CasePrepPlus

December 21, 2016

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

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COURT OF APPEALS

CRIMINAL LAW.

NO EVIDENCE DEFENDANT EXPRESSLY WAIVED HIS RIGHT TO BE PRESENT AT RESENTENCING, WAIVER BY COUNSEL NOT SUFFICIENT.

The Court of Appeals determined there was insufficient evidence demonstrating defendant waived his right to be present at his resentencing: "A defendant has the right to be present at all material stages of trial ... , including sentencing (see CPL 380.40 [1]). We recently held that a defendant who has been convicted of a felony may waive his right to be present at sentencing, but must do so 'expressly' ... . The same principle applies in resentencing. The People do not contend otherwise, but insist that an inmate who wishes to waive his right to be present at resentencing should not be required to convey that waiver by personal appearance in court, and that defendant properly waived his right to be present by having his counsel speak on his behalf. Here, however, there is no record of any form of express waiver by defendant himself, whether oral or in writing, and, thus, the issue raised by the People is not presented. Nor in this case can waiver or forfeiture of the right to be present be inferred from defendant's actions or inaction ... . Accordingly, defendant did not validly waive his right to be present." ***People v. Stewart*, 2016 N.Y. Slip Op. 08398, CtApp 12-15-16**

CRIMINAL LAW, APPEALS.

DIRECT APPEAL CANNOT BE DISMISSED BASED UPON THE APPELLANT'S INVOLUNTARY DEPORTATION.

The Court of Appeals determined defendant's direct appeal should not have been dismissed based upon defendant's deportation, even though there was no relationship between the matter on appeal and the deportation: "We recently ... held 'that [*People v] Ventura* [(17 NY3d 675 [2011])] prohibits intermediate appellate courts from dismissing pending direct appeals due to the defendant's involuntary deportation, regardless of the contentions raised by the defendant on appeal' ... . We further explained that '[o]ur holding in *Ventura* did not depend upon any causal relationship between the defendant's conviction and deportation' ... . Here, the Appellate Term erred as a matter of law insofar as it granted the People's motion to dismiss defendant's direct appeal from his judgment of conviction because he was involuntarily deported. This error requires reversal." ***People v. Morales*, 2016 N.Y. Slip Op. 08397, CtApp 12-15-16**

CRIMINAL LAW, APPEALS.

NARROW EXCEPTIONS TO PRESERVATION REQUIREMENT DID NOT APPLY, DEFENDANT DID NOT MOVE TO WITHDRAW HIS PLEA.

The Court of Appeals determined defendant's failure to move to withdraw his plea or object precluded review: "Defendant's challenges to the validity of his guilty plea are unpreserved and unreviewable by this Court. Defendant had 'an opportunity to seek relief from the sentencing court' by moving to withdraw his plea based on his alleged justification defense, and therefore the 'narrow exception to the preservation requirement' does not apply ... . Defendant said nothing during the plea colloquy or the sentencing proceeding that negated an element of the crime or raised the possibility of a justification defense, and therefore *People v. Lopez* (71 NY2d 662, 666 [1988]) is inapplicable. Defendant's further contention that the court failed to advise him of the immigration consequences of his plea is also unpreserved for appellate review. The court informed defendant during the plea colloquy that if he was not a citizen, he could face deportation as a result of his guilty plea. Defendant therefore was informed before he pleaded guilty of the possibility that he could be deported as a result of his plea, and if he was confused about that issue, he was obligated to move to withdraw his plea on that ground before the sentencing court ... ." ***People v. Pastor*, 2016 N.Y. Slip Op. 08399, CtApp 12-15-16**

CRIMINAL LAW, EVIDENCE.

THREE-YEAR-OLD SEXUAL ABUSE VICTIM'S STATEMENTS AND GESTURES, MADE WITHIN A HALF HOUR OF THE ABUSE, PROPERLY ADMITTED AS EXCITED UTTERANCES.

The Court of Appeals determined the trial court did not err when it admitted the three-year-old victim's statements (and gestures) made within half an hour of the sexual abuse as excited utterances. The same statements made at the hospital three hours later may not have been admissible as excited utterances, but any error in admitting them was deemed harmless:

"We discern no error in the admission of the child's initial statements to her mother and father as excited utterances. The evidence established that the child was in a highly emotional state when she first stepped off the bus and that she continued to cry inconsolably as she uttered the phrase 'Señor Bus' to her mother and father at home and made a licking gesture with her tongue. Those statements were made within a half hour of the startling event, while the child was still under the stress of excitement, and therefore were properly admitted at trial ... . The child repeated the same phrase and gesture to her parents three hours later at a hospital and also pulled her mother's hand to the child's genital area. Even accepting defendant's contention that the stress of excitement had sufficiently abated by the time the child made those later statements, any error in their admission was harmless ... . Forensic testing confirmed the presence of defendant's DNA in the child's underwear, and the bus matron provided unrefuted testimony that defendant had altered his bus route in such a way that the child was alone with defendant for approximately thirty minutes on the day of the incident. Additionally, the child's mother testified that the child ran into the house screaming and crying as soon as she got off the bus, and that the child's underwear had been pulled down and were bunched up inside the leg of her pants. The emergency room doctor found redness and a sore on the child's genital area that he believed were the result of external trauma, i.e., touching." ***People v. Hernandez*, 2016 N.Y. Slip Op. 08396, CtApp 12-15-16**

DISCIPLINARY HEARINGS (INMATES), EVIDENCE, APPEALS.

DENIALS OF PETITIONER'S REQUESTS FOR DOCUMENTS AND WITNESSES WERE PRESERVED FOR REVIEW, NO NEED FOR PETITIONER TO SPECIFICALLY OBJECT.

The Court of Appeals determined Supreme Court erred when it held petitioner (Henry, an inmate charged with participating in an assault) had not preserved evidentiary issues for review. Henry had requested certain documents and witness-testimony which were not provided. The Court of Appeals found the denial of Henry's requests was preserved despite his failure to specifically object during the hearing: "An inmate charged with violating a prison regulation is entitled to due process protections which include a right "'To call witnesses and present documentary evidence in his defense when permitting him to do so will not be unduly hazardous to institutional safety or correctional goals.' ... . Contrary to the conclusion of the Appellate Division, Henry cannot be deemed to have waived his challenges simply because he failed to make specific objections at the hearing. In sum, the record shows that Henry plainly requested access to specific documents and witnesses, and the Hearing Officer denied some of those requests. In light of the denial of Henry's requests, the courts below erred in determining that Henry's failure to specifically object to the Hearing Officer's unfavorable rulings constituted a failure to preserve those rulings for judicial review." ***Matter of Henry v. Fischer*, 2016 N.Y. Slip Op. 08395, CtApp 12-15-16**

FIRST DEPARTMENT

CIVIL PROCEDURE.

REDACTED DOCUMENTS AND A SEALED RECORD MUST BE UNREDACTED AND UNSEALED, CRITERIA AND PROCEDURE FOR REDACTION AND SEALING EXPLAINED.

The First Department, reversing Supreme Court, determined redacted documents filed in connection with one lawsuit, and the entirely sealed record of a second lawsuit should be fully disclosed and available to the media (the intervenors here): "This Court has previously held that there is a 'broad presumption that the public is entitled to access to judicial proceedings and court records' ... . The right of public access includes the right of the press to read and review court documents, unless those documents have been sealed pursuant to a statutory provision or by a properly issued sealing order. To allow them to assert their interests here, the proposed intervenors should be allowed to intervene in both actions for the limited purpose of obtaining access to court records ... . Furthermore, because confidentiality is the exception and not the rule ... , 'the party seeking to seal court records has the burden to demonstrate compelling circumstances to justify restricting public access' ... . Having reviewed the record, we see no basis to seal the entire court record in the second action; therefore, we vacate the sealing order. It appears that the motion court sealed the second action because the parties stipulated to it. Before sealing, the motion court should have made its own written finding of good cause, as is required by the provisions of the Uniform Rules for Trial Courts (22 NYCRR) § 216.1(a) ...". ***Maxim Inc. v. Feifer*, 2016 N.Y. Slip Op. 08319, 1st Dept 12-13-16**

CIVIL PROCEDURE, SECURITIES, FRAUD, CRIMINAL LAW.

SIX YEAR STATUTE OF LIMITATIONS APPLIES TO FRAUD ACTIONS AGAINST DEFENDANT BANK RELATING TO THE SALE OF RESIDENTIAL MORTGAGE-BACKED SECURITIES BROUGHT PURSUANT TO THE MARTIN ACT AND EXECUTIVE LAW 63.

The First Department, over an extensive dissent, determined that fraud-related actions against defendant Credit Suisse (stemming from the sale of residential mortgage-backed securities [RMBS]) were governed by the six-year, not three-year statute of limitations. The actions were brought pursuant to the Martin Act and Executive Law 63(12). Those statutes were deemed to have codified common law causes of action. Therefore the six-year statute (CPLR 213), not the three-year statute (CPLR 214) applies: "Where claims are 'to recover upon a liability . . . created or imposed by statute' (CPLR 214[2]), and the

liability, although akin to common-law causes, 'would not exist but for [the] statute' ... , the three-year statute of limitations of CPLR 214(2) applies ... . In contrast, where a statute 'merely codifies and affords new remedies for what in essence is a common-law ... claim[,]' CPLR 214(2) does not apply and 'the Statute of Limitations for the statutory claim is that for the common-law cause of action which the statute codified or implemented'. In the complaint, the Attorney General alleges, inter alia, that defendants' fraud was their failure to abide by their representations that they had carefully evaluated and would continue to monitor the quality of the loans underlying their RMBS, and that they would encourage loan originators to implement sound origination practices. Instead, defendants routinely ignored defects discovered in their due diligence reviews and did not seek to influence originators to utilize appropriate origination practices, choosing instead to misuse their quality control process to obtain significant monetary settlements from originators, which defendants improperly kept for themselves." ***People v. Credit Suisse Sec. (USA) LLC*, 2016 N.Y. Slip Op. 08339, 1st Dept 12-13-16**

CRIMINAL LAW.

DEFENDANT'S FAMILY IMPROPERLY EXCLUDED FROM THE COURTROOM, CONVICTION REVERSED.

The First Department reversed defendant's conviction, finding that defendant's family was improperly excluded from the courtroom: "Defendant's family members were improperly excluded from the closed courtroom during the testimony of an undercover officer. It is undisputed that the evidence presented at a Hinton hearing did not demonstrate that the 'exclusion of [defendant's family members was] necessary to protect the interest advanced by the People in support of closure' ... . … The prosecutor requested that the courtroom be closed 'entirely,' without making any specific provision for family members, and asserted that the closure requested was not 'overly broad.' Defense counsel specifically asserted the right of the family members to be present. The court then granted the People's application, making no specific allowance or arrangements for the family members to attend. Under these circumstances, we cannot fairly read the record to indicate that the presence of family members was permitted." ***People v. Moore*, 2016 N.Y. Slip Op. 08447, 1st Dept 12-15-16**

CRIMINAL LAW, EVIDENCE.

FLAWED JURY INSTRUCTIONS ON THE JUSTIFICATION DEFENSE REQUIRED REVERSAL IN THE INTEREST OF JUSTICE.

The First Department reversed defendant's conviction in the interest of justice because of flaws in the jury instructions. The court did not make clear that acquittal on the top count based upon the justification defense required acquittal on the other counts. Also the court's charge on the use of excessive force was incomplete: "... [T]he court's charge on the use of excessive force contained a significant omission. Even if a defendant is initially justified in using deadly physical force in self-defense, he or she may not continue to use deadly physical force after the assailant no longer poses a threat ... . However, in such a situation the People must prove that it was the unnecessary additional force that caused the alleged harm ... , which in this case was serious physical injury. The court's charge on excessive force omitted the latter principle and thus impermissibly permitted the jury to convict defendant based upon a finding that although he was justified when he initially stabbed the complainant in the abdomen, defendant was not justified in inflicting subsequent wounds on the fleeing complainant, even if these additional wounds did not constitute serious physical injury. Although the parties dispute whether the additional wounds were serious, the jury could reasonably have concluded that they were not. It cannot be determined whether the jury found that defendant's conduct was not justified because he was the initial aggressor or because, although not the initial aggressor, he subsequently used unnecessary physical force." ***People v. Delin*, 2016 N.Y. Slip Op. 08465, 1st Dept 12-15-16**

CRIMINAL LAW, EVIDENCE, APPEALS.

SUPPRESSION NOT RULED ON BELOW COULD NOT BE CONSIDERED ON APPEAL, STRIP AND BODY CAVITY SEARCHES CRITICIZED.

The First Department affirmed defendant's conviction because he pled guilty before the court ruled on his suppression motion. Suppression therefore could not be considered on appeal. However, the court determined there was no justification for a strip search and warrantless body-cavity search: "... [T]here is merit to defendant's claim that the police lacked the requisite reasonable suspicion to conduct a strip search. The record showed only that defendant was arrested during a buy-and-bust operation in a drug-prone location. Defendant was not observed reaching into his pants and no drugs were found on his clothing. 'The police officers' generalized knowledge that drug sellers often keep drugs in their buttocks, and the fact that no drugs were found in a search of defendant's clothing [a]re insufficient' ... . There is also merit to defendant's claim that the strip and visual body cavity search were not conducted in a reasonable manner and without a warrant or exigent circumstances." ***People v. Durham*, 2016 N.Y. Slip Op. 08438, 1st Dept 12-15-16**

EMPLOYMENT LAW, CONTRACT LAW, EDUCATION-SCHOOL LAW.

FACULTY MEMBERS SUFFICIENTLY ALLEGED BREACH OF CONTRACT CAUSE OF ACTION AGAINST UNIVERSITY BASED UPON POLICIES DESCRIBED IN THE FACULTY HANDBOOK.

The First Department, reversing Supreme Court, determined faculty members sufficiently alleged the policies in the university's faculty handbook had the force of contract and therefore a breach of contract action was viable: "A university's academic and administrative decisions require professional judgment and may only be reviewed by way of an article 78 proceeding to ensure that such decisions are not violative of the institution's own rules and neither arbitrary nor irrational ... . However, '[i]f the claim involves a matter of contractual right it may, of course, be vindicated in an action [at] law' ... . For the purpose of surviving respondents' cross motion to dismiss, petitioners, tenured faculty members of respondent New York University's School of Medicine, have sufficiently alleged that the policies contained in respondent's Faculty Handbook, which "form part of the essential employment understandings between a member of the Faculty and the University," have the force of contract ... . Further, for the purposes of surviving respondents' cross motion to dismiss, petitioners have sufficiently alleged that they had a mutual understanding with respondent that tenured faculty members' salaries may not be involuntarily reduced. Additionally, petitioners have sufficiently alleged that they reasonably relied on oral representations by respondents that their salaries would not be involuntarily reduced." ***Matter of Monaco v. New York Univ. & N.Y. Univ. School of Medicine*, 2016 N.Y. Slip Op. 08467, 1st Dept 12-15-16**

FAMILY LAW, CRIMINAL LAW, EVIDENCE.

TESTIMONY AT THE FACT FINDING HEARING ABOUT THE IDENTIFICATION PROCEDURE SHOULD NOT HAVE BEEN ADMITTED BECAUSE IT DIFFERED SIGNIFICANTLY FROM THE PROCEDURE DESCRIBED IN THE VOLUNTARY DISCLOSURE FORM.

The First Department, reversing Family Court's juvenile delinquent adjudication, determined the testimony at the fact finding hearing about the identification procedure was so different from the description in the voluntary disclosure form [VDF] that the identification evidence should not have been admitted: "In a voluntary disclosure form [VDF], the presentment agency informed appellant that the complainant identified him inside a restaurant. Consistent with this notice, the arresting detective testified at the suppression hearing that he saw appellant and two companions, whom he had been following, enter the restaurant, ,that the complainant arrived at the scene, and that despite the officer's instruction for the complainant to wait outside, the complainant entered the restaurant shortly after the detective did and there identified appellant. Based on this testimony, the court denied suppression, finding that the identification was a 'spontaneous or un-arranged identification.' However, when the complainant ultimately testified at the fact-finding hearing, he testified that he never entered the restaurant, but rather that he identified appellant after the detective brought the three boys out of the restaurant and lined them up against a wall. Although an inconsequential defect in a notice may be excused ... , here the discrepancy between the two accounts of the identification was not inconsequential, but rather reflected that the VDF provided inadequate notice of the evidence the presentment agency intended to present at the fact-finding hearing ... . Accordingly, the court should have granted appellant's Family Ct Act § 330.2(2) motion to preclude identification evidence, which was made after the complainant testified regarding the identification procedure outside the restaurant." ***Matter of Deavan W.*, 2016 N.Y. Slip Op. 08469, 1st Dept 12-15-16**

LABOR LAW-CONSTRUCTION LAW.

LABOR LAW 240(1) CAUSE OF ACTION PROPERLY DISMISSED, EVENT NOT RELATED TO THE FORCE OF GRAVITY.

The First Department determined summary judgment dismissing plaintiff's Labor Law 240(1) cause of action was properly granted. Plaintiff was cutting a steel beam when it sprang up, striking him in the face. The event was not related to the force of gravity: "The Labor Law § 240(1) claim was correctly dismissed, because the record demonstrates that plaintiff's injuries were not the result of a failure to provide proper protection against 'the application of the force of gravity to an object or person' ... , but rather the result of the propulsion of the vertical beam upward by 'the kinetic energy of the sudden release of tensile stress in the [beam]' ...". ***Quishpi v. 80 WEA Owner, LLC*, 2016 N.Y. Slip Op. 08324, 1st Dept 12-13-16**

LABOR LAW-CONSTRUCTION LAW.

PLAINTIFF ENTITLED TO SUMMARY JUDGMENT ON LABOR LAW 240(1) AND 240(6) CAUSES OF ACTION, HEAVY MOTORIZED PALLET JACK SLID ON WATER ON A DESCENDING RAMP.

The First Department, in a full-fledged opinion by Justice Saxe, determined plaintiff was entitled to summary judgment on his Labor Law 240(1) and 241(6) causes of action. Plaintiff was guiding a heavy motorized pallet jack carrying concrete blocks down a ramp to a lower level of the building under construction. The ramp was wet and the pallet jack slid, running over plaintiff's foot. The fact that the load was not being hoisted or secured at the time of the accident did not preclude recovery. The pallet itself was deemed a safety device that failed in an elevation-related accident: "Plaintiff's testimony here established that his accident was proximately caused by the combination of the traction-reducing water condition and

the slope, which caused the heavy, loaded pallet jack to slide downhill while the breaking [sic] mechanism was rendered useless. The jack, with its built-in braking mechanism, failed to provide him adequate protection against the gravity-related risk inherent in transporting the heavy load down the water-covered ramp. Therefore, defendants failed 'to provide adequate protection against' the risk that was created in part by the 'significant elevation differential' of the ramp ...". ***Landi v. SDS William St., LLC*, 2016 N.Y. Slip Op. 08340, 1st Dept 12-13-16**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

QUESTION OF FACT WHETHER DEFENDANT EXERCISED SUFFICIENT CONTROL OVER THE WORK TO BE LIABLE UNDER LABOR LAW 200 AS AN AGENT OF THE OWNER AND GENERAL CONTRACTOR.

The First Department determined there were questions of fact whether defendant (Premiere) exercised sufficient control over the work to be liable as an agent of the owner and general contractor pursuant to Labor Law 200. Plaintiff, who worked for the building where the work was being done, tripped over a worker's tool bag which had been left in the vicinity of a staircase. The decision gives some insight into the level of control and supervision necessary for Labor Law 200 liability: "Given its responsibilities regarding the construction work - responsibilities that resemble those of a construction manager - there are issues of fact as to whether Premiere was a statutory agent of the owner and general contractor, i.e., whether it exercised general control over the work site ... , rather than the exclusive control that it claims on appeal. Premiere CEO Grimes's testimony supports plaintiff's claim that Premiere exercised general control over the work site. Not only did Grimes hire and schedule the repair people and oversee the quality of their work, but he also interacted with construction teams on a day-to-day basis, told them if he was displeased with work, made decisions about the work, and reminded the teams to move materials around to insure clear access to apartments and stairways. He was authorized to shut down the job 'if there was a dangerous or unsafe condition,' and before plaintiff's injury he and the superintendent spoke with ... workers about not leaving tools and construction dust in the common areas. From theses facts, a jury could find that Premiere exercised general control." ***Burgos v. Premiere Props., Inc.*, 2016 N.Y. Slip Op. 08317, 1st Dept 12-13-1**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY, WORKERS' COMPENSATION LAW.

ALTHOUGH NOT AN EMPLOYEE UNDER THE WORKERS' COMPENSATION LAW, PLAINTIFF WAS AN EMPLOYEE UNDER THE LABOR LAW AND WAS ENTITLED TO SUMMARY JUDGMENT ON HIS LABOR LAW 240(1) CAUSE OF ACTION.

The First Department, over a dissent, determined plaintiff was entitled to summary judgment on his Labor Law 240(1) cause of action, despite the finding by the Workers' Compensation Board that plaintiff was not an employee entitled to Workers' Compensation benefits from the general contractor. Plaintiff was found to be an independent contractor legitimately working at the site. The definitions of employer and employee in the Labor Law and Workers' Compensation Law are different: "The sole issue at the workers' compensation hearing was whether plaintiff was an employee of [the general contractor] as to be entitled to workers' compensation benefits. The sole finding made by the ALJ was that plaintiff was an 'independent contractor' not entitled to receive workers' compensation. The ALJ made no determination as to the scope of that work. ... Plaintiff testified that he was injured when a scaffold collapsed underneath him while he was helping to load a container with construction debris. [The owner] fails to point to any evidence demonstrating that plaintiff was not 'employed' on the premises on the date of the accident, and therefore, fails to raise a triable issue of fact. Having established that he was 'employed' within the meaning of the Labor Law, plaintiff is entitled to partial summary judgment on the issue of liability on his section 240(1) claim." ***Vera v. Low Income Mktg. Corp.*, 2016 N.Y. Slip Op. 08318, 1st Dept 12-13-16**

SECOND DEPARTMENT

CIVIL PROCEDURE, FRAUD.

PLEADING REQUIREMENTS FOR A LAUNDRY LIST OF FRAUD-RELATED CAUSES OF ACTION SUCCINCTLY ILLUSTRATED.

The Second Department, in the context of motions to dismiss, motions for injunctions, and motions for sanctions, described the pleading requirements for the following causes of action: preliminary injunction, permanent injunction, breach of fiduciary duty, fraud, aiding and abetting fraud, constructive trust, conspiracy to commit a tort, fraudulent conveyance, unjust enrichment and conversion. ***Swartz v. Swartz*, 2016 N.Y. Slip Op. 08390, 2nd Dept 12-14-16**

CIVIL PROCEDURE, PERSONAL INJURY.

INTERNALLY INCONSISTENT VERDICT PROPERLY SET ASIDE.

The Second Department determined Supreme Court correctly set aside a verdict in a slip and fall case as inconsistent. The jury found plaintiff was negligent but her negligence was not a substantial factor in causing her injuries (she slipped and fell on a wet floor in defendant's store). But the jury went on to attribute 15% of the fault for the accident to plaintiff: "... [W]

hen a jury's verdict is internally inconsistent, the trial court must order either reconsideration by the jury or a new trial ... . Under the circumstances here, the jury's verdict as to liability was internally inconsistent because the jury attributed 15% of the fault for the accident to the plaintiff, despite having found that the plaintiff's negligence was not a substantial factor in causing her injuries ... . The Supreme Court properly determined that the jury was confused about the meaning of the court's charge regarding proximate cause when it returned its liability verdict ...". ***Magee v. Cumberland Farms, Inc.*, 2016 N.Y. Slip Op. 08354, 2nd Dept 12-14-16**

CRIMINAL LAW.

DEFFENDANT, WHO WAS 14 AT THE TIME OF THE ROBBERY, SHOULD HAVE BEEN ADJUDICATED A YOUTHFUL OFFENDER.

The Second Department, reversing Supreme Court, determined defendant, who had just turned 14 at the time of the robbery, should have been adjudicated a youthful offender. The defendant had been placed in a program called "Project Redirect" which, had he successfully completed it, would have resulted in dismissal of the felony. Defendant, however, did not successfully complete the program: " 'The youthful offender provisions of the Criminal Procedure Law emanate from a legislative desire not to stigmatize youths . . . with criminal records triggered by hasty or thoughtless acts which, although crimes, may not have been the serious deeds of hardened criminals' ... . Here, the evidence before the court showed that the defendant participated with a group of other youths in a single robbery at an age when he was barely capable of being held criminally responsible for his conduct (see Penal Law § 30.00). Although the defendant did not fully comply with the requirements of the 'Project Redirect' program, there is no indication in the record that he is incapable of rehabilitation. Indeed, no further criminal conduct was alleged during that time. Under these circumstances, in view of the defendant's tender years, background, and lack of juvenile or criminal record, the interest of justice would be served by relieving the defendant from the onus of a criminal record ...". ***People v. Darius B.*, 2016 N.Y. Slip Op. 08371, 2nd Dept 12-14-16**

FREEDOM OF INFORMATION LAW.

ARCHITECTURAL PLANS BRIEFLY LEFT WITH THE TOWN PLANNER AND DISPLAYED AND DISCUSSED AT A MEETING OF THE PLANNING BOARD WERE RECORDS WITHIN THE MEANING OF THE PUBLIC OFFICERS LAW, PETITION SEEKING THE DOCUMENTS SHOULD NOT HAVE BEEN DISMISSED AND SANCTIONS FOR BRINGING THE PETITION SHOULD NOT HAVE BEEN IMPOSED.

The Second Department, in a full-fledged opinion by Justice Dickerson, reversing Supreme Court, determined shopping center development plans which were left for a few days with the town planner, and which were displayed and briefly discussed at a planning board meeting, were "records" within the meaning of the Public Officers Law (Freedom of Information Law). Therefore petitioner's request for the documents was not frivolous and sanctions, her petition should not have been denied, and attorneys fees should not have been assessed against her: "The Court of Appeals has 'required that FOIL be liberally construed and its exemptions narrowly interpreted so that the public is granted maximum access to the records of government' ... . 'The legislative purpose is mainly accomplished through the definitions of 'Agency' and 'Record.' . . . 'Record' is broadly defined to include any information kept, held, filed, produced or reproduced by, with or for an agency . . . in any physical form whatsoever' ... . '[T]his very broad definition is not limited by the purpose for which a document was originated or the function to which it relates' ... . Here, it is undisputed that Camarda, the developer's owner, left the subject architectural renderings in the possession of Williams, the Town Planner, for a number of days, and that Williams displayed the renderings at the meeting of the Planning Board ... . Thus, the renderings were 'kept' and 'held' by an agency, and were 'records' within the meaning of FOIL ... Since the definition of 'record' is not limited by the purpose for which a document was originated or the function to which it relates, the fact that Camarda did not formally submit the renderings as part of an application for approval of an amended site plan is irrelevant." ***Matter of Fanizzi v. Planning Bd. of Patterson*, 2016 N.Y. Slip Op. 08361, 2nd Dept 12-14-16**

INSURANCE LAW, CONTRACT LAW.

DRIVER STRUCK AS HE WAS ABOUT TO ENTER HIS PARKED CAR WAS NOT AN OCCUPANT OF THE CAR WITHIN THE MEANING OF THE INSURANCE POLICY.

The Second Department determined summary judgment was properly granted to the defendant insurer. The insurer, Republic, issued an uninsured-underinsured motorist policy to plaintiff's employer. The policy applied to anyone who was an occupant of the vehicle at the time of injury. Here plaintiff (Bosco) had parked and gone across the street. As Bosco crossed the street to return he was struck by a car: "A person remains an occupant of a vehicle, even if that person is not in physical contact with the vehicle, 'provided there has been no severance of connection with it, his [or her] departure is brief and he [or she] is still vehicle-oriented with the same vehicle' ... . A connection to a vehicle will be severed 'upon alighting therefrom to perform a chore which was not vehicle-oriented' ... . Moreover, there has to be '[m]ore than a mere intent to occupy a vehicle . . . to alter the status of pedestrian to one of occupying' it' ... . '[O]ne is [not] considered to be occupying a car if he is merely approaching it with intent to enter' ... . Here, Republic met its prima facie burden of establishing, as a matter of law, that Bosco was not occupying the insured vehicle at the time of the accident ... . The evidence Republic submitted

demonstrated that Bosco left the insured vehicle and walked across the street to go to his office on the second floor of the building, to retrieve documents. Thus, Bosco's leaving the insured vehicle was not a temporary break in his journey such that he remained in the immediate vicinity of the insured vehicle ... . Moreover, the evidence demonstrated that the accident occurred as Bosco was walking back across the street, and that he had yet to reach the insured vehicle. The evidence therefore showed that Bosco had a mere intent to enter the insured vehicle and was not an occupant of the insured vehicle at the time of the accident ...". ***J. Lawrence Constr. Corp. v. Republic Franklin Ins. Co.*, 2016 N.Y. Slip Op. 08349. 2nd Dept 12-14-16**

MORTGAGES, REAL PROPERTY LAW.

BANK WHICH ISSUED A MORTGAGE TO A THIRD PARTY THAT WAS USED BY THE THIRD PARTY TO PAY OFF PLAINTIFF'S MORTGAGE IN VIOLATION OF THE REAL PROPERTY LAW WAS ENTITLED TO AN EQUITABLE LIEN AGAINST PLAINTIFF'S PROPERTY IN THE AMOUNT OF THE ORIGINAL MORTGAGE.

The Second Department determined defendant bank (Chase) was entitled an equitable lien against plaintiff's property under the doctrine of equitable subrogation. Chase had issued a mortgage to a third party which was used to pay off plaintiff's mortgage. The transaction with the third party was fraudulent under Real Property Law 265-a known as the Home Equity Theft Prevention Act. Supreme Court held that Chase should have heeded warnings signs about the validity of the transaction, but did not actively facilitate the third party's fraud (Chase did not have "unclean hands"). To avoid plaintiff's unjust enrichment, Chase was entitled to an equitable lien against the property equal to the mortgage that was paid off plus taxes and insurance: "Under the doctrine of equitable subrogation, where the 'property of one person is used in discharging an obligation owed by another or a lien upon the property of another, under such circumstances that the other would be unjustly enriched by the retention of the benefit thus conferred, the former is entitled to be subrogated to the position of the obligee or lien-holder' ... . … The doctrine of unclean hands applies when the offending party 'is guilty of immoral, unconscionable conduct' directly related to the subject matter in litigation and which conduct injured the party seeking to invoke the doctrine ... . Here, although Chase was charged with knowledge of information which would have caused a prudent lender to inquire as to the circumstances of the transaction, the Supreme Court did not find that it had actual notice of the fraud or that it did anything to actively facilitate the fraud. There was no evidence that Chase 'was a willing participant in a mortgage [rescue] scheme' ...". ***Lucia v. Goldman*, 2016 N.Y. Slip Op. 08353, 2nd Dept 12-14-16**

PERSONAL INJURY.

WHEEL STOP OPEN AND OBVIOUS AND NOT INHERENTLY DANGEROUS.

The Second Department after the grant of defendant's summary judgment motion in this slip and fall case. The wheel stop over which plaintiff tripped was deemed open and obvious and not inherently dangerous: "Although a landowner has a duty to maintain its premises in a reasonably safe manner ... , there is no duty to protect or warn against an open and obvious condition that is not inherently dangerous ... . Generally, '[a] wheel stop or concrete parking lot divider which is clearly visible presents no unreasonable risk of harm' ... . Here, the defendant established its prima facie entitlement to judgment as a matter of law by submitting, inter alia, the plaintiff's deposition testimony and photographic evidence demonstrating that the plaintiff tripped when her foot came into contact with a wheel stop that was open and obvious and not inherently dangerous. Among other things, the plaintiff testified at her deposition that she noticed the yellow cement wheel stops in the parking lot shortly before her accident ...". ***Bogaty v. Bluestone Realty NY, Inc.*, 2016 N.Y. Slip Op. 08343, 2nd Dept 12-14-16**

PERSONAL INJURY.

DEFENDANT'S CAR MERELY FURNISHED THE CONDITION FOR PLAINTIFF'S BICYCLE ACCIDENT, NOT A PROXIMATE CAUSE.

The Second Department, reversing Supreme Court, determined summary judgment was properly granted to defendant Brady in this bicycle-car collision case. Brady was parked parallel to Dunbar waiting for Dunbar to pull out of a parking space. Plaintiff rode her bicycle between the two cars and struck the door of the Dunbar car when Dunbar opened it to speak to Brady. Brady's car was deemed not to be a proximate cause of the accident, rather the position of Brady's car merely furnished the condition for the accident. Dunbar's motion for summary judgment, however was properly denied: "The Supreme Court should have granted Brady's motion for summary judgment dismissing the second supplemental complaint insofar as asserted against him. Although the issue of proximate cause is generally one for the jury ... , 'liability may not be imposed upon a party who merely furnished the condition or occasion for the occurrence of the event' but was not one of its causes' ... . Here, in support of his motion, Brady demonstrated his prima facie entitlement to judgment as a matter of law by presenting evidence that his conduct in stopping his car while waiting for a parking space merely furnished the condition or occasion for the accident, and was not a proximate cause of the plaintiff's injuries ... . Dunbar failed to eliminate all triable issues of fact as to whether Dunbar was negligent in opening the door when it was not reasonably safe to do so, and in allegedly failing to see what, by the reasonable use of his senses, he should have seen ...". ***Price v. Tasber*, 2016 N.Y. Slip Op. 08385, 2nd Dept 12-14-16**

PERSONAL INJURY, CONTRACT LAW, LANDLORD-TENANT.

DESPITE THE CITY CODE PROVISION CREATING A NONDELEGABLE DUTY ON THE OWNER'S PART TO MAINTAIN AN ABUTTING SIDEWALK, THE TERMS OF THE LEASE RAISED A QUESTION OF FACT ABOUT THE TENANT'S LIABILITY [LIABILITY TO THIRD PARTIES ARISING FROM CONTRACT].

The Second Department determined plaintiffs raised a question of fact when the terms of the lease created a duty on the part of the tenant (the City here) to maintain the abutting sidewalk: Administrative Code of the City of New York § 7-210 imposes a nondelegable duty on a property owner to maintain and repair the sidewalk abutting its property, and specifically imposes liability upon certain property owners for injuries resulting from a violation of the code provision (see Administrative Code § 7-210…). As a general rule, the provisions of a lease obligating a tenant to repair the sidewalk do not impose on the tenant a duty to a third party ... . This is in accordance with the principle that 'a contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party' ... . However, the Court of Appeals has recognized that there are exceptions to this general rule and that there are situations in which a party who enters into a contract may be said to have assumed a duty of care to third parties The lease, inter alia, required the City, at its sole cost and expense, to take good care of the sidewalk, and 'make all repairs thereto, ordinary and extraordinary, foreseen and unforeseen.' It also provided that the former owner 'shall have no responsibility and shall not be required to furnish any services, make any repairs or to perform any other maintenance work.' The plaintiffs' submission of this evidence raised a triable issue of fact as to whether the City's lease was comprehensive and exclusive as to sidewalk maintenance so as to entirely displace the former landowner's duty to maintain the sidewalk ...". ***Hsu v. City of New York*, 2016 N.Y. Slip Op. 08348, 2nd Dept 12-14-16**

PERSONAL INJURY, MEDICAL MALPRACTICE.

MOTHER CAN NOT RECOVER FOR EMOTIONAL DISTRESS CAUSED BY IN UTERO INJURY WHEN THE BABY IS BORN ALIVE.

The Second Department determined mother could not recover for emotional distress based upon alleged in utero medical malpractice when the baby is born alive. Here the baby was born alive but not conscious and died eight days later: "When an infant who is injured by medical malpractice while in utero survives the pregnancy, the infant may seek damages for his or her injuries ... . If the pregnant mother suffers an independent injury as a result of malpractice, she may commence suit to recover for her own personal injuries ... . If the malpractice causes a stillbirth or miscarriage, the mother can recover for emotional injuries even without showing that she suffered an independent physical injury ... . However, where, as here, the alleged medical malpractice causes in utero injury to a fetus that is born alive, the mother cannot recover damages for emotional harm ...". ***Ward v. Safajou*, 2016 N.Y. Slip Op. 08394, 2nd Dept 12-14-16**

THIRD DEPARTMENT

DISCIPLINARY HEARINGS (INMATES).

FAILURE TO VERIFY THAT TWO WITNESSES REFUSED TO TESTIFY REQUIRED A NEW HEARING.

Although the evidence was sufficient to support the misbehavior determinations, the hearing officer's handling of petitioner's requests for two witnesses required a new hearing: "... [T]he Hearing Officer improperly denied petitioner's request to call two inmate witnesses. Although the Hearing Officer noted that the two witnesses had informed petitioner's employee assistant that they refused to testify, no explanation for the refusal was given and the Hearing Officer made no attempt to verify the basis for the refusal. Accordingly, we find that petitioner's regulatory right to call witnesses was violated and the determination of guilt with respect to the charges in the first misbehavior report must be annulled and the matter remitted for a new hearing ...". ***Matter of DeJesus v. Venettozzi*, 2016 N.Y. Slip Op. 08404, 3rd Dept 12-15-16**

DISCIPLINARY HEARINGS (INMATES).

HEARING OFFICER'S REFUSAL TO CALL A REQUESTED WITNESS REQUIRED ANNULMENT OF THE DETERMINATION.

The Third Department determined the hearing officer's refusal to call a witness requested by the inmate required annulment: "Petitioner contends, among other things, that he was improperly denied the right to call as a witness an inmate who allegedly overheard a conversation between petitioner and the author of the misbehavior report establishing that the author lied about seeing petitioner place drugs on the food tray. According to petitioner, during this conversation the correction officer admitted that he reported that he saw petitioner put the drugs in the food tray in order to 'cover his ass' after being advised to do so by another correction officer. At the hearing, petitioner maintained that the verbal exchange between the two officers revealing that the author was advised to make this misrepresentation was captured on a videotape of the area outside the observation room. When the videotape was played at the hearing, however, the audio was not working. Consequently, the only evidence that could potentially corroborate petitioner's defense was the testimony of the other inmate." ***Matter of McFarlane v. Annucci*, 2016 N.Y. Slip Op. 08432, 3rd Dept 12-15-16**

FAMILY LAW, CONTRACT LAW.

HEARING SHOULD HAVE BEEN HELD ON BIRTH PARENT'S PETITION TO ENFORCE A POSTADOPTION AGREEMENT ALLOWING THE BIRTH PARENT'S VISITATION WITH THE CHILD.

The Third Department determined a hearing should have been held on a birth parent's petition to enforce a postadoption agreement which allowed visitation by the parent: "Family Court erred in dismissing the petition without an evidentiary hearing. Pursuant to Domestic Relations Law § 112-b (4), birth parents and adoptive parents may enter into a legally enforceable agreement regarding postadoption contact that may thereafter be enforced by filing a petition in Family Court ... . Enforcement of a postadoption contact agreement, however, 'will only be ordered if it is determined to be in the child's best interests' ... , and '[a]n evidentiary hearing is generally necessary to determine what is in the best interests of the child' ... . … Further, the adoptive parents are persons whose interests may be adversely or inequitably affected by an order enforcing the postadoption contact agreement and, therefore, they should have been named as parties ...". ***Matter of Lynn X. (Joseph W.)*, 2016 N.Y. Slip Op. 08415, 3rd Dept 12-15-16**

FAMILY LAW, EVIDENCE.

PROPER FOUNDATION HAD BEEN LAID, FACEBOOK MESSAGES BETWEEN MOTHER AND CHILD SHOULD HAVE BEEN ALLOWED IN EVIDENCE IN THIS ABANDONMENT PROCEEDING.

In an abandonment proceeding, Family Court erred when it would not allow Facebook messages between mother and child into evidence. The Third Department determined a proper foundation for the Facebook messages had been laid. The messages were crucial to mother's attempt to demonstrate she had maintained contact with her child: "A recorded conversation — such as a printed copy of the content of a set of cell phone instant messages — may be authenticated through, among other methods, the 'testimony of a participant in the conversation that it is a complete and accurate reproduction of the conversation and has not been altered' ... . Notably, '[t]he credibility of the authenticating witness and any motive she [or he] may have had to alter the evidence go to the weight to be accorded this evidence, rather than its admissibility' ... . Respondent testified that she was present when her counsel printed the Facebook messages at his office, and that she reviewed the entire document to ensure that it was a full and complete copy. The ... stipulation and respondent's testimony, when combined with her adult son's testimony confirming that he had provided respondent with his account information, password and permission to use the account for communication with the child, constituted a sufficient foundation for the admission into evidence of the printed messages and her related testimony ... . By erroneously precluding this proffered evidence, Family Court deprived respondent of her due process right to a full and fair opportunity to be heard. In a proceeding to terminate parental rights 'the court is obliged to ensure that the proceeding is fair and that due process is afforded to an individual whose parental rights may be terminated' ... . The frequency and content of these Facebook communications are relevant in determining whether respondent initiated or maintained substantial contact with the child during the statutory period ...". ***Matter of Colby II. (Sheba II.)*, 2016 N.Y. Slip Op. 08402, 3rd Dept 12-15-16**

UNEMPLOYMENT INSURANCE.

BRAND AMBASSADOR NOT AN EMPLOYEE.

The Third Department determined a brand ambassador was not an employee of Attack, a marketing outfit that hired ambassadors to promote particular products at events: "Here, the record evidence reflects that Attack retained little or no control over the means or results of the work performed by claimant and the other brand ambassadors. Although Attack required claimant to fill out a profile page and provide certain personal information and work experience, Attack did not interview or audition claimant, nor did it conduct a background check. Significantly, pursuant to the written agreement that claimant executed with Attack, the rate of pay of compensation, as well as the nature and duration of the services that claimant would provide, were dictated by the clients and not Attack. Similarly, Attack did not provide any training, supervision or materials and did not establish claimant's work schedule. Nor did Attack provide claimant with any benefits, and claimant was not paid until the client paid Attack. Although claimant could not directly solicit work from Attack's clients, he was also free to work as a brand ambassador for other companies." ***Matter of Burgess (Commissioner of Labor)*, 2016 N.Y. Slip Op. 08410, 3rd Dept 12-15-16**

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