CasePrepPlus

February 15, 2017

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

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# COURT OF APPEALS

## ATTORNEYS, CONTRACT LAW.

ETHICAL VIOLATION CANNOT BE USED AS A SWORD TO AVOID PAYMENT OF ATTORNEY'S FEE; BECAUSE TRIAL PREPARATION NOT NECESSARY, LOWER ATTORNEY'S-FEE PERCENTAGE APPLIED.

The Court of Appeals, in a full-fledged opinion by Judge DiFiore, determined the fee arrangement contracts between plaintiff's attorney, Menkes, and two attorneys Menkes contracted with for assistance, Manheimer and Golomb, should be enforced according to standard prinicples of contract interpretation. Menkes argued that Manheimer was not entitled to payment because the clients were never informed (by Menkes) of Manheimer's involvement (an ethical violation). Golomb argued he was entitled to 40% of the fees because the matter did not settle at the mediation session. The Court of Appeals determined the 40% term only applied if it became necessary to prepare for trial (the case settled before trial preparation): "Menkes's attempt to use the ethical rules as a sword to render unenforceable, as between the two attorneys, the agreements with Manheimer that she herself drafted is unavailing. Her failure to inform her clients of Manheimer's retention, while a serious ethical violation, does not allow her to avoid otherwise enforceable contracts under the circumstances of this case ... . * * * Here, the mediator and Golomb communicated in the days following the May 20 mediation session, with the mediator continuing to act as go-between. Ten days after the session, the mediator communicated the final $8 million offer, which Golomb accepted. Reading the agreement as a whole, the plain language of the agreement entitles Golomb to 12% of net attorneys' fees." ***Marin v. Constitution Realty, LLC*, 2017 N.Y. Slip Op. 01019, CtApp 2-9-17**

## CRIMINAL LAW.

NO EVIDENCE JURY COULD SEE ORANGE CORRECTIONS DEPARTMENT PANTS WORN BY DEFENDANT ON THE FIRST DAY OF TRIAL, DEFENDANT NOT DENIED A FAIR TRIAL.

The Court of Appeals determined the fact that defendant appeared on the first day of the trial wearing orange sweat pants issued by the department of corrections did not require reversal. There was no evidence the jury could see the defendant's legs: "Under the circumstances described here by the trial judge on the record, there is no merit to defendant's contention that he was denied a fair trial because he was compelled to appear before the jury in correctional garb. We have previously held that 'to require [a defendant] to appear in convict's attire — a continuing visual communication to the jury — is to deny' the defendant the right to appear 'with the dignity and self-respect of a free and innocent' person ... , consistent with the Supreme Court's holding that '[t]he State cannot, consistently with the Fourteenth Amendment, compel an accused to stand trial before a jury while dressed in identifiable prison clothes' ... . These concerns are not implicated here, however, where there is no evidence that defendant's orange correctional pants were visible to the jury and the clothing that was visible to the jury was clearly not identifiable as correctional garb ...". ***People v. Then*, 2017 N.Y. Slip Op. 01021, CtApp 2-9-17**

## CRIMINAL LAW, EVIDENCE.

ELEMENTS OF OFFICIAL MISCONDUCT, MALFEASANCE AND NONFEASANCE, EXPLAINED; COCONSPIRATOR STATEMENTS MADE BEFORE A DEFENDANT JOINS A CONSPIRACY AND AFTER A DEFENDANT LEAVES A CONSPIRACY ARE ADMISSIBLE.

The Court of Appeals, in a full-fledged opinion by Judge DiFiore, affirmed the conviction of a Nassau County Police Department detective on two counts of official misconduct and conspiracy. The opinion is too detailed to fairly summarize here. The charges stemmed from allegations defendant participated in an attempt to prevent the arrest of the son of a prominent supporter of the police department. It was alleged the supporter's son stole electronic equipment from his high school. Despite many attempts by members of the police department to have the high school withdraw the charges, the school refused. The opinion explains in detail the proof requirements for official misconduct, based upon malfeasance and nonfeasance. In a question of first impression, the Court of Appeals ruled that statements made by coconspirators before a defendant joins the conspiracy and after a defendant leaves the conspiracy are admissible: "We now hold that when a conspirator subsequently joins an ongoing conspiracy, any previous statements made by his or her coconspirators in furtherance of the conspiracy are admissible against the conspirator pursuant to the coconspirator exception to the hearsay rule. ... We further conclude, in line with federal case law, that statements made after a conspirator's alleged active involvement in the conspir-

acy has ceased, but the conspiracy continues, are admissible unless this conspirator has unequivocally communicated his or her withdrawal from the conspiracy to the coconspirators ...". ***People v. Flanagan*, 2017 N.Y. Slip Op. 01018. CtApp 2-9-17**

### FAMILY LAW.

EXPUNGEMENT NOT AVAILABLE FOR CHILD NEGLECT CASE REFERRED TO THE FAMILY ASSESSMENT RESPONSE TRACK (FAR TRACK).

The Court of Appeals, in a full-fledged opinion by Judge Fahey, determined the statutory scheme for a potential child-neglect case referred to the Family Assessment Response Track (FAR track) does not provide a mechanism for expungement. Here a potential educational neglect case was referred to the FAR track and ultimately no action was taken by the caseworker and the case was closed. The petitioners requested expungement: "Petitioners contend that the right to seek early expungement may be inferred from the silence of Social Services Law § 427-a on this topic. We disagree. Principles of statutory construction teach that .the failure of the Legislature to include a substantive, significant prescription in a statute is a strong indication that its exclusion was intended. ... . Moreover, this is not a case in which the two statutes that petitioners seek to interpret in identical fashion 'relate to the same subject matter, contain identical language and were adopted together' ... . Rather, the FAR track was created as a new and entirely separate means of addressing certain allegations of child abuse in a program geared toward the provision of social services, rather than an investigation assessing blame. In other words, the subject matter of the FAR track cannot be deemed identical to that of a traditional child abuse investigation." ***Matter of Corrigan v. New York State Off. of Children & Family Servs.*, 2017 N.Y. Slip Op. 01020, CtApp 2-9-17**

## FIRST DEPARTMENT

### CONTRACT LAW, FRAUD.

A SOPHISTICATED PARTY'S REQUEST FOR AND RECEIPT OF WRITTEN ASSURANCES FROM DEFENDANT WAS A VALID SUBSTITUTE FOR A DUE DILIGENCE INQUIRY, SUPREME COURT'S DISMISSAL OF FRAUD ACTION REVERSED.

The First Department, reversing Supreme Court, determined the motion to dismiss the complaint alleging fraud should not have been granted, and the motion to amend the complaint to allege negligent misrepresentation should have been granted. Supreme Court ruled that plaintiff was a sophisticated lender and made the loan without performing due diligence (and therefore could not allege justifiable reliance on any misrepresentations). The First Department held that plaintiff's request for and receipt of written assurances was sufficient due diligence: "A sophisticated party is generally required to exercise due diligence to verify the facts represented to it before entering into a business transaction ... . The Court of Appeals has recognized, however, that, 'where a plaintiff has gone to the trouble to insist on a written representation that certain facts are true, it will often be justified in accepting that representation rather than making its own inquiry' ... . In this case, plaintiff alleges that it made the loan ... in reliance on [defendant] Noto's opinion letter, which was specifically addressed to plaintiff, in which Noto opined that the loan transaction would not put [any party] into breach of any preexisting contract or agreement ... . Plaintiff alleges that this representation was false, inasmuch as the undisclosed 2005 letter agreement required [maintenance of] a $2 million cushion of 'unencumbered equity' in the property in any refinancing, and — given that the true value of the property was only $1.9 million, based on the terms of the undisclosed 2005 transaction — plaintiff's $6.6 million loan ... wiped out any such equity in the property." ***Remediation Capital Funding LLC v. Noto*, 2017 N.Y. Slip Op. 01119, 1st Dept 2-10-17**

### EMPLOYMENT LAW, (NYS) HUMAN RIGHTS LAW, (NYC) HUMAN RIGHTS LAW.

PLAINTIFF'S FIRING FOR WORKPLACE DISRUPTION AND CUSTOMER RELATIONS STEMMING FROM PLAINTIFF'S PERCEIVED INVOLVEMENT IN A NOTORIOUS ASSAULT CASE [HIS CONVICTIONS WERE VACATED] DID NOT VIOLATE THE HUMAN RIGHTS LAW.

The First Department affirmed the dismissal of a former police officer's complaint which alleged he was fired from his job at Con Edison because of his convictions, in violation of the state and city Human Rights Law. While a police officer, the plaintiff was charged with beating and sodomizing an arrestee in a notorious case. Plaintiff's assault-related convictions were vacated and the jury deadlocked in the second trial. The only conviction which remained was for perjury. Plaintiff was fired because of workplace disruption and customer relations stemming from plaintiff's perceived involvement in the assault. The First Department determined the firing was not the result of discrimination based upon the perjury conviction. The vacated convictions were not "convictions" covered by the statutory prohibition: "The assault-related convictions on which plaintiff was retried, and the jury deadlocked, are not covered by article 23-A [of the Correction Law], since the article applies only to individuals who 'previously have been convicted,' and the vacatur of plaintiff's prior assault convictions rendered those convictions nullities ... . Although plaintiff maintains that he remains 'previously ... convicted,' we reject this interpretation since it would permit an employer to deny employment based on a vacated conviction in reliance on the statutory exceptions ... . The legislative intent is to rehabilitate, and therefore avoid recidivism by, 'ex-offenders,' not

those whose convictions have been vacated, who generally do not need rehabilitation and are not at risk of recidivism ... . 'Although ex-offenders were urged when released from prison to find employment as a part of their rehabilitation, they had great difficulty in doing so because of their criminal records.... Failure to find employment ... injured society as a whole by contributing to a high rate of recidivism ... Thus, [article 23-A] sets out a broad general rule that employers and public agencies cannot deny employment or a license to an applicant solely based on status as an ex-offender' ...". ***Schwarz v. Consolidated Edison, Inc.*, 2017 N.Y. Slip Op. 00927, 1st Dept 2-7-17**

## MUNICIPAL LAW (NYC), ADMINISTRATIVE LAW.

NYC BOARD OF HEALTH PROPERLY ISSUED REGULATION REQUIRING CERTAIN RESTAURANTS TO PROVIDE INFORMATION ABOUT THE LEVEL OF SODIUM IN THE RESTAURANT FOOD.

The First Department, in a full-fledged opinion by Justice Gesmer, determined the NYC Board of Health properly issued a regulation requiring certain restaurant to provide factual information about the level of sodium in the restaurant food. The decision is comprehensive and cannot fairly be summarized here. Applying the *Boreali* factors, the First Department held the rule was well within the board's rule-making authority. In addition, the court found the rule did not violate the First Amendment (commercial speech): "Salt is both an essential ingredient of our diet and, when consumed in excess, a significant health hazard. Excess consumption of sodium, the primary ingredient of salt, can cause high blood pressure, which is in turn correlated with a higher risk of cardiovascular disease, congestive heart failure and kidney disease, according to the overwhelming consensus among scientists and the federal agencies charged with protecting the nation's health. To address this issue, defendant New York City Board of Health (the Board) adopted a rule requiring certain restaurants to provide factual information to consumers on this issue. That rule is challenged in this appeal by the National Restaurant Association (NRA). We affirm the trial court's rejection of that challenge, since the Board acted legally, constitutionally and well within its authority in adopting this limited yet salutary rule." ***National Rest. Assn. v. New York City Dept. of Health & Mental Hygiene*, 2017 N.Y. Slip Op. 01140, 1st Dept 2-10-17**

## MUNICIPAL LAW (NYC), CONSTITUTIONAL LAW (NYS).

THE RECORD-KEEPING AND INSPECTION REQUIREMENTS FOR NYC PAWNBROKERS DO NOT VIOLATE THE UNREASONABLE SEARCH AND SEIZURE PROHIBITION IN THE NYS CONSTITUTION.

The First Department, in a full-fledged opinion by Justice Saxe, determined that the various record-keeping and inspection statutes and regulations which apply to New York City pawnbrokers did not violate the unreasonable search and seizure prohibition in Article I, section 12 of the New York State Constitution. Therefore, the preliminary injunction prohibiting enforcement of the statutes, regulations and procedures should not have been granted: "Here, the statutory and regulatory framework at issue consists of two distinct components: not merely inspection requirements involving targeted, on-premises administrative inspections by government officials, but also substantial reporting requirements, involving submission of transactional information to the government. To the extent the statutory and regulatory framework involves transactional reporting requirements, it does not involve either physical inspections or administrative searches of a business or its records; instead, it merely requires the submission of information in which the businesses have little, if any, expectation of privacy. * * * Even if we focus on those provisions that authorize inspections, and characterize them as administrative searches, plaintiffs failed to demonstrate a likelihood that they will prevail. The Court of Appeals ... acknowledged the continued viability of an 'administrative search' exception to the constitutional requirements of probable cause and warrants. While that exception 'cannot be invoked where ... the [administrative] search is undertaken solely to uncover evidence of criminality' and the underlying regulatory scheme is in reality, designed simply to give the police an expedient means of enforcing penal sanctions' ... , a regulatory administrative search scheme can pass muster under New York's Constitution where it is 'pervasive and include[s] detailed standards in such matters as, for example, the operation of the business and the condition of the premises' ...". ***Collateral Loanbrokers Assn. of N.Y., Inc. v. City of New York*, 2017 N.Y. Slip Op. 00953, 1st Dept 2-7-17**

## MUNICIPAL LAW, PERSONAL INJURY.

WRITTEN NOTICE REQUIREMENT APPLIED TO GRAVEL PILED NEAR A MANHOLE, ACTION BY BICYCLIST INJURED WHEN HIS WHEEL STRUCK THE GRAVEL PROPERLY DISMISSED.

The First Department determined the city's summary judgment motion was properly granted in this bicycle accident case. Plaintiff was injured when his bicycle struck a pile of gravel near a manhole that was being accessed for sewer maintenance. Because sewer maintenance is a governmental function, the written notice requirement applies. Without written notice of the condition, the city cannot be held liable: "This action seeks recovery for injuries allegedly sustained by plaintiff Daniel Chambers when the front wheel of the bicycle he was riding came into contact with gravel located around a large hole, near a manhole cover. ... The court properly dismissed the action as plaintiff failed to establish that an exception to the prior written notice requirement of Administrative Code of the City of New York § 7-201(c)(2) is at issue here ... . The City's ownership of a manhole cover, which allows the City to access the sewer system and water pipes in order to perform maintenance and repairs, does not provide the City with 'a special benefit from that property unrelated to the public use'

... . Accordingly, it does not fall within the "special use" exception ...". ***Chambers v. City of New York*, 2017 N.Y. Slip Op. 01120, 1st Dept 2-10-17**

### MUNICIPAL LAW, PERSONAL INJURY, MEDICAL MALPRACTICE.

NOTICE OF CLAIM TIMELY SERVED AS A MATTER OF LAW UNDER THE CONTINUOUS TREATMENT DOCTRINE.
The First Department, reversing Supreme Court, determined plaintiff's notice of claim in this medical malpractice action was timely served as a matter of law under the continuous treatment doctrine. Two justices, in a concurring decision, agreed that the action should not have been dismissed, but argued there was a question of fact whether the continuous treatment doctrine applied: "On January 25, 2006, plaintiff served a notice of claim on defendant HHC. At the 50-h hearing in June 2006, plaintiff testified that while her last actual medical treatment at Lincoln Hospital occurred on October 19, 2005, when hospital personnel removed the sutures from her leg, she received a follow-up appointment to return to Lincoln Hospital on October 24, 2005. Plaintiff stated that she arrived at Lincoln Hospital for treatment on that date, but was informed that the staff could not locate her medical records and that she should return to the Hospital in one week, on October 31, 2005. Plaintiff testified that she did, in fact, return on October 31, only to have the staff inform her that they did not accept her insurance and that she should seek treatment elsewhere. ... [P]laintiff argued, her last treatment date was October 31, 2005 and thus, she had timely served her notice of claim on January 25, 2006." ***Hill v. New York City Health & Hosps. Corp.*, 2017 N.Y. Slip Op. 00914, 1st Dept 2-7-17**

## SECOND DEPARTMENT

### CIVIL PROCEDURE, FORECLOSURE.

CPLR 205 (a), WHICH ALLOWS SIX MONTHS FOR RECOMMENCING AN ACTION AFTER DISMISSAL, APPLIES TO FORECLOSURE PROCEEDINGS, EVEN WHEN THE CURRENT HOLDER OF THE NOTE IS A SUCCESSOR IN INTEREST TO THE PARTY WHICH STARTED THE FORECLOSURE ACTION.
The Second Department, in a full-fledged opinion by Justice Maltese, determined the six-month extension of a statute of limitations provided by CPLR 205 (a) applied in this foreclosure action. The court summarized the rulings as follows: "Under certain conditions, CPLR 205(a) provides an additional six months in which to recommence a prior action that has been dismissed on grounds other than voluntary discontinuance, lack of personal jurisdiction, neglect to prosecute, or a final judgment on the merits. The first question in this case is whether a prior action to foreclose the same mortgage was dismissed for neglect to prosecute, a category of dismissal that renders CPLR 205(a) inapplicable. We answer this question in the negative, concluding that the prior action was not dismissed for neglect to prosecute. The second question is more novel. We must determine whether the plaintiff in this mortgage foreclosure action, which was assigned the note and mortgage during the pendency of the prior foreclosure action, is entitled to the savings provision—or grace period—of CPLR 205(a) even though the prior action was commenced by a prior holder of the note. ... [W]e conclude that a plaintiff in a mortgage foreclosure action which meets all of the other requirements of the statute is entitled to the benefit of CPLR 205(a) where, as here, it is the successor in interest as the current holder of the note." ***Wells Fargo Bank, N.A. v. Eitani*, 2017 N.Y. Slip Op. 01015, 2nd Dept 2-8-17**

### CRIMINAL LAW.

FAILURE TO READBACK THE CROSS OF AN IMPORTANT WITNESS PURSUANT TO THE JURY'S REQUEST REQUIRED REVERSAL IN THE INTEREST OF JUSTICE.
The Second Department, in a case remitted after reversal by the Court of Appeals, determined the trial judge's failure to respond to the deliberating jury's request for a witness's (Richard's) testimony by reading both the direct and the cross deprived defendant of a fair trial. The Second Department had previously found the error to be a mode of proceedings error that required reversal in the absence of an objection. The Court of Appeals held the error was not a mode of proceedings error. On remand the Second Department addressed the unpreserved error in the interest of justice: "Although the defendant's contentions regarding the jury note are unpreserved for appellate review, as no objections were raised (see CPL 470.05[2]), we reach them in the exercise of our interest of justice jurisdiction (see CPL 470.15[6][a]). Under the circumstances of this case, the trial court's failure to meaningfully respond to the jury note requesting a readback of Richards' testimony deprived the defendant of a fair trial ... . ' [A] request for a reading of testimony generally is presumed to include cross-examination which impeaches the testimony to be read back, and any such testimony should be read to the jury unless the jury indicates otherwise' … . Richards was the only witness to the argument and the shooting, other than the complainant and the defendant. Richards' cross-examination testimony included testimony that was relevant to the defense, directly impeached significant portions of his direct examination testimony, and was detrimental to the prosecution. As a result, the trial court's readback of only Richards' direct examination testimony in response to the jury's request seriously prejudiced the defendant ...". ***People v. Morris*, 2017 N.Y. Slip Op. 01007, 2nd Dept 2-8-17**

## EDUCATION-SCHOOL LAW, PERSONAL INJURY.

SCHOOL NOT LIABLE FOR OFF PREMISES ASSAULT.

The Second Department determined the school's motion for summary judgment was properly granted. Plaintiff and her father were allegedly assaulted 30 to 100 feet beyond the entrance to the infant plaintiff's school by students from the school: "With respect to the contention that the defendants may be liable for the infant plaintiff's injuries, a school's duty is coextensive with, and concomitant with, its physical custody and control over a child .... 'When that custody ceases because the child has passed out of the orbit of its authority in such a way that the parent is perfectly free to reassume control over the child's protection, the school's custodial duty also ceases' ... . 'As a result, where a student is injured off school premises, there can generally be no actionable breach of a duty that extends only to the boundaries of school property' ... . Here, the defendants established, prima facie, that they may not be held liable for the infant plaintiff's injuries since, at the time of the subject incident, the infant plaintiff was no longer in their custody or under their control and was, thus, outside the orbit of their authority ... . Nor is there a basis to impose liability upon the defendants for the injuries sustained by the infant plaintiff or her father for failure to provide adequate security, since the defendants demonstrated that they did not affirmatively assume a duty to protect either plaintiff from criminal activity which occurred off the school premises ... ". ***Hernandez v. City of New York*, 2017 N.Y. Slip Op. 00962, 2nd Dept 2-8-17**

## FAMILY LAW, IMMIGRATION LAW.

MOTION FOR FINDINGS ALLOWING CHILD TO PETITION FOR SPECIAL IMMIGRANT JUVENILE STATUS SHOULD HAVE BEEN GRANTED.

The Second Department determined Family Court should have granted the child's motion for findings to allow him to petition for special immigrant juvenile status: "Pursuant to 8 USC § 1101(a)(27)(J) ... and 8 CFR 204.11, a special immigrant is a resident alien who, inter alia, is under 21 years of age, unmarried, and dependent upon a juvenile court or legally committed to an individual appointed by a state or juvenile court. Additionally, for a juvenile to qualify for SIJS, a court must find that reunification of the juvenile with one or both of the juvenile's parents is not viable due to parental abuse, neglect, abandonment, or a similar basis found under state law ... , and that it would not be in the juvenile's best interests to be returned to his or her previous country of nationality or country of last habitual residence ... . Based upon our independent factual review, we find that reunification of the child with one or both of his parents is not a viable option due to parental abandonment ... , and that it would not be in his best interests to return to India ...". ***Matter of Varinder S. v. Satwinder S.*, 2017 N.Y. Slip Op. 00987, 2nd Dept 2-8-17**

## LABOR LAW-CONSTRUCTION LAW.

BASEMENT OFFICE DID NOT CAUSE DEFENDANT TO LOSE THE HOMEOWNER'S EXEMPTION TO LIABILITY UNDER THE LABOR LAW.

The Second Department determined the defendant property owner was entitled to the homeowners' exemption from liability under the Labor Law, despite the fact that the residence included an office used for defendant's business: "Owners of one- or two-family dwellings are exempt from liability under Labor Law § 241(6) unless they directed or controlled the work being performed ... . 'The exception was enacted to protect those people who, lacking business sophistication, would not know or anticipate the need to obtain insurance to cover them against the absolute liability'... . ... [T]he use of a portion of the defendant's residence for commercial purposes did not automatically cause him to lose the protection of the exemption. The presence of an office in the basement did not detract from the building's primary use as a residence, and the defendant's commercial activity was incidental thereto ... . ... The defendant's alleged discussion with the injured plaintiff about the scope of the project and the defendant's request to install a shelf and support beam were insufficient to transform the defendant from a legitimately concerned homeowner into a de facto supervisor, because these acts, without any specific direction as to how the injured plaintiff was to accomplish his tasks, do not constitute direction or control over the manner or method of the injured plaintiff's work ...". ***Levy v. Baumgarten*, 2017 N.Y. Slip Op. 00963, 2nd Dept 2-8-17**

## LABOR LAW-CONSTRUCTION LAW.

CORRIDOR FORMED BY LUMBER AND MATERIALS PILED ON EITHER SIDE WAS A PASSAGEWAY WITHIN THE MEANING OF THE INDUSTRIAL CODE, DEFENDANT LIABLE UNDER LABOR LAW 241(6).

The Second Department determined a two to three-foot wide corridor created by lumber and materials piled on either side was a "passageway" within the meaning to the industrial code. Plaintiff was injured when he tripped while carrying materials along the corridor. The Court of Claims properly found defendant liable under Labor Law 241 (6): "The claimant filed a claim pursuant to Labor Law § 241(6) alleging a violation of 12 NYCRR 23-1.7(e)(1), which provides in relevant part that '[a]ll passageways shall be kept free from accumulations of dirt and debris and from any other obstructions or conditions which could cause tripping.' ... 'Labor Law § 241(6) imposes a nondelegable duty upon owners and contractors to provide reasonable and adequate protection and safety to construction workers' ... . 'In order to recover damages on a cause of action

alleging a violation of Labor Law § 241(6), a plaintiff must establish the violation of an Industrial Code provision which sets forth specific safety standards' ... . To establish liability under Labor Law § 241(6), a plaintiff or a claimant must demonstrate that his injuries were proximately caused by a violation of an Industrial Code provision that is applicable under the circumstances of the case ... . Contributory and comparative negligence are valid defenses to a Labor Law § 241(6) claim ...". ***Aragona v. State of New York*, 2017 N.Y. Slip Op. 00954, 2nd Dept 2-8-17**

### LABOR LAW-CONSTRUCTION LAW, WORKERS' COMPENSATION LAW, CONTRACT LAW.

PLAINTIFF ENTITLED TO SUMMARY JUDGMENT ON HIS LABOR LAW 240 (1) CLAIM; QUESTION OF FACT WHETHER INDEMNIFICATION AGREEMENT WAS INTENDED TO BE EFFECTIVE RETROACTIVELY.

The Second Department, reversing Supreme Court, determined plaintiff was entitled to summary judgment on his Labor Law 240 (1) cause of action. Plaintiff, who was not wearing a harness, had fallen through a skylight. The anchor points for harnesses had not yet been installed. The employer's motion for summary judgment dismissing the property owner's third-party complaint seeking indemnification was, however, properly denied. The Workers' Compensation Law allows suit only when the injury is grave (not so here) or where there is a written indemnification agreement. Here there was an indemnification agreement entered after the accident. There was a question of fact whether the agreement was intended to be effective retroactively: "Here, the plaintiff established his prima facie entitlement to judgment as a matter of law by submitting evidence that he was not provided with necessary protection from the gravity-related risk of his work and that the absence of the necessary protection was a proximate cause of his injuries ... . ... An employer may be held liable for contribution or indemnification only when its employee has sustained a grave injury as defined by the Workers' Compensation Law or when there is a 'written contract entered into prior to the accident or occurrence by which the employer had expressly agreed to contribution or indemnification of the claimant' ... . The Workers' Compensation Law does not bar indemnification or contribution pursuant to a written agreement that was entered into after the employee's injury and which the parties agree will have retroactive effect ... . '[I]ndemnity contracts are to be strictly construed to avoid reading into them duties which the parties did not intend to be assumed' ... . Therefore, an indemnity contract will not be held to have retroactive effect 'unless by its express words or necessary implication it clearly appears to be the parties' intention to include past obligations' ...". ***Cacanoski v. 35 Cedar Place Assoc., LLC*, 2017 N.Y. Slip Op. 00956, 2nd Dept 2-8-17**

## THIRD DEPARTMENT

### DISCIPLINARY HEARINGS (INMATES).

DENIAL OF INMATE'S REQUEST FOR WITNESS TESTIMONY AND INCOMPLETE INVESTIGATION BY EMPLOYEE ASSISTANT REQUIRED ANNULMENT AND EXPUNGEMENT.

The Third Department determined errors made by the hearing officer and employee assistant deprived the inmate of his constitutional right to meaningful employee assistance. The determination was annulled and expunged: "Petitioner contends, among other things, that the Hearing Officer improperly denied his request to have an inmate who was involved in the initial fight testify at the hearing. The Hearing Officer denied this inmate's testimony as irrelevant, noting that '[a]t the time of [the] incident [,] this inmate was in the process of being restrained by security staff and was face down on the floor.' However, as respondent concedes, there is no proof in the record to substantiate the Hearing Officer's conclusion. The fight occurred in the area where petitioner allegedly assaulted staff and the requested witness may have made observations helpful to petitioner's defense. Consequently, the Hearing Officer's denial of this witness based upon his own speculation as to the content of the witness's testimony was error ... . ... [I]t appears from the record that the assistant interviewed only six of the 30 inmates housed in petitioner's cell block, five of whom refused to testify and one who provided a vague written statement. It is unclear from the record what attempts, if any, petitioner's assistant made to interview the other inmates housed in his cell block who were present during the incident. In view of this, and given that the observations of such inmates could have potentially supported petitioner's defense, petitioner was prejudiced by his assistant's failure to interview them and by the Hearing Officer's failure to remedy this deficiency ...". ***Matter of Nance v. Annucci*, 2017 N.Y. Slip Op. 01044, 3rd Dept 2-9-17**

### WORKER'S COMPENSATION LAW.

EMPLOYER ENTITLED TO FULL REIMBURSEMENT OF WAGES PAID TO CLAIMANT SINCE THE ACCIDENT, DESPITE THE FACT THAT CLAIMANT WAS NOT PAID COMPENSATION BENEFITS FOR THE ENTIRE TIME SINCE THE ACCIDENT.

The Third Department determined that an employer who paid the claimant during the disability period was entitled to reimbursement from the award for the entire time beginning when the accident occurred, despite the fact that claimant was not awarded compensation for that entire period: "Claimant does not dispute that the employer paid him wages for the period of his disability prior to the schedule award and that the employer filed a timely claim for reimbursement with the Board as required by Workers' Compensation Law § 25 (4) (a) … . Claimant challenges the Board's reimbursement directive

upon the ground that the reimbursement here covers a period of time when there were no awards of compensation made, arguing that, as a result, the employer is not entitled to reimbursement of wages paid to claimant during those periods of time and that the amount of reimbursement should be reduced. However, under settled law, where, as here, a claimant ultimately receives a schedule loss of use award, 'an employer has the right to reimbursement for the full amount of wages paid during a claimant's period of disability from the claimant's schedule award of worker[s'] compensation benefits' ... . * * * Inasmuch as claimant received a schedule award compensating him for the partial loss of use of his right foot, the Board was correct in finding that the employer was entitled to full reimbursement out of that award for all of its advanced payment of wages to claimant during that time (see Workers' Compensation Law § 25 [4] [a]). The fact that a temporary disability award was denied during part of that period based upon missing medical evidence in the Board's record is not relevant to the employer's entitlement to reimbursement." ***Matter of Newbill v. Town of Hempstead*, 2017 N.Y. Slip Op. 01049, 3rd Dept 2-9-17**

### WORKER'S COMPENSATION LAW.

THE DIFFERENT PURPOSES OF THE TERMS "LOSS OF WAGE-EARNING CAPACITY" AND "WAGE-EARNING CAPACITY" EXPLAINED.

The Third Department explained the different purposes for the terms "loss of wage-earning capacity" and "wage-earning capacity:" "The employer argues that claimant's compensation must be calculated based upon his wage-earning capacity pursuant to Workers' Compensation Law § 15 (5-a) and that, because he was working at full wages, his wage-earning capacity was 100% at the time of classification and that the finding of a 25% loss of wage-earning capacity was accordingly unlawful. The term 'loss of wage-earning capacity' was added in 2007 as part of the reform of the Workers' Compensation Law ..., and 'is used at the time of classification to set the maximum number of weeks over which a claimant with a permanent partial disability is entitled to receive benefits' ... . In contrast, wage-earning capacity is used to determine a claimant's weekly rate of compensation ... . As this Court recently explained in detail, 'the legislative history makes clear that 'wage-earning capacity' and 'loss of wage-earning capacity' are to be used for separate and distinct purposes' ... . Indeed, '[u]nlike wage-earning capacity, which can fluctuate based on the claimant's employment status, loss of wage-earning capacity was intended to remain fixed' ... . In light of the separate and distinct purposes for the calculation of a loss of wage-earning capacity and the wage-earning capacity, the Board was free to establish the duration of claimant's benefits by classifying him with a 25% loss of wage-earning capacity in order to set a fixed durational limit on potential benefits." ***Matter of Barrett v. New York City Dept. of Transp.*, 2017 N.Y. Slip Op. 01037, 3rd Dept 2-9-17**

### WORKER'S COMPENSATION LAW, ATTORNEYS.

ATTORNEY'S FEE PROPERLY REDUCED TO $450, FEE APPLICATION NOT PROPERLY FILLED OUT.

The Third Department determined the Worker's Compensation Board properly reduced attorney's fees because the fee application form was not properly competed: "... [C]laimant's counsel contends that the Board erred in reducing the WCLJ's award of counsel fees based upon counsel's failure to complete the OC-400.1 fee application form with respect to dates or time spent on the services rendered. Where counsel requests a fee in excess of $450, the Board's rules and regulations provide that an attorney must file a written application for such fee using form OC-400.1 and that form must be 'accurately completed' (12 NYCRR 300.17 [d] [1]). The form specifically instructs an attorney to, among other things, include the dates that the services were rendered and the time spent [FN3]. Such information, which is also required to be provided to a claimant, is relevant to the Board's evaluation of the services rendered (see 12 NYCRR 300.17 [e], [f], [g]). 'The Board may approve counsel fees 'in an amount commensurate with the services rendered' ... , and its award will not be disturbed absent a showing that it is arbitrary and capricious or an abuse of discretion ... . Here, counsel listed the services rendered, but inserted '35 hours' for the time spent on the services and did not indicate any dates upon which the services were performed or the amount of time spent on each service rendered. Under these circumstances, we do not find that the Board abused its discretion or acted in an arbitrary and capricious manner in finding the OC-400.1 fee application form defective and reducing the counsel fees to the maximum $450 fee permitted in the absence of the accurate completion of such application form ...". ***Matter of Curcio v. Sherwood 370 Mgt. LLC*, 2017 N.Y. Slip Op. 01047, 3rd Dept 2-9-17**

## FOURTH DEPARTMENT

### ATTORNEYS.

PLENARY ACTION ALLEGING ATTORNEY MISCONDUCT DURING A FORECLOSURE PROCEEDING PROPERLY BROUGHT UNDER JUDICIARY LAW 487; PRIOR MOTIONS FOR SANCTIONS DID NOT PRECLUDE JUDICIARY LAW 487 ACTION.

The Fourth Department, reversing Supreme Court, determined plaintiff could bring a plenary action against their attorneys pursuant to Judiciary Law 487. The further determined the fact that plaintiff's had previously asked for sanctions against the attorneys did not collaterally estop them from bringing the Judiciary Law action: "Plaintiffs commenced this Judiciary

Law § 487 action against defendant based on her conduct when representing plaintiffs' adversary in a foreclosure action. We agree with plaintiffs that Supreme Court erred in granting defendant's motion to dismiss the complaint. Although plaintiffs were aware of the alleged misconduct during the pendency of the prior foreclosure action, they are not precluded from bringing a plenary action alleging a violation of Judiciary Law § 487 provided that they are not collaterally attacking the judgment from the prior action ... . Indeed, the language of the statute does not require the claim to be brought in a pending action ... . Here, plaintiffs are seeking to recover damages for additional legal fees made necessary by defendant's alleged misconduct in the foreclosure action, and they are not collaterally attacking the judgment of foreclosure ... . ... A motion for sanctions for frivolous conduct (see 22 NYCRR 130-1.1 [c]) is not the same as a cause of action for attorney misconduct ... . We therefore conclude that collateral estoppel does not apply, inasmuch as the identical issue was not raised in the foreclosure action ...". ***Kimbrook Rte. 31, L.L.C. v. Bass*, 2017 N.Y. Slip Op. 01083, 4th Dept 2-10-17**

## CONTRACT LAW, FRAUD.

DISCLAIMER IN SUBCONTRACT IS AMBIGUOUS, MOTION TO DISMISS FRAUD COUNTERCLAIM BASED UPON THE DISCLAIMER SHOULD NOT HAVE BEEN GRANTED.

The Fourth Department, reversing Supreme Court, determined there was a question of fact whether a disclaimer in a subcontract precluded the fraud counterclaim. The court further determined the fraud counterclaim was not duplicative of the breach of contract counterclaim and the fraud counterclaim was pled with sufficient specificity. Plaintiff, Pike, did concrete and steel construction work. Defendant subcontractor, Jersen, was hired to do masonry work: "The fraud counterclaim is the sole focus of this appeal. In that counterclaim, Jersen alleged that, before it began work on the project, Pike was informed by at least one of its other subcontractors that its substrate work was not 'accurate, flat or level,' i.e., was deficient. Nevertheless, Pike represented to Jersen that the substrate work 'had been erected in accordance with the contract requirements and was plumb, level, and true and that [Pike] had performed a professional survey of the structural steel to confirm the same.' Jersen alleged that Pike's representations to Jersen 'were false,' and that Pike 'concealed and recklessly withheld from Jersen knowledge that the substrate was not dimensionally accurate, flat or level.' Additionally, Jersen alleged that Pike made those false representations 'in order to deceive Jersen and induce Jersen to commence installation upon the substrate.' Jersen further alleged that it relied on Pike's representations and would not have commenced installation of the masonry work had Pike not misrepresented to Jersen that the substrate had been installed in accordance with the contract requirements. According to Jersen, it suffered damages as a result of its reliance on Pike's false representations. * * * We conclude that the subcontract is ambiguous whether the disclaimer clause in section 1.8 precludes Jersen from relying on any opinions or representations concerning work performed by others after Jersen executed the subcontract, and thus that section 1.8 does not 'conclusively establish[ ] a defense' to the counterclaim for fraud ...". ***Pike Co., Inc. v. Jersen Constr. Group, LLC*, 2017 N.Y. Slip Op. 01116, 4th Dept 2-10-17**

## CRIMINAL LAW.

INSUFFICIENT PROOF GUNSHOT CAUSED SERIOUS PHYSICAL INJURY, ASSAULT FIRST CONVICTION REDUCED TO ASSAULT SECOND.

The Fourth Department reduced defendant's conviction from assault first to assault second based upon insufficient proof of serious physical injury. The victim was shot in the leg: "Although the victim displayed to the jury scars on his leg caused by his gunshot wounds, 'the record does not contain any pictures or descriptions of what the jury saw so as to prove that these scars constitute serious or protracted disfigurement' ... . Furthermore, although the victim testified that he 'feel[s] pain in [his] leg' in cold weather, we conclude that such testimony does not constitute evidence of persistent pain so severe as to cause 'protracted impairment of health' ...". ***People v. Romero*, 2017 N.Y. Slip Op. 01069, 4th Dept 2-10-17**

## CRIMINAL LAW.

DEFENDANT SHOULD HAVE BEEN ALLOWED TO TESTIFY BEFORE THE GRAND JURY EVEN THOUGH THE REQUEST WAS MADE AFTER THE GRAND JURY HAD VOTED TO INDICT.

The Fourth Department, reversing County Court, determined defendant was entitled to testify before the grand jury, even though his request was received by the district attorney after deadlines had passed and after the grand jury had voted to indictment (but before filing of the indictment): "As the Court of Appeals has noted, a defendant has a right 'under CPL 190.50 (5) (a) to provide notice and, therefore, the concomitant right to give testimony even perhaps after an indictment has been voted but before it is filed' ... . Where, as here, defendant's request to testify is received after the grand jury has voted, but before the filing of the indictment, defendant is entitled to a reopening of the proceeding to enable the grand jury to hear defendant's testimony and to revote the case, if the grand jury be so advised ...". ***People v. White*, 2017 N.Y. Slip Op. 01070, 4th Dept 2-10-17**

## CRIMINAL LAW.

PLACE OF BUSINESS EXCEPTION TO CRIMINAL POSSESSION OF A WEAPON DID NOT APPLY WHERE DEFENDANT'S EMPLOYER PROHIBITED POSSESSION OF FIREARMS IN THE WORKPLACE.

The Fourth Department, over a dissent, determined defendant was not entitled to the exception to the criminal possession of a weapon statute for possession in a person's "place of business" (reducing the offense to a misdemeanor). Here defendant brought a firearm to work at McDonald's and shot himself in the leg. The court reasoned the "place of business" exception did not apply because McDonald's prohibited its employees from carrying firearms: "Although the 'place of business' exception is not statutorily defined, it has been 'construed narrowly by the courts in an effort to balance the State's strong policy to severely restrict possession of any firearm' . . . with its policy to treat with leniency persons attempting to protect certain areas in which they have a possessory interest and to which members of the public have limited access' ... . Inasmuch as the evidence at trial established that defendant was prohibited from bringing a gun to work, we conclude that to permit defendant to be subjected only to a misdemeanor 'would certainly controvert the meaning and intent of the statute' ...". ***People v. Wallace*, 2017 N.Y. Slip Op. 01071, 4th Dept 2-10-17**

## CRIMINAL LAW.

LATE REQUEST TO EXERCISE A PEREMPTORY CHALLENGE TO A JUROR SHOULD NOT HAVE BEEN DENIED, CONVICTION REVERSED.

The Fourth Department, reversing defendant's conviction, determined defense counsel's late request to exercise a peremptory challenge to a juror should not have been denied: "Here, defense counsel momentarily lost count of the number of jurors who had been selected. As a result, defense counsel declined to exercise a peremptory challenge to prospective juror 21. When informed that prospective juror 21 was the 12th juror seated, defense counsel immediately asked the court to allow defendant to exercise his last peremptory challenge to that juror. The jury had not yet been sworn, the panel from which the alternates would be selected had not yet been called, and prospective juror 21 had not yet been informed that he had been selected. Furthermore, the People expressly declined to object to the request. Under the circumstances of this case, we conclude that the court abused its discretion in denying defendant's request. Indeed, 'we can detect no discernable interference or undue delay caused by [defense counsel's] momentary oversight . . . that would justify [the court's] hasty refusal to entertain [the] challenge' ... . Such an error cannot be deemed harmless ...". ***People v. Scerbo*, 2017 N.Y. Slip Op. 01073, 4th Dept 2-10-17**

## CRIMINAL LAW.

NO PRETRIAL NOTICE OF IDENTIFICATION TESTIMONY BY A POLICE OFFICER, CONVICTION REVERSED.

The Fourth Department, reversing defendant's conviction, determined the identification testimony of a police officer should not have been admitted because pretrial notice of the identification had not been provided to the defendant: "We agree with defendant … that the court erred in permitting the officer to identify defendant as the person in the left rear seat of the vehicle in the absence of a notice pursuant to CPL 710.30 (1) (b). We therefore reverse the judgment and grant that part of the omnibus motion seeking preclusion of that testimony on the ground that the People failed to serve a notice pursuant to CPL 710.30 (1) (b). The prosecutor advised the court and defense counsel after jury selection that the officer would identify defendant as the left rear passenger. Defendant objected and the court conducted a hearing, over defendant's objection, and determined that the officer's identification of defendant by means of a single photo approximately two hours after the incident was merely confirmatory and thus that no notice was required pursuant to CPL 710.30 (1) (b). The exception to the requirement to provide notice pursuant to CPL 710.30 'carries significant consequences' ... , and the Court of Appeals has 'consistently held that police identifications do not enjoy any exemption from the statutory notice and hearing requirements' …". ***People v. Clay*, 2017 N.Y. Slip Op. 01074, 4th Dept 2-10-17**

## CRIMINAL LAW.

JUDGE DID NOT PUT ON THE RECORD THE REASONS FOR DENIAL OF YOUTHFUL OFFENDER STATUS, CASE REMITTED.

The Fourth Department remitted the case to Supreme Court because the reasons for denial of youthful offender status were not put on the record: "Where, as here, 'a defendant has been convicted of an armed felony or an enumerated sex offense pursuant to CPL 720.10 (2) (a) (ii) or (iii), and the only barrier to his or her youthful offender eligibility is that conviction, the court is required to determine on the record whether the defendant is an eligible youth by considering the presence or absence of the factors set forth in CPL 720.10 (3). The court must make such a determination on the record even where [the] defendant has failed to ask to be treated as a youthful offender, or has purported to waive his or her right to make such a request' pursuant to a plea bargain . . . If the court determines, in its discretion, that neither of the CPL 720.10 (3) factors exist and states the reasons for that determination on the record, no further determination by the court is required. If, however, the court determines that one or more of the CPL 720.10 (3) factors are present, and the defendant is therefore an eligible youth, the court then must determine whether or not the eligible youth is a youthful offender' ...". ***People v. Dukes*, 2017 N.Y. Slip Op. 01105, 4th Dept 2-10-17**

## CRIMINAL LAW.

CROSSING THE CENTER LINE AND TRAVELING IN THE ONCOMING LANE PROVIDED PROBABLE CAUSE FOR THE VEHICLE STOP, GRANT OF MOTION TO SUPPRESS REVERSED.

The Fourth Department, reversing County Court, determined there was probable cause for the stop in this DWI case. Defendant was observed the deputy driving in the oncoming traffic lane for two tenths of a mile: "We agree with the People that the stop was based on probable cause and thus that County Court erred in granting that part of defendant's motion seeking suppression. The arresting deputy testified at the Dunaway hearing that he personally observed defendant's vehicle cross the center line and proceed into the lane for oncoming traffic. The vehicle remained in that lane for approximately two-tenths of a mile, in violation of Vehicle and Traffic Law § 1120 (a). Thus, the deputy, having personally observed the violation, had probable cause to stop the vehicle ... . Once the deputy effectuated the stop, he noticed that defendant's eyes were watery and bloodshot, and he smelled the strong odor of alcohol on her breath. He conducted a series of field sobriety tests, all of which defendant failed. Thus, the deputy had probable cause to arrest defendant for driving while intoxicated …". ***People v. Lewis*, 2017 N.Y. Slip Op. 01059, 4th Dept 2-10-17**

## CRIMINAL LAW, APPEALS.

AFTER APPEAL AND REMITTAL, DEFENDANT WAS ENTITLED TO PUT ON A DEFENSE AFTER THE MOTION FOR A TRIAL ORDER OF DISMISSAL WAS DENIED, PRIOR TO THE APPEAL THE VERDICT HAD BEEN PREMATURELY ANNOUNCED WITHOUT ANY RULING ON THE TRIAL ORDER OF DISMISSAL MOTION.

The Fourth Department determined defendant was entitled to the opportunity to present a defense after the motion for a trial order of dismissal was denied: "When the appeal was previously before us, we held the case, reserved decision, and remitted the matter to County Court for a ruling on the motion for a trial order of dismissal 'following such further proceedings as may be necessary' ... . Upon remittal, the court ... denied the motion ... . ... [T]he court did not afford defendant the opportunity to present a defense, notwithstanding that defendant had not rested and the proof was not closed. Contrary to the court's conclusion, the fact that we did not set aside its premature verdict [the motion for a trial order of dismissal had not been ruled on] when the appeal was previously before us did not preclude it from considering further proof or making new factual determinations ... . We therefore hold the case, reserve decision, and remit the matter to County Court to afford defendant the opportunity to present a defense." ***People v. White*, 2017 N.Y. Slip Op. 01058, 4th Dept 2-10-17**

## EMPLOYMENT LAW, (NYS) HUMAN RIGHTS LAW.

DEPARTMENT OF HUMAN RIGHTS' DETERMINATION WITHOUT A HEARING IN THIS DISABILITY DISCRIMINATION MATTER WAS NOT ARBITRARY OR CAPRICIOUS AND HAD A RATIONAL BASIS, SUPREME COURT SHOULD NOT HAVE ANNULLED THE DETERMINATION.

The Fourth Department, reversing Supreme Court, determined the New York State Department of Human Rights' (SDHR's) ruling, without a hearing, there was no probable cause to believe petitioner was discriminated or retaliated against because of her disability was not arbitrary or capricious and had a rational basis: " 'Where, as here, SDHR renders a determination of no probable cause without holding a hearing, the appropriate standard of review is whether the probable cause determination was arbitrary and capricious or lacked a rational basis' ... . We agree with respondent that the court erred in disturbing SDHR's determination based upon, inter alia, its failure to conduct a hearing. 'Courts give deference to SDHR due to its experience and expertise in evaluating allegations of discrimination' ... , and 'such deference extends to [SDHR's] decision whether to conduct a hearing' ... . SDHR has the discretion to determine the method to be used in investigating a claim, and 'a hearing is not required in all cases' ... . Inasmuch as 'the parties made extensive submissions to [SDHR], petitioner was given an opportunity to present [her] case, and the record shows that the submissions were in fact considered, the determination cannot be arbitrary and capricious merely because no hearing was held' ...". ***Matter of McDonald v. New York State Div. of Human Rights*, 2017 N.Y. Slip Op. 01060, 4th Dept 2-10-17**

## EMPLOYMENT LAW, LABOR LAW.

GLAZIERS ENROLLED IN AN APPRENTICE PROGRAM SHOULD BE PAID AS APPRENTICES EVEN IF THE WORK FOR WHICH THEY ARE PAID IS NOT IN THE SAME TRADE AS THE APPRENTICESHIP PROGRAM.

The Fourth Department, over a dissent, determined the Department of Labor's interpretation of a statute was wrong and reversed. The case concerned whether glaziers enrolled in an apprentice program should be paid as apprentices even if the work for which they are paid is not in the same trade or occupation as the apprenticeship program: "In reviewing Labor Law § 220 as a whole, we conclude that nothing in that statute establishes any basis for a different interpretation of section 220 (3-e). Rather, we note that the very limitation defendants seek to impose on section 220 (3-e), i.e., a limitation to work in the same trade or occupation, was added to other subdivisions of Labor Law § 220 (see § 220 [3] [a], [b]). When 'the Legislature uses unlike terms in different parts of a statute it is reasonable to infer that a dissimilar meaning is intended' ... . The fact that the Legislature did not add similar restrictive language to section 220 (3-e) further supports our conclusion that no such

restriction was intended, and this Court will not 'amend [the] statute by inserting words that are not there' ... . Inasmuch as 'the language of [the] statute is clear and unambiguous, [we] must give effect to its plain meaning' ... , and we may not 'resort to extrinsic material such as legislative history or memoranda' ... . We thus conclude that Labor Law § 220 (3-e), by its terms, permits glazier apprentices who are registered, individually, under a bona fide glazier apprenticeship program to work and be paid as apprentices even if the work they are performing is not work in the same trade or occupation as their apprenticeship program." ***International Union of Painters & Allied Trades v. New York State Dept. of Labor*, 2017 N.Y. Slip Op. 01112. 4th Dept 2-10-17**

## INSURANCE LAW, CONTRACT LAW.

UNAMBIGUOUS TERM OF INSURANCE CONTRACT CAPPING PAYMENT FOR WATER DAMAGE SHOULD HAVE BEEN ENFORCED.

The Fourth Department, reversing Supreme Court, over a two-justice dissent, determined the terms of the insurance policy were not ambiguous and the $25,000 cap for water damage applied: "It is well-settled that insurance contracts are construed 'in light of common speech' and the reasonable expectations of a businessperson' ... . '[U]nambiguous provisions of an insurance contract must be given their plain and ordinary meaning' ... . We conclude that the contract language at issue here is not ambiguous. By its plain terms, the contract limits coverage to $25,000 for damage caused when ground water enters the basement through a gap, hole, or opening in the wall, and the conduit clearly falls within the water damage exclusion and endorsement ...". ***Papa v. Associated Indem. Corp.*, 2017 N.Y. Slip Op. 01118, 4th Dept 2-10-17**

## LABOR LAW-CONSTRUCTION LAW.

FALL FROM TRUCK BED 20 INCHES ABOVE THE GROUND NOT COVERED BY LABOR LAW 240(1).

The Fourth Department, reversing Supreme Court, determined plaintiff's fall from a truck bed was not the type of elevation risk covered by Labor Law 240 (1): "Plaintiffs commenced this Labor Law and common-law negligence action seeking damages for injuries sustained by Joseph T. Grabar (plaintiff) when the trailer on which plaintiff was standing tipped, and he fell. Plaintiff was on the bed of the trailer in order to place fuel in a welder that was located on the trailer, and it is undisputed that the trailer bed was approximately 20 inches from the ground. ... We conclude that the trailer 'did not present the kind of elevation-related risk that the statute contemplates' ...". ***Grabar v. Nichols, Long & Moore Constr. Corp.*, 2017 N.Y. Slip Op. 01068, 4th Dept 2-10-17**

## PERSONAL INJURY.

TRIPPING OVER EDGE OF A RUG NOT ACTIONABLE, NO SHOWING RUG DEFECTIVE OR DANGEROUS.

The Fourth Department, reversing Supreme Court, determined defendant's motion for summary judgment should have been granted in this slip and fall case. Although plaintiff's foot apparently "picked up" the corner of a rug, there was no showing the rug was defective or dangerous: "Although the rug may not have been designed to be placed over another rug or the recessed mat system, the video of the incident, which was submitted in opposition to the motion, shows that decedent tripped over the front edge of the rug. There is no indication that the rug slipped, and there is no record evidence that the rug constituted a defective or dangerous condition at the time of the fall. We conclude that 'the mere placement of the [rug] by the front door of the defendant's premises was not an inherently dangerous condition' ...". ***Slattery v. Tops Mkts., LLC*, 2017 N.Y. Slip Op. 01078, 4th Dept 2-10-17**

## PERSONAL INJURY.

NEGLIGENT BRAKING BY TRUCK DRIVER, IN RESPONSE TO A COLLISION WITH A THIRD PARTY, MAY HAVE BEEN A PROXIMATE CAUSE OF THE COLLISION BETWEEN THE TRUCK AND PLAINTIFFF.

The Fourth Department, reversing Supreme Court, determined plaintiff's expert had raised a question of fact about whether the actions of defendant truck driver (negligent application of the brakes) contributed to the accident: "... [A] tractor-trailer ... driven by Mark C. Shaw ... collided with a car driven by defendant Robin F. Lewis ... , after Lewis made a sudden left turn in front of the tractor-trailer. After that initial collision, the tractor-trailer jackknifed, collided with plaintiff's car, and ended up in a ditch on the opposite side of the road, on top of plaintiff's car. We agree with plaintiff that Supreme Court erred in granting defendants' motion insofar as it sought summary judgment dismissing the complaint against them on the ground that Lewis's conduct was the sole proximate cause of the collision. Even assuming, arguendo, that defendants met their initial burden of establishing their entitlement to judgment as a matter of law, we conclude that plaintiff raised triable issues of fact by submitting the affidavit of an expert forensic examiner ... . Plaintiff's expert opined within a reasonable degree of professional certainty that Shaw's conduct was a proximate cause of the collision with plaintiff's vehicle because he inappropriately and negligently applied the brakes, which caused the tractor-trailer to jackknife after the initial impact with Lewis's vehicle. The expert's opinion was not based on speculation, but was supported by voluminous deposition testimony, police reports, and the New York State Commercial Driver's Manual ...". ***Pacino v. Lewis*, 2017 N.Y. Slip Op. 01099, 4th Dept 2-10-17**