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COURT OF APPEALS

CRIMINAL LAW.

EXIGENT CIRCUMSTANCES JUSTIFIED WARRANTLESS SEARCH OF A BACKPACK.

The Court of Appeals determined the warrantless search of appellant's backpack when appellant was handcuffed and seated in the police car was justified by exigent circumstances. Prior to searching the backpack, the officer had determined the presence of a weapon by feel. It is not clear from the facts described how "exigent circumstances" — stemming from a legitimate concern for officer safety — arose after the appellant was handcuffed: "When the touching revealed the shape of a gun in the bag, appellant was arrested. Appellant became agitated and upset, and resisted being handcuffed, such that two officers were required to handcuff him. Notably, the officers knew that on the occasion of appellant's prior arrest he had started to walk away while being handcuffed. By this time, a crowd had gathered, yelling at the officers, who placed appellant in their police vehicle. Once in the vehicle, one of the officers opened and searched the backpack. He found what was later confirmed to be an air pistol. Significantly, the unmarked police vehicle had no partition, and the officer who searched the bag was seated next to appellant on the back seat. In these circumstances, there is record support for the conclusion that the officers reasonably believed that appellant might gain possession of a weapon, so that exigent circumstances — a legitimate concern about the safety of the arresting officers — justified the warrantless search of appellant's backpack." ***Matter of Kenneth S.*, 2016 N.Y. Slip Op. 02123, CtApp 3-24-16**

ZONING, MUNICIPAL LAW.

PROPERTY DEVELOPMENT BASED UPON AN INVALID PERMIT DOES NOT GIVE RISE TO A VESTED RIGHT IN THE DEVELOPED PROPERTY.

The Court of Appeals, in a full-fledged opinion by Judge Pigott, determined petitioner did not acquire a vested right to an advertising sign erected pursuant to an invalid permit which was later revoked by the city (NYC). The court further determined the proper procedure for seeking approval for the sign is an application for a variance. Whether petitioner relied in good faith on the invalid permit could be considered in the variance proceeding: " '[A]n owner of real property can acquire a common law vested right to develop property in accordance with prior zoning regulations when, in reliance on a 'legally issued permit,' the landowner 'effect[s] substantial changes and incur[s] substantial expenses to further the development' and '[t]he landowner's actions relying on [the] valid permit [are] so substantial that the municipal action results in serious loss rendering the improvements essentially valueless' ... . Vested rights cannot be acquired, however, where there is reliance on an invalid permit ... . When a permit is wrongfully issued in the first instance, the vested rights doctrine does not prevent the municipality from revoking the permit to correct its error. Because the 2008 permit was unlawfully issued, petitioner could not rely on it to acquire vested rights." ***Matter of Perlbinder Holdings, LLC v. Srinivasan*, 2016 N.Y. Slip Op. 02122, CtApp 3-24-16**

FIRST DEPARTMENT

CIVIL PROCEDURE, INSURANCE LAW.

OMISSIONS FROM COMPLAINT SUPPLIED BY AFFIDAVIT IN OPPOSITION TO MOTION TO DISMISS, COMPLAINT SHOULD NOT HAVE BEEN DISMISSED.

The First Department, reversing Supreme Court, determined the omissions from the complaint against defendant insurance company were remedied by an affidavit submitted in opposition to the motion to dismiss: "A complaint must 'be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions' that form the basis of the complaint and 'the material elements of each cause of action' (CPLR 3013). The factual allegations of the complaint are accepted as true, and afforded 'every possible favorable inference' ... . '[A] court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint and the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one ... . When such affidavits are considered, dismissal should not result unless "a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it' ... . Here, the complaint standing alone failed to apprise defendant insurance companies of basic pertinent information to

put them on notice of the claims against them, such as the patients treated and the insurance policies issued by defendant, under which plaintiff submitted claims for treatment rendered. However, in opposition to defendant insurance companies' motion to dismiss, plaintiff submitted an affidavit from its principal with an exhibit attached providing such information. Thus, the complaint and affidavit submitted in opposition sufficiently apprise defendant insurance companies of the 'transactions, occurrences, or series of transactions' that form the basis of the complaint (CPLR 3013)." ***High Definition MRI, P.C. v. Travelers Cos., Inc.*, 2016 N.Y. Slip Op. 02027, 1st Dept 3-22-16**

FAMILY LAW.

PRENUPTIAL AGREEMENT INTERPRETED TO WAIVE TEMPORARY MAINTENANCE DESPITE ABSENCE OF THE PRECISE TERM.

The First Department, over an extensive dissent, determined the prenuptial agreement waived both parties' entitlement to temporary maintenance during the divorce proceedings. The majority gleaned the intent to waive temporary maintenance from various provisions of the agreement, even though the terms "temporary maintenance" and "interim spousal support" were not used. The dissent argued that the waiver of "maintenance" in the agreement should not be interpreted to waive "temporary maintenance:" "Although the dissent acknowledges that "'no particular catechism is required to waive temporary maintenance claims,' it nevertheless finds the agreement ambiguous and suggests that the parties may only have intended to waive a final award of maintenance. No fair reading of the agreement supports that conclusion. When read as a whole, the agreement contains no ambiguity as to whether the parties intended to waive temporary maintenance. As noted, the agreement waives 'any and all' maintenance claims, 'now and in the future.' Contrary to the dissent's view, there is nothing imprecise about the phrase 'any and all.' Indeed, this Court has repeatedly found the use of that phrase to be 'clear'... . Further, although minimized by the dissent, the agreement explicitly states that the parties are 'fully capable of being self supporting,' which is another indicia that neither intended to seek any kind of maintenance." ***Anonymous v. Anonymous*, 2016 N.Y. Slip Op. 02016, 1st Dept 3-22-16**

PARTNERSHIP LAW.

SUIT ALLEGING BREACH OF FIDUCIARY DUTY IN CONNECTION WITH THE SALE OF AN ASSET OWNED NEARLY ENTIRELY BY BANKRUPT LEHMAN BROTHERS DISMISSED.

The First Department dismissed a complaint alleging, inter alia, breach of a limited partnership agreement and breach of fiduciary duty in connection with the sale of a fund (Archstone) nearly entirely owned by bankrupt Lehman Brothers. Plaintiff, who had purchased a 1% interest in the fund for $20 million, alleged the sale will generate enough to pay only the preferred interests and will "wipe out" the minority interests (including plaintiff). Plaintiff further alleged the sale was motivated by Lehman's desire to pay creditors relating to its 2008 bankruptcy. In dismissing the breach of fiduciary duty cause of action, the court explained the analytical criteria, including an "entire fairness" analysis: "Even under the heightened entire fairness standard advocated by plaintiff, the claim is insufficient. An 'entire fairness' analysis focuses on two entwined considerations: fair dealing and fair price ... . Plaintiff fails to allege facts demonstrating the absence of fairness, or that it did not 'receive the substantial equivalent in value of what [it] had before' ... . Conclusory assertions that amounts paid were 'unfair' are insufficient ... . Plaintiff concedes that the $16 billion transaction price attained Archstone's current value at the time of the transaction. Plaintiff also admits that the transaction 'represented a premium of approximately 15% over the implied purchase price of Lehman's combined acquisitions of the interests of the other [s]ponsor [b]anks' interests earlier in 2012.' Plaintiff identifies no alternative transactions, let alone one that would have achieved more value for the Fund. Fiduciaries are 'not required to abandon [a] transaction simply because a better deal might have become available in the future' ...". Cambridge Capital Real Estate Invs., LLC v. Archstone Enter. LP, 2016 N.Y. Slip Op. 02017, 1st Dept 3-22-16

PERSONAL INJURY, EVIDENCE.

HEARSAY OFFERED IN OPPOSITION TO SUMMARY JUDGMENT PROPERLY CONSIDERED.

The First Department determined defendants, including defendant SSA, had made a prima facie showing of entitlement to summary judgment in this slip and fall case, but the plaintiff raised a question of fact whether an identified defect in the sidewalk caused her fall. The court noted that hearsay evidence supplied in opposition to the motion was properly considered because it was not the only evidence submitted in opposition. The case is a rare example of each side submitting evidence of all the required "slip and fall" elements: "Defendants made a prima showing of their entitlement to summary judgment, by submitting deposition testimony and an affidavit from SSA's managing member stating that SSA never did any work on the sidewalk where plaintiff fell, that he never received complaints about the sidewalk or curb prior to plaintiff's accident, and that he never observed the alleged hazardous curb and sidewalk condition while making his regular, twice-weekly inspections of the strip mall ... . 'In opposition, plaintiff raised triable issues of fact. Plaintiff testified that she fell when her left foot stepped into a hole-like depression in the curb/sidewalk, and she marked photographs to show where she fell. Plaintiff also submitted her daughter's affidavit, wherein she averred that after receiving a call about her mother's fall, she responded quickly to the scene of the accident and found her mother on the sidewalk. According to the daughter, her mother pointed to a broken and cracked curb/sidewalk condition and stated that the defective condition

caused her to fall. This hearsay statement may be relied upon to defeat summary judgment where, as here, it is not the only evidence submitted in opposition to the motion ... . The daughter added that the photographs taken of the sidewalk/curb seven months after the accident, and the area of the photographs her mother marked, accurately depicted the broken condition of the curb/sidewalk as it appeared on the date of the accident. The photographs show a broken curb/sidewalk. Taken together, the evidence raises triable issues of fact whether the broken sidewalk/curb caused plaintiff's fall, and whether the defective condition existed for a sufficient period of time prior to the accident for defendants to have discovered and remedied it ...". ***Uncyk v. Cedarhurst Prop. Mgt., LLC*, 2016 N.Y. Slip Op. 02037, 1st Dept 3-22-16**

PROFESSIONAL LIABILITY, CONTRACT LAW.

FINANCIAL ADVISOR IS NOT A PROFESSIONAL WHO CAN BE HELD LIABLE IN TORT BASED UPON A CONTRACTUAL RELATIONSHIP.

The First Department noted that a "financial advisor" is not a professional who may be liable in tort based upon a contract: "While '[p]rofessionals . . . may be subject to tort liability for failure to exercise reasonable care, irrespective of their contractual duties' . . . , a financial advisor . . . is not a 'professional' ... . Thus, any duty owed by the . . . defendants to render financial advisory services to plaintiff in a competent manner must arise out of a contract. Indeed, the complaint alleges that plaintiff 'retained' the . . . defendants and that [defendant] 'agreed to act as [his] financial advisor' ... . However, 'claims based on negligent or grossly negligent performance of a contract are not cognizable' ...". ***Starr v. Fuoco Group LLP*, 2016 N.Y. Slip Op. 02143, 1st Dept 3-24-16**

SECOND DEPARTMENT

ACCOUNT STATED, DEBTOR-CREDITOR.

PLAINTIFF ENTITLED TO SUMMARY JUDGMENT UNDER AN ACCOUNT STATED THEORY IN AN ACTION TO COLLECT A CREDIT CARD DEBT.

The Second Department determined plaintiff, who had purchased defendant's credit card debt of over $16,000, was entitled to summary judgment under an account stated theory. The court explained the elements: " 'An account stated is an agreement between [the] parties to an account based upon prior transactions between them with respect to the correctness of the account items and balance due' ... . To establish its prima facie entitlement to judgment as a matter of law to recover on an account stated, a plaintiff must show that the defendant received the plaintiff's account statements for payment and retained these statements for a reasonable period of time without objection ... . In the case of existing indebtedness, the agreement may be implied as well as express ... . 'An agreement may be implied where a defendant retains bills without objecting to them within a reasonable period of time, or makes partial payment on the account' ...'. ***Cach, LLC v. Aspir*, 2016 N.Y. Slip Op. 02046, 2nd Dept 3-23-16**

CIVIL PROCEDURE, DEBTOR-CREDITOR, ATTACHMENT.

CRITERIA FOR AN ORDER OF ATTACHMENT EXPLAINED.

The Second Department, affirming Supreme Court, determined the motion for an order of attachment was properly granted. The court explained the analytical criteria: "Attachment is a provisional remedy designed to secure a debt by preliminary levy upon the property of the debtor to conserve it for eventual execution, and the courts have strictly construed the attachment statute in favor of those against whom it may be employed ... . In order to be granted an order of attachment under CPLR 6201(3), a 'plaintiff must demonstrate that the defendant has concealed or is about to conceal property in one or more of several enumerated ways, and has acted or will act with the intent to defraud creditors or to frustrate the enforcement of a judgment that might be rendered in favor of the plaintiff' ... . In addition to proving fraudulent intent, the plaintiff must show a probability of success on the merits ...". ***Hume v. 1 Prospect Park ALF, LLC*, 2016 N.Y. Slip Op. 02055, 2nd Dept 3-23-16**

INSURANCE LAW.

LESSOR ENTITLED TO SUMMARY JUDGMENT DECLARING LESSEE'S INSURANCE CARRIER WAS OBLIGATED TO DEFEND LESSOR IN SLIP AND FALL CASE.

The Second Department determined the complaint raised the reasonable possibility that plaintiff Cumberland Farms would be liable in a slip and fall case, even though the subject property had been leased to another. Therefore, Cumberland was entitled to summary judgment declaring the lessee's insurance carrier was obligated to defend Cumberland: " 'A duty to defend is triggered by the allegations contained in the underlying complaint' ... . 'An insurer's duty to defend is broader than the duty to indemnify and arises whenever the allegations of the complaint against the insured, liberally construed, potentially fall within the scope of the risks undertaken by the insurer' ... . The duty remains 'even though facts outside the four corners of [the] pleadings indicate that the claim may be meritless or not covered' ... . Nonetheless, 'an insurer can be relieved of its duty to defend if it establishes as a matter of law that there is no possible factual or legal basis on which it

might eventually be obligated to indemnify its insured under any policy provision' ... . [T]he complaint in the underlying action alleged that Cumberland was negligent in its ownership, operation, control, and maintenance of the subject gas station. However, the defendants' submissions in support of their motion included evidence that Cumberland leased the gas station to Noori as a franchisee. Since Cumberland's liability, if any, may hinge on the scope of its obligations under the agreements entered into with Noori that established their franchisor/franchisee relationship, the allegations of the complaint in the underlying action suggest a reasonable possibility of coverage for Cumberland in the underlying action ...". ***Cumberland Farms, Inc. v. Tower Group, Inc.*, 2016 N.Y. Slip Op. 02048, 2nd Dept 3-23-16**

INSURANCE LAW.

BECAUSE PLAINTIFF RECOVERED FROM THE OTHER DRIVER AN AMOUNT EQUAL TO THE LIMIT OF PLAINTIFF'S SUPPLEMENTARY UNINSURED/UNDERINSURED MOTORISTS (SUM) COVERAGE, PLAINTIFF WAS NOT ENTITLED TO ANY FURTHER RECOVERY.

The Second Department, reversing Supreme Court, determined plaintiff was not entitled to payment under his supplementary uninsured/underinsured motorists (SUM) coverage. The SUM covered loss up to $100,000. The plaintiff recovered $100,000 from the other driver's insurance. Therefore nothing was due under the SUM provision of plaintiff's policy: "The SUM endorsement contained in the plaintiff's automobile insurance policy contained coverage limits of $100,000 per person, and further provided, in pertinent part, that '[t]he maximum amount payable under SUM coverage shall be the policy's SUM limits, reduced and thus offset by motor vehicle bodily injury liability insurance policy or bond payments received from, or on behalf of, any negligent party involved in the accident.' Although the plaintiff's SUM coverage was triggered . . . , the plaintiff received $100,000 from the tortfeasor, which is equal to the limit of the SUM coverage that he purchased. Consequently, the amount that he was entitled to recover under the automobile insurance policy's SUM coverage was reduced to zero ...". ***Nafash v. Allstate Ins. Co.*, 2016 N.Y. Slip Op. 02061, 2nd Dept 3-23-16**

LIMITED LIABILITY COMPANY LAW.

LIMITED LIABILITY COMPANY WHICH DID NOT COMPLY WITH STATUTORY PUBLICATION REQUIREMENT CANNOT BRING A COURT ACTION.

The Second Department determined the plaintiff limited liability company's failure to comply with the publication requirement of Limited Liability Company Law § 206(a) precluded the company from bringing the action: "Limited Liability Company Law § 206 requires limited liability companies to publish their articles of organization or comparable specified information for six successive weeks in two local newspapers designated by the clerk of the county where the limited liability company has its principal office, followed by the filing of an affidavit with the Department of State, stating that such publication has been completed ... . Failure to comply with these requirements precludes a limited liability company from maintaining any action or special proceeding in New York ... . Here, as the defendants correctly contend, since the plaintiff failed to comply with the publication requirements of Limited Liability Company Law § 206, it is precluded from bringing this action ...". ***Small Step Day Care, LLC v. Broadway Bushwick Bldrs., L.P.*, 2016 N.Y. Slip Op. 02071, 2nd Dept 3-23-16**

PERSONAL INJURY.

DEFENDANTS FAILED TO DEMONSTRATE SIDEWALK DEFECT WAS TRIVIAL AS A MATTER OF LAW, SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined defendants in this slip and fall case did not demonstrate the sidewalk defect which allegedly caused plaintiff's fall was trivial as a matter of law. The defendants submitted insufficient or conflicting evidence of the dimensions of the defect and the photographs were not dispositive: " 'A defendant seeking dismissal of a complaint on the basis that the alleged defect is trivial must make a prima facie showing that the defect is, under the circumstances, physically insignificant and that the characteristics of the defect or the surrounding circumstances do not increase the risks it poses. Only then does the burden shift to the plaintiff to establish an issue of fact' ... . In determining whether a defect is trivial, the court must examine all of the facts presented, including the 'width, depth, elevation, irregularity and appearance of the defect along with the time, place, and circumstance of the injury' ... . In support of its motion, [one of the defendants] failed to submit any measurements of the dimensions of the alleged defective condition. * * * ... [The other defendant] submitted conflicting evidence as to the dimensions of the alleged defective condition, including the plaintiff's testimony at a hearing pursuant to General Municipal Law § 50-h and measurements performed by its expert, and it is impossible to ascertain from the photographs submitted in support of the motion whether the alleged defective condition was trivial as a matter of law ...". ***Padarat v. New York City Tr. Auth.*, 2016 N.Y. Slip Op. 02064, 2nd Dept 3-23-16**

PERSONAL INJURY, MEDICAL MALPRACTICE.

SURGICAL PROCEDURES WERE DEEMED DISCRETE EVENTS WHICH DID NOT ANTICIPATE FURTHER TREATMENT, CONTINUOUS TREATMENT DOCTRINE DID NOT APPLY TO EXTEND THE STATUTE OF LIMITATIONS.

The Second Department, reversing Supreme Court, determined defendant oncologist, Khulpateea, was entitled to summary judgment dismissing the malpractice complaint on statute of limitations grounds. The court held that the "continuous treatment doctrine" did not apply to extend the statute. Plaintiff's decedent saw Khulpateea several times, after referral from decedent's gynecologist, and Khulpateea performed surgical procedures on decedent. It was only the last procedure which discovered the cancer. Each procedure was deemed to constitute a discrete event which did not anticipate ongoing treatment by Khulpateea: " 'To establish that the continuous treatment doctrine applies, a plaintiff is required to demonstrate that there was a course of treatment, that it was continuous, and that it was in respect to the same condition or complaint underlying the claim of malpractice' ... . 'Continuity of treatment is often found to exist when further treatment is explicitly anticipated by both physician and patient as manifested in the form of a regularly scheduled appointment for the near future, agreed upon during th[e] last visit, in conformance with the periodic appointments which characterized the treatment in the immediate past' ... . Here, the plaintiff failed to show that there was a continuous course of treatment. The diagnostic services performed by Khulpateea were discrete and complete, and not part of a course of treatment ... . Moreover, the plaintiff failed to submit evidence showing that the decedent and Khulpateea contemplated further treatment after the follow-up visit ... . The decedent did not schedule another appointment with Khulpateea until she returned to see him in 2005, and she only did so then because [her gynecologist] referred her to him ...". ***Nisanov v. Khulpateea*, 2016 N.Y. Slip Op. 02062, 2nd Dept 3-23-16**

PERSONAL INJURY, MEDICAL MALPRACTICE.

WHERE DEFENDANT DOCTOR, IN A MOTION FOR SUMMARY JUDGMENT, DOES NOT ADDRESS THE ALLEGATIONS OF PROXIMATE CAUSE IN THE MEDICAL MALPRACTICE COMPLAINT, THE PLAINTIFF NEED NOT ADDRESS PROXIMATE CAUSE IN OPPOSITION TO THE MOTION.

The Second Department determined defendant surgeon's motion for summary judgment was properly denied. The court noted that the doctor's proof addressed only the alleged departure from good and accepted practice and did not address any of the proximate cause allegations. Therefore, the plaintiff, in opposition to summary judgment, need only address the departure from good and accepted practice to defeat the motion: "Here, the expert affirmation submitted by the defendant established, prima facie, that his treatment of the decedent did not depart from good and accepted medical practice. However, the defendant failed to make a prima facie showing that any alleged departure from the standard of care was not a proximate cause of the decedent's death ... . Thus, in order to defeat the defendant's motion, the plaintiffs only had to raise a triable issue of fact regarding the issue of departure from good and accepted medical practice ... . The competing expert affirmation submitted by the plaintiffs in opposition was sufficient to do so ...". ***Uchitel v. Fleischer*, 2016 N.Y. Slip Op. 02075, 2nd Dept 3-23-16**

PERSONAL INJURY, MUNICIPAL LAW.

FIREFIGHTER'S GENERAL MUNICIPAL LAW CAUSE OF ACTION FOR INJURIES INCURRED WHILE FIGHTING A FIRE CANNOT BE BASED UPON AN ALLEGED OSHA VIOLATION ON THE PART OF THE PROPERTY OWNER.

The Second Department determined a firefighter's General Municipal Law § 205-a(1) cause of action was properly dismissed. Plaintiff firefighter was injured when he fell into a pit in defendants' garage while fighting a fire. The General Municipal Law allows a firefighter to sue for injury incurred due to a failure to comply with an applicable regulation. Plaintiff alleged the open pit violated an OSHA regulation. However, OSHA regulations apply only in employer/employee relationships: "General Municipal Law § 205-a(1) provides that a firefighter has a cause of action when he or she sustains an injury in the line of duty 'as a result of any neglect, omission, willful or culpable negligence of any person or persons in failing to comply with the requirements of any of the statutes, ordinances, rules, orders and requirements of the federal, state, county, village, town or city governments.' The plaintiff contends that he sustained an injury in the line of duty as a result of the defendants' violation of OSHA regulation 29 CFR § 1910.23(a)(1). However, a cause of action predicated on the alleged violation of OSHA regulations can only be maintained against a plaintiff's employer ... . This Court has noted that OSHA governs employee/employer relationships, and thus OSHA regulations do not impose a specific statutory duty on parties other than a plaintiff's employer ...". ***Gallagher v. 109-02 Dev., LLC*, 2016 N.Y. Slip Op. 02051, 2nd Dept 3-23-16**

ZONING, LAND USE.

NO RATIONAL BASIS FOR GRANTING USE VARIANCE TO CONSTRUCT CAR WASH; PARTY SEEKING VARIANCE IS ENTITLED TO REASONABLE RETURN BUT NOT THE MOST PROFITABLE RETURN.

The Second Department determined Supreme Court properly annulled a use variance granted to allow the construction of a car wash. The court explained the analytical criteria: " 'To qualify for a use variance premised upon unnecessary hardship there must be a showing that (1) the property cannot yield a reasonable return if used only for permitted purposes as currently zoned, (2) the hardship resulted from unique characteristics of the property, (3) the proposed use would not alter the character of the neighborhood, and (4) the alleged hardship was not self-created' ... . With regard to the first element, '[i]t is well settled that a landowner who seeks a use variance must demonstrate factually, by dollars and cents proof, an inability to realize a reasonable return under existing permissible uses' ... . * * * The . . . parties did not . . . submit any actual financial information, such as the original purchase price of the property, the expenses and carrying costs of the property, the present value of the property, the taxes, the amount of any mortgages or other encumbrances, the amount of income presently realized, if any, or an estimate as to what a reasonable return on the entire property or any portion should be ... . Entitlement to a use variance is not established merely by proof that the proposed use would be more profitable than a smaller scaled project not requiring a use variance … . The . . . parties are entitled to a reasonable return, not the most profitable return ... . Thus, the Supreme Court properly found that the ZBA's determination that the Splash parties established unnecessary hardship was arbitrary and capricious since it does not have a rational basis in the record ...". ***Matter of DeFeo v. Zoning Bd. of Appeals of Town of Bedford*, 2016 N.Y. Slip Op. 02082, 2nd Dept 3-23-16**

THIRD DEPARTMENT

CRIMINAL LAW.

IN PLEADING GUILTY TO A LESSER CRIME, DEFENDANT ADMITTED AN ACTION WHICH NEGATED AN ELEMENT OF THE CRIME TO WHICH HE PLED; MOTION TO WITHDRAW PLEA SHOULD HAVE BEEN GRANTED.

The Third Department reversed County Court finding that defendant should have been allowed to withdraw his guilty plea on the ground it was not knowingly and voluntarily entered. Although plaintiff was pleading to a lesser crime, during the plea colloquy County Court elicited an admission to an act which negated an element of the crime defendant was pleading to. Defendant pled to a rape where the victim was unable to consent. However, in the plea colloquy defendant admitted the victim demonstrated she did not consent: "Where, as here, a defendant pleads to a lesser crime as part of a plea bargain, the court is not required to engage in a factual recitation in order to establish the elements of the crime . . . , and, in fact, 'under such circumstances defendants can even plead guilty to crimes that do not exist' ... . In this instance, although not required to do so, County Court nevertheless sought to elicit the details of the crime from defendant prior to accepting his plea and led him in a factual recitation. The questions posed by the court during the allocution appeared to be designed to elicit from defendant facts supporting the elements of rape in the third degree, a crime which had been charged in the indictment, but was to be dismissed as part of the plea to rape in the second degree; notably, rape in the third degree includes the element that the victim's 'words and acts' demonstrated that he or she did not consent to sexual intercourse with the defendant (Penal Law § 130.05 [2] [d]; see Penal Law § 130.25). In response to the court's inquiries, defendant admitted that he had engaged in nonconsensual sexual intercourse with the victim and that the intercourse was nonconsensual because the victim had 'indicated to [him], by words or actions, that she did not wish to engage in sexual intercourse with [him].' This factual recitation was inconsistent with the crime to which he was pleading and, in fact, negated an element of that crime, namely that the victim be 'incapable of consent by reason of being mentally disabled or mentally incapacitated' (Penal Law § 130.30 [2] ...). County Court failed to conduct any further inquiry prior to accepting the plea in order 'to ensure that defendant underst[ood] the nature of the charge and that the plea [was] intelligently entered' ...". ***People v. Banks*, 2016 N.Y. Slip Op. 02127, 3rd Dept 3-24-16**

RETIREMENT AND SOCIAL SECURITY LAW, POLICE OFFICERS.

INJURY DURING HURRICANE SANDY RESCUE OPERATIONS DID NOT RESULT FROM AN ACCIDENT WITHIN THE MEANING OF THE RETIREMENT AND SOCIAL SECURITY LAW.

The Third Department, over a two-justice dissent, determined petitioner police officer was not injured in an "accident" within the meaning of the Retirement and Social Security Law, and therefore was not entitled to accidental disability retirement benefits. The officer was injured during Hurricane Sandy when he entered an unstable house to rescue people inside: "For the purposes of Retirement and Social Security Law § 363, an injury that results from 'a risk of the work performed' is not an accident ... . Consistent with this principle, this Court has long recognized that police officers face many substantial risks in the regular course of their duties that are inherent to the work that they perform ... . According to petitioner, he was considered a first responder to emergency calls and had a duty to assist injured persons. The Uniform Police Officer Job Description that governed petitioner's job confirmed petitioner's testimony to the extent that it dictated that his professional responsibilities included '[a]ssist[ing] any injured persons.' Petitioner acknowledged that, due to the hurricane,

his supervisors had impressed upon him that his professional duty extended to responding to emergency calls involving life and limb. Petitioner explained that he answered a call regarding occupants of a house who were trapped due to a tree falling onto and through the home. Petitioner acknowledged that, when he arrived, the home was not a stable structure and debris was still falling, but he explained that he had to go in to help the trapped occupants. Petitioner was thereafter injured while throwing debris off of the trapped occupants and while holding up debris that continued to fall during that rescue effort. Accordingly, a reasonable conclusion to draw from the record is that the threat that compelled petitioner's response as a police officer and first responder — the dangerous condition in the home — was the same threat that ultimately caused petitioner's injuries." ***Matter of Kelly v. DiNapoli*, 2016 N.Y. Slip Op. 02132, 3rd Dept 3-24-16**

FOURTH DEPARTMENT

CRIMINAL LAW.

THE JUDGE REMOVED ELEMENTS OF THE CHARGED OFFENSES FROM THE JURY'S CONSIDERATION, NEW TRIAL ORDERED.

The Fourth Department determined the trial judge took away consideration of elements of the charged offenses from the jury and ordered a new trial. Defendants were charged with assault (on a police officer) and obstructing governmental administration. The charges arose when one of the defendants tried to stop police officers from entering her home and a struggle ensued. The assault charge required proof the police were performing a lawful duty and the arrest was authorized. The obstruction charge required proof the police were performing a governmental function. When defense counsel asked a police officer whether a warrant was necessary to enter defendants' home, the judge wouldn't allow the question and instructed the jury no search warrant was required. "The court thereby improperly removed the abovementioned elements from the jury's consideration ...". ***People v. O'Dell*, 2016 N.Y. Slip Op. 02262, 4th Dept 3-25-16**

CRIMINAL LAW, APPEALS.

THE SOLE REMEDY WHEN A CONVICTION IS DEEMED AGAINST THE WEIGHT OF THE EVIDENCE IS DISMISSAL OF THE INDICTMENT; REDUCTION TO A LESSER INCLUDED OFFENSE IS NOT AVAILABLE.

The Fourth Department, over a two-justice dissent, determined: (1) the defendant's conviction for robbery in the second degree was against the weight of the evidence because the physical injury element was not proved beyond a reasonable doubt (the injury at issue was a small cut on the victim's finger); and (2) when a conviction is deemed against the weight of the evidence, the only remedy is dismissal of the indictment and not a reduction to a conviction of a lesser included offense. The dissent saw no reason reduction to a conviction of a lesser included offense should not be available as a remedy: " 'CPL 470.20 (5) provides that the determination by an intermediate appellate court that a verdict is against the weight of the evidence requires dismissal of the indictment . . . [T]he power to reduce a conviction to a lesser included offense is limited to cases in which it is determined that the evidence is not legally sufficient to establish the defendant's guilt of an offense of which he [or she] was convicted but is legally sufficient to establish his [or her] guilt of a lesser included offense' (CPL 470.15 [2] [a]). Thus, we conclude that 'CPL 420.20 (5) requires dismissal of the indictment if it is determined that the verdict is against the weight of the evidence' (*id*. at 31). Indeed, the Court of Appeals has explained that '[a]n important judicial bulwark against an improper criminal conviction is not only the restrictive scope of review undertaken during a sufficiency analysis, but the protection provided by weight of the evidence examination in an intermediate appellate court. This special power requires the court to . . . determine whether the verdict was factually correct[,] and acquit a defendant if the court is not convinced that the jury was justified in finding that guilt was proven beyond a reasonable doubt' ... . As we explained in Heatley (116 AD3d at 30), 'if the legislature had intended to provide the same relief to modify a judgment in the event that the weight of the evidence failed to support the conviction but supported a lesser included offense, it would have done so.' " ***People v. Cooney*, 2016 N.Y. Slip Op. 02203, 4th Dept 3-25-16**

CRIMINAL LAW, EVIDENCE.

DEFENDANT'S STARING AT THE POLICE FROM ACROSS THE ROAD DID NOT JUSTIFY THE INITIAL APPROACH BY THE POLICE, MOTION TO SUPPRESS SHOULD HAVE BEEN GRANTED AND INDICTMENT FOR POSSESSION OF A WEAPON SHOULD HAVE BEEN DISMISSED.

The Fourth Department determined defendant's motion to suppress should have been granted and the indictment must be dismissed. The police approached the defendant and others in a patrol car merely because they had observed the defendant staring at the police from the other side of the road. The police pulled alongside defendant and asked "what's up guys?" Defendant walked away and discarded a weapon. The Fourth Department found that the initial approach by the police was not warranted: "We conclude that merely staring at or otherwise looking in the direction of police officers or a patrol vehicle in a high crime area while continuing to proceed on one's way, absent any indicia of nervousness, evasive behavior, or other movements in response to seeing the police, i.e., 'attendant circumstances . . . sufficient to arouse the officers' interest' . . . , is insufficient to provide the police with the requisite 'objective, credible reason, not necessarily indicative of criminality' to

justify a level one encounter ... . Here, beyond the fact that defendant had stared at the police in a 'higher crime area' while continuing to walk down the sidewalk, the officers testified to no further observations of defendant or the other men that drew their attention . . . and, to the extent that the court found that defendant displayed any nervous or evasive behavior upon initially seeing the officers, we conclude that such a finding is unsupported by the record. We agree with defendant that the officers lacked other attendant circumstances to arouse their interest inasmuch as the encounter occurred at 6:30 in the evening rather than late at night and there was automobile traffic in the area at that time ...". ***People v. Savage*, 2016 N.Y. Slip Op. 02184, 4th Dept 3-25-16**

CRIMINAL LAW, EVIDENCE.

FORCIBLE DETENTION AMOUNTED TO ARREST WITHOUT PROBABLE CAUSE, GUILTY PLEA VACATED, INDICTMENT DISMISSED.

The Fourth Department determined the forcible detention of defendant prior to finding heroin in plain view in a vehicle in which defendant was a passenger constituted an illegal arrest. The seized evidence, therefore, should have been suppressed and the indictment dismissed: "We . . . agree with defendant that he was unlawfully arrested without probable cause prior to the police finding packets of heroin in plain view in the vehicle. Although '[i]t is well established that not every forcible detention constitutes an arrest' . . . , we conclude that defendant was arrested when an officer, with his weapon drawn, opened the unlocked front seat passenger door of the vehicle, physically removed defendant, had him lie down on the ground, handcuffed and searched him, and placed him in a patrol vehicle ... . 'Under such circumstances, a reasonable [person] innocent of any crime, would have thought' that he [or she] was under arrest' ... . Contrary to the People's contention and the court's determination, the officer's conduct 'went beyond merely ordering defendant from [the vehicle]. [He] took the additional 'protective measures' of frisking defendant, handcuffing him and placing him in a police car . . . [S]uch an intrusion amounts to an arrest[,] which must be supported by probable cause' ... . Inasmuch as the police lacked probable cause to arrest defendant before the officer returned to the vehicle and discovered the packets of heroin, the court should have suppressed that evidence, as well as the evidence subsequently found on defendant's person, as fruit of the poisonous tree ...". ***People v. Finch*, 2016 N.Y. Slip Op. 02191, 4th Dept 3-25-16**

CRIMINAL LAW, EVIDENCE.

SEARCH WARRANT WAS NOT BASED UPON PROBABLE CAUSE TO BELIEVE THE EVIDENCE SOUGHT WOULD BE AT THE SEARCHED LOCATION, MOTION TO SUPPRESS WAS PROPERLY GRANTED AND INDICTMENT WAS PROPERLY DISMISSED.

The Fourth Department affirmed Supreme Court's granting of defendant's motion to suppress the fruits of a search warrant for a house (285 Lincoln Avenue). The search warrant sought evidence of a murder at a residence on Grafton Street. The defendant had been driven to the Grafton Street residence on the day of the murder. The search warrant at issue was for a different residence, 285 Lincoln Avenue. The search warrant application was based upon evidence the defendant's cell phone had been in the vicinity of 285 Lincoln Avenue, the defendant had been seen in the driveway of 285 Lincoln Avenue, and defendant was a Facebook friend of the person to whom the utilities at 285 Lincoln Avenue were registered. However, defendant was never seen entering 285 Lincoln Avenue and the search warrant application did not provide probable cause to believe evidence of the Grafton Street murder would be found at the property: "It is well settled that a search warrant may be issued only upon a showing of probable cause to believe that a crime has occurred, is occurring, or is about to occur . . . , and where there is sufficient evidence from which to form a reasonable belief that evidence of the crime may be found inside the location sought to be searched ... . Here, we conclude that the Supreme Court properly determined that the application for the search warrant contained no specific factual allegations that tied the location of 285 Lincoln Avenue to the evidence sought to be seized; failed to establish any dominion and control of 285 Lincoln Avenue by defendant; and failed to tie defendant to the Grafton Street murder, or to his possession of evidence or contraband pertaining to that murder ...". ***People v. Moxley*, 2016 N.Y. Slip Op. 02192, 4th Dept 3-25-16**

CRIMINAL LAW, EVIDENCE.

JURY SHOULD NOT HAVE BEEN INSTRUCTED ON CONSTRUCTIVE POSSESSION, NEW TRIAL ORDERED.

The Fourth Department reversed defendant's conviction for possession of a weapon, finding the People's request for a constructive-possession jury instruction should not have been granted. The defendant had been seen holding an object that appeared to have been fired and DNA evidence tied defendant to a revolver that was found five feet away from where defendant was lying, shot, in a parking lot. There was no evidence which warranted a jury charge on constructive, as opposed to physical, possession of the weapon: " 'To meet their burden of proving defendant's constructive possession of the [revolver], the People had to establish that defendant exercised dominion or control over [the revolver] by a sufficient level of control over the area in which [it was] found' ... . Here, we conclude that there is no view of the evidence that defendant had constructive possession of the revolver ... . Defendant's 'mere presence in an area where' the revolver was found 'is not sufficient to establish that he exercised such dominion and control as to establish constructive possession' ... . We further conclude that the error is not harmless inasmuch as we cannot determine if the verdict was based upon defendant's phys-

ical possession of the revolver or his constructive possession of it ...". ***People v. Diallo*, 2016 N.Y. Slip Op. 02213, 4th Dept 3-25-16**

CRIMINAL LAW, EVIDENCE.

MIDTRIAL ORAL MOTION TO SUPPRESS, MADE AFTER THE PEOPLE BELATEDLY PROVIDED THE SEARCH WARRANT APPLICATION, REQUIRED A HEARING; COURT'S SUA SPONTE DENIAL OF THE MOTION WAS IMPROPER.

The Fourth Department determined the denial of defendant's midtrial motion to suppress evidence seized pursuant to a search warrant should not have been denied without a hearing. The search warrant application was not provided to the defense until after the trial had begun. The application indicated probable cause for the warrant was gained through a prior "security sweep" of the building: "In determining whether a hearing is required pursuant to CPL 710.60, 'the sufficiency of defendant's factual allegations should be evaluated by (1) the face of the pleadings, (2) assessed in conjunction with the context of the motion, and (3) defendant's access to information' ... . We note that the motion was not required to be made in writing, as would be required for a pretrial motion to suppress (see CPL 710.60 [1]) and, because it was properly 'made orally in open court' during trial, the court was required, 'where necessary, [to] conduct a hearing as provided in [CPL 710.60 (4)], out of the presence of the jury if any, and make findings of fact essential to the determination of the motion' (CPL 710.60 [5]). We conclude that a hearing was necessary herein. Defendant's allegation that the search was of his home was sufficient 'to demonstrate a personal legitimate expectation of privacy in the searched premises' ...". **People v. *Samuel*, 2016 N.Y. Slip Op. 02222, 4th Dept 3-25-16**

CRIMINAL LAW, EVIDENCE, APPEALS.

SEIZURE OF COCAINE WAS NOT SUFFICIENTLY ATTENUATED FROM ILLEGAL DETENTION, SUPPRESSION SHOULD HAVE BEEN GRANTED; RULING THAT DETENTION WAS ILLEGAL WAS NOT ADVERSE TO THE DEFENDANT AND THEREFORE COULD NOT BE RECONSIDERED ON APPEAL.

The Fourth Department determined cocaine found on defendant's person in a strip search should have been suppressed. Defendant was stopped on the street after the police saw an exchange between defendant and a woman. The defendant was patted down with his consent but nothing was found. The defendant was then placed in the back of a police car uncuffed. When the police questioned the woman, she told them defendant had cocaine between his buttocks, where it was eventually found. The trial court found defendant had been illegally detained but did not suppress. The court noted that, because the illegal detention finding was not adverse to the defendant, the court could not consider the issue on appeal. Therefore, the People's argument that the police actions were proper from the outset could not be entertained. The court concluded the seizure of the cocaine was not sufficiently attenuated from the illegal detention: "As a preliminary matter, we note that, '[s]ince we are reviewing a judgment on the defendant's appeal, and the issue of whether the defendant was [unlawfully detained] was not decided adversely to him, we are jurisdictionally barred from considering' the People's contention that the police officers' encounter with defendant was lawful at its inception and at every stage thereafter ... . We agree with defendant that the court erred in determining that the seizure of evidence from his person was attenuated from the taint of the illegality ... . 'While the effect of illegally initiated police intrusion may potentially become attenuated, as a practical matter there is rarely opportunity for the attenuation of primary official illegality in the context of brief, rapidly unfolding street or roadside encounters predicated on less than probable cause . . . [O]nce a wrongful police-initiated intrusion is established, suppression of closely after-acquired evidence appears to follow ineluctably' ...". ***People v. King*, 2016 N.Y. Slip Op. 02264, 4th Dept 3-25-16**

EDUCATION-SCHOOL LAW, MUNICIPAL LAW.

SPECIAL NEEDS STUDENT SHOULD HAVE BEEN ALLOWED TO AMEND HER NOTICE OF CLAIM TO REFLECT ALLEGATIONS OF AN ASSAULT AND RAPE SHE MADE IN HER DEPOSITION, ALLEGATIONS WHICH DIFFERED DRAMATICALLY FROM THOSE MADE IN THE ORIGINAL NOTICE OF CLAIM.

The Fourth Department, over an extensive dissent, determined Supreme Court should have allowed plaintiff, a special needs student, to amend her notice of claim to reflect allegations made in her deposition. At the deposition, she alleged she was raped by an African-American male under the bleachers on the athletic field. Her original notice of claim alleged she was raped by a white man in a locker room. The essence of the notice of claim was the school district's failure to supervise plaintiff, who was always to be accompanied by an aide. The Fourth Department determined the essence of the claim, failure to supervise, remained unchanged and the amendment would not prejudice the school district: " 'Pursuant to [General Municipal Law] section 50-e (6), a court in its discretion may permit the correction of a notice of claim where there has been a mistake, omission, irregularity or defect made in good faith . . . , provided it shall appear that the other party was not prejudiced thereby' ... . We conclude that Doe's documented delays in cognitive and social functioning, together with her fear of the assailant and post traumatic stress disorder allegedly resulting from the attack, provide a good faith basis for the amendment sought by plaintiffs ... . We further conclude that the District is not prejudiced by the proposed amendment. Contrary to the contention of the District, the amendment sought by plaintiffs does not make 'substantive changes in the theory of liability' ... . Plaintiffs' theory of liability in the original notice of claim was that Doe suffered injury as the result

of the District's negligent failure to provide the level of supervision that it had previously determined was necessary for her, i.e., door-to-door transportation and an aide to accompany her at all times throughout the school day. Plaintiffs' claim remains that defendant was negligent in failing to supervise Doe, regardless of the identity of her assailant or the precise location of the attack." ***Doe v. Rochester City School Dist.*, 2016 N.Y. Slip Op. 02275, 4th Dept 3-25-16**

FAMILY LAW.

DENIAL OF MOTHER'S REQUEST FOR A *LINCOLN* HEARING WAS AN ABUSE OF DISCRETION.
The Fourth Department determined Family Court should have held a *Lincoln* hearing before granting father's motion to dismiss mother's petition to modify a custody order which awarded sole legal and primary physical custody of their daughter, now 14, to father: "We conclude that the court abused its discretion in denying the mother's request that it conduct a *Lincoln* hearing before ruling on the father's motion ... . Such a hearing may be conducted 'during or after fact-finding' . . . , and may be used to support an allegation of a change in circumstances ... . The decision whether to conduct such a hearing is discretionary, but it is 'often the preferable course' to conduct one ... . In this case, the child was 14 years old at the time of trial and expressed a preference to live with the mother, the Attorney for the Child did not oppose a *Lincoln* hearing, and many of the changed circumstances alleged by the mother concerned matters within the personal knowledge of the child but not that of the mother or her witnesses. Under those circumstances, we conclude that a *Lincoln* hearing would have provided the court with 'significant pieces of information [it needed] to make the soundest possible decision' ...". ***Matter of Noble v. Brown*, 2016 N.Y. Slip Op. 02238, 4th Dept 3-25-16**

FAMILY LAW, APPEALS.

INTENT TO HARASS NOT DEMONSTRATED; EXPIRATION OF ORDER OF PROTECTION DID NOT MOOT APPEAL.
The Fourth Department determined the evidence did not support an intent to harass and the family offense petition was dismissed. The court noted the fact that the related protective order had expired did not render the appeal moot because the order still imposes significant enduring consequences that can be relieved by an appellate decision: "The Referee found that respondent committed a family offense, i.e., harassment in the second degree, based upon the Referee's conclusion that respondent told petitioner during a lengthy telephone call that he did not know what he would do if he saw her with another man, sent her two or three text messages stating that he hoped to reconcile with her, and then left on petitioner's car several mementos that petitioner had given him along with the message that he would 'never forget [her], bye.' Notwithstanding the Referee's implicit finding that petitioner was upset by the communications, 'her reaction is immaterial in establishing [respondent]'s intent' ... . Furthermore, although '[t]he requisite intent may be inferred from the surrounding circumstances' . . . , the circumstances here failed to establish that respondent acted with the requisite intent. Even crediting the Referee's credibility determinations that respondent engaged in the conduct described above, we conclude that such conduct was comprised of relatively innocuous acts that were insufficient to establish that respondent engaged in a course of conduct with the intent to harass, alarm or annoy petitioner ...". ***Matter of Shephard v. Ray*, 2016 N.Y. Slip Op. 02239, 4th Dept 3-25-16**

FAMILY LAW, RIGHT TO COUNSEL.

INADEQUATE INQUIRY PRECEDING FATHER'S WAIVER OF HIS RIGHT TO COUNSEL REQUIRED REVERSAL.
The Fourth Department reversed Family Court's order finding father willfully violated a support order because of the court's inadequate inquiry into father's waiver of his right to counsel: "At the parties' initial appearance, the Support Magistrate informed the father only that he had 'the right to hire a lawyer [or] talk for [himself],' asked the father to choose between those options, and conducted no further inquiry when the father chose to proceed pro se. The Support Magistrate thus failed to inform the father of his right to have counsel assigned if he could not afford to retain an attorney . . . , and also failed to engage the father in the requisite searching inquiry concerning his decision to proceed pro se and thereby ensure that the father was knowingly, intelligently and voluntarily waiving his right to counsel ...". ***Matter of Soldato v. Caringi*, 2016 N.Y. Slip Op. 02265, 4th Dept 3-25-16**

PERSONAL INJURY, CIVIL PROCEDURE.

PLAINTIFF'S ALLEGATION OF A NEW INJURY IN A SUPPLEMENTAL BILL OF PARTICULARS SUBMITTED IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN CONSIDERED BY THE MOTION COURT.
The Fourth Department determined Supreme Court should not have considered allegations of a serious injury in a car-accident case which were raised for the first time in a "supplemental verified bill of particulars" submitted in opposition to defendant's summary judgment motion: "[D]efendant filed the instant motion for summary judgment seeking dismissal of plaintiffs' complaint for failure to meet the serious injury threshold and for failure to incur economic loss exceeding basic economic loss. In opposition to the motion, plaintiffs submitted, inter alia, a 'supplemental verified bill of particulars' in which they added an allegation that plaintiff had sustained a serious injury under the significant disfigurement category of

serious injury (Insurance Law § 5102 [d]). Defendant objected to plaintiffs' attempt to 'supplement' their bill of particulars in opposition to the motion. … We agree with defendant that plaintiffs improperly asserted a 'new injury' in their 'supplemental verified bill of particulars' (CPLR 3043 [b] . . .), and that the court erred in considering that new category of serious injury inasmuch as it was raised for the first time in opposition to defendant's motion for summary judgment ... . We thus conclude that the claim of significant disfigurement was not cognizable by the court . . . , that it was error for the court to consider the new injury claim . . . , and that the court should have disregarded evidence related to that category of serious injury ...". ***Stamps v. Pudetti*, 2016 N.Y. Slip Op. 02272, 4th Dept 3-25-16**

PERSONAL INJURY, EVIDENCE.

STRIKING OF PLEADINGS TOO SEVERE A SANCTION FOR SPOLIATION OF EVIDENCE.

The Fourth Department concluded sanctions for spoliation of evidence were appropriate, but striking defendant's pleadings was too severe a sanction. Plaintiff alleged injury from glass which fell out of defendant's (IGT's) video slot machine. Although the complaint was filed in 2008, the request to maintain the condition of the machine was not made until 2010 and the request to examine the machine was not made until 2011. The machine had been scrapped in the regular course of business in 2008: "[W]e conclude that plaintiffs established that some sanction is warranted because IGT negligently failed to preserve the machine, but plaintiffs failed to show that the destruction of the machine was intentional or contumacious, to warrant the sanctions imposed by the court. To the contrary, the only evidence in the record concerning this issue is that IGT scrapped the machine in the normal course of business, as part of the removal and destruction of a large number of machines to create additional space in the casino. In addition, IGT established that the machine was removed from the casino at the request of the casino's owners, who were no longer parties to this action, which belies plaintiffs' contention that IGT removed and destroyed the machine for litigation purposes. Contrary to plaintiffs' further contention, they failed to establish that the machine was destroyed before they had an opportunity to inspect it, and thus plaintiffs failed to establish that the extreme sanctions of striking IGT's answer and granting plaintiffs partial summary judgment on liability against IGT were warranted ...". ***Mahiques v. County of Niagara*, 2016 N.Y. Slip Op. 02190, 4th Dept 3-25-16**

PRODUCTS LIABILITY, PERSONAL INJURY.

EXPERT AFFIDAVIT RAISED QUESTION OF FACT WHETHER NAIL GUN WAS DEFECTIVELY DESIGNED.

The Fourth Department determined plaintiffs raised a question of fact whether a nail gun was defectively designed based upon an affidavit from an expert engineer. The nail gun could be operated in a "bump" mode where the nail is released when the tip of the gun comes into contact with a surface. And the nail gun could be operated by squeezing a trigger. Here the nail gun was in "bump" mode when it came into contact with plaintiff's head and a three-inch nail went into plaintiff's brain: "Plaintiffs' expert opined to a reasonable degree of engineering certainty that the nail gun is defective 'because it did not have[,] as a sole means of actuation, a full sequential trip trigger' and instead also provided for the option for a 'contact trip' or a bump trigger. The expert explained that the center of gravity of the nail gun causes the operator to maintain a finger on the trigger when lowering the nine-pound gun, as was the case here; that the sequence of the use of the trigger to determine the mode of operation causes operator confusion as to which mode of operation is in use, which he opined happened here based upon the testimony of the employee that he thought the nail gun was in sequential fire mode; that government safety studies he reviewed found a much higher rate of injury when the nail gun was in the bump mode; and that tests he performed and studies he reviewed established that the utility of the bump mode does not outweigh the danger of its use because it is 'only 10% faster' than the sequential fire mode ... . 'Where, as here, a qualified expert opines that a particular product is defective or dangerous, describes why it is dangerous, explains how it can be made safer, and concludes that it is feasible to do so, it is usually for the jury to make the required risk-utility analysis' ...". ***Terwilliger v. Max Co., Ltd.*, 2016 N.Y. Slip Op. 02226, 4th Dept 3-25-16**

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