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FIRST DEPARTMENT

CONTRACT LAW.

MOTION TO DISMISS BREACH OF WARRANTY ACTION PROPERLY DENIED; THE WARRANTY CONCERNED THE QUALITY OF MORTGAGES POOLED INTO RESIDENTIAL MORTGAGE-BACKED SECURITIES.

The First Department, in a full-fledged opinion by Justice Moskowitz, determined the motion to dismiss the breach of warranty action against JP Morgan Mortgage Acquisition Corporation (JPMMAC) was properly denied. The warranty required JPMMAC to buy back any defective mortgages which were pooled into residential mortgage-backed securities. The lawsuit was commenced because JPMMAC refused to do so when notified of the problem mortgages. JPMMAC argued that the language of the warranty narrowly restricted the time to which it applied (constituting a so-called "gap" or "bring-down" warranty). Under standard principles of contract interpretation, however, the First Department held that the warranty applied no matter when the material misstatements occurred during the warranty period. **Bank of N.Y. Mellon v WMC Mtge., LLC, 2015 NY Slip Op 08794, 1st Dept 12-1-15**

CRIMINAL LAW.

MODE OF PROCEEDINGS ERROR TO PARAPHRASE SUBSTANTIVE JURY NOTE.

The trial judge's paraphrasing a substantive jury note, rather than reading it into the record verbatim, was a mode of proceedings error requiring reversal: "By only paraphrasing some of the content of the third note, and failing to read the precise content of the [ ] note into the record verbatim at any time, the court violated the procedures set forth in *People v O'Rama* (78 NY2d 270, 277-278 [1991]), more recently reiterated in *People v Nealon* (__ NY3d __ , 2015 NY Slip Op 07781 [2015]) ...). A court does not satisfy its responsibility to provide counsel with meaningful notice of a jury's substantive inquiry by summarizing the substance of the jurors' note ... . The ... note, which was a substantive jury inquiry, should not have been paraphrased, but read in its entirety so that counsel had meaningful notice of its contents and, therefore, an opportunity to formulate a proposed response. Although counsel did not object to how the court handled the ... note, the court's failure to read this substantive note into the record verbatim, is a 'mode of proceedings error,' and given this departure, counsel was not required to object to it in order to preserve any claim of error for appellate review ...". **People v Lane, 2015 NY Slip Op 08771, 1st Dept 12-1-15**

CRIMINAL LAW.

O'RAMA-PROCEDURE ERRORS WERE NOT "MODE OF PROCEEDINGS" ERRORS AND WERE NOT PRESERVED FOR REVIEW BY OBJECTION.

The *O'Rama*-procedure errors made by the trial judge did not rise to the level of "mode of proceedings" errors and were not preserved for appeal by objection. The note was read essentially verbatim in open court, but the judge did not give counsel advance notice of the contents of the note and did not give the parties the chance for input re: the response: "The trial court's handling of the note sent out by the jury during deliberations did not constitute a mode of proceedings error ... . The note contained two questions and two requests for exhibits. While the court initially read only the first substantive question into the record in the presence of counsel before the jury was brought into the courtroom, once the jury was brought in, the court read the remainder of the note aloud, essentially verbatim, stopping at the end of each of the four parts to provide its response. Although the court did not inform counsel in advance about the entirety of the note or give the parties any opportunity for input into the court's proposed responses, by reading the full contents of the note in the presence of the parties and the jury, the court satisfied its core responsibility ...". **People v Ramirez, 2015 NY Slip Op 08772, 1st Dept 12-1-15**

CRIMINAL LAW.

CONVICTION IN VIOLATION OF *CATU* CAN NOT BE USED AS PREDICATE FOR SENTENCING.

The failure to mention the imposition of a period of postrelease supervision (PRS) in connection with a 2000 conviction precluded using that conviction as a predicate felony for sentencing purposes. The court noted that the 2005 *Catu* decision, which held defendants must be informed of PRS, applied retroactively: "CPL 400.15(7)(b) provides: 'A previous conviction . . . which was obtained in violation of the rights of the defendant under the applicable provisions of the constitution of the

United States must not be counted in determining whether the defendant has been subjected to a predicate violent felony conviction.' The People's argument that a *Catu* error does not violate the United States Constitution is improperly raised for the first time in their reply brief, and is without merit in any event. '[A] conviction obtained in violation of *Catu* implicates rights under the federal Constitution as well as the state constitution' ... . Furthermore, although the *Catu* error in this case occurred in 2000, prior to the 2005 *Catu* decision, *Catu* applies retroactively ...". **People v Fagan, 2015 NY Slip Op 08782, 1st Dept 12-1-15**

CRIMINAL LAW.

WAIVER OF APPEAL INVALID; DESCRIPTION OF THE EXTENT OF THE WAIVER WAS ERRONEOUS; NO ASSURANCE DEFENDANT WAS AWARE OF THE DIFFERENCE BETWEEN RIGHTS WAIVED BY A GUILTY PLEA AND APPELLATE RIGHTS.

The First Department sent the matter back for resentencing because the record suggested the sentencing judge erroneously thought he did not have the power to impose a reduced sentence. The First Department determined the defendant's waiver of appeal was invalid because the sentencing judge erroneously stated the relevant law and did not make sure the defendant understood the difference between the rights waived by entering a guilty plea and his appellate rights: "Defendant's waiver of his right to appeal was invalid, where the court failed to adequately ensure defendant's understanding that the right to appeal is separate and distinct from the rights automatically forfeited by pleading guilty ... . The court's statement that defendant was 'waiving [his] right to appeal *any legal issues* connected with the case, including the sentence' (emphasis added) was incorrect, insofar as a defendant cannot waive certain rights, such as the right to challenge the legality of a sentence or raise a speedy trial claim ... . The court's further statement that the 'right of appeal is waived by [defendant], the rights I just mentioned are automatically waived by a plea' was insufficient to explain that the right to appeal is not included with those automatically waived by a guilty plea, since the court had 'just mentioned' that right. Moreover, defendant's execution of a written waiver 'does not, standing alone, provide sufficient assurance that the defendant is knowingly, intelligently and voluntarily giving up his or her right to appeal' ...". **People v Flores, 2015 NY Slip Op 08905, 1st Dept 12-3-15**

PERSONAL INJURY, DUTY OF CARE.

A QUESTION OF FACT EXISTS WHETHER DEFENDANT DRUG TREATMENT FACILITY OWED A DUTY OF CARE TO PLAINTIFF WHO WAS STABBED BY A PATIENT OF THE FACILITY SHORTLY AFTER DISCHARGE.

The First Department, in a full-fledged opinion by Justice Sweeny, over a full-fledged dissenting opinion by Justice Saxe, determined defendant drug treatment facility (Queens Village) did not demonstrate that it owed no duty of care to plaintiff who was stabbed by a patient just discharged by the facility. Queens Village is an alternative to incarceration. The patient was there because he had robbed a cab driver at gunpoint. The patient was discharged because he had pushed another patient to the ground and admitted drinking alcohol. The director of Queens Village indicated that the plan was to transfer the patient to an interim facility until he could be returned to the TASC program [Treatment Alternatives for Safer Communities]. However, the patient apparently became enraged when told he was being discharged and was "escorted" from Queens Village by the police. There was no evidence the police took the patient into custody, or that the police were told by Queens Village to take the patient to the interim facility. The majority concluded that the evidence demonstrated Queens Village exercised sufficient control over the patient (he was to be transferred to an interim facility, not released) to give rise to a duty of care owed to plaintiff. Because Queens Village moved for summary judgment, the court deemed that Queens Village did not demonstrate, as a matter of law, that it did not owe plaintiff a duty of care. **Oddo v Queens Vil. Comm. for Mental Health for Jamaica Community Adolescent Program, Inc., 2015 NY Slip Op 08943, 1st Dept 12-3-15**

PERSONAL INJURY, EVIDENCE.

STATEMENT ATTRIBUTED TO PLAINTIFF PROPERLY REDACTED FROM HOSPITAL RECORDS; EXPERT TESTIMONY DISCLOSED DAYS BEFORE TRIAL PROPERLY EXCLUDED.

In a case with a substantial plaintiff's verdict, the First Department noted the statement that the driver "made an illegal left turn," which was attributed to the plaintiff, was properly redacted from the hospital records. It was not clear the plaintiff made the statement. Even if she did, plaintiff was not the driver so it was not a statement against plaintiff's interest. The statement was not made for the purpose of diagnosis and treatment. And the statement does not relate to a matter of fact ("illegal" is a conclusion of law). The First Department further noted that the trial court's preclusion of testimony by defendants' experts was not an abuse of discretion. The defendants served their disclosures only days before the trial. With respect to the expert evidence, the court wrote: "The trial court providently exercised its discretion in precluding testimony from defendants' biomechanical and accident reconstruction experts because defendants served their disclosures only days before the scheduled trial date. We see no reason to disturb the trial court's exercise of discretion in precluding this testimony ... , whether applying a 'good cause' standard ... or a 'willful or prejudicial' standard ... . We also see no reason to disturb the trial court's exercise of discretion in precluding testimony regarding a seatbelt defense ...". **Coleman v New York City Tr. Auth., 2015 NY Slip Op 08906, 1st Dept 12-3-15**

SECOND DEPARTMENT

CIVIL PROCEDURE.

DEFAULT JUDGMENT GIVEN RES JUDICATA EFFECT.
The Second Department, in affirming a cross-motion for summary judgment, explained that plaintiffs' action was precluded by the doctrine of res judicata based upon a default judgment taken against them. Plaintiffs did not move to vacate the default judgment. Therefore the judgment precluded plaintiffs' action as to any matters actually litigated and any matters that might have been litigated in the prior action: "[R]es judicata, or claim preclusion, bars successive litigation based upon the same transaction or series of connected transactions if: (i) there is a judgment on the merits rendered by a court of competent jurisdiction, and (ii) the party against whom the doctrine is invoked was a party to the previous action, or in privity with a party who was ... . The doctrine is applicable to an order or judgment taken by default which has not been vacated, as well as to issues which were or could have been raised in the prior proceeding ... . Here, an order was issued in a declaratory judgment action granting the unopposed motion of the plaintiffs therein for leave to enter a default judgment against, inter alia, the appellants, who were named defendants in that action, upon their failure to appear or answer the complaint in that action. That order is conclusive for res judicata purposes as to any matters actually litigated or that might have been litigated in that action, and precludes the appellants from maintaining this action ...". [internal quotation marks omitted] **Albanez v Charles, 2015 NY Slip Op 08795, 2nd Dept 12-2-15**

CIVIL PROCEDURE.

NOTICE TO ADMIT IMPROPERLY SOUGHT CONCESSIONS THAT WENT TO THE HEART OF THE CONTROVERSY.
Reversing Supreme Court, the Second Department determined defendant's notice to admit sought concessions that went to the heart of the controversy which should not have been deemed admitted: "CPLR 3123(a) authorizes the service of a notice to admit upon a party, and provides that if a timely response thereto is not served, the contents of the notice are deemed admitted ... . However, the purpose of a notice to admit is only to eliminate from contention those matters which are not in dispute in the litigation and which may be readily disposed of ... . A notice to admit is not to be employed to obtain information in lieu of other disclosure devices, or to compel admissions of fundamental and material issues or contested ultimate facts ... . Here, as the plaintiff correctly contends, ... the notice to admit improperly sought concessions that went to the essence of the controversy between the parties and involved matters that clearly were in contravention of the allegations of the complaint. Thus, the third-party defendant could not have reasonably believed that the admissions he sought were not in substantial dispute ... , and those items were palpably improper ... . Accordingly, the plaintiff was not obligated to respond to them … . The Supreme Court therefore erred in deeming those items admitted by reason of the plaintiff's failure to respond to the notice. Since those items should not have been deemed admitted, the plaintiff's motion pursuant to CPLR 3123(b) to withdraw those deemed admissions was unnecessary." **32nd Ave. LLC v Angelo Holding Corp., 2015 NY Slip Op 08824, 2nd Dept 12-2-15**

CRIMINAL LAW.

SEVEN-YEAR DELAY BETWEEN ARREST AND INDICTMENT DID NOT VIOLATE RIGHT TO SPEEDY TRIAL.
Supreme Court properly found that the seven-year delay between defendant's arrest and indictment did not violate defendant's right to a speedy trial. The Second Department explained the relevant law: "A defendant's right to a speedy trial is guaranteed both by the United States Constitution ... . Moreover, an unjustified delay in prosecution will deprive a defendant of the State constitutional right to due process ... . However, 'a determination made in good faith to delay prosecution for sufficient reasons will not deprive defendant of due process even though there may be some prejudice to defendant. ... . Where there has been extended delay, the People have the burden to establish good cause ... .In determining whether a defendant's constitutional right to a speedy trial has been violated, the Court of Appeals has articulated five factors to be considered: (1) the extent of the delay; (2) the reason for the delay; (3) the nature of the underlying charges; (4) any extended period of pretrial incarceration; and (5) any impairment of the defendant's defense ... . These factors apply as well to the due process guarantee ... . 'In this State, we have never drawn a fine distinction between due process and speedy trial standards when dealing with delays in prosecution. ...". **People v Allen, 2015 NY Slip Op 08850, 2nd Dept 12-2-15**

FAMILY LAW.

PRIMA FACIE CASE OF NEGLECT REBUTTED BY MOTHER'S EXPERT.
Reversing Family Court, the Second Department determined expert testimony on behalf of the mother rebutted the petitioner's prima facie case of neglect. The court noted the nature of petitioner's prima facie proof is akin to the doctrine of res ipsa loquitur in negligence. Proof of an injury to a child which would not occur if the child had been in the care of a responsible caregiver is enough to make out a prima facie case. Expert testimony demonstrating the injuries may have occurred when the child was not in the mother's care and further demonstrating alternate causes of the injuries was sufficient to rebut the prima facie case of neglect/abuse. **Matter of Miguel G. (Navil G.). 2015 NY Slip Op 08834, 2nd Dept 12-2-15**

PERSONAL INJURY.

BECAUSE PROPERTY-OWNER-DEFENDANTS UNDERTOOK SNOW REMOVAL EFFORTS, THEIR FAILURE TO AFFIRMATIVELY DEMONSTRATE THOSE EFFORTS DID NOT CREATE THE HAZARDOUS CONDITION REQUIRED DENIAL OF THEIR MOTION FOR SUMMARY JUDGMENT.

The Second Department noted that, although a property owner is under no duty to remove snow and ice during a storm, if snow removal efforts are made, in moving for summary judgment, the property owner (here Chestnut Oaks) must affirmatively demonstrate the snow removal efforts did not create a hazardous condition. Chestnut Oaks' failure to so demonstrate required denial of its motion: "As the proponents of a motion for summary judgment, the Chestnut Oaks defendants had the burden of establishing, prima facie, that they neither created the ice condition nor had actual or constructive notice of the condition ... . Under the so-called storm in progress rule, a property owner will not be held responsible for accidents occurring as a result of the accumulation of snow and ice on its premises until an adequate period of time has passed following the cessation of the storm to allow the owner an opportunity to ameliorate the hazards caused by the storm ... . A person responsible for maintaining property is not under a duty to remove ice and snow until a reasonable time after the cessation of the storm ... . However, if a storm is ongoing, and a property owner elects to remove snow, it must do so with reasonable care or it could be held liable for creating or exacerbating a natural hazard created by the storm ... . In such an instance, a property owner moving for summary judgment in a slip and fall case must demonstrate in support of its motion that the snow removal efforts it undertook neither created nor exacerbated the allegedly hazardous condition which caused the injured plaintiff to fall ...". [internal quotation marks omitted] **DeMonte v Chestnut Oaks at Chappaqua, 2015 NY Slip Op 08800, 2nd Dept 12-3-15**

PERSONAL INJURY.

ALLEGATION THAT PLAINTIFF'S LEAD VEHICLE STOPPED FOR NO APPARENT REASON RAISED QUESTION OF FACT ABOUT WHETHER PLAINTIFF'S NEGLIGENCE CAUSED OR CONTRIBUTED TO THE REAR-END COLLISION.

Defendant's (Balenescu's) allegation that plaintiff (Galuten, the driver of the lead vehicle) suddenly stopped for no apparent reason raised a question of fact about whether plaintiff's negligence caused or contributed to the rear-end collision: "Mere evidence of a sudden stop, without more, is not enough to raise a triable issue of fact as to whether the operator of the stopped vehicle was partly at fault, so as to defeat summary judgment ... . However, while vehicle stops under prevailing traffic conditions are forseeable and must be anticipated by the following driver, where the sudden stop is unexplained by the existing circumstances and conditions, an issue of fact as to liability is raised ... . Here, Balenescu averred, inter alia, that when he was '25 yards from the Galuten vehicle, still traveling at 15 miles per hour, the light turned green, and the Galuten vehicle . . . accelerated safely through the intersection into the next block.' Then about 10 yards past the intersection of West 23rd Street and 12th Avenue, the Galuten vehicle suddenly stopped short 'for no apparent reason,' as there was no traffic 'for fifty yards in front of the Galuten vehicle,' and the Galuten vehicle showed no signs, nor made any signals, to signify that it was stopping. This evidence was sufficient to raise a triable issue of fact as to whether Galuten's alleged negligence caused or contributed to the accident ...". **Etingof v Metropolitan Laundry Mach. Sales, Inc., 2015 NY Slip Op 08803, 2nd Dept 12-2-15**

PERSONAL INJURY, MUNICIPAL LAW.

FIREFIGHTER RULE DID NOT PRECLUDE ACTION BY POLICE OFFICER STEMMING FROM A FALL AT THE OFFICE; GENERAL MUNICIPAL LAW 205-e CAUSE OF ACTION PROPERLY BASED ON ALLEGED VIOLATION OF LABOR LAW 27-a.

A police officer's common law negligence and General Municipal Law 205-e actions should not have been dismissed. The officer tripped over an electric cord at the office. The firefighter rule did not bar the suit because the injury was not the result of the heightened risk associated with police work. The General Municipal Law 205-e cause of action was correctly based upon an alleged violation of Labor Law 27-a. **Kelly v City of New York, 2015 NY Slip Op 08808, 2nd Dept 12-2-15**

PERSONAL INJURY, MUNICIPAL LAW.

DEFENDANT'S FAILURE TO DEMONSTRATE WHEN THE AREA WAS LAST INSPECTED AND CLEANED REQUIRED DENIAL OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT IN THIS SLIP AND FALL CASE.

Reversing Supreme Court, the Second Department determined defendant transit authority did not demonstrate a lack of constructive notice of a slip and fall hazard because it did not present evidence of when the area was last cleaned and inspected or what the area looked like prior to the slip and fall: "A defendant property owner who moves for summary judgment in a slip-and-fall case has the initial burden of making a prima facie showing that it neither created the hazardous condition nor had actual or constructive notice of its existence ... . To meet its initial burden on the issue of lack of constructive notice, the defendant must offer some evidence as to when the area in question was last cleaned or inspected relative to

the time when the plaintiff fell ... . Here, viewing the evidence in the light most favorable to the plaintiff, as the nonmoving party, the defendant failed to establish its prima facie entitlement to judgment as a matter of law ... . The defendant failed to set forth when the subject platform was last inspected or what it looked like prior to the accident, and it failed to establish, prima facie, that it did not have constructive notice of the alleged hazardous condition ...". [internal quotation marks omitted] **Roman v New York City Tr. Auth., 2015 NY Slip Op 08820, 2nd Dept 12-2-15**

TRUSTS AND ESTATES.

REMAINDER INTERESTS WHICH CAN ONLY BE DIVESTED BY A POWER OF APPOINTMENT ARE VESTED REMAINDER INTERESTS.

The five individuals who were to take remainder interests in the event a power of appointment was not exercised had vested remainder interests: "In Article Third of the will, the testator created a trust for the benefit of Sydelle [his wife] during her lifetime. Upon the death of Sydelle, the remainder was to be distributed to or for the benefit of such one or more persons within a class composed of the testator's then living issue or Sydelle's living issue, 'in such estates, interests and proportions as [Sydelle] may appoint by specific reference to this power of appointment in her last will and testament, admitted to probate.' The will provided that if Sydelle failed to exercise or did not fully or effectually exercise her power of appointment, all property not effectually appointed, was to be paid and distributed to five other named individuals. * * * 'It is a well-established rule, both of the common law and by statute, in this State that estates in remainder which are limited to take effect upon default in the exercise of a power of appointment are not prevented from vesting by the existence of the power, but take effect in the same manner as if no power existed, subject, however, to be divested by an exercise of the power' ... . Where the power of appointment has not been exercised and cannot be until the death of the person with the power of appointment, it may be eliminated from consideration and the next limitation considered ... . Thus, the five individuals named in Article Third ... have a vested remainder interest which can be divested if Sydelle exercises her power of appointment by will ...". **Matter of Levitan, 2015 NY Slip Op 08838, 2nd Dept 12-2-15**

THIRD DEPARTMENT

CIVIL PROCEDURE.

USE OF MOTION TO REARGUE TO RAISE NEW ISSUES REQUIRED REVERSAL.

The Third Department reversed based upon the improper use of a motion to reargue, despite the defendants' failure to raise the issue. The motion was improperly based upon a theory not raised in the original motion: "[A] motion to reargue is not available to advance a new theory of liability, or to present arguments different from those originally asserted ... , but plaintiffs did just that in their motion for reargument, arguing that the installation of the original [s]ewer [l]ine was no longer an issue and that the alleged trespass caused by the new sewer line justified a grant of summary judgment. Supreme Court accordingly abused its discretion in granting reargument based upon the presence of the new sewer line, a claim that was not raised by plaintiffs in either their original motion for summary judgment or their complaint ...". [internal quotation marks omitted] **Wasson v Bond, 2015 NY Slip Op 08900, 3rd Dept 12-3-15**

CRIMINAL LAW.

17-YEAR DELAY ADEQUATELY EXPLAINED, SPEEDY TRIAL RIGHT NOT VIOLATED.

A 17-year delay between the act and defendant's indictment did not violate his right to a speedy trial. Several years of the delay were attributed to the ability to test DNA without destroying it (which was not available at the time of the offense in 1994). In addition, a witness came forward in 2011. The Third Department explained the applicable law: "In determining whether there is an undue delay, the trial court must consider (1) the extent of the delay; (2) the reason for the delay; (3) the nature of the underlying charge; (4) whether or not there has been an extended period of pretrial incarceration; and (5) whether or not there is any indication that the defense has been impaired by reason of the delay ... . Where, as here, the delay is extraordinary, close scrutiny of the other factors, especially the question of why the delay occurred, is required ... . The People introduced evidence indicating that DNA technology in 1994 would have required the destruction of the two samples of biological material that had been collected. Further evidence established that technology at the time that the samples were tested — in 2004 and 2011 — did not require such destruction. In addition to this physical evidence becoming probative, a witness came forward in May 2011 implicating defendant in the murder. Such evidence demonstrated a good faith basis for the delay in proceeding with the prosecution ... . Turning to the remaining factors, the charge of murder in the second degree is inarguably a very serious offense ... . Further, defendant was never incarcerated during the 17-year delay ... . In addition, defendant's generic claim that witnesses may have moved and that their recall of events is no longer as strong as it once was is too speculative to carry significant weight in the analysis ... . Although defendant faced a substantial delay, upon considering these factors, we find that his constitutional right to a speedy trial was not violated ...". **People v Chaplin, 2015 NY Slip Op 08869, 2nd Dept 12-2-15**

CRIMINAL LAW.

DEFENSE COUNSEL'S FAILURE TO OBJECT TO PROSECUTOR'S REFERENCES TO STRICKEN TESTIMONY CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL REQUIRING REVERSAL.

Defense counsel's failure to object to the prosecutor's references to stricken testimony in summation amounted to ineffective assistance of counsel requiring reversal. The defendant was accused of running over his girlfriend with a pickup truck: "Here, during direct examination by the People, the witness testified that he heard defendant yell, 'I hope you f***ing die, bitch.' Finding that this testimony went to defendant's state of mind, County Court overruled counsel's objection and permitted the statement into evidence. The witness then testified that he assumed defendant was directing such comment toward [the victim]. Upon defendant's further objection, County Court held that the witness could not speculate as to whom defendant had directed his comment, and the witness's testimony in that regard was stricken from the record. Despite this evidentiary ruling, during summation, the People twice made improper references to the stricken testimony and twice those references went without objection from defense counsel or curative instructions from the court. Specifically, at one point during closing argument the prosecutor stated, 'If this was some sort of an accident, then why would the defendant scream at [the victim], I hope you f***ing die, bitch? Is that consistent with an accident or is that consistent with an intent to injure? If you accidentally just ran over your significant other, is that what you would say to them?' ...". **People v Ramsey, 2015 NY Slip Op 08874, 3rd Dept 12-3-15**

CRIMINAL LAW.

FAILURE TO CLARIFY WHETHER APPEAL WAIVER WAS PART OF THE PLEA AGREEMENT RENDERED THE WAIVER INVALID.

Defendant's waiver of appeal was invalid because it was not made clear whether the waiver was part of the plea agreement. The court further determined that the sentence for non-violent offenses committed by the 18-year-old defendant was harsh and excessive. With respect to the invalid waiver of appeal, the court wrote: "Defendant was free to waive his right to appeal as an adjunct to the plea agreement, so long as he made a voluntary, knowing and intelligent decision to do so ... . It was accordingly incumbent upon County Court to verify, among other things, that defendant understood he was 'intentionally relinquish[ing] or abandon[ing] a known right that would otherwise survive a guilty plea' as a component of the plea agreement ... . Defendant expressed his willingness to waive his right to appeal during the plea colloquy, but the record is devoid of any indication that an appeal waiver was actually a component of the plea agreement. An appeal waiver was not mentioned when the terms of the plea agreement were recited and, indeed, the People stated that they did not know if defendant was executing an appeal waiver given the absence of any sentencing commitment. Defense counsel then gratuitously offered to have defendant waive his right to appeal in the spirit of 'mak[ing] it as easy on everyone as possible.' As a result of these statements, County Court was obliged to determine whether an appeal waiver was required as a 'detail[] of the plea bargain' and, if not, whether defendant understood that he did not have to execute one .... . County Court did neither and, given the absence of proof that defendant waived his right to appeal in return for any consideration, we find that waiver to be invalid …". **People v Justiniano, 2015 NY Slip Op 08875, 3rd Dept 12-3-15**

CRIMINAL LAW, EVIDENCE.

MARITAL PRIVILEGE DID NOT APPLY TO DEFENDANT'S STATEMENT THAT HE WAS GOING TO BURN THE HOUSE DOWN.

In an arson case, the Third Department determined County Court properly allowed defendant's wife to testify defendant said he was going to burn the house down. The court explained the limits of marital privilege: "The privilege that precludes a spouse from disclosing a confidential communication made during marriage by the other spouse (*see* CPLR 4502 [b]; CPL 60.10) does not protect every remark between spouses during a marriage. Instead, the privilege attaches only to those statements made in confidence and that are induced by the marital relation and prompted by the affection, confidence and loyalty engendered by such relationship ... . The wife testified that her marriage to defendant began to deteriorate during the months before the fire, in part because defendant wanted to relocate to Colorado while the wife wanted to remain in New York and continue living in the marital home with her children. She stated that, as the relationship worsened, defendant told her many times that he would burn the house down to prevent her from taking possession of it when they separated. The privilege was never designed to forbid inquiry into the personal wrongs committed by one spouse against the other and, thus, does not apply here, as defendant's statements were not prompted by trust or confidence in the marital relationship, but, instead, constituted threats of criminal activity directed at the wife ... . Further, the privilege does not apply when the substance of a communication . . . is revealed to third parties ... . Here, the wife testified that several of defendant's threats were made in the presence of other people, including mutual friends and the couple's children, and these statements were not privileged ...". [internal quotation marks omitted] **People v Howard, 2015 NY Slip Op 08870, 3rd Dept 12-3-15**

CRIMINAL LAW, EVIDENCE.

DEFENSE "OPENED THE DOOR" TO ALLOW EVIDENCE OF OTHERWISE INADMISSIBLE TESTIMONIAL HEARSAY STATEMENTS MADE TO A POLICE OFFICER.

Testimonial statements made by a co-defendant, Denno, to a police investigator were properly allowed in evidence because the defense "opened the door" by questioning the investigator about one of the statements: "Although testimonial statements by a nontestifying witness are inadmissible as violative of the Confrontation Clause, 'a defendant can open the door to the admission of evidence otherwise barred by the Confrontation Clause' ... . Denno, a witness to and participant in the crimes, gave three statements to the investigator, and Denno invoked his Fifth Amendment right not to testify at defendant's trial. Defendant called the investigator as a witness to elicit information about Denno's second statement, which was favorable to defendant. This opened the door for the People to cross-examine the investigator about the content of the two other Denno statements, which provided context and were less favorable to defendant." **People v Taylor, 2015 NY Slip Op 08873, 3rd Dept 12-3-15**

ENVIRONMENTAL LAW, CIVIL PROCEDURE.

BECAUSE THE GAS WELL TO WHICH PLAINTIFFS OBJECTED MAY NEVER BE CONSTRUCTED, THE DECLARATORY JUDGMENT ACTION DID NOT PRESENT A JUSTICIABLE CONTROVERSY.

Plaintiff coalition's declaratory judgment action against the New York Department of Environmental Conservation (DEC) was properly dismissed. The action contended that the DEC's response to a comment submitted by plaintiff coalition (re: a gas-well permit under State Environmental Quality Review Act [SEQRA] review) constituted an unlawful extension of the common law rule of capture and effectuated a trespass on the land owned by a coalition member. The Third Department determined, because the comment period for the relevant rule-making had passed and the relevant rules had not been adopted, and because whether the gas-well permit will be issued has not been determined, the declaratory judgment action did not raise a justiciable controversy. **Community Watersheds Clear Water Coalition, Inc. v New York State Dept. of Envtl. Conservation, 2015 NY Slip Op 08890, 3rd Dept 12**

FAMILY LAW.

DESPITE FLORIDA DIVORCE, NEW YORK HAD JURISDICTION OVER THE CUSTODY/VISITATION MATTERS BASED UPON THE PARTIES' PRESENCE IN NEW YORK.

Reversing Family Court, the Third Department determined New York had jurisdiction over the custody/visitation matters, despite the Florida divorce. The parties had subsequently moved from Florida to New York and there was no indication the relocation was temporary. The criteria for New York's jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) has nothing to do with the legal residence of the parties. The court further determined that the relevant provisions of the UCCJEA did not conflict with the Parental Kidnapping Prevention Act (PKPA) and was therefore not preempted by the PKPA. **Matter of Lewis v Martin, 2015 NY Slip Op 08879, 3rd Dept 12-3-15**

MUNICIPAL LAW, TOWN LAW.

TOWN'S WITHDRAWAL FROM A COORDINATED ASSESSMENT PROGRAM (CAP) DOES NOT TERMINATE TOWN ASSESSOR'S TERM.

The Third Department, in a matter of first impression, determined petitioner, a town assessor who was removed when the town withdrew from the coordinated assessment program (CAP), was entitled to finish out his six-year term. Under the CAP, the petitioner served three towns. When one of those towns withdrew from the CAP, that town appointed its own town assessor. The Third Department held that petitioner was entitled to finish out his term as assessor for that town: "[W]e find it telling that RPTL 579 was amended in 2009 to, among other things, clarify that an assessor appointed in a CAP receives a six-year term and to shorten the notice period for a member to withdraw (*see* L 2009, ch 46, §§ 1-3 [eff May 29, 2009]). The adoption of these companion provisions leads us to conclude that the Legislature intended an assessor's six-year term to remain intact, even where a CAP member opts to withdraw. Insofar as the assessor is concerned, the effect of withdrawal is merely delayed until the assessor's term expires, at which time the assessing unit is free to choose a new assessor, without approval from any other assessing unit." **Matter of Rubeor v Town of Wright, 2015 NY Slip Op 08895, 3rd Dept 12-3-15**

REAL PROPERTY, CONTRACT LAW.

QUESTION OF FACT WHETHER PARTIAL PERFORMANCE TOOK ORAL AGREEMENT OUT OF THE STATUTE OF FRAUDS.

A question of fact had been raised about whether an oral agreement to extend a mining lease was enforceable because partial performance took the contract out of the statute of frauds. An amendment to extend the mining lease for 20 years was never executed. However, the agreement was mentioned in a 20-year sublease which was subsequently entered: "Defen-

dants' statute of frauds argument is governed by General Obligations Law § 5-703, which, as relevant here, provides that an interest in real property can be created or conveyed only by a signed writing. While plaintiff concedes that a signed copy of the amendment does not exist, he contends that the statute of frauds is inapplicable, as the parties' course of conduct constitutes partial performance of an oral contract to extend the term of the lease (see General Obligations Law § 5-703 [4]...). '[P]artial performance of an alleged oral contract will be deemed sufficient to take such contract out of the [s]tatute of [f]rauds only if it can be demonstrated that the acts constituting partial performance are 'unequivocally referable' to said contract'; ... . Here, plaintiff raised triable issues of fact as to whether the partial-performance exception to the statute of frauds applies. Evidence of such performance can be found in the parties' mutual decision to execute the 20-year sublease agreement, which explicitly referred to the amendment and acknowledged that plaintiff and [defendant] were parties to it. Indeed, if the parties did not have an understanding that the mining lease was to be extended to 20 years, then [defendant sublessee's] willingness to enter into a 20-year sublease with plaintiff — despite the fact that plaintiff had only a five-year lease with [defendant] and [defendant's] express consent to the creation of these incongruous interests in his property — would appear to be 'unintelligible or at least extraordinary, explainable only with reference to the oral agreement' ...". **Bowers v Hurley, 2015 NY Slip Op 08884, 3rd Dept 12-3-15**

UNEMPLOYMENT INSURANCE.

MEDICAL COURIERS WERE EMPLOYEES.

Couriers were employees of Dynamex entitled to unemployment insurance benefits: "[T]he record contains evidence that claimants were required to wear uniforms identifying themselves as being contracted through Dynamex. Claimants were also issued Dynamex identification cards. Further, claimants were bound by a one-year noncompetition restriction following their termination with Dynamex. Claimants would advise Dynamex when they were available to work and Dynamex would then assign pickups and deliveries to them within their general geographic location. Claimants were required to complete their assignments the same day and provide Dynamex with proof of delivery. Dynamex handled customer complaints and would bill its customers and pay claimants weekly, based upon commissions for the services performed, even if the customer did not pay Dynamex." **Matter of Voisin (Dynamex Operations E., Inc.--Commissioner of Labor), 2015 NY Slip Op 08881, 3rd Dept 12-3-15**

UNEMPLOYMENT INSURANCE.

IT CONSULTANT WAS EMPLOYEE.

Claimant, who had her own IT consultant business, was an employee of Geneva, despite the contractual "independent contractor" designation. The court, however, sent the matter back for a determination whether claimant was totally unemployed. With respect to the employee status, the court wrote: "The evidence at the hearing demonstrated that claimant, who runs her own consulting business, Jessica Consultant LLC, responded to an advertisement placed by Geneva that listed the job requirements and necessary IT background for a position with its client; Geneva screened her and forwarded her credentials to its client, which interviewed and approved of claimant. Geneva required that claimant sign a contract that designated her as the consultant assigned to perform the IT services for the client, and labeled her as an independent contractor. Geneva employed approximately 35 people as consultants who received benefits and designated another 15 consultants as independent contractors who were required to be in business for themselves and to obtain, among other things, their own liability insurance, but Geneva's chief financial officer conceded that both groups provided the 'same services' and had the 'same skills.' Geneva contracted with its client to provide claimant's services and charged the client for those services, and Geneva paid claimant a negotiated daily rate. Claimant worked a full-time schedule set by the client and performed services in the client's office where she was provided a desk, computer, supplies and support staff. Claimant reported regularly to the client's manager, who instructed her on the client's needs and expectations, trained her on the client's systems, gave her assignments, set her deadlines and approved her time sheets, which were submitted to Geneva for payment. Claimant could not provide substitutes or refuse assigned work and needed the client's approval to take time off from work." **Matter of Thomas (Geneva Consulting Group--Commissioner of Labor), 2015 NY Slip Op 08889, 3rd Dept 12-3-15**

UNEMPLOYMENT INSURANCE.

SPECIAL EDUCATION PROVIDER NOT AN EMPLOYEE.

Claimant, a provider of special education services, was not an employee of Mid Island, which was under contract with the New York City Department of Education (NYCDOE) to provide such services: "Although Mid Island would contact claimant to let her know whether a student in her geographic area needed special education services, Mid Island did not assign students to claimant; she was free to accept or reject a referral from Mid Island ... . Mid Island also did not control the scheduling of services, which would be arranged between the student's parents and claimant ... , and did not dictate the type, location or manner of delivery of the services that were to be provided, which would be specified in the student's individualized education program ... . Once services were provided, any parental complaints were handled by NYCDOE, not

Mid Island, and if a teacher needed to be replaced, NYCDOE would direct Mid Island to do so. Mid Island never performed any type of performance evaluation of claimant ... . The reporting requirements governing submission of session and progress notes also came from NYCDOE, and such notes were neither required nor reviewed by Mid Island ... .Claimant was required under the parties' agreement to maintain her own malpractice insurance and cover her own expenses, and she was not provided with any supplies or benefits ... . The rate of payment was established by NYCDOE, and, if Mid Island did not receive payment from NYCDOE, it was not obliged to remit payment to claimant for services provided to a student ...". **Matter of Wright (Mid Is. Therapy Assoc. LLC--Commissioner of Labor), 2015 NY Slip Op 08897, 3rd Dept 12-3-15**

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