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CasePrepPlus

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FIRST DEPARTMENT

CRIMINAL LAW, APPEALS.

APPEAL WAIVER INVALID, FLAWED ON-THE-RECORD EXPLANATION OF WAIVED RIGHTS NOT REMEDIED BY SIGNED WRITTEN WAIVER.

The First Department, over a dissent, determined defendant's waiver of appeal was invalid because the trial judge did not make it clear the appeal-rights were distinct from those waived by the guilty plea. The written waiver signed by the defendant was not sufficient to remedy the flawed colloquy: "Here, the court never adequately explained the nature of the waiver, the rights the defendant would be waiving, or that the right to appeal was separate and distinct from the rights automatically forfeited upon a plea of guilty. Rather, the court merely stated that 'as a part of this' — that is, as part of the guilty plea — defendant was waiving his right to appeal and thus, that the convictions would be final because no appellate court would review them. Despite our dissenting colleague's suggestion otherwise, the problem with the waiver's validity is not that there was 'some ambiguity in the court's colloquy.' Rather, by using the phrase 'as a part of this,' the trial court expressly undercut the principle that a defendant must understand his waiver of appeal to be distinct from the rights forfeited upon a guilty plea ... . [T]the written waiver that defendant signed was no substitute for an on-the-record explanation of the nature of the right to appeal ... . This conclusion holds especially true here, where the record does not make clear when defendant signed the waiver. Although the waiver itself states that defendant signed the waiver only 'after being advised by the Court,' it is not evident from the record whether defendant signed the waiver before the colloquy regarding his right to appeal, or whether he signed it after." **People v Bryant, 2016 NY Slip Op 01427, 1st Dept 3-1-16**

EMPLOYMENT LAW, CORRECTIONS LAW, MUNICIPAL LAW.

POLICE DEPARTMENT CAN REFUSE EMPLOYMENT IN A CIVILIAN POSITION BASED SOLELY UPON THE APPLICANT'S CRIMINAL RECORD WITHOUT APPLYING THE HIRING CRITERIA GENERALLY REQUIRED BY THE CORRECTIONS LAW.

The First Department, as a matter of first impression, determined the police department (NYPD) could refuse to hire petitioner as a civilian police communication technician (PCT) solely because petitioner had a criminal record, without regard to the criteria set out in Corrections Law article 23-a. The Corrections Law, in an effort to support the hiring of persons with a criminal record, generally requires employers to determine whether an applicant's criminal record has a direct relationship with the responsibilities of the job and/or whether employment of the applicant would pose an unreasonable risk to the public. The First Department concluded the Corrections Law excluded law enforcement from the reach of its hiring criteria: "Article 23-A broadly provides that employers, whether public or private, are prohibited from unfairly discriminating against persons previously convicted of one or more criminal offenses, unless after consideration of certain enumerated statutory factors, the employer determines that there is direct relationship between the offense(s) and the duties or responsibilities inherent in the license or employment sought or held by the individual, or such employment or license poses an unreasonable risk to the public, etc. (Correction Law §§ 752, 753). The statute defines the term 'employment' as follows: ' "(5) Employment" means any occupation, vocation or employment, or any form of vocational or educational training. Provided, however, that "employment" shall not, for the purposes of this article, include membership in any law enforcement agency' (Correction Law § 750[5] …)." **Matter of Belgrave v City of New York, 2016 NY Slip Op 01548, 1st Dept 3-3-16**

FRAUD, EXECUTIVE LAW, CIVIL PROCEDURE.

STATUTORY FRAUD CAUSE OF ACTION REINSTATED AGAINST DONALD TRUMP ET AL.

In an action by the Attorney General against Donald Trump, alleging fraud in connection with the operation of Trump University, the First Department, overruling its own precedent, determined Executive Law § 63(12) authorized a stand-alone fraud cause of action. The court further held that the three-year statute of limitations for causes of action created by statute did not apply because Executive Law § 63(12) did not create a cause of action which did not exist at common law, rather it merely authorized the Attorney General to bring a fraud cause of action. Applying the six-year statute of limitations, the First Department reinstated the Executive Law § 63(12) cause of action, and concluded questions of fact precluded summary

judgment on both the statutory and common law fraud claims. **Matter of People of the State of N.Y. by Eric T. Schneiderman v Trump Entrepreneur Initiative LLC, 2016 NY Slip Op 01430, 1st Dept 3-1-16**

PERSONAL INJURY.

NO OBLIGATION TO CONTINUOUSLY MOP UP TRACKED IN WATER.

The First Department determined the defendants demonstrated they did not have constructive notice of a dangerous condition allegedly caused by tracked in rain, noting there was no obligation to continuously mop up tracked in water: " 'The fact that it was raining and water was being tracked in does not constitute notice of a dangerous situation'; … defendants 'were under no obligation . . . to continuously mop up all tracked-in water' ... . Moreover, plaintiff's own testimony established that the water on which she slipped was not visible and apparent and therefore could not provide constructive notice ... . Plaintiff testified that, despite looking at the floor where she was walking, it was not until after she fell that she was able to discern the wet spots on the floor, which she described as clear droplets in a small area less than two feet in diameter that were 'hard to have seen . . . when I was standing up.' Plaintiff failed to raise a triable issue of fact whether the accumulating rain water was a recurrent condition ...". **Gunzburg v Quality Bldg. Servs. Corp., 2016 NY Slip Op 01438, 1st Dept 3-1-16**

PERSONAL INJURY.

RIDER ASSUMED THE RISK OF BEING THROWN FROM A HORSE.

The First Department, reversing Supreme Court, determined defendants' motion for summary judgment should have been granted. Plaintiff was injured when thrown from a horse during a recreational ride at defendant's stable. Plaintiff was deemed to have assumed the risk of being thrown from the horse: "The risk of a horse acting in an unintended manner resulting in the rider being thrown is a risk inherent in the sport of horseback riding ... . There is no evidence that defendant stable was reckless, nor were there any concealed or unreasonably increased risks ... . To the extent plaintiffs' expert opined otherwise, such opinion was conclusory, since it did not rely on any rules, regulations, laws or industry standards, and therefore, it fails to raise a triable issue of fact ...". **Blumenthal v Bronx Equestrian Ctr., Inc., 2016 NY Slip Op 01545, 1st Dept 3-3-16**

CONTRACT LAW, ARCHITECTURAL MALPRACTICE.

ARCHITECT MAY BE LIABLE FOR BOTH BREACH OF CONTRACT AND NEGLIGENCE.

The First Department, over a dissent, determined an architect, Perkins, could be sued for both breach of contract and negligence in a lawsuit stemming from the settling of a building and other structures in the vicinity of new construction. The court also concluded the plaintiff city, although not mentioned in the contract with the architect, had raised a question of fact whether the city was an intended third-party beneficiary of the contract. With respect to when a professional-party to a contract can be liable in tort, the court wrote: "Perkins, as architect, may be subject to tort liability based on a failure to exercise due care in the performance of its duties. In making this determination, the court is to look at the nature of the injury and whether the plaintiff is merely seeking the benefit of its agreement. Where the plaintiff is merely seeking the benefit of its agreement, it is limited to a contract claim ... . Where, however, 'the particular project . . . is so affected with the public interest that the failure to perform competently can have catastrophic consequences,' a professional may be subject to tort liability as well ..." **Dormitory Auth. of the State of N.Y. v Samson Constr. Co., 2016 NY Slip Op 01546, 1st Dept 3-3-16**

SECOND DEPARTMENT

CIVIL PROCEDURE.

MOTION TO RENEW BASED UPON LAW OFFICE FAILURE PROPERLY GRANTED; CRITERIA FOR GRANTING A MOTION TO RENEW IS FLEXIBLE.

The Second Department determined law office failure was properly deemed an adequate ground for a motion to renew based on evidence which could have been presented to support the original motion. The Second Department further determined that, upon renewal, the denial of defendant's motion to dismiss for failure to timely file a complaint after service of the demand for a complaint was proper. The court noted the criteria for granting a motion to renew is flexible: " 'Although a motion for leave to renew generally must be based on newly-discovered facts, this requirement is a flexible one, and a court has the discretion to grant renewal upon facts known to the movant at the time of the original motion, provided that the movant offers a reasonable justification for the failure to submit the additional facts on the original motion' ... . What is considered a 'reasonable justification' is within the Supreme Court's discretion ... . 'Law office failure can be accepted as a reasonable excuse in the exercise of the court's sound discretion' ...". **Castor v Cuevas, 2016 NY Slip Op 01456, 2nd Dept 3-2-16**

EMINENT DOMAIN, MUNICIPAL LAW.

EXTENSION OF TIME TO FILE NOTICE OF APPEARANCE RE: A CLAIM FOR DAMAGES FOR THE ACQUISITION OF REAL PROPERTY BY THE VILLAGE PROPERLY GRANTED, CRITERIA EXPLAINED.

The Second Department affirmed Supreme Court's grant of an extension of time to file a notice of appearance pursuant to Eminent Domain Procedure Law (EDPL) 503(B). The village's petition for condemnation had been granted and the EDPL requires a landowner to file a notice of appearance for any claim of damages arise from the acquisition of real property. The landowners' attorney failed to timely file the notice of appearance with the clerk of the court, but the village had been served with it. The Second Department explained the relevant law: "The time within which to file a written claim or notice of appearance pursuant to EDPL 503 is 'merely a procedural direction to be issued by the court in the exercise of its broad discretion to administer the litigation in an orderly and expeditious manner' ... . It is neither a statute of limitations nor a condition precedent to compensation and may be extended by the Supreme Court 'on such terms as may be just and upon good cause shown' ... . In considering a motion for such an extension of time, '[a] court may properly consider factors such as the length of the delay, whether the opposing party has been prejudiced by the delay, the reason given for the delay, whether the moving party was in default before seeking the extension, and, if so, the presence or absence of an affidavit of merit ...". **Matter of Village of Haverstraw v Ray Riv. Co., Inc., 2016 NY Slip Op 01500, 2nd Dept 3-2-16**

ENVIRONMENTAL LAW, NAVIGATION LAW, INSURANCE LAW.

LANDSCAPER AND ITS INSURER STRICTLY LIABLE FOR OIL DISCHARGE ON PLAINTIFFS' PROPERTY; OIL LINE SEVERED DURING SPRINKLER REPAIR.

The Second Department determined summary judgment was properly awarded to plaintiffs in an action under the Navigation Law based upon an oil spill. The defendant landscaping company acknowledged that its employee severed the underground oil line on plaintiffs' property while repairing a sprinkler system. Navigation Law § 181(1) imposes strict liability upon a person responsible for the discharge of petroleum and any insurer: "Navigation Law § 181(1) provides that a person who has 'discharged petroleum shall be strictly liable . . . for all cleanup and removal costs and all direct and indirect damages, no matter by whom sustained.' Article 12 of the Navigation Law defines a 'discharge,' as relevant here, as 'any intentional or unintentional action or omission resulting in the releasing, spilling, leaking, pumping, pouring, emitting, emptying or dumping of petroleum' (Navigation Law § 172[8]). The statute provides that any individual or entity 'who is not responsible for the discharge' may maintain a claim thereunder (Navigation Law § 172[3]...). The statute also provides that under article 12, '[a]ny claims for costs of cleanup and removal, civil penalties or damages by the state and any claim for damages by any injured person, may be brought directly against the bond, the insurer, or any other person providing evidence of financial responsibility' (Navigation Law § 190)." **Bennett v State Farm Fire & Cas. Co., 2016 NY Slip Op 01452, 2nd Dept 3-2-16**

INSURANCE LAW.

QUESTION OF FACT WHETHER INSURED'S 17-MONTH DELAY IN NOTIFYING INSURER OF THE OCCURRENCE WAS BASED UPON A GOOD FAITH BELIEF OF NONLIABILITY.

The Second Department determined the insured defendants had raised a question of fact whether a 17-month delay in notifying the plaintiff insurer of the "occurrence" was based upon a good-faith belief of nonliability. The court explained the relevant law: "Where, as here, an insurance policy requires that notice of an occurrence be given 'as soon as practicable,' notice must be given within a reasonable time in view of all of the circumstances ... . 'However, circumstances may exist that will excuse or explain the insured's delay in giving notice, such as a reasonable belief in nonliability' ... . It is the insured's burden to demonstrate the reasonableness of the excuse ... . In general, whether there existed a good faith belief that the injured party would not seek to hold the insured liable, and whether that belief was reasonable, are questions of fact for the fact-finder ... . Summary judgment may be granted in favor of the insurer only if the evidence, construing all inferences in favor of the insured, establishes as a matter of law that the insured's belief in nonliability was unreasonable or in bad faith ...". **Aspen Ins. UK Ltd. v Nieto, 2016 NY Slip Op 01449, 2nd Dept 3-2-16**

PERSONAL INJURY.

CAR CRASHING THROUGH SUPERMARKET DOORS WAS AN UNFORESEEABLE INTERVENING ACT; SUMMARY JUDGMENT PROPERLY GRANTED TO SUPERMARKET AND LANDOWNER.

The Second Department determined defendant supermarket (Stop & Shop) and plaza owner (Ridgeway) were entitled to summary judgment dismissing the complaint of a customer injured when a car crashed the glass doors in the bottle-return area. The incident was deemed an unforeseeable intervening act: "Here, Stop & Shop and Ridgeway established their prima facie entitlement to judgment as a matter of law by demonstrating, through an expert's affidavit, that they maintained the premises in a reasonably safe condition and did not have a duty to construct and install bollards or other protective measures to protect against the conduct of the defendant driver ... . Furthermore, Stop & Shop and Ridgeway established, prima facie, that the conduct of the defendant driver, in inexplicably losing control of her vehicle, was an unforeseeable

intervening cause of the accident ... . Stop & Shop and Ridgeway demonstrated, prima facie, that the location of the parking lot relative to the bottle return room merely furnished the condition or occasion for the accident, rather than one of its causes ...". **Dawkins v Mastrangelo, 2016 NY Slip Op 01459, 2nd Dept 3-2-16**

PERSONAL INJURY.

GENERAL AWARENESS OF A RECURRENT CONDITION DOES NOT AMOUNT TO CONSTRUCTIVE NOTICE OF THE PARTICULAR CONDITION WHICH CAUSED THE ACCIDENT.

The Second Department determined defendant was entitled to summary judgment in this slip and fall case. The plaintiff alleged she slipped on water which had dripped from the ceiling. The defendant demonstrated it did not create or have actual or constructive notice of the condition. The court noted that a general awareness of a recurrent condition does not amount to constructive notice of the particular condition which caused the accident: "The defendant established its prima facie entitlement to judgment as a matter of law by submitting evidence demonstrating that it neither created nor had actual or constructive notice of the water in the lobby ... . In opposition, the plaintiff failed to raise a triable issue of fact. A general awareness of a recurring problem is insufficient, without more, to establish constructive notice of the particular condition that caused the accident ...". **Gurley v Rochdale Vil., Inc., 2016 NY Slip Op 01467, 2nd Dept 3-2-16**

PERSONAL INJURY, EVIDENCE.

ACCIDENT DIAGRAM IN POLICE REPORT WAS NOT BASED ON OFFICER'S FIRST-HAND KNOWLEDGE; REPORT SHOULD NOT HAVE BEEN ADMITTED IN EVIDENCE; NEW TRIAL ORDERED.

The Second Department determined a new trial was necessary in a pedestrian-accident case because the police report (admitted in evidence included) included a diagram of the accident scene which was not based on the police officer's personal observation: "Information in a police accident report is 'admissible as a business record so long as the report is made based upon the officer's personal observations and while carrying out police duties' ... . Conversely, information in a police accident report is inadmissible where the information came from witnesses not engaged in the police business in the course of which the memorandum was made, and the information does not qualify under some other hearsay exception ... . Here, the diagram contained in the police accident report was not derived from the personal observations of the police officer, who did not witness the subject accident ... . In addition, there was insufficient evidence as to the source of the information used to prepare the diagram, whether that person was under a business duty to supply it, or whether some other hearsay exception would render the diagram admissible. The diagram therefore should not have been admitted ...". **Wynn v Motor Veh. Acc. Indem. Corp., 2016 NY Slip Op 01484, 2nd Dept 3-2-16**

REAL PROPERTY TAX LAW.

ALLEGED ZONING VIOLATION DID NOT AUTOMATICALLY WARRANT REMOVAL OF TAX-EXEMPT STATUS; TOWN'S SUMMARY JUDGMENT MOTION SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined an alleged zoning violation, for which plaintiff property owner had never been cited, did not justify automatic removal of plaintiff's tax-exempt status. Therefore, defendant-town's motion for summary judgment should not have been granted. The property had been tax-exempt for years as low-income property. The alleged zoning violation, i.e., that the plaintiff had more than two residential apartments, was not incompatible with the tax-exempt use. Therefore, the alleged zoning violation could not justify automatic removal of the tax-exempt status: "... [E]ven assuming that a zoning violation had been sufficiently established, the defendants have failed to articulate why such a violation, under the particular circumstances presented, should result in the loss of the plaintiff's tax exemption. Not all violations of law automatically result in the loss of a tax exemption ... . 'The concern of the taxing authority is not with the observance or non-observance by plaintiff of regulatory provisions relating to a specific building, but to the use to which the real property as an entity is or is intended to be devoted' ... . This is not a case in which the applicable zoning regulation is incompatible with the occupant's tax-exempt use ... . In such cases, the rationale for denying the tax exemption is simple and clear, as compliance with both the tax-exempt use and the zoning regulation is impossible. Here, by contrast, the tax-exempt use of providing residential housing to low-income tenants is consonant with the property's permitted use as a two-family dwelling. Under these circumstances, the defendants have failed to establish, prima facie, that the nature of the alleged violation (i.e., that the plaintiff had more than two residential apartments) can serve as a valid legal basis for denying the property tax exemption ...". **Community Humanitarian Assn., Inc. v Town of Ramapo, 2016 NY Slip Op 01458, 2nd Dept 3-2-16**

TRUSTS AND ESTATES.

QUESTION OF FACT RAISED WHETHER DECEDENT REVOKED A LOST WILL.

The Second Department determined summary judgment should not have been granted in favor of objectants to the probate of a will. The original will could not be found, but copies were in a folder decedent told his home aide about. There was, therefore, a question of fact raised about whether the will had been revoked: "When a will previously executed and in the

testator's possession cannot be found after the death of the testator, a presumption arises that the will was revoked by the testator ... . This legal presumption may be overcome, and the lost will admitted to probate, if the will's proponent establishes that the will was not revoked by the testator during his or her lifetime (see SCPA 1407[1]...). * * * ... [E]vidence that, shortly before his death, the decedent showed the blue binder to the home health aide and stated that it contained his will and that it was kept in a certain location, which the decedent was thereafter unable to access due to his declining health, and where several copies of the will were later found after his death, was sufficient to raise an issue of fact regarding the presumption of revocation of his will, thereby precluding an award of summary judgment to the objectants on the issue of revocation ...". **Matter of Marotta, 2016 NY Slip Op 01491, 2nd Dept 3-2-16**

THIRD DEPARTMENT

CRIMINAL LAW.

PEOPLE DEMONSTRATED, IN A *RODRIGUEZ* HEARING, THE IDENTIFICATION OF DEFENDANT WAS CONFIRMATORY, *WADE* HEARING NOT NECESSARY.

The Third Department determined the evidence presented at the *Rodriguez* hearing demonstrated the confidential informant's (CI's) identification of the defendant was confirmatory (i.e., based upon prior acquaintance with the defendant) and, therefore, a *Wade* hearing to determine the validity of the identification was not necessary. The court also noted that a two-hour discrepancy between when the drug sale took place as alleged in the indictment, and the testimony about the time of the sale at trial, did not deprive the defendant of the ability to defend against the allegations. With respect to the sufficiency of the identification of the defendant, the court wrote: "... '[A] Wade hearing is not required when the witness is so familiar with the defendant that there is little or no risk that police suggestion could lead to a misidentification' ... . Where, as here, the People assert that the pretrial identification was merely confirmatory, the People bear the burden of 'prov[ing] the witness's sufficient familiarity with the defendant at a Rodriguez hearing' … . 'Although the People are not obligated to call the identifying witness at [the] Rodriguez hearing' ... , they nonetheless must come forward with 'sufficient details of the extent and degree of the protagonists' prior relationship' with one another ... . Relevant factors to be considered in this regard include 'the number of times the witness saw the defendant prior to the crime, the duration and nature of those encounters, time periods and setting of the viewings, time between the last viewing and the crime, and whether the two individuals had any conversations' ...". **People v Smith, 2016 NY Slip Op 01521, 3rd Dept 3-3-16**

DISCIPLINARY HEARINGS (INMATES).

HEARING OFFICER FAILED TO CONSIDER MEDICAL EVIDENCE SUPPORTING PETITIONER'S CLAIM HE WAS UNABLE TO PROVIDE A URINE SAMPLE, DETERMINATION EXPUNGED.

The Third Department expunged petitioner's disciplinary determination finding that the hearing officer improperly failed to consider medical evidence demonstrating petitioner was unable to provide a urine sample, and did not refuse to provide a sample: "[Petitioner] informed the Hearing Officer of his medical condition during the hearing and also provided medical documentation establishing that he had problems providing urine specimens in the past due to this condition. The Hearing Officer downplayed the significance of petitioner's medical condition and did not consider the medical documentation submitted even though it was sent prior to the conclusion of the hearing. The only evidence that the Hearing Officer considered was the misbehavior report and the request for urinalysis form. The request for urinalysis form indicated that petitioner did not willfully refuse to submit the specimen, but also stated that petitioner did not claim to be unable to submit the specimen in the presence of others. Given this inconsistency in the request for urinalysis form, the absence of any testimony concerning the administration of the urinalysis test or petitioner's medical condition and the Hearing Officer's failure to consider the medical documentation submitted, we find that the determination at issue is not supported by substantial evidence ...". **Matter of Katsanos v Prack, 2016 NY Slip Op 01531, 3rd Dept 3-3-16**

DISCIPLINARY HEARINGS (INMATES).

NO EFFORT WAS MADE TO DETERMINE WHY PETITIONER'S WITNESS WOULD NOT TESTIFY, DETERMINATION ANNULLED.

The Third Department annulled the determination because no effort was made to determine why petitioner's cellmate refused to testify at the hearing: "Petitioner contends, among other things, that he was improperly denied the right to have his cellmate, who allegedly overheard the correction officer threaten him, testify at the hearing. Petitioner requested the cellmate as a witness at the hearing. A correction officer approached the cellmate about testifying, but he apparently refused and would neither sign a refusal form nor state the reason for his refusal. It does not appear that the Hearing Officer communicated directly with the cellmate, but rather related this information to petitioner based upon the contents of the refusal form. Notably, the correction officer who completed the refusal form did not testify at the hearing. This Court has acknowledged that '[a] deprivation of the inmate's right to present witnesses will be found when there has been no inquiry

at all into the reason for the witness's refusal, without regard to whether the inmate previously agreed to testify' ... . No such inquiry was made by the Hearing Officer here, and respondent has essentially conceded this much. Thus, while respondent maintains that this is a regulatory violation for which remittal is appropriate, we find that the circumstances presented give rise to a constitutional violation for which expungement is the proper remedy ...". **Matter of Tevault v Prack, 2016 NY Slip Op 01533, 3rd Dept 3-3-16**

DISCIPLINARY HEARINGS (INMATES).

DENIAL OF PETITIONER'S REQUEST FOR TWO CORRECTIONAL-STAFF WITNESSES WAS ERROR, DETERMINATION ANNULLED.

The Third Department annulled the disciplinary determination because the hearing officer improperly denied petitioner's request to call two witness who on the staff of the correctional facility and were trained in the identification of gang-related materials. Petitioner was charged possession of gang-related materials (photographs): "... [T]he Hearing Officer improperly denied petitioner's request to call two witnesses, who were correctional facility staff trained at identifying gang-related materials, to support his claim that the pictures did not depict any gang-related signs. As petitioner sought such testimony in order to refute a correction officer's testimony that the gestures in the pictures depict gang signs, the Hearing Officer erred in finding that such testimony would be redundant. Given that the Hearing Officer put forth a good faith reason for the denial, this violated petitioner's regulatory right to call witnesses and the proper remedy is to remit the matter for a new hearing ...". **Matter of Williams v Annucci, 2016 NY Slip Op 01535, 3rd Dept 3-3-16**

DISCIPLINARY HEARINGS (INMATES).

HEARING OFFICER DID NOT ADDRESS PETITIONER'S MENTAL HEALTH STATUS, DETERMINATION ANNULLED.

The Third Department annulled the disciplinary determination because the hearing officer made no effort to ascertain the testimony of a mental health clinician or therapist (outside the presence of petitioner) after the therapist called by the petitioner refused to testify: "...[P]etitioner's mental health status was at issue and the Hearing Officer erred in not taking testimony from Office of Mental Health (OMH) personnel regarding petitioner's mental condition (see 7 NYCRR 254.6 [c]). Although a therapist from OMH that petitioner had requested refused to testify, the Hearing Officer was obligated to interview, out of petitioner's presence, an OMH clinician 'as may be available' concerning petitioner's mental condition (7 NYCRR 254.6 [c] [3]...). Here, the Hearing Officer made no effort to ascertain the testimony of the therapist, or any other clinician at OMH, outside the presence of petitioner. Under the circumstances presented herein, the proper remedy for the Hearing Officer's failure to satisfy his obligations under 7 NYCRR 254.6(b) is a new hearing to address petitioner's mental health status...". **Matter of Howard v Prack, 2016 NY Slip Op 01538, 3rd Dept 3-3-16**

FAMILY LAW.

MOTHER ENTITLED TO HEARING ON HER PRO SE PETITION TO MODIFY A CUSTODY AWARD; FATHER SHOULD NOT HAVE BEEN GIVEN COMPLETE CONTROL OVER MOTHER'S VISITATION; ATTORNEY SHOULD HAVE BEEN APPOINTED FOR THE CHILDREN.

The Third Department, reversing Family Court, determined mother was entitled to a hearing on her pro se petition to modify the award of custody to father. The Third Department also noted that the court should not have delegated to father complete authority to control visitation with mother, and the court should have appointed an attorney for the children. With respect to the need for a custody-modification hearing, the Third Department wrote: "As the party seeking to modify an existing custodial arrangement, the mother was required to demonstrate, as a threshold, that 'there has been a change in circumstances since the prior custody order significant enough to warrant a review of the issue of custody to ensure the continued best interests of the children' ... . The mother's petition, filed pro se, 'should be construed liberally when considering whether she sufficiently alleged a change in circumstances' ..., and she should be accorded 'the benefit of every favorable inference' ... . 'While not every petition in a Family Ct Act article 6 proceeding is automatically entitled to a hearing, generally an evidentiary hearing is necessary and should be conducted unless the party seeking the modification fails to make a sufficient evidentiary showing to warrant a hearing or no hearing is requested and the court has sufficient information to undertake a comprehensive independent review of the [children's] best interests' ...". **Matter of Harrell v Fox, 2016 NY Slip Op 01534, 3rd Dept 3-3-16**

MUNICIPAL LAW, EMPLOYMENT LAW.

PUBLIC EMPLOYEE FAILED TO DEMONSTRATE ELIMINATION OF POSITION WAS DONE IN BAD FAITH; NEGLIGENT VIOLATION OF OPEN MEETINGS LAW DID NOT INVALIDATE TOWN'S ACTIONS.

The Third Department determined the petitioner did not demonstrate the elimination of his position with the parks maintenance department was done in bad faith or to circumvent the Civil Service Law. The Third Department concluded the town violated the Open Meetings Law when it eliminated petitioner's position, but the nature of the violation (mere negligence) did not warrant invalidating the town's actions: " '[A] public employer may, in the absence of bad faith, collusion or fraud, abolish positions for purposes of economy or efficiency' ... . Respondent explained through the affidavits of its Supervi-

sor and a member of its Town Board that because its parks maintenance department consisted of only petitioner and one part-time laborer, it could achieve greater economy and efficiency by abolishing the supervisory position in favor of hiring additional laborers. Petitioner's managerial duties were shifted to the Supervisor and two full-time and one part-time laborer positions were created at an overall cost savings. The burden was then on petitioner to demonstrate that his position was eliminated in bad faith or as a subterfuge to circumvent his rights under the Civil Service Law ... . However, the mere reassignment of duties, in and of itself, does not constitute proof of bad faith ... . Nor is there any indication in the record of any personal or political animosities that would suggest some deceitful purpose of ousting and replacing petitioner. Rather, petitioner's conclusory and unsupported assertions fail to refute the Town Board's showing that its actions were part of a good faith effort to reorganize a municipal department for the purposes of reducing costs and increasing efficiency ...". **Matter of Cutler v Town of Mamakating, 2016 NY Slip Op 01543, 3rd Dept 3-3-16**

PERSONAL INJURY.

SIDEWALK DEFECT TOO TRIVIAL TO BE ACTIONABLE.

The Third Department determined defendant's motion for summary judgment in a slip and fall case was properly granted. Defendants demonstrated the defect in the sidewalk was trivial and the plaintiff's expert did not identify any relevant code, standard, or accepted-practice violation: "A property owner 'may not be cast in damages for negligent maintenance by reason of trivial defects on a walkway, not constituting a trap or nuisance, as a consequence of which a pedestrian might merely stumble, stub his [or her] toes, or trip over a raised projection' ... . 'Whether a defect is so trivial to preclude liability depends on the particular facts of each case and requires consideration of such relevant factors as the dimensions of the alleged defect and the circumstances surrounding the injury, including the width, depth, elevation, irregularity, and ap-pearance of the defect as well as the time, place and circumstances of the injury' ... . * * * Photographs of the portion of the sidewalk at issue demonstrate that it is relatively smooth and show only a slight height differential between the adjacent slabs of concrete, which were of different shades. Such evidence satisfied defendant's initial burden of making a prima facie showing that any alleged defect in the sidewalk was too trivial to be actionable ...". **Chirumbolo v 78 Exch. St., LLC, 2016 NY Slip Op 01537, 3rd Dept 3-3-16**

TRUSTS AND ESTATES.

PETITION SEEKING DISCOVERY BASED UPON THE ALLEGATION RESPONDENT HELD ASSETS OF THE ESTATE PROPERLY DENIED, PETITIONERS DID NOT MEET THEIR INITIAL BURDEN.

After carefully considering all the allegations (not summarized here), the Third Department determined the petitioners (children of the decedent) did not meet their burden of showing respondent (another child of the decedent who had lived with decedent) held any property which was an asset of the estate. The petition seeking discovery pursuant to Surrogate's Court Procedure Act (SCPA) 2103 was therefore properly denied: "SCPA 2103 establishes a discovery procedure by which a fiduciary can identify and recover estate assets held by a third party ... . The fiduciary bears the burden to prove that property held by a respondent is an estate asset; only when that obligation has been satisfied does the burden shift to the respondent to prove the proper disposition of the disputed property. We agree with Surrogate's Court that petitioners did not satisfy this initial burden and failed to establish grounds for further inquiry." **Dwyer v Valachovic, 2016 NY Slip Op 01542, 3rd Dept 3-3-16**

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