restitution or unjust enrichment ...". ***Pierce Coach Line, Inc. v. Port Wash. Union Free Sch. Dist.*, 2023 N.Y. Slip Op. 01018, Second Dept 2-22-23**

CRIMINAL LAW, EVIDENCE.

ALTHOUGH THE SEARCH WARRANT DESCRIBED THE RESIDENCE AS HAVING TWO ENTRANCE DOORS, ONE LEADING TO THE AREA WHERE THE INFORMANT SAW THE FIREARMS AND ONE LEADING TO A STAIRWAY TO THE SECOND FLOOR (WHICH THE INFORMANT HAD NOT VISITED), THE WARRANT WAS NOT SEVERABLE AND WAS THEREFORE OVERBROAD.

The Second Department determined Supreme Court properly found the search warrant overly broad and suppressed the seized evidence. The warrant described the premises to be searched as having two exterior doors, one leading to the area described by the confidential informant who had seen firearms there, and the other leading to stairs to the second floor. The informant had never been upstairs and nothing was seized from upstairs. The issue was whether the part of the warrant which authorized the search of the upstairs could be severed from the part of the warrant describing the area visited by the informant. The court reasoned that severance would be justified if the warrant described two separate apartments. But because the warrant described the premises as a single residence, it was overbroad: "Unlike the warrant in *Hansen* [38 NY2d 17], which authorized the search of two obviously separate places—a home and a vehicle—the language of the warrant in this case was ambiguous, and failed to clearly delineate whether it authorized a search of a single residence or two separate residences. The warrant did refer to the premises as a 'two-family home,' with a 'right main entrance' that led to 'a living room, a kitchen, and bedrooms,' and a 'left main entrance,' which led to 'a set of stairs that lead up to a living room, a kitchen and bedrooms,' which may have suggested that the building contained two separate apartments. Yet, the warrant referred to the premises as the 'Subject Location' and 'the residence,' and instead of using words like 'apartment' or 'unit,' it referred to the rooms on the first floor as being 'at the residence,' and referred to the rooms on the second floor as being 'at the rear of the residence.' In light of this ambiguity, a reviewing court could not determine that the warrant authorized the search of two separate places without impermissibly engaging in 'retrospective surgery, dehors the language of the warrant, [to] cut away the illegal portions of the area to be searched and by judicially revised description save evidence recovered from a more narrowly limited area' ...". ***People v. Capers*, 2023 N.Y. Slip Op. 01011, Second Dept 2-22-23**

CRIMINAL LAW, EVIDENCE.

THE EXPERTS WHO TESTIFIED THE SEIZED SUBSTANCES CONTAINED HEROIN OR COCAINE RELIED ON COMPARISONS WITH STANDARD SAMPLES IN THEIR LABS BUT NO EVIDENCE WAS OFFERED TO DEMONSTRATE THE ACCURACY OF THE SAMPLES; THEREFORE THE EXPERTS' OPINIONS RELIED ON EVIDENCE NOT IN THE RECORD; CONVICTIONS REVERSED.

The Second Department, reversing the convictions which relied on expert evidence that the seized substances contained cocaine or heroin, determined the experts relied on evidence which was not in the record. Therefore a proper foundation had not been laid for the conclusions that the substances contained cocaine and heroin: "Here, each of the People's five experts testified to arriving at the conclusion that the substance tested was either heroin or cocaine by comparing the substance with a standard sample in the laboratory that was known to be heroin or cocaine. When questioned about the accuracy of the known standard, the experts testified generally that the sample reference material was obtained from chemical manufacturers. Some of the experts testified that the samples came with certifications, which might have established the sample's accuracy, but no such certifications were offered into evidence. Some of the experts testified that the sample reference material generally is tested upon arrival at the laboratory, but none of the experts could testify to personal knowledge of the testing of the known standard that she or he used in this case, and the People did not introduce any evidence establishing that such independent testing had occurred. ... Although an expert's testimony that a substance contains a narcotic drug may be admissible when it is not based solely upon comparative tests using known standards, but is also based on other tests not involving known standards, or other facts in evidence ... , here, two of the experts relied solely upon the comparative tests, and their testimony should have been stricken .... Further, while the other three experts testified that before using the comparative tests to confirm the identity of the substance, she or he employed one or more presumptive tests, each of those presumptive tests merely demonstrated the possibility that cocaine or heroin might be present in the substance, but did not confirm the presence of the narcotic drug. It was the comparison to the known standard that enabled each expert to conclude that the substance tested was heroin or cocaine ...". ***People v. Ramis*, 2023 N.Y. Slip Op. 01013, Second Dept 2-22-23**

CRIMINAL LAW, EVIDENCE.

DEFENDANT WAS NOT FREE TO LEAVE AFTER A STREET STOP AND WAS INTERROGATED WITHOUT HAVING BEEN AFFORDED THE MIRANDA WARNINGS; THE DEFENDANT'S STATEMENTS SHOULD HAVE BEEN SUPPRESSED.

The Second Department, reversing Supreme Court and suppressing defendant's statements, determined defendant was in custody after a street stop and was interrogated without the Miranda warnings: "At a pretrial suppression hearing, a police officer testified ... he stopped the

defendant and another male, both of whom matched the description of individuals suspected of leaving the scene of a motor vehicle accident where a motorcyclist had been struck. At that time, the defendant and the other male were detained and were not 'free to leave.' Further, at least ten police vehicles responded to the location, along with several officers. Thereafter, without advising the defendant of his Miranda rights ... , a state trooper asked the defendant his name and performed a 'quick cursory pat down' of the defendant's person. The state trooper then engaged in what he indicated was a 'more detailed conversation' with the defendant. Specifically, the state trooper inquired whether the defendant was the operator of the subject vehicle. According to the state trooper, in response thereto, the defendant initially admitted that he was the operator of that vehicle, but then 'quickly corrected himself and stated that he took the train' to the location. The state trooper proceeded to ask the defendant additional details relating to the train trip, including 'which train he took to that location, which stop he got off at, and where his trip began.' The state trooper testified that the defendant 'couldn't give . . . an answer to any of those questions.' At the time that the state trooper asked these questions, the defendant was placed with his hands on the hood of a police car. Additionally, the 'entire street was pretty much blocked off by police vehicles.' " ***People v. Trice*, 2023 N.Y. Slip Op. 01015, Second Dept 2-22-23**

FAMILY LAW, JUDGES, EVIDENCE.

FAMILY COURT ABUSED ITS DISCRETION IN FAILING TO CONDUCT AN IN CAMERA INTERVIEW WITH THE CHILD BEFORE DENYING MOTHER'S PETITION FOR IN-PERSON PARENTAL ACCESS.

The Second Department, reversing Family Court, determined the denial of mother's petition for in-person parental access was not supported by the record, in part because the judge did not conduct an in camera interview with the child: "The Family Court's determination, in effect, denying that branch of the mother's petition which was for in-person parental access lacked a sound and substantial basis in the record. 'The decision to conduct an in camera interview to determine the best interests of the child is within the discretion of the hearing court' ... . Here, the court improvidently exercised its discretion in failing to conduct an in camera interview of the child, particularly given the mother's testimony that the child's fear of visiting her in person was due to outside influence ... . The child is of such an age and maturity that his preferences are necessary to create a sufficient record to determine his best interests ...". ***Matter of Badal v. Wilkinson*, 2023 N.Y. Slip Op. 00997, Second Dept 2-22-23**

LABOR LAW-CONSTRUCTION LAW, CIVIL PROCEDURE, PERSONAL INJURY.

PLAINTIFF IN THIS LABOR LAW §§ 240(1) AND 241(6) ACTION WAS STRUCK BY A PIPE WHICH FELL AS IT WAS BEING HOISTED FROM A TRUCK; DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON THE LABOR LAW § 240(1) CAUSE OF ACTION SHOULD NOT HAVE BEEN GRANTED; PLAINTIFF'S MOTION TO ADD THE VIOLATION OF ADDITIONAL INDUSTRIAL CODE PROVISIONS TO THE BILL OF PARTICULARS SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined defendants' summary judgment motion in this Labor Law §§ 240(1) and 241(6) action should not have been granted and plaintiff's motion to amend the bill of particulars should have been granted. Plaintiff was unloading pipes from a flatbed truck when a pipe which was being lifted by an excavator came loose and fell on plaintiff's leg: " 'With respect to falling objects, Labor Law § 240(1) applies where the falling of an object is related to 'a significant risk inherent in . . . the relative elevation . . . at which materials or loads must be positioned or secured' ... . '[A] plaintiff must show that, at the time the object fell, it was being hoisted or secured, or that the falling object required securing for the purposes of the undertaking' ... . A plaintiff must also show that 'the object fell . . . because of the absence or inadequacy of a safety device of the kind enumerated in the statute' ... . * * * Supreme Court improvidently exercised its discretion in denying the plaintiff's cross-motion pursuant to CPLR 3025(b) for leave to amend the bill of particulars to allege certain additional violations of sections of the Industrial Code with regard to the Labor Law § 241(6) cause of action. The plaintiff made a showing of merit, and the proposed amendment did not prejudice the defendants and did not involve new factual allegations or raise new theories of liability ...". ***Castano v. Algonquin Gas Transmission, LLC*, 2023 N.Y. Slip Op. 00983, Second Dept 2-22-23**

PERSONAL INJURY, EVIDENCE.

AN AFFIDAVIT FROM A WITNESS TO THIS REAR-END TRAFFIC ACCIDENT STATING THAT PLAINTIFF WAS BACKING UP AT THE TIME DEFENDANT'S CAR STRUCK PLAINTIFF'S RAISED ONLY A QUESTION OF PLAINTIFF'S COMPARATIVE FAULT WHICH WILL NOT DEFEAT PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT.

The Second Department, reversing Supreme Court, determined plaintiff's motion for summary judgment in this rear-end traffic accident case should have been granted. The affidavit of a witness stating that plaintiff was backing up when defendant's car struck it raised an issue of comparative negligence, which is no longer a bar to summary judgment: " 'A driver of a vehicle approaching another vehicle from the rear is required to maintain a reasonably safe distance and rate of speed under the prevailing conditions to avoid colliding with the other vehicle' ... . As such, '[a] rear-end collision with a stopped or stopping vehicle establishes a prima facie case of negligence on the part of the operator of the rear vehicle, thereby requiring that operator to rebut the inference of negligence by providing a non-negligent explanation for the collision' ... . 'A nonnegligent explanation includes, but is not limited to, sudden or unavoidable circumstances' ... . '[V]ehicle stops which are foreseeable under the prevailing traffic conditions, even if sudden and frequent, must be anticipated by the driver who follows' ... . 'A plaintiff is no longer required to show freedom from comparative fault to establish her or his prima facie entitlement to judgment as a matter of law on the issue of liability'... . ... [T]he plaintiff submitted an affidavit in which he averred that his vehicle was at a full stop when it was struck in the rear by the defendants' vehicle ... . In opposition, the defendants failed to rebut the inference of negligence by providing a nonnegligent explanation for the collision ... . The defendants submitted an affidavit ... a witness to the accident ... who stated that he saw the plaintiff's vehicle backing up while the defendants' vehicle was moving forward and, as a result, the front of the defendants' vehicle made contact with the rear of the

plaintiff's vehicle. ... [The]statement that the plaintiff's vehicle was backing up ... was insufficient to raise a triable issue of fact because that statement related only to the plaintiff's comparative fault ...". ***An v. Abbate*, 2023 N.Y. Slip Op. 00977, Second Dept 2-22-23**
Same result (no comparative negligence evidence) in ***Balgobin v. McKenzie***, 2023 N.Y. Slip Op. 00978, Second Dept 2-22-23

PERSONAL INJURY, VEHICLE AND TRAFFIC LAW, MUNICIPAL LAW.

QUESTION OF FACT WHETHER THE POLICE OFFICER ACTED IN RECKLESS DISREGARD FOR THE SAFETY OF OTHERS WHEN HE ATTEMPTED TO MAKE A U-TURN TO PURSUE A VEHICLE AND STRUCK PLAINTIFF'S CAR.
The Second Department, reversing Supreme Court, determined defendants in this police-car traffic accident case did not demonstrate the defendant officer (Hughes) did not act with reckless disregard for the safety for the safety of others when he attempted a U-turn and struck plaintiff's car:' "Conduct exempted from the rules of the road by Vehicle and Traffic Law § 1104(b) includes disregarding regulations governing the direction of movement or turning in 'specified directions' ... . Here, the defendants established, prima facie, that Hughes's conduct in attempting to execute a U-turn to pursue a suspected violator of the law was exempted from the rules of the road by Vehicle and Traffic Law § 1104(b)(4), and that, as a result, his conduct was governed by the reckless disregard standard of care in Vehicle and Traffic Law § 1104(e) ... . The reckless disregard standard 'requires evidence that 'the actor has intentionally done an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow' and has done so with conscious indifference to the outcome' ... . Hughes testified that after the offending vehicle passed him, he took his eyes off the road and looked into his left side mirror to see the offending vehicle's license plate number. When he resumed looking straight ahead, the plaintiff's vehicle was less than half a car length in front of him. Although Hughes testified that he applied the brakes once he saw the plaintiff's vehicle, the plaintiff testified that the collision occurred when Hughes turned sharply into the path of the plaintiff's vehicle and then accelerated. ... Hughes did not activate his turn signal, lights, or siren before he started the U-turn. ... [D]efendants' submissions presented a triable issue of fact as to whether Hughes was reckless in attempting to make a U-turn without taking precautionary measures to avoid causing harm to others ...". ***Bourdierd v. City of Yonkers*, 2023 N.Y. Slip Op. 00981, Second Dept 2-22-23**

TRUSTS AND ESTATES, CIVIL PROCEDURE, JUDGES, PERSONAL INJURY, ATTORNEYS.

SUPREME COURT HAD THE POWER TO APPOINT THE PUBLIC ADMINISTRATOR TO REPRESENT THE ESTATE IN THIS TRAFFIC ACCIDENT CASE; DEFENSE COUNSEL REPRESENTED THE INSURER, NOT THE DEFENDANT ESTATE.
The Second Department, reversing Supreme Court, determined Supreme Court should have granted plaintiff's motion to appoint the Public Administrator to represent the defendant estate in this traffic accident case. Defense counsel represented the insurance company, not the estate: "[C]ounsel's affirmation stated that he 'was retained by Truck Insurance Exchange to represent the interests of their insured Arthur Ketterer herein.' Under these circumstances, moving counsel lacked authority to represent the defendant estate ... . … In appropriate circumstances, the Supreme Court is empowered to appoint a temporary administrator, in order to 'avoid delay and prejudice in a pending action' ... . Such a determination is addressed to the broad discretion of the court ... . Here, a Surrogate's Court decree appointed the Public Administrator to represent the estate of Arthur C. Ketterer in a related prior action. That decree did not expressly grant to the Public Administrator the authority to represent the defendant estate in this action. Under these circumstances, the plaintiff's cross-motion should have been granted, and we remit the matter to the Supreme Court, Kings County, for the appointment of a temporary administrator to represent the defendant in the instant action ...". ***Franco v. Estate of Arthur C. Ketterer*, 2023 N.Y. Slip Op. 00988, Second Dept 2-22-23**

THIRD DEPARTMENT

CRIMINAL LAW.

THE MURDER SECOND DEGREE COUNTS MUST BE DISMISSED AS INCLUSORY CONCURRENT COUNTS OF THE MURDER FIRST DEGREE CONVICTION.
The Third Department, affirming defendant's convictions in this arson-murder case, noted that the two murder second degree counts were conclusory concurrent counts of the murder first degree count and must be dismissed: "[T]he judgment must be modified, as the two counts of murder in the second degree upon which defendant was convicted are inclusory concurrent counts of the count of murder in the first degree, upon which he was also convicted (see CPL 300.40 [3] [b]). We therefore reverse his convictions for murder in the second degree and dismiss the corresponding counts in the indictment ...". ***People v. Truitt*, 2023 N.Y. Slip Op. 01028, Third Dept 2-23-23**

CRIMINAL LAW, EVIDENCE, CIVIL PROCEDURE.

THE PEOPLE DID NOT HAVE THE DOCUMENT OFFERED TO PROVE DEFENDANT'S MASSACHUSETTS CONVICTION CERTIFIED PURSUANT TO CPLR 4540; SECOND FELONY OFFENDER SENTENCE VACATED.
The Third Department, vacating defendant's sentence as a second felony offender, determined the proof of the Massachusetts conviction which was the basis for the second felony offender status was deficient: "[T]he People offered a copy of a 'warrant' transferring defendant from local custody to state prison, as well as a copy of defendant's public docket report. Both documents reflect defendant's conviction in Massachusetts of armed robbery, bear the seal of the Massachusetts Superior Court and contain the signature of a court official attesting that such documents are true copies. However, the People's submissions 'lacked the certificate, under seal, showing that the attestor was the legal custodian of the records and that this signature was genuine as required by CPLR 4540 [c]' ... As a result of such failure, we vacate defendant's

adjudication as a second felony offender, as well as the resulting sentence, and remit this matter to County Court for a new second felony offender hearing, at which time the People will have an opportunity to overcome the technical deficiencies in their proof ...". ***People v. Caraballo*, 2023 N.Y. Slip Op. 01029, Third Dept 2-23-23**

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

DEFENDANT WAS NOT GIVEN THE REQUIRED 20-DAY NOTICE OF THE SORA RISK LEVEL HEARING, A VIOLATION OF DUE PROCESS; ALTHOUGH DEFENDANT DID NOT APPEAR AT THE HEARING, HE CAN APPEAL THE UPWARD DEPARTURE TO LEVEL THREE.

The Third Department, reversing County Court, determined petitioner could appeal the 2006 level three sex offender risk level classification, despite his failure to appear at the hearing, because he was not given 20 days' notice prior to the hearing: "Although the hearing took place on June 25, 2003, defendant was only advised of it in a letter dated June 11, 2003. Accordingly, defendant's due process rights were violated given that he was not afforded the minimum 20-day notice as required by statute ... . The People respond that defendant explained in a letter sent after the June 2003 hearing that he chose not to attend that hearing because he did not think he would be classified at risk level three. This letter, however, postdated the hearing and any explanation made therein does not amount to a waiver of the right to appear at the hearing. Furthermore, defendant's posthearing explanation does not obviate the notice requirements that defendant must be statutorily given prior to the hearing." ***People v. Lockrow*, 2023 N.Y. Slip Op. 01030, Third Dept 2-23-23**

DISCIPLINARY HEARINGS (INMATES).

THE SUBSTANCE FOUND ON PETITIONER-INMATE'S PERSON WAS NOT TESTED OR OTHERWISE IDENTIFIED AS A DRUG; THE DRUG POSSESSION AND DISTRIBUTION, AS WELL AS THE SMUGGLING, DETERMINATIONS ANNULLED.

The Third Department, held the drug possession and distribution, as well as the smuggling, determinations should be annulled. A drug sniffing dog alerted to a substance on petitioner-inmate's person but no testing or other identification of the substance was done: "At the prison disciplinary hearing, it was established that the suspected substance was not subjected to chemical testing, nor was there any evidence indicating that facility pharmacy or nursing staff inspected or visually identified the substance … . Rather, the substance was visually identified as synthetic marihuana by the OSI K-9 officer. However, the regulation does not authorize an OSI officer to identify suspected substances as drugs. Similarly, testimony regarding the K-9 alerting to petitioner's groin area did not suffice to comply with the regulation. While there was testimony that petitioner admitted that he possessed K2 this would, at most, establish a charge of possession of contraband, but not drug possession. Unlike a drug-related disciplinary charge, which requires compliance with the aforementioned identification procedures ... , the prohibition on contraband merely depends on whether or not an item is authorized ... . In light of the lack of compliance with regulatory procedures, the identity of the substance was not properly established ... As for the remaining charge of smuggling, this charge only requires that "any item" be smuggled in or out of the facility or from one area to another ... , and does not require proof that the item was a drug or contraband. However, in finding petitioner guilty of this charge, the Hearing Officer expressly based his finding on the OSI K-9 officer's conclusion that the substance was synthetic marihuana, and therefore must have been smuggled in from outside the facility. As noted above, this conclusion was flawed. Given that, and because there was no proof at the hearing that the substance in question was moved from one area to another, the finding as to this charge is also unsupported by substantial evidence and must be annulled." ***Matter of Then v. Annucci*, 2023 N.Y. Slip Op. 01037, Third Dept 2-23-23**

EDUCATION-SCHOOL LAW, PERSONAL INJURY, EVIDENCE.

HERE THE STUDENT WITH DISABILITIES WAS UNSUPERVISED IN GYM CLASS WHEN SHE WAS INJURED; THE DEFENDANT SCHOOL DISTRICT SUCCESSFULLY EXCLUDED EVIDENCE THAT MORE SUPERVISION OF THE STUDENT WAS NEEDED BECAUSE SUCH EVIDENCE PURPORTEDLY CONFLICTED WITH THE STUDENT'S "AMERICANS WITH DISABILITIES ACT 504 PLAN" (WHICH DID NOT CALL FOR EXTRA SUPERVISION) AND THEREFORE EXTRA SUPERVISION WOULD HAVE AMOUNTED TO DISCRIMINATION; THE THIRD DEPARTMENT REJECTED THE ARGUMENT FINDING THAT THE 504 PLAN DID NOT ACT AS A CEILING FOR THE LEVEL OF SUPERVISION TO BE AFFORDED THE STUDENT AND ORDERED A NEW TRIAL.

The Third Department, in a full-fledged opinion by Justice Garry, reversing the judgment and ordering a new trial, determined expert evidence and lay-witness testimony should not have been excluded from this negligent-supervision-of-a-student trial. The student had some physical disabilities and a "504 plan" had been developed for her pursuant to the Americans with Disabilities Act (ADA). The plan did not explicitly call for extra supervision. The student was injured when she was practicing jumps in gym class while the teacher was working with other students. The school district successfully argued to the judge that any evidence that the "504 plan" was inadequate to protect the student amounted to discrimination because the plan did not call for extra supervision. That argument was rejected by the Third Department: "[A] school district's written 504 plan does not operate as a supervision ceiling in all respects and circumstances. The central purpose of Section 504 is to assure that students with disabilities receive equal treatment in relation to their peers ... , that is, that they receive support, based on their individual needs, so that they may also meaningfully access a given educational experience ... . This stands in stark contrast to defendant's reliance upon federal antidiscrimination law as a shield from liability. Plainly put, if two kindergarteners have difficulty performing a skill in a mainstream physical education class, adequate support should be provided to both of them — not, illogically, only the one who does not have a 504 plan. Yet that is precisely what defendant's argument devolves to." ***Jaquin v. Canastota Cent. Sch. Dist.*, 2023 N.Y. Slip Op. 01039, Third Dept 2-23-23**

ENVIRONMENTAL LAW, NAVIGATION LAW.

IN THIS OIL SPILL CLEAN UP SUIT AGAINST THE PROPERTY OWNER BROUGHT UNDER THE NAVIGATION LAW, THERE IS NO STATUTE PROHIBITING THE STATE FROM SEEKING INDEMNIFICATION FOR FUNDS EXPENDED FROM THE ENVIRONMENTAL RESTORATION PROGRAM FUND PURSUANT TO THE ENVIRONMENTAL CONSERVATION LAW.

The Third Department, reversing Supreme Court, determined the complaint seeking reimbursement of oil spill cleanup costs from the defendant property owner should not have been dismissed. Defendant argued the state could not seek reimbursement under the Navigation Law for funds expended from the Environmental Restoration Program Fund pursuant to the Environmental Conservation Law. The Third Department found no support for the argument in the statutes: "Nothing in the Navigation Law prohibits plaintiff from seeking indemnification for funds expended from sources other than the Oil Spill Fund. Moreover, the Environmental Conservation Law requires the state to seek recovery of the funds under any statute (see ECL 56-0507 [2]). * * * ... '[T]he state of New York and any of its political subdivisions or agents' (Navigation Law § 172 [14]). Additionally, the Legislature imposed strict liability against 'a]ny person who has discharged petroleum . . . without regard to fault, for all cleanup and removal costs and all direct and indirect damages, no matter by whom sustained' (Navigation Law § 181 [1]…). The language of the statute does not limit recovery solely to the Oil Spill Fund. Rather, the fund simply serves as a possible means to effectuate the statute. '[B]arring plaintiff from seeking to hold defendant strictly liable for the [remediation] expenditures would thwart the plain language of Navigation Law § 181, as well as the express purposes of Navigation Law article 12 ...". ***State of New York v. Alfa Laval Inc.*, 2023 N.Y. Slip Op. 01034, Third Dept 2-23-23**

FAMILY LAW, CONTRACT LAW, JUDGES.

IN THIS DIVORCE ACTION, THE SETTLEMENT AGREEMENT STATED THE WIFE'S INCOME WAS WELL BELOW THE FEDERAL POVERTY LEVEL YET SHE WAIVED SPOUSAL SUPPORT; GENERAL MUNICIPAL LAW § 5-311 MAY, THEREFORE, HAVE BEEN VIOLATED; ALTHOUGH THE AGREEMENT AS A WHOLE WAS NOT UNCONSCIONABLE, THE MATTER WAS SENT BACK TO ALLOW THE JUDGE TO ENQUIRE ABOUT THE WAIVER.

The Third Department, reversing (modifying) Supreme Court in this divorce action, determined a portion of the settlement agreement may violate the General Municipal Law and sent the matter back for further inquiry by the judge. The wife's income is well below the federal poverty guidelines yet she waived spousal support: "General Obligations Law § 5-311 prohibits spouses from contracting to dissolve a marriage and 'relieve either of his or her liability to support the other in such a manner that he or she will become incapable of self-support and therefore is likely to become a public charge ...'. * * * ... [A]rticle four of the settlement agreement, concerning spousal support, sets forth the wife's income as $11,446, which is well below the applicable federal 2020 poverty guidelines ... . As such, there is a question as to whether this provision is in violation of General Obligations Law § 5-311 in that the wife 'is likely to become a public charge.' Because of this, we find that Supreme Court erred when it failed to make an inquiry into the circumstances surrounding the wife's waiver of spousal support ...". ***Majid v. Hasson*, 2023 N.Y. Slip Op. 01035, Third Dept 2-23-23**

FAMILY LAW, EVIDENCE.

THE RECORD DID NOT SUPPORT THE FINDING THAT FATHER NEGLECTED THE CHILD BASED ON MOTHER'S DRUG USE WHEN SHE WAS PREGNANT; ALTHOUGH FATHER DID NOT REPORT MOTHER'S DRUG USE TO HER PROBATION OFFICER, FATHER MADE EFFORTS TO INTERVENE RE: MOTHER'S DRUG USE DURING THE PREGNANCY.

The Third Department, reversing Family Court, determined the record did not support a finding that father (respondent) neglected the child based on mother's drug use when she was pregnant: "Respondent argues that Family Court erred when it found that, knowing that the mother was abusing drugs while pregnant with the daughter, respondent failed to exercise a minimum degree of care when he failed to report the mother's drug use to her probation officer In its decision, Family Court found that respondent made 'some efforts to intervene as to the mother's drug use,' by enrolling her in an inpatient drug treatment facility, attending drug treatment sessions and drug court proceedings with the mother and preventing her from residing with the son and limiting her contact with him. Indeed, the court stated that respondent had 'failed to do the one thing that would have ensured that [the mother did] not have access to drugs while pregnant, reporting her to her probation officer,' and it found that this single failure constituted neglect. Under the circumstances of this case, we disagree. Respondent testified that ... he ... learned that the mother had a warrant for her arrest due to her issues with probation. ... [H]e and the mother agreed that the mother would engage in an inpatient treatment program to address her addiction and that she would then turn herself in to probation. ... [F]our days after entering inpatient treatment, the mother signed herself out and absconded. ... [P]etitioner failed to prove by a preponderance of the evidence that respondent failed to exercise a minimum degree of care required of a reasonable and prudent parent ... . While respondent could have contacted the mother's probation officer and reported her drug use, a warrant for the mother's arrest was already in place, and respondent seemingly lacked any information to assist probation in locating her." ***Matter of Leo RR. (Joshua RR.)*, 2023 N.Y. Slip Op. 01041, Second Dept 2-23-23**

FAMILY LAW, JUDGES, EVIDENCE.

FAMILY COURT SHOULD NOT HAVE DISMISSED FATHER'S MODIFICATION OF CUSTODY PETITION WITHOUT HOLDING A BEST INTERESTS HEARING, SHOULD HAVE ACCEPTED THE FACTS ALLEGED IN THE PETITION AS TRUE, AND SHOULD NOT HAVE RELIED ON UNSWORN INFORMATION FROM THE ATTORNEYS.

The Third Department, reversing Family Court, determined father's petition for a modification of custody should not have been dismissed without holding a best interests hearing. The Third Department noted that Family Court should have accepted the facts alleged in the petition as true and should not have relied on unsworn information provided by the attorneys: "[F]ather's petition sufficiently alleged ... changed circumstances that, if established at a hearing, would entitle him to a best interests review, including that the mother had thwarted the electronic communication to which he was entitled ... , failed to keep him informed of certain health information pertaining to the child and, upon information and belief, was found to have neglected the child ... . Even if such circumstances do not ultimately result in an award of joint legal custody as sought by the father, his petition also sought increased visitation and unsupervised parenting time. These changed circumstances, if established, would support a best interests review to determine whether such relief is warranted based upon the totality of the evidence." ***Matter of Ryan Z. v. Adrianne AA.*, 2023 N.Y. Slip Op. 01032, Third Dept 2-23-23**

FAMILY LAW, TAX LAW, JUDGES.

COVID STIMULUS PAYMENTS WERE ADVANCE TAX REFUNDS MEASURED BY THE NUMBER OF CHILDREN, NOT PAYMENTS FOR THE BENEFIT OF THE CHILDREN; THEREFORE THE PAYMENTS WERE SUBJECT TO EQUITABLE DISTRIBUTION IN THIS DIVORCE PROCEEDING AND SHOULD NOT HAVE BEEN AWARDED TO MOTHER AS CHILD SUPPORT.

The Third Department, reversing Family Court, determined the COVID stimulus payments were advance tax refunds constituting marital property subject to equitable distribution in this divorce/family offense proceeding. Family Court had ordered father to turn over the stimulus payments to mother as temporary child support: "[F]ather argues that the federal stimulus payments are subject to equitable distribution and, therefore, Family Court did not have jurisdiction to direct him to remit them to the mother. We agree. 'Family Court is a court of limited jurisdiction that cannot exercise powers beyond those granted to it by statute' ... . In response to the global pandemic, Congress enacted several economic stimulus payments which created advance refunds of tax credits. As relevant here, the Coronavirus Aid, Relief, and Economic Security Act (the CARES Act) ... provided eligible individuals an 'advance refund amount' of the applicable tax credit of $500 for each qualifying child ... . Thereafter, eligible individuals were entitled to an additional 'advance refund' of the applicable tax credit of $600 for each qualifying child under the Tax Relief Act of 2020 ... . [T]hese federal stimulus payments were not paid 'for the benefit of the minor children,' but they were the parties' advance refund for a tax credit earned pursuant to their last tax return, which was jointly filed, and which was partially measured by the number of children the tax filers had listed as dependents ... . Generally, a tax refund is marital property and subject to equitable distribution by Supreme Court ... . Although, within the context of a family offense petition, Family Court may issue an order for temporary child support (see Family Ct Act § 828 [4]), and there could be appropriate circumstances where a party's tax refund may be seized to satisfy child support obligations ... , those circumstances are not present here." ***Matter of Josefina O. v. Francisco P.*, 2023 N.Y. Slip Op. 01031, Third Dept 2-23-23**

ZONING.

THE REASONS PROVIDED BY THE ZONING BOARD OF APPEALS FOR THE DENIAL OF A USE VARIANCE TO ALLOW CONSTRUCTION OF A SOLAR ARRAY WERE IRRATIONAL.

The Third Department reversed Supreme Court and annulled the determination of the zoning board of appeals [ZBA] which denied a use variance to allow construction of a solar array by Source Renewables. The decision is fact-specific and cannot be fairly summarized here. The Third Department determined the reasons the board gave for finding certain criteria for a use variance were irrational: "[T]here is no basis in the record for the ZBA's conclusion that Source Renewables failed to prove that the alleged hardship results from 'unique conditions peculiar to and inherent in the property as compared to other properties in the zoning district' or neighborhood ... . [T]he evidence before the ZBA established that the ... parcel is poorly suited for residential development due its lack of access to public utilities ... . There is also no evidence in the record to support the ZBA's conclusion that Source Renewables failed to satisfy the third criteria for a use variance — that the variance would not alter the essential character of the neighborhood. The ZBA acknowledged the negative SEQRA declaration, which ...found that the ... project would not impair the quality of aesthetic resources or of existing community or neighborhood character ... , but ultimately relied upon the opinion of one of its members that the solar array would not be visually pleasing from certain vantage points, particularly in the fall and winter. ... Supreme Court concluded that Source Renewables failed to prove that the alleged hardship was not self-created because it entered into the subject contract knowing its proposed project was prohibited. This was not the basis articulated by the ZBA ... . [T]he ZBA concluded that, because the property has not changed since [the seller] purchased it in 1963, any alleged hardship was self-imposed. This was an irrational reason for branding the hardship self-created. Although a hardship is considered self-created, for zoning purposes, where property is acquired subject to the restrictions from which relief is sought ... , here, [the seller] purchased the ... parcel in 1963, and it was not until 1986 and 2018, respectively, that the Town adopted any zoning law ... or regulated solar energy systems ...". ***Matter of Source Renewables, LLC v. Town of Cortlandville Zoning Bd. of Appeals*, 2023 N.Y. Slip Op. 01036, Third Dept 2-23-23**

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