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CasePrepPlus

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COURT OF APPEALS

CRIMINAL LAW.

DEFENDANT DID NOT CONSENT TO THE ENTRY AND SEARCH OF HIS HOME, MOTION TO SUPPRESS SHOULD HAVE BEEN GRANTED.

The Court of Appeals, reversing the Appellate Division, determined the evidence did not support the conclusion that defendant consented to the entry and search of his home. The motion to suppress, therefore, should have been granted. The decision does not discuss the facts and indicates the reasoning of the Appellate Division dissent was followed. ***People v. Freeman*, 2017 N.Y. Slip Op. 02090, CtApp 3-23-17**

CRIMINAL LAW, ATTORNEYS, APPEALS.

WHETHER DEFENDANT MADE AN UNEQUIVOCAL REQUEST FOR COUNSEL IS A MIXED QUESTION OF LAW AND FACT WHICH CANNOT BE HEARD BY THE COURT OF APPEALS.

The Court of Appeals determined the issue whether defendant made an unequivocal request for counsel presented a mixed question of law and fact which cannot be heard by the Court of Appeals. ***People v. Slocum*, 2017 N.Y. Slip Op. 02089, CtApp 3-23-17**

FIRST DEPARTMENT

CRIMINAL LAW.

FIRST DEPARTMENT REDUCED DEFENDANT'S SORA RISK LEVEL FROM THREE TO TWO, BASED PRIMARILY UPON DEFENDANT'S USE OF EDUCATIONAL AND REHABILITATIVE RESOURCES WHILE IN PRISON.

The First Department took the unusual step of reducing defendant's SORA risk level from three to two. Defendant committed a heinous rape 30 years ago when he was using drugs and alcohol. While in prison defendant earned two bachelor degrees and completed many therapeutic programs: "The Court of Appeals has enunciated a three-step process for determining whether to depart downward from a defendant's presumptive risk level ... . First, a court must decide whether the proffered mitigating circumstance or circumstances are 'of a kind, or to a degree, not adequately taken into account by the guidelines. ... '. Second, a court must determine whether the defendant seeking a downward departure has proven the existence of these alleged mitigating circumstances by a preponderance of the evidence ... . If the defendant surmounts these first two steps, a court must then exercise its discretion and determine at the final third step, 'whether the totality of the circumstances warrants a departure' .... . Here, we find that, under this three-step analysis, a departure to level two is warranted. Initially, we note that defendant has met his burden of proving the existence of mitigating circumstances unaccounted for in the Guidelines by a preponderance of the evidence. Defendant's remarkable rehabilitation and his pain and mobility problems constitute, in this case, the sort of 'special circumstances' for which a downward departure is appropriate ... . Moreover, defendant supported his application with a number of exhibits, including his degrees, his medical records, and his letters of recommendation." ***People v. Williams*, 2017 N.Y. Slip Op. 01988, 1st Dept 3-21-17**

EMPLOYMENT LAW, PERSONAL INJURY, LONGSHORE AND HARBOR WORKERS' COMPENSATION ACT.

QUESTIONS OF FACT WHETHER VESSEL OWNER LIABLE IN NEGLIGENCE UNDER LONGSHORE AND HARBOR WORKERS' COMPENSATION ACT, PLAINTIFF INJURED JUMPING DOWN FROM THE DOCK TO THE VESSEL DECK.

The First Department, reversing Supreme Court, in a full-fledged opinion by Justice Acosta, over a full-fledged dissenting opinion, determined summary judgment should not have been granted to defendant vessel owners. Plaintiff was injured when he boarded the vessel by jumping from the dock down to the deck of the vessel. Plaintiff, who was a deemed worker on the vessel, was covered by the Longshore and Harbor Workers' Compensation Act (LHWCA): "In *Scindia* [*Steam Nav. Co. v. De los Santos*] (451 US 156 [1981]), the Supreme Court addressed the duty of care owed by a shipowner to a longshoreman injured in the course of stevedoring operations aboard a ship. The Court held that the ship's liability for due care under the

circumstances is limited to turning over the vessel in a reasonably safe condition (the turnover duty); conducting reasonably safely operations regarding the vessel and stevedoring operations in which it actively involves itself (the active control duty); and intervening in areas under the stevedore employer's control only if the vessel has actual knowledge of an unsafe condition that the stevedore is not exercising reasonable care to protect against (duty to intervene) ... . * * * '[T]he turnover duty, at a minimum, requires a vessel to provide a safe means of access' ... . * * * The second of the turnover duties — or corollary to the turnover duty — is a duty to warn of latent hazards on the ship or with respect to its equipment that are known, or with the exercise of reasonable care should be known, to the vessel owner and are likely to be encountered by, but not obvious to or anticipated by, the stevedore in the reasonably competent performance of his work ... . * * * There are also issues of fact as to whether defendant violated its duty to intervene. The duty to intervene requires the vessel owner to intervene in areas under the principal control of the stevedore if the owner has actual knowledge that a condition of the vessel or its equipment poses a risk of harm and the stevedore or other contractor is not exercising reasonable care to protect its employees from that risk ...". ***Schnapp v. Miller's Launch, Inc.*, 2017 N.Y. Slip Op. 02172, 1st Dept 3-23-17**

LABOR LAW-CONSTRUCTION LAW, EVIDENCE, PERSONAL INJURY.

PLAINTIFF'S INABILITY TO PINPOINT THE CAUSE OF HIS FALL FROM A LADDER DID NOT WARRANT SUMMARY JUDGMENT, THERE WAS CIRCUMSTANTIAL EVIDENCE OF THE CAUSE.

The First Department determined plaintiff's inability to state exactly how the accident happened did not warrant summary judgment. Circumstantial evidence established that the bottom of plaintiff's ladder slid out from under him: " 'A plaintiff's inability to testify exactly as to how an accident occurred does not require dismissal where negligence and causation can be established with circumstantial evidence' ... . Plaintiff established his entitlement to partial summary judgment on the Labor Law § 240(1) claim, despite his admitted inability to remember the specifics of the accident, through the submission of a workers' compensation report and the statement of defendant ... , both of which established that the accident occurred when the bottom of the ladder from which plaintiff was descending suddenly slipped out from under him, causing him to fall to the ground ...". ***Weicht v. City of New York*, 2017 N.Y. Slip Op. 01995, 1st Dept 3-21-17**

PERSONAL INJURY.

EVEN THOUGH THERE WAS A STORM IN PROGRESS, QUESTION OF FACT RAISED WHETHER SNOW REMOVAL EFFORTS CREATED OR EXACERBATED THE DANGEROUS ICY CONDITION.

The First Department determined defendants' summary judgment motion in this slip and fall case was properly denied. Although there was a snow storm in progress at the time of the fall, there was evidence plaintiff slipped on a sheet of ice which, because the temperature was well below freezing, could not have formed during the storm: "Here, as plaintiffs concede, there was a storm in progress at the time of the accident. Thus, the burden shifted to plaintiffs to demonstrate the existence of a triable issue of fact as to whether Sterling created or exacerbated the hazardous condition through its snow removal activities. Plaintiffs have met that burden, as they have both testified that they saw an ice patch at the scene of the accident. * * * This evidence supports plaintiffs' argument that ice could not have formed after the snowclearing efforts by [defendant's] employees. Accordingly, an issue of fact was raised as to whether [defendant's] actions created or exacerbated a hazardous condition by employing a snowblower to remove snow without taking further steps to de-ice the sidewalk ..." ***Baumann v. Dawn Liquors, Inc.*, 2017 N.Y. Slip Op. 01986, 1st Dept 3-21-17**

PERSONAL INJURY.

DEFENDANT DID NOT DEMONSTRATE A LACK OF ACTUAL OR CONSTRUCTIVE NOTICE OF A HOLE WHICH CAUSED PLAINTIFF TO FALL, SUMMARY JUDGMENT PROPERLY DENIED.

The First Department determined the defendant owner (In Line) and restaurant manager (Spanburgh) did not demonstrate entitlement to summary judgment in this slip and fall case. Plaintiff, a restaurant patron, was injured when he stepped in a hole in the front lawn of the property while playing a game (apparently sanctioned by the restaurant): "Defendants failed to establish that In Line did not create the hole in its front lawn by submitting Spanburgh's deposition testimony and affidavit, because Spanburgh did not state that the lawn was inspected after it was last maintained by the outside company In Line had hired to mow the grass. They also failed to satisfy their initial burden to show that In Line lacked actual notice of the hole in its lawn, because they submitted no evidence that its employees and the outside company had received no complaints about the defect prior to the incident and that there were no similar accidents at the subject location ... . The fact that Spanburgh testified and averred that he did not receive any complaints about the condition of the lawn does not establish that In Line lacked actual notice, because he did not state that he was working when the accident happened. Defendants also failed to satisfy their initial burden to show that In Line lacked constructive notice of the hole in its lawn, because Spanburgh's testimony and averment that he would inspect the entire premises every time the restaurant was open is insufficient to establish when the lawn was last checked before the accident ...". ***Clarkin v. In Line Rest. Corp.*, 2017 N.Y. Slip Op. 02004, 1st Dept 3-21-17**

PERSONAL INJURY, MUNICIPAL LAW (NYC).

NEW YORK CITY HOUSING AUTHORITY NOT ENTITLED TO PRESUMPTION BUILDING CONSTRUCTED IN 1974 DID NOT HAVE LEAD PAINT, SUMMARY JUDGMENT PROPERLY DENIED.

The First Department determined the New York City Housing Authority's (NYCHA's) motion for summary judgment in this lead-paint poisoning case was properly denied. The NYCHA argued that the building was constructed in 1974 and lead paint was banned in 1960: "Although NYCHA relies on its own testing that was negative for lead paint, DOH's [Department of Health's] lead testing came back positive. NYCHA's arguments that these were false positives due to the manner in which, and location from where, the samples were taken is insufficient to disregard them as a matter of law. * * * Nor did NYCHA prove as a matter of law, that it had no actual or constructive notice of the existence of lead paint in the building. Pursuant to the City's Childhood Lead Poisoning Prevention Act (Local Law 1 of 2004), lead-based paint is presumed to exist in a multiple dwelling unit if the building was built before 1960. Where, as here, the building is built between 1960 and 1978, the presumption will apply only if the owner knows that there is lead-based paint, and a child under the age of six lives in the apartment. Although in a pre-1960 building, paint is presumed to contain lead, the opposite is not true; there is no presumption that paint in a building constructed after 1960 is not lead-based. Given plaintiff's claim, that NYCHA maintains the premises and assumed the duty to have the apartments painted, the absence of any evidence concerning the history of painting in the subject apartments is insufficient for the court to rule out, as a matter of law, notice." ***Dakota Jade T. v. New York City Hous. Auth.*, 2017 N.Y. Slip Op. 01987, 1st Dept 3-21-17**

SECOND DEPARTMENT

CIVIL PROCEDURE.

FOUR-MONTH ARTICLE 78 STATUTE OF LIMITATIONS STARTS WHEN THE PETITIONER'S ATTORNEY IS NOTIFIED OF THE CHALLENGED DETERMINATION, NOT WHEN PETITIONER IS NOTIFIED.

The Second Department determined the four-month statute of limitations for bringing an Article 78 action starts when petitioner's attorney is notified of the challenged determination, not when the petitioner is notified: "Contrary to the Supreme Court's determination, the four-month statute of limitations did not begin to run when the petitioner was personally served with a copy of the respondents' letter notifying him that his employment had been terminated. At that time, the respondents were on notice that the petitioner had retained counsel to represent him in connection with the disciplinary charges. '[B]asic procedural dictates and . . . fundamental policy considerations . . . require that once counsel has appeared in a matter a Statute of Limitations or time requirement cannot begin to run unless that counsel is served with the determination or the order or judgment sought to be reviewed' ... . Under the circumstances of this case, the respondents were required to serve a copy of the letter on the petitioner's counsel in order for the statute of limitations to commence running ...". ***Matter of Munroe v. Ponte*, 2017 N.Y. Slip Op. 02041, 2nd Dept 3-22-17**

CIVIL PROCEDURE, CONTRACT LAW.

GUARANTY WHICH DID NOT HAVE A FORUM SELECTION CLAUSE DEEMED TO BE SUBJECT TO THE CLAUSE IN A RELATED CONTRACT EXECUTED CLOSE IN TIME, SUMMARY JUDGMENT IN LIEU OF COMPLAINT SHOULD NOT HAVE BEEN GRANTED, OUTSIDE PROOF NECESSARY.

The Second Department determined the forum selection clause in the loan contract was enforceable and applied to the related guaranty (which did not include a similar clause). The Second Department further determined Supreme Court should not have granted plaintiff's motion for summary judgment in lieu of complaint because proof of the amount owed required proof in addition to the documents: "... '[D]ocuments executed at about the same time and covering the same subject matter are to be interpreted together, even if one does not incorporate the terms of the other by reference, and even if they are not executed on the same date, so long as they are substantially' contemporaneous' ... . Contrary to the defendant's contention, the agreement and guaranty were executed sufficiently close in time and relate to the same subject matter, such that they should be interpreted together to determine the parties' intent to be bound by the forum selection clause ... . * * * Although an unconditional guarantee may qualify as an instrument for the payment of money only ... , here, neither the guaranty nor the underlying agreement relied upon by the plaintiff in support of its motion contains an unconditional promise to pay a sum certain, signed by the maker and due on demand or at a definite future time ... . Since proof outside of the guaranty and underlying agreement is required to establish the amount of Platinum's obligation to the plaintiff pursuant to the agreement, the plaintiff's motion for summary judgment in lieu of complaint should have been denied, with the motion and answering papers deemed to be the complaint and answer, respectively ...". ***Oak Rock Fin., LLC v. Rodriguez*, 2017 N.Y. Slip Op. 02048, 2nd Dept 3-22-17**

CONTRACT LAW.

DEFENDANTS' FAILURE TO INSIST ON PROMISED MONTHLY MINIMUM PURCHASES OF DEFENDANTS' PRODUCTS CONSTITUTED A WAIVER OF THE CONTRACTUAL MINIMUM PURCHASE REQUIREMENTS, NOTWITHSTANDING A NO ORAL WAIVER CLAUSE.

The Second Department, in a full-fledged opinion by Justice Chambers, determined the failure of defendants to insist on the fulfillment of plaintiffs' promise to make monthly minimum purchases of defendants' product constituted a waiver of the minimum-purchases contract, notwithstanding the "no oral waiver" contractual provision: "... [W]e find that the Supreme Court properly concluded that ... the affirmative conduct of [defendants] over the previous weeks and months evinced an unmistakable intent to waive the remaining 2006 minimum purchase requirements, including the 2006 annual minimum purchase requirement ... . * * * ... [W]e agree with the Supreme Court that, under the facts presented, the agreements' no-oral-waiver provision ... does not compel a different result. As explained above, the [plaintiffs'] persistent and repeated failure to meet minimum purchase requirements, coupled with [defendants'] continued acceptance of such conduct without any reservation or protest until a few weeks before the expiration of the agreements (by which time it was, of course, too late to insist upon strict compliance with the terms of the agreements), equitably estops [defendants] from invoking the benefit of the no-oral-waiver provision ...". ***Kamco Supply Corp. v. On the Right Track, LLC*, 2017 N.Y. Slip Op., 02025, 2nd Dept 3-22-17**

CONTRACT LAW.

STATUTE OF FRAUDS (GENERAL OBLIGATIONS LAW) REQUIREMENTS FOR A CONTRACT TO NEGOTIATE A BUSINESS OPPORTUNITY NOT MET, PART PERFORMANCE NOT APPLICABLE.

The Second Department, reversing Supreme Court, determined summary judgment should not have been granted in favor of defendants' counterclaim for a finder's fee. General Obligations Law 5-701(a)(1) (Statute of Frauds) applies to contracts for services rendered in negotiating a business opportunity. In finding the writings did not satisfy the Statute of Frauds, the court explained the relevant criteria: "The memorandum necessary to satisfy the statute of frauds may be pieced together out of separate writings, connected with one another either expressly or by the internal evidence of subject matter and occasion ... . In the event that one of the writings is unsigned, it may be read together with the signed writings, provided that they clearly refer to the same subject matter or transaction ... . Here, the collective writings to which the defendants point, seeking to make out a written agreement sufficient to satisfy the statute of frauds ... , are insufficient since there is no writing establishing a contractual relationship between the parties which bears the signature of the plaintiff, who is the party to be charged ... . Additionally, part performance does not take the matter out of the statute of frauds. The exception to the statute of frauds for part performance has not been extended to General Obligations Law § 5-701...". ***Kelly v. P & G Ventures 1, LLC*, 2017 N.Y. Slip Op. 02026, 2nd Dept 3-22-17**

CRIMINAL LAW, ATTORNEYS, EVIDENCE.

PROSECUTOR'S SUMMATION AMOUNTED TO MISCONDUCT, 911 CALL SHOULD NOT HAVE BEEN ADMITTED AS PRESENT SENSE IMPRESSION OR AN EXCITED UTTERANCE, CROSS-EXAMINATION OF COMPLAINANT UNDULY RESTRICTED.

The Second Department, reversing defendant's conviction, determined the prosecutor's remarks in summation amounted to prosecutorial misconduct, a 911 call made by a non-testifying witness should not have been admitted as present sense impression or an excited utterance, and the cross-examination of the complainant was unduly restricted. With respect to the prosecutor's summation, the court wrote: "Here, during summation, the prosecutor repeatedly engaged in improper conduct. For instance, the prosecutor vouched for the credibility of the People's witnesses with regard to significant aspects of the People's case by asserting, inter alia, that 'the witnesses who came before you provided truthful testimony that makes sense,' that they gave the 'kind of truthful and credible testimony that you can rely on,' and that one witness had 'no reason . . . to be anything but truthful with the 911 operator' ... . In describing a complainant, the prosecutor asserted that he was 'exactly what you hoped to see from someone who had troubles with the law in their youth,' but had 'changed [his] life" and now worked at an organization that helps "low-income people [obtain] health care,' which was a clear attempt to appeal to the sympathy of the jury ... . To support the credibility of that same complainant, the prosecutor injected the integrity of the District Attorney's office into the trial to downplay the severity of a past criminal charge he faced ... . Further, the prosecutor denigrated the defense and undermined the defendant's right to confront witnesses by implying that the complainants were victims of an overly long cross-examination and that one was a 'saint' for answering so many questions ... . Moreover, the prosecutor improperly used the defendant's right to pretrial silence against him by arguing that he could not be a victim as he did not call 911 ... . The cumulative effect of these improper comments deprived the defendant of a fair trial ...". ***People v. Casiano*, 2017 N.Y. Slip Op. 02053, 2nd Dept 3-22-17**

EMPLOYMENT LAW, PERSONAL INJURY.

DRIVER AND CAR OWNER WERE NOT EMPLOYEES OF CAR SERVICE, CAR SERVICE THEREFORE NOT LIABLE FOR ACCIDENT UNDER DOCTRINE OF RESPONDEAT SUPERIOR.

The Second Department, reversing Supreme Court, determined defendants Tuapanta and Hanif (driver and owner of the car involved in an accident) were not employees of defendant car service, Church Ave. Therefore the car service was not liable to plaintiff passenger: "Here, Church Ave established, prima facie, that Tuapanta and Hanif were independent contractors, not its employees. The evidence submitted by Church Ave showed that it is a licensed livery base station in the business of dispatching for-hire vehicles. Specifically, Church Ave receives calls from customers seeking transportation services and then dispatches such calls to drivers of vehicles affiliated with it. Church Ave further demonstrated that it does not own the vehicles to which it dispatches calls and that it does not provide any services to drivers other than transmitting a customer's request for transportation services. Drivers are responsible for their own schedules, choosing when to turn on their two-way radios and deciding which dispatches to accept. Drivers are free to provide their services to other car services and they retain all of the monies paid by the customers. Drivers pay Church Ave $100 per week to use the service. Church Ave does not provide a salary to the drivers, nor does it provide them with any tax forms. Drivers are also responsible for maintaining their own insurance. There were no written agreements or meetings between the drivers and Church Ave, nor did Church Ave provide any manuals, policies, or procedures for the drivers outside of establishing prices. Under these circumstances, Church Ave established, prima facie, that it did not exercise sufficient control to give rise to liability under the doctrine of respondeat superior ...". ***Castro-Quesada v. Tuapanta*, 2017 N.Y. Slip Op. 02014, 2nd Dept 3-22-17**

LABOR LAW-CONSTRUCTION LAW.

QUESTION OF FACT WHETHER OBJECT THAT FELL WAS THE TYPE OF OBJECT WHICH SHOULD HAVE BEEN SECURED WITH A SAFETY DEVICE ENUMERATED IN THE LABOR LAW STATUTE.

The Second Department determined summary judgment should not have been granted to plaintiff on his Labor Law § 240(1) cause of action. Plaintiff fell off a scissors lift when what he alleged was a "beam" came down from above him. The object which came down was also described as a "duct." The Second Department found there was a question of fact whether the object which came down should have been secured by a safety device enumerated in the Labor Law statute: "The evidence submitted by the plaintiff was insufficient to establish that the beam in question fell due to the absence or inadequacy of an enumerated safety device. Specifically, there was a question of fact as to the nature of the 'beam' at issue. The plaintiff alternately described it as a flat or narrow 'metal slab supposedly made of Steel but it was mostly [copper],' or an iron or steel 'beam.' The plaintiff's supervisor described it as 'like old duct work, metal studs,' and a representative of [defendant] described it as a 'duct' or 'ductwork.' Although the plaintiff submitted the affidavit of an expert who opined that a contractor's lift should have been provided to hold 'the beam' as it was being cut, the expert, whose opinion was rendered after reviewing the relevant deposition transcripts, failed to identify a basis for concluding that the object at issue was a 'beam' or otherwise explain why a contractor's lift was required to hold the object at issue, and thereby establish that this was 'a situation where a hoisting or securing device of the kind enumerated in the statute would have been necessary or even expected' ...". ***Romero v. 2200 N. Steel, LLC*, 2017 N.Y. Slip Op. 02075, 2nd Dept 3-22-17**

LABOR LAW-CONSTRUCTION LAW, LANDLORD-TENANT.

TREE CUTTING NOT COVERED, PILE OF DEBRIS NOT A STRUCTURE, OUT OF POSSESSION LANDLORD NOT LIABLE UNDER LABOR LAW 200.

The Second Department, in the course of a decision addressing the exclusivity of a Workers' Compensation recovery and Labor Law §§ 240(1), 241(6) and 200 causes of action, noted that tree cutting was not covered under Labor Law § 240(1) and a pile of debris was not a structure within the meaning of §§ Labor Law 240(1) and 241(6). The court further noted that defendant (LLC), as an out of possession landlord, was not liable under Labor Law 200 for either the manner in which work is done or a dangerous condition: "The Supreme Court ... properly granted that branch of the respondents' motion which was for summary judgment dismissing the causes of action alleging violations of Labor Law §§ 240(1) and 241(6) insofar as asserted against the LLC, as tree cutting and removal are not activities covered by those statutory provisions ... , and the evidence established, as a matter of law, that the mound of old tennis court clay, sand, rocks, and other construction debris was not a 'structure' under the Labor Law ... . Moreover, the respondents established, prima facie, that the tree cutting and removal was "routine maintenance outside of a construction or renovation context'" ... . The Supreme Court also properly granted that branch of the respondents' motion which was for summary judgment dismissing the causes of action alleging a violation of Labor Law § 200 and common-law negligence insofar as asserted against the LLC. "Labor Law § 200 is a codification of a property owner's common-law duty to provide workers at a site with a reasonably safe place to work" ... . To the extent that the plaintiff's claims are based on the manner in which the work was performed, the respondents established, prima facie, that the LLC did not have authority to supervise or control the means and method of the work ... . Likewise, to the extent the plaintiff's claims were based on a dangerous condition on the premises, by presenting the lease between

the LLC and the camp, the respondents also established, prima facie, that the LLC, as an out-of-possession landlord, was not responsible for the plaintiff's injuries ... . The LLC relinquished control of the subject property to the camp and placed all responsibility for landscaping and maintenance work on the camp ... . Although the LLC reserved a right of entry under the lease, here, this did not provide a sufficient basis on which to impose liability upon the LLC for injuries caused by a dangerous condition, as the condition did not violate a specific statute, nor was it a significant structural or design defect ...". ***Derosas v. Rosmarins Land Holdings, LLC*, 2017 N.Y. Slip Op. 02019, 2nd Dept 3-22-17**

LABOR LAW-CONSTRUCTION LAW, MUNICIPAL LAW, LONGSHOREMAN'S AND HARBOR WORKERS' COMPENSATION ACT.

NOTICE OF CLAIM REQUIREMENT FOR LABOR LAW ACTION AGAINST CITY NOT PREEMPTED BY LONGSHOREMAN'S AND HARBOR WORKERS' COMPENSATION ACT.

The Second Department determined plaintiff was required to file a notice of claim in his Labor Law action against the city. The notice of claim requirement was not preempted by the Longshoreman's and Harbor Workers' Compensation Act (LHWCA). Plaintiff was injured while doing overhaul work in a the Brooklyn Navy Yard: "The LHWCA provides nonseaman maritime workers with the right to bring no-fault workers' compensation claims against their employer, pursuant to 33 USC § 904(b), and negligence claims against the vessel, pursuant to 33 USC § 905(b). As to those two categories of defendants, 33 USC § 905(a) and (b) expressly preempt all other claims, but 33 USC § 933(a) expressly preserves all claims against third parties ... . 'Importantly, § 933 recognizes that a covered employee may have tort remedies against third parties under federal or state law. Section 933 preserves and codifies a maritime worker's common law right to pursue a negligence claim against a third party that is not the employer or a coworker; it does not create a cause of action nor establish a third party's liability for negligence' ...". ***Fernandez v. City of New York*, 2017 N.Y. Slip Op. 02022, 2nd Dept 3-22-17**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY, CIVIL PROCEDURE.

PLAINTIFF WAS NOT INJURED ON THE CONSTRUCTION SITE, LABOR LAW § 241(6) CAUSE OF ACTION SHOULD HAVE BEEN DISMISSED, LABOR LAW § 200 AND NEGLIGENCE CAUSES OF ACTION WERE VIABLE HOWEVER, USE OF ALIAS WAS NOT A FRAUD UPON THE COURT.

The Second Department determined the Labor Law § 241(6) cause of action should have been dismissed because plaintiff was not injured on the construction site but rather on a storage site a few blocks away. Plaintiff was injured when he stepped in a hole. However the Labor Law § 200 cause of action was viable. The Second Department also determined the plaintiff's use of an alias to bring suit was not a fraud upon the court (plaintiff is an undocumented immigrant) but held that the complaint should be amended to reflect his actual name: "Turning to the plaintiff's Labor Law § 241(6) cause of action, Royal and Vista established, prima facie, that at the time of the accident the plaintiff was not working in a construction area within the meaning of Labor Law § 241(6) ... . They submitted evidence which established that the lot where the accident occurred was located several blocks away from the construction area, and was used to store materials. There was no construction taking place at the lot, and the plaintiff's accident occurred as he was taking materials to a truck so they could be transported to the construction site. In opposition to this prima facie showing by Royal and Vista, the plaintiff failed to raise a triable issue of fact. ... . With respect to the plaintiff's Labor Law § 200 and common-law negligence causes of action, this accident arose not from the manner in which the work was performed, but rather from an allegedly dangerous condition at the work site. Under such circumstances, liability may be imposed if the property owner created the condition or had actual or constructive notice of it, and failed to remedy the condition within a reasonable amount of time ... . Similarly, a general contractor may be held liable in common-law negligence and under Labor Law § 200 if it had control over the work site and actual or constructive notice of the dangerous condition ...". ***Bessa v. Anflo Indus., Inc.*, 2017 N.Y. Slip Op. 02013, 2nd Dept 3-22-17**

LANDLORD-TENANT, CONTRACT LAW.

LEASE PROVISION ALLOWING THE COLLECTION OF RENT AFTER EVICTION BY SUMMARY PROCEEDINGS VALID AND ENFORCEABLE.

The Second Department determined the clause in the lease which allowed the landlord to collect rent after eviction by summary proceedings was valid and enforceable: " 'Although an eviction terminates the landlord-tenant relationship, the parties to a lease are not foreclosed from contracting as they please' ... . 'Where a lease provides that a landlord is under no duty to mitigate damages after its reentry by virtue of its successful prosecution of a summary proceeding, and that the tenant remains liable for damages, [the tenant] remain[s] liable for all monetary obligations arising under the lease' ... . Here, the lease did not obligate the plaintiff to mitigate damages after a dispossession by summary proceeding and specifically provided that [tenant] would remain liable for rent after eviction. In addition, the lease clearly stated that if [tenant] breached the lease, the plaintiff was not precluded from any other remedy in law or equity. Consequently, the lease did not limit the plaintiff to recovery of only pretermination rent in the event that it commenced a summary eviction proceeding to regain possession of the premises ...". ***L'Aquila Realty, LLC v. Jalyng Food Corp.*, 2017 N.Y. Slip Op. 02027, 2nd Dept 3-22-17**

PERSONAL INJURY, MUNICIPAL LAW.

PLAINTIFF INJURED IN COLLSION WITH A POLICE CAR, POLICE REPORT PROVIDED CITY WITH NOTICE OF THE CLAIM, PETITION TO FILE LATE NOTICE OF CLAIM SHOULD HAVE BEEN GRANTED DESPITE LACK OF EXCUSE.
The Second Department determined the petition for leave to file a late notice of claim should have been granted, despite of the lack of an adequate excuse. The plaintiff was involved in an accident with a police car. The police report noted that plaintiff was injured. Therefore the city had timely notice of essential elements of the claim: "Here, the City and the NYPD acquired timely actual notice of the facts underlying the claim. The subject motor vehicle accident involved a police department vehicle and police department employee. The NYPD responded to the scene and conducted an investigation into the facts and circumstances surrounding the accident. Indeed, the police accident report specifically noted that the petitioner, as well as the driver of the vehicle in which she was a passenger, made statements alleging that [the officer] was liable. The police accident report also noted that the petitioner was injured and that a copy of the report was being provided to the Office of the Comptroller, as well as the Motor Transport Division and Personal Safety Unit of the NYPD. Thus, the overall circumstances of this matter support an inference that the City effectively received actual notice of the essential facts constituting the claim ... . In light of the City's actual knowledge of the essential facts constituting the claim, there is no substantial prejudice to the City in maintaining a defense ... . "'W]here there is actual notice and an absence of prejudice, the lack of reasonable excuse will not bar the granting of leave to serve a late notice of claim' ...". ***Matter of Jaffier v. City of New York*, 2017 N.Y. Slip Op. 02039, 2nd Dept 3-22-17**

PERSONAL INJURY.

DEFENDANT DID NOT DEMONSTRATE NONNEGLIGENT EXPLANATION FOR REAR-END COLLISION, PLAINTIFF'S SUMMARY JUDGMENT MOTION SHOULD HAVE BEEN GRANTED.
The Second Department, reversing Supreme Court, determined plaintiff was entitled to summary judgment in this rear-end collision case. The defendant city owned the sanitation truck (driven by McPhillips) which struck the car in which plaintiff was a passenger: "... [T]he plaintiffs submitted, inter alia, transcripts of the parties' deposition testimony, which demonstrated, prima facie, that the injured plaintiff was not comparatively at fault for the happening of the subject accident, and that McPhillips was negligent. Contrary to the City's contention, the transcript of McPhillips's deposition testimony did not reveal a triable issue of fact as to whether he demonstrated a nonnegligent explanation for the rear-end collision into the other vehicle. Even if, as McPhillips testified, the other vehicle came to a sudden stop at the subject intersection's yellow traffic light, McPhillips should have anticipated that the other vehicle might come to a stop at the intersection ... . Furthermore, McPhillips's deposition testimony did not rebut the inference of negligence from the rear-end collision, as he testified that he knew that the road was wet from a recent rain shower and he failed to demonstrate that his skid on known road conditions was unavoidable ...". ***Tumminello v. City of New York*, 2017 N.Y. Slip Op. 02083, 2nd Dept, 3-22-17**

PERSONAL INJURY, MUNICIPAL LAW.

PLAINTIFF COULD NOT IDENTIFY CAUSE OF HIS FALL, COMPLAINT PROPERLY DISMISSED.
The Second Department determined plaintiff's slip and fall complaint was properly dismissed because plaintiff could not identify the cause of his fall: "During his 50-h hearing, the injured plaintiff testified that he was walking on the sidewalk and was about to cross the street when his right foot caught on 'some sort of stone,' causing him to fall. He did not see the stone before the accident, but after he fell, he looked and saw stones embedded in the earth around a tree, which caught his foot. At his deposition, however, the injured plaintiff testified that as he was about to cross the street, he was paying attention to traffic and his foot 'hit something' causing him to lose his balance and fall. This time, he identified a raised portion of the sidewalk, approximately three feet away from the tree, as the cause of his fall. He distinguished this area from the cobblestones around the tree and testified that he did not make contact with the cobblestones, as he was 'further down, to the side of the tree.' Contrary to the plaintiffs' contention, the injured plaintiff's own contradictory testimony does not create a question of fact ... . Rather, it demonstrates that he is unable to identify the cause of his fall and any determination by the trier of fact as to causation would be based upon sheer speculation ...". ***Vojvodic v. City of New York*, 2017 N.Y. Slip Op. 02085, 2nd Dept 3-22-17**

PROPERTY DAMAGE, INSURANCE LAW, LANDLORD-TENANT.

LANDLORD (SUBLESSOR) DID NOT OWE A DUTY TO PLAINTIFF'S SUBROGEE TO PREVENT A MENTALLY ILL TENANT FROM SMOKING IN THE APARTMENT WHERE A FIRE STARTED.
The Second Department determined defendant nonprofit did not owe a duty of care to plaintiff's subrogee for the actions of a tenant which apparently started a fire in the tenant's apartment. Defendant nonprofit leased apartments to tenants suffering from mental illness. The tenants lived independently with little supervision: "Under limited circumstances, the relationship between a lessor and a lessee can give rise to a duty of care inasmuch as the lessor 'must exercise reasonable care not to expose third persons to an unreasonable risk of harm' ... . [T]he relevant inquiry [is] whether the defendant, as sublessor, exposed the plaintiff's insured in this case to an unreasonable risk of harm. Moreover, in evaluating the existence

and scope of the duty of care, we are mindful that where, as here, the action involves only property damage, 'the public policies, factors, and other analytical considerations used in setting the orbit of duty are different from those at play in cases involving physical injury' ... . Under the circumstances presented, the defendant established, prima facie, that it owed no duty to the plaintiff's insured to take affirmative steps to prevent the tenant from smoking in the demised premises ... . The evidence showed, inter alia, that all participants in the defendant's housing program had to be able to live independently, and the degree of oversight provided by the defendant under the terms of its agreement with the tenant was limited. ... '[I]n the absence of fault or a specific contract provision to the contrary, neither the landlord nor the tenant is obligated to perform repairs after a fire' ... . Here, the defendant established its prima facie entitlement to judgment as a matter of law dismissing the breach of contract cause of action by showing that the subject lease did not impose an obligation on it to repair the premises after a fire ... , or to answer in damages for a fire caused by its sublessee ...". ***Tower Ins. Co. of N.Y. v. Hands Across Long Is., Inc.*, 2017 N.Y. Slip Op. 02082, 2nd Dept 3-22-17**

THIRD DEPARTMENT

CRIMINAL LAW, APPEALS.

AFTER FINDING THE ISSUE PRESENTED AN EXCEPTION TO THE MOOTNESS DOCTRINE, THE COURT DETERMINED THE STATE DID NOT ADEQUATELY ASSIST A SEX OFFENDER IN FINDING SUITABLE HOUSING UPON RELEASE.

The Third Department, in a full-fledged opinion by Justice Garry, determined the Department of Corrections and Community Services (DOCCS) did not give the petitioner, an indigent sex offender who had completed his sentence, adequate assistance in finding housing in a residential treatment facility (RTF) upon release. Although petitioner had been provided RTF housing by the time the matter was heard, the Third Department reached the issue as an exception to the mootness doctrine. DOCCS's insufficient assistance in finding RTF housing for released sex offenders was deemed a recurring problem that needed to be addressed: "The feasibility and appropriateness of the specific means by which DOCCS may choose to provide affirmative assistance in locating housing to petitioner are, of course, discretionary and beyond the reach of judicial review unless they are shown to be irrational, arbitrary and capricious. Accordingly, we may not specify the particular actions that DOCCS should have taken. Nevertheless, its passive approach of leaving the primary obligation to locate housing to an individual confined in a medium security prison facility 100 miles from his family and community, without access to information or communication resources beyond that afforded to other prison inmates, falls far short of the spirit and purpose of the legislative obligation imposed upon DOCCS to assist in this process." ***Matter of Gonzalez v. Annucci*, 2017 N.Y. Slip Op. 02099, 3rd Dept 3-23-17**

CRIMINAL LAW, ATTORNEYS.

DEFENDANT ENTITLED TO A HEARING ON HIS MOTION TO VACATE HIS CONVICTION ON INEFFECTIVE ASSISTANCE GROUNDS, DEFENDANT ALLEGED HE WAS NOT INFORMED OF THE INTOXICATION DEFENSE PRIOR TO PLEADING GUILTY.

The Third Department determined defendant was entitled to a hearing on his motion to vacate his conviction. Defendant alleged he was not informed of the intoxication defense prior to pleading guilty: "... [R]egarding defendant's claim in his CPL 440.10 motion that counsel's representation was ineffective for failing to inform him that the required element of criminal intent for burglary in the second degree (see Penal Law § 140.25) could be negated by the defense of intoxication[:] The victims' statements to police include the observations that defendant 'looked high and his speech was slow' and that defendant appeared 'either drunk or stoned.' Additionally, his criminal record reflects a history of alcohol-related arrests and convictions. Insofar as a defendant's knowledge that the element of intent may be negated by the potential defense of intoxication is essential to a knowing and voluntary plea ... and there is no indication that defendant was aware of the intoxication defense and knowingly waived his right to present such evidence, we are persuaded that defendant has raised an issue sufficient to require a hearing ...". ***People v. Perry*, 2017 N.Y. Slip Op. 02095, 3rd Dept 3-23-17**

FREEDOM OF INFORMATION LAW (FOIL).

INSUFFICIENT SHOWING BY THE STATE POLICE TO JUSTIFY DENIAL OF REQUEST FOR RECORDS PERTAINING TO A VICTIM OF CRIMES COMMITTED BY PETITIONER, MATTER REMITTED.

The Third Department determined the state police did not make sufficient assertions to justify the denial of petitioner's request for records concerning a victim of crimes committed by petitioner (an inmate). The state police did not provide factual information to support the claims that the records would disclose non-routine investigatory techniques and would violate privacy. The state police further failed to show that redaction could address those concerns. The matter was remitted to Supreme Court: "The State Police merely paraphrased the statutory language of the exemptions without describing the records withheld or providing any factual basis for its conclusory assertions that disclosure would constitute an unwarranted invasion of personal privacy and would reveal nonroutine criminal investigative techniques and procedures ... . Further, with respect to the personal privacy exemption, the State Police offered no proof that the requested records fell into

any enumerated categories and failed to specify the implicated privacy interests, if any, against which the public interest in disclosing the records were to be balanced ... . Moreover, Public Officers Law § 89 (2) (a) expressly permits an agency to delete 'identifying details' from records that it makes available to the public in order to prevent unwarranted invasions of personal privacy ... , and the State Police failed to make any showing as to whether the requested documents could be redacted in such a manner as to protect personal privacy ... . Nor did it submit the documents to Supreme Court for an in camera review to allow an 'informed determination' by the court on that issue ...". ***Matter of McFadden v. Fonda*, 2017 N.Y. Slip Op. 02101, 3rd Dept 3-23-17**

FOURTH DEPARTMENT

CIVIL PROCEDURE, FREEDOM OF INFORMATION LAW (FOIL), MUNICIPAL LAW.

DELIBERATIVE PROCESS PRIVILEGE UNDER THE FREEDOM OF INFORMATION LAW DOES NOT APPLY TO DISCOVERY REQUEST FOR GOVERNMENT DOCUMENTS UNDER THE CPLR.

In the context of a suit against the county, the Fourth Department determined the deliberative process privilege (also called the inter-agency or intra-agency materials exception) which applies to documents requested under the Freedom of Information Law does not apply to discovery request under the CPLR: "Both the CPLR and FOIL provide for disclosure of documents. The former controls discovery between litigants in court proceedings, and the latter permits disclosure of governmental records to the public even in the absence of litigation. 'When a public agency is one of the litigants, this means that it has the distinct disadvantage of having to offer its adversary two routes into its records' ... . The deliberative process privilege or exemption under FOIL seeks 'to protect the deliberative process of the government by ensuring that persons in an advisory role [will] be able to express their opinions freely to agency decision makers' ... . While some courts have applied that privilege outside the FOIL context ... , we decline to do so inasmuch as the Court of Appeals 'has never created nor recognized a generalized deliberative process privilege' ... . We 'recognize[] the existence of some cases which all too casually mention the deliberate process privilege' and purport to apply it outside the context of a FOIL proceeding' ... . Nevertheless, it is also important to recognize that 'privileges simply do not exist in the absence of either constitutional or statutory authority, or, when created as a matter of jurisprudence' ... . Although the County seeks to assert 'the so-called deliberative process privilege[,]' in the context of a civil litigation, 'neither the Court of Appeals' case law nor that of the [Fourth] Department can be construed [as] having created a distinct deliberate process privilege' outside the context of a FOIL proceeding' ...". ***Mosey v. County of Erie*, 2017 N.Y. Slip Op. 02201, 4th Dept 3-24-17**

CRIMINAL LAW.

BOTH THE GRAND JURY AND THE TRIAL JURY SHOULD HAVE BEEN INSTRUCTED ON THE DEFENSE OF INNOCENT POSSESSION OF A WEAPON, INDICTMENT DISMISSED.

The Fourth Department determined the both the grand jury and the trial jury should have been instructed on the defense of innocent possession of a weapon. The indictment was dismissed: "We agree with defendant … that reversal is required because Supreme Court erred in denying his request for a jury instruction on the defense of temporary innocent possession of the handgun. In order for a defendant to be entitled to such an instruction, 'there must be proof in the record showing a legal excuse for having the weapon in [one's] possession as well as facts tending to establish that, once possession [was] obtained, the weapon [was not] used in a dangerous manner' ... . Here, there were such facts. Defendant testified that he briefly struggled with a man who threatened him with a gun in front of his wife's residence and, in the struggle, the gun fell to the ground. According to defendant's testimony, after the assailant fled the scene, defendant picked up the gun from the street and immediately handed it to his wife, who then brought it into the home and hid it in the bedroom. * * * We agree with defendant that the integrity of the grand jury proceeding was impaired, and we thus dismiss the two counts of the indictment of which defendant was convicted, without prejudice to the People to re-present any appropriate charges under those counts to another grand jury ... . The prosecutor is required to instruct the grand jury on the law with respect to matters before it … . If the prosecutor fails to instruct the grand jury on a defense that would eliminate a needless or unfounded prosecution, the proceeding is defective, mandating dismissal of the indictment ...". ***People v. Graham*, 2017 N.Y. Slip Op. 02175, 4th Dept 3-24-17**

CRIMINAL LAW.

IF POSSIBLE, A RECONSTRUCTION HEARING MUST BE HELD TO DETERMINE DEFENDANT'S COMPETENCY AT THE TIME HE ENTERED A GUILTY PLEA, IF A HEARING CANNOT BE HELD THE PLEA MUST BE VACATED.

The Fourth Department determined a reconstruction hearing should be held to determine whether defendant was competent to stand trial in 2008 when he entered a guilty plea. If a reconstruction hearing cannot be held, the plea should be vacated. At the time of the plea two examining psychiatrists came to opposite conclusions about defendant's competency. Yet the guilty plea was accepted without holding a competency hearing: " 'Article 730 of the Criminal Procedure Law sets out the procedures courts of this State must follow in order to prevent the criminal trial of [an incompetent] defendant' ... .

The CPL expressly provides that, '[w]hen the examination reports submitted to the court show that the psychiatric examiners are not unanimous in their opinion as to whether the defendant is or is not an incapacitated person, . . . the court must conduct a hearing to determine the issue of capacity' ... . 'That section is mandatory and not discretionary' ... , and a plea of guilty cannot be accepted unless the requisite hearing is held and the defendant is found competent ...". ***People v. Pett*, 2017 N.Y. Slip Op. 02178, 4th Dept 3-24-17**

CRIMINAL LAW.

AMENDMENT OF INDICTMENTS CHARGING A COURSE OF SEXUAL CONDUCT TO CHARGES WHICH REQUIRE A UNANIMOUS VERDICT WITH RESPECT TO A PARTICULAR ACT DEPRIVED DEFENDANT OF HIS RIGHT TO BE TRIED ONLY ON THE CRIMES CHARGED.

The Fourth Department, reversing defendant's convictions, determined the indictments were improperly amended after trial: "We agree with defendant … that the court erred in granting the People's motion to amend the indictments at the close of proof. The fact that defendant consented to the amendments is of no moment because he has ' a fundamental and nonwaivable right to be tried only on the crimes charged' ... . 'An indictment may not be amended in any respect which changes the theory or theories of the prosecution as reflected in the evidence before the grand jury which filed it' ... . Unlike the crimes charged in the amended indictments, the crimes of course of sexual conduct against a child in the first degree and predatory sexual assault against a child based upon allegations that defendant committed a course of sexual conduct against a child in the first degree as charged in the initial indictments do not criminalize a specific act, and thus do not require jury unanimity with respect to a specific act ... . For that reason, we conclude that the amendments of the indictments 'resulted in an impermissible substantive change in the indictment[s] by adding new counts that changed the theory of the prosecution' ... . We therefore reverse the judgments insofar as they convicted defendant on those counts, and dismiss those counts of the amended indictments without prejudice to the People to re-present any appropriate charges under those counts to another grand jury." ***People v. Vickers*, 2017 N.Y. Slip Op. 02183, 4th Dept 3-24-17**

CRIMINAL LAW.

ATTEMPTED ASSAULT IN THE FIRST DEGREE COULD NOT SERVE AS A PREDICATE FOR CONVICTION OF CRIMINAL USE OF A FIREARM IN THE SECOND DEGREE.

The Fourth Department noted that attempted assault in the first degree cannot serve as a predicate for conviction of criminal use of a firearm in the second degree: "... [T]he use or display of the firearm while committing the class C felony of attempted assault in the first degree cannot serve as the predicate for his conviction of criminal use of a firearm in the second degree inasmuch as the use or display of that same firearm satisfied an element of attempted assault in the first degree ... . Although defendant failed to preserve that contention for our review ... , we exercise our power to review it as a matter of discretion in the interest of justice (see CPL 470.15 [6] [a]), and we modify the judgment by reversing that part convicting him of criminal use of a firearm in the second degree and dismissing that count of the indictment." ***People v. Butler*, 2017 N.Y. Slip Op. 02186, 4th Dept 3-24-17**

CRIMINAL LAW.

DIFFERENT OFFENSE DATES IN THE SUPERIOR COURT INFORMATION REQUIRED DISMISSAL.

The Fourth Department determined the superior court information (SCI) must be dismissed because it did not charge the same offenses which were charged in the written waiver of indictment (different dates): "Here, the felony complaint charged defendant with the commission of robbery in the first degree 'on or about the 2nd day of 2011,' i.e., January 2, 2011. The written waiver of indictment, however, specified that defendant waived his right to indictment with respect to the commission of robbery in the first degree on February 2, 2012, and the SCI itself charged defendant with the commission of robbery in the first degree on February 2, 2011. Inasmuch as robbery is a single-act offense ... , the January 2, 2011 robbery charged in the felony complaint was a 'different crime entirely' from both the February 2, 2012 robbery set forth in the waiver of indictment and the February 2, 2011 robbery charged in the SCI ... . Indeed, 'the [dates] set forth in the [three] instruments,' i.e., the felony complaint, the waiver of indictment, and the SCI, 'exclude any possibility that they were based on the same criminal conduct' ... . The SCI therefore violates CPL 195.20 and must be dismissed as jurisdictionally defective ... . The SCI is also jurisdictionally defective inasmuch as it violates CPL 200.15, which provides in relevant part that a 'superior court information . . . shall not include an offense not named in the written waiver of indictment.' That 'express prohibition' was violated here ... , inasmuch as the SCI included an offense, i.e., a robbery in the first degree committed on February 2, 2011 that was not set forth in the written waiver of indictment, which identified only a robbery in the first degree committed on February 2, 2012." ***People v. Walker*, 2017 N.Y. Slip Op. 02200, 4th Dept 3-24-17**

CRIMINAL LAW.

DEFENDANT WAS ENTITLED TO SEVERANCE FROM THE CODEFENDANTS, CODEFENDANTS TOOK AN AGGRESSIVE ADVERSARIAL STANCE AGAINST DEFENDANT AT TRIAL, NEW TRIAL ORDERED.

The Fourth Department determined defendant's trial for criminal possession of a weapon should have been severed from the trial of his codefendants for the same offense. At trial the codefendants alleged it was defendant who possessed the weapon: "We conclude that the codefendants' respective attorneys 'took an aggressive adversarial stance against [defendant at trial], in effect becoming a second [and a third] prosecutor' ... . We further conclude that the ' essence or core of the defenses [were] in conflict, such that the jury, in order to believe the core of one defense, . . . necessarily [had to] disbelieve the core of the other' ... . Thus, in retrospect ... , there was 'a significant danger . . . that the conflict alone would lead the jury to infer defendant's guilt,' and therefore severance was required ...". ***People v. Mcguire*, 2017 N.Y. Slip Op. 02206, 4th Dept 3-24-17**

CRIMINAL LAW.

FINE BELOW THE MINIMUM STATUTORY AMOUNT WAS ILLEGAL AND WAS THEREFORE VACATED BY THE APPELLATE DIVISION.

The Fourth Department, over a two-justice dissent, determined the $1500 fine imposed in connection with a DWI was illegal because the statute required a minimum fine of $2000.00. The court determined no fine should be imposed. The dissent agreed the fine was illegal but argued the matter should be remitted: "As the People correctly concede, however, the court erred in imposing a $1,500 fine. Vehicle and Traffic Law § 1193 (1) (c) (ii) provides that a person convicted of driving while intoxicated as a class D felony 'shall be punished by a fine of not less than two thousand dollars nor more than ten thousand dollars or by a period of imprisonment as provided in the penal law, or by both such fine and imprisonment.' The court therefore had the authority to impose a fine and a sentence of imprisonment, but was required to impose a minimum fine of $2,000 if it chose to impose any fine. We cannot allow the $1,500 illegal fine to stand ... and, as a matter of discretion in the interest of justice, we conclude that no fine should be imposed. We therefore modify the judgment by vacating the fine." ***People v. Neal*, 2017 N.Y. Slip Op. 02320, 4th Dept 3-24-17**

CRIMINAL LAW.

FAILURE TO READ JURY NOTE INTO RECORD REQUIRED REVERSAL.

The Fourth Department, over an extensive dissent, determined the trial court erred when it did not read the contents of a jury note into the record. The note said the jury "was not sure what to do:" "The record establishes that a jury note marked as court exhibit 8 stated that '[w]e have made decision on the Third Count we are having hard time with 1 and 2 just giving you are [sic] status.' Soon thereafter, a jury note marked as court exhibit 9 stated that '[w]e have arrived on decision on 2 and 3, but we have a lot of work to do on #1. I don[']t see it being quick. Not sure what to do. We ars [sic] starting to make way.' * * * Our dissenting colleague concludes that the jury's statement, '[n]ot sure what to do,' was a ministerial inquiry concerning the logistics of the jury's deliberations, i.e., the jury was asking whether it should continue deliberating that evening considering the late hour. We agree that the note could be interpreted that way, but we conclude that it also could be interpreted as it was interpreted by the court, i.e., the jury was having difficulty reaching a unanimous verdict and was making a substantive inquiry for guidance concerning further deliberations. In response to the note, the court issued an Allen-type charge. Quite simply, even if we consider all the surrounding circumstances, the jury note was ambiguous, and we must resolve that ambiguity in defendant's favor ...". ***People v. Morrison*, 2017 N.Y. Slip Op. 02324, 4th Dept 3-24-17**

CRIMINAL LAW, EVIDENCE.

IN THIS DRUG OFFENSE TRIAL, COURT SHOULD NOT HAVE ALLOWED IMPEACHMENT OF DEFENDANT WITH EVIDENCE OF PRIOR DRUG-RELATED CONVICTIONS.

Although the error was deemed harmless, the Fourth Department determined the People should not have been allowed, in this drug-offense trial, to impeach defendant with evidence of his prior drug-related convictions: "We agree with defendant that the court abused its discretion in ruling that the People could impeach him using his prior drug-related convictions and their underlying facts. In determining whether the People may impeach a defendant using prior criminal acts, a court must balance the probative value of the evidence on the issue of credibility against the risk of undue prejudice, as measured by the potential impact of the evidence and the possibility that its introduction would deter defendant from testifying in his or her defense (see *People v. Sandoval*, 34 NY2d 371, 376-377). Certain factors should be considered, such as the prior conviction's temporal proximity, the degree to which the prior conviction bears upon the defendant's truthfulness, and the extent to which the prior conviction may be taken as evidence of the defendant's propensity to commit the crime charged (see id.). It is well recognized that 'in the prosecution of drug charges, interrogation as to prior narcotics convictions . . . may present a special risk of impermissible prejudice because of the widely accepted belief that persons previously convicted of narcotics offenses are likely to be habitual offenders' ' ... . Here, the record reveals that the court considered only the temporal proximity of the prior convictions and defendant's willingness to place his interests above those of society in general ...

. There is no indication that the court considered the special risk that defendant's prior drug-related convictions might be taken by the jury as evidence of his propensity to commit the crime charged ...". ***People v. Brown*, 2017 N.Y. Slip Op. 02190, 4th Dept 3-24-17**

CRIMINAL LAW, EVIDENCE.

DEFENDANT'S MOTION TO VACATE HIS CONVICTION, BASED UPON NEWLY DISCOVERED EVIDENCE IN THE FORM OF A DECLARATION AGAINST PENAL INTEREST, SHOULD HAVE BEEN GRANTED.

The Fourth Department, reversing Supreme Court, determined defendant's motion to vacate his conviction based upon newly discovered evidence of third party culpability should have been granted. The statement at issue was admissible as a declaration against penal interest: "We conclude that defendant provided sufficient competent evidence at the 440.10 hearing to establish the 'possibility of trustworthiness' of the third party's statement to satisfy the requirement that the statement was a declaration against penal interest. In addition to the trial testimony that the third party was engaged in a dispute with the victim, the third party admitted to the defense investigator that he was present and engaged in a dispute with the victim and that he wrote the letters to defendant's former attorney. Thus, we conclude that the third party is unavailable and that his alleged statement is 'supported by independent proof indicating that it is trustworthy and reliable' and thus that it is a statement against penal interest ... . Furthermore, the statement is 'clearly exculpatory of the defendant' ... . We therefore conclude that defendant met his burden of establishing, by a preponderance of the evidence ... , that the third party's statement against penal interest was not available at the time of defendant's trial and 'is of such a character as to create a probability that had such evidence been received at the trial the verdict would have been more favorable to the defendant' ...". ***People v. Mcfarland*, 2017 N.Y. Slip Op. 02194, 4th Dept 3-24-17**

CRIMINAL LAW, EVIDENCE.

DEFENDANT THREW BAGS OF COCAINE ONTO THE FLOOR IN PLAIN SIGHT OF POLICE OFFICERS, NOT SUFFICIENT TO SUPPORT TAMPERING WITH EVIDENCE CHARGE.

The Fourth Department determined the evidence was insufficient for conviction of the tampering with evidence charge. Defendant threw bags of cocaine on the floor. There was insufficient evidence that the act of throwing the drugs on the floor was intended to conceal the evidence: "... [T]he evidence is legally insufficient to support the conviction of tampering with physical evidence. Insofar as relevant here, a person is guilty of that crime when, '[b]elieving that certain physical evidence is about to be produced or used in an official proceeding or a prospective official proceeding, and intending to prevent such production or use, he [or she] suppresses it by any act of concealment' ... . The People's theory was that defendant tampered with physical evidence by throwing bags of cocaine onto the floor of a store with the intent of concealing the drugs from the pursuing police officers and thereby preventing the use of the drugs in a prospective official proceeding. The evidence at trial established that officers observed defendant throw bags of suspected crack cocaine onto the floor when he passed through the front entrance of the store. Although the offense of tampering with physical evidence does not require the actual suppression of physical evidence, there must be an act of concealment while intending to suppress the evidence ... . We conclude that the evidence is legally insufficient to establish that defendant accomplished an act of concealment inasmuch as he dropped the items onto the floor in plain sight of the officers ...". ***People v. Parker*, 2017 N.Y. Slip Op. 02208, 4th Dept 3-24-17**

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA), FAMILY LAW.

SORA GUIDELINE WHICH ALLOWS JUVENILE DELINQUENCY ADJUDICATION TO BE CONSIDERED IN THE CRIMINAL HISTORY CALCULATION SHOULD NOT BE FOLLOWED.

The Fourth Department determined the language in the SORA guideline which allows a juvenile delinquency adjudication to be used to calculate points in the criminal history category should not be followed because it conflicts with provisions of the Family Court Act: "The risk assessment guidelines issued by the Board provide that a juvenile delinquency adjudication is considered a crime for purposes of assessing points under the criminal history section of the risk assessment instrument (see Sex Offender Registration Act: Risk Assessment Guidelines and Commentary [Guidelines], at 6 [2006]). Family Court Act § 381.2 (1) provides, however, that neither the fact that a person was before Family Court for a juvenile delinquency hearing, nor any confession, admission or statement made by such a person is admissible as evidence against him or her in any other court. Section 380.1 (1) further provides that '[n]o adjudication under this article may be denominated a conviction and no person adjudicated a juvenile delinquent shall be denominated a criminal by reason of such adjudication.' Given this conflict between the Guidelines and the plain language of the Family Court Act, we agree with the Second Department[ ] ... and conclude that the Board 'exceeded its authority by adopting that portion of the Guidelines which includes juvenile delinquency adjudications in its definition of crimes for the purpose of determining a sex offender's criminal history' ...". ***People v. Brown*, 2017 N.Y. Slip Op. 02323, 4th Dept 3-24-17**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

QUESTIONS OF FACT WHETHER PLAINTIFF'S INJURIES WERE CAUSED BY THE PLACEMENT OF THE SCAFFOLD OR THE ABSENCE OF RAILINGS.

The Fourth Department, reversing Supreme Court, determined there were questions of fact whether plaintiff's fall was caused by the placement of the scaffold or the absence of railings on the scaffold: "We conclude that plaintiff failed to establish his entitlement to judgment as a matter of law under that statute. Specifically, we conclude that there is an issue of fact whether the scaffold failed to provide proper protection because it was not properly placed, thereby precipitating plaintiff's fall, or 'whether plaintiff simply lost his balance and fell' when his head struck the beam ... . Plaintiff likewise failed to establish as a matter of law that the lack of safety railings on the scaffold, as required by 12 NYCRR 23-5.18 (b) ... , is a sufficient basis for a determination of liability under section 240 (1) that the scaffold failed to provide plaintiff proper protection. Rather, we conclude that there is an issue of fact whether the presence of rails would have prevented his fall ...". ***Kopasz v. City of Buffalo*, 2017 N.Y. Slip Op. 02305, 4th Dept 3-24-17**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

FALL FROM FIRST FLOOR TO BASEMENT FLOOR IS COVERED UNDER LABOR LAW § 240(1), THE UNGUARDED OPENING VIOLATED A PROVISION OF THE INDUSTRIAL CODE.

The Fourth Department, overruling precedent, determined a fall from the first floor through an unguarded opening to the basement floor was a covered event under Labor Law § 240(1) and the unguarded opening violated a provision of the Industrial Code. The decision covers a number of other substantive issues (not summarized here) including statutory agent liability, Labor Law 200 and common law negligence liability, and indemnification: "We agree with plaintiffs that the court erred in denying that part of their motion seeking partial summary judgment on liability on their Labor Law § 240 (1) claim and in granting, instead, those parts of the motion of Gates and cross motion of Nolan seeking dismissal of that claim against them. We therefore further modify the order by denying those parts of the motion and cross motion, reinstating that claim, and granting that part of plaintiffs' motion. As a preliminary matter, we note that the court relied on our decision in *Riley v. Stickl Constr. Co.* (242 AD2d 936) for its determination that a fall from the first floor through an unguarded opening to the basement is not a fall from an elevated worksite within the meaning of section 240 (1). To the extent that *Riley* stands for the proposition that a worker falling from the first floor to the basement is not protected by section 240 (1), that decision is no longer to be followed. Instead, we conclude that, because there was a 'difference between the elevation level of the required work and a lower level' ... , and '[b]ecause plaintiff fell through an opening in the floor, [plaintiffs are] entitled to judgment on liability under Labor Law § 240 (1)' …". ***McKay v. Weeden*, 2017 N.Y. Slip Op. 02327, 4th Dept 3-24-17**

MUNICIPAL LAW.

CITIZEN REVIEW BOARD HAS THE CAPACITY TO SUE AND STANDING TO BRING AN ARTICLE 78-DECLARATORY JUDGMENT ACTION SEEKING THE POLICE DEPARTMENT'S COMPLIANCE WITH POLICE-ACTION-REVIEW PROCEDURES.

The Fourth Department, in a full-fledged opinion by Justice Curran, in a matter of first impression, determined the Citizen Review Board of Syracuse (CRB) had the capacity to sue and had standing to bring Article 78/declaratory judgment proceedings against the Syracuse Police Department seeking compliance with the citizen review procedures: "Here, the CRB's enabling legislation provides that it was formed to 'establish an open citizen-controlled process for reviewing grievances involving members of the Syracuse Police Department' and that 'citizen complaints regarding members of the Syracuse Police Department shall be heard and reviewed fairly and impartially by the review board.' Further, the CRB is required by the ordinance to report and publish the number of cases in which sanctions were imposed. Inasmuch as the CRB cannot perform its legislative mandate without the Chief of Police's compliance with the corresponding legislative mandate that he 'advise the [CRB] in writing as to what type of actions or sanctions were imposed, and the reasons if none were imposed,' we conclude that the CRB has sustained a sufficiently particularized injury that falls squarely within the zone of interests set forth in the ordinance ...". ***Matter of Citizen Review Bd. of The City of Syracuse v. Syracuse Police Dept.*, 2017 N.Y. Slip Op. 02181, 4th Dept 3-24-17**

MUNICIPAL LAW, PERSONAL INJURY.

LATE NOTICE OF CLAIM PROPERLY ALLOWED DESPITE ABSENCE OF REASONABLE EXCUSE AND LACK OF TIMELY NOTICE OF THE UNDERLYING FACTS.

The Fourth Department determined the application for leave to file a late notice of claim was properly granted, despite the absence of an adequate excuse and the lack of timely notice of the underlying facts: "Here, even assuming, arguendo, that claimants failed to provide a reasonable excuse for their delay, we conclude that the remaining factors support the court's exercise of discretion in granting their application. Although respondents did not obtain knowledge of the facts underlying

the claim until approximately nine months after the expiration of the 90-day period, we conclude under the circumstances of this case that 'this was a reasonable time, particularly in light of the fact that respondent[s] do[ ] not contend that there has been any subsequent change in the condition of the [premises] which might hinder the investigation or defense of this action' ... . Moreover, claimants made a sufficient showing that the late notice will not substantially prejudice respondents, and respondents failed to 'respond with a particularized evidentiary showing that [they] will be substantially prejudiced if the late notice is allowed' ... . We therefore conclude that the court 'properly exercised its broad discretion in granting [claimants'] application pursuant to General Municipal Law § 50-e (5)' ...". ***Matter of Diegelman v. City of Buffalo*, 2017 N.Y. Slip Op. 02316, 4th Dept 3-24-17**

PERSONAL INJURY.

DEFENDANTS DID NOT HAVE ACTUAL OR CONSTRUCTIVE NOTICE OF LEAD-PAINT CONDITION, DEFENDANTS DID NOT HAVE A DUTY TO TEST FOR LEAD, COMPLAINT SHOULD HAVE BEEN DISMISSED.

The Fourth Department determined the lead paint poisoning complaint should have been dismissed because plaintiff was unable to show defendants had actual or constructive knowledge of the condition and defendants were not under a duty to test for lead: "Defendants submitted affidavits and deposition testimony establishing that they were not aware of any peeling or chipping paint on the premises prior to the inspection conducted by the [Monroe County Department of Health]. Defendants also established that neither plaintiff nor the relatives with whom plaintiff resided at the premises ever complained to either defendant of any peeling or chipping paint on the premises. Contrary to plaintiff's contention, he failed to raise an issue of fact whether defendants were aware of chipping and peeling paint on the premises ... , or whether defendants retained the requisite right of entry to the apartment to sustain a claim for constructive notice ... . Furthermore, '[w]ithout evidence legally sufficient to permit a jury to rationally infer that the defendant had constructive notice of a dangerous condition, the defendant cannot be held liable for failure to warn or to remedy the defect' ... . Consequently, absent evidence raising a triable issue of fact whether defendants had actual or constructive notice of a dangerous condition on the premises, the court erred in denying that part of the motion seeking dismissal of the failure to warn claim. ... 'The Court of Appeals in *Chapman* (97 NY2d at 21) expressly decline[d] to impose a new duty on landlords to test for the existence of lead in leased properties based solely upon the general knowledge of the dangers of lead-based paints in older homes' ...". ***Taggart v. Fandel*, 2017 N.Y. Slip Op. 02177, 4th Dept 3-24-17**

REAL PROPERTY TAX LAW.

FIBER OPTIC CABLES NOT TAXABLE UNDER THE REAL PROPERTY TAX LAW.

The Fourth Department, reversing Supreme Court, determined fiber optic cables were not included in the statutory definition of real property and therefore were not taxable under the Real Property Tax Law (RPTL). However, because the fiber optic company paid the taxes voluntarily and without protest, it was not entitled to a refund: "The word distribution means 'a spreading out or scattering over an area or throughout a space' or 'delivery or conveyance (as of newspapers or goods) to the members of a group' (Webster's Third New International Dictionary [2002]). Examples include 'the distribution of the oil throughout the engine parts' and 'the distribution of telephone directories to customers' (id.). In other words, distribution implies an 'apportioning of something' more or less evenly, or as a due or right, to an 'appropriate person or place' ... . Given the context in which the word distribution appears in RPTL 102 (12) (f), that definition makes sense. Undoubtedly, the kinds of equipment enumerated in the statute, such as boilers, plumbing, and lighting apparatus, distribute heat, liquids, and light to consumers. By contrast, although 'the fiber optic cables at issue undeniably transmit light signals from one end of the network to the other, such transmission does not result in the distribution' of light, but rather data' ... . Thus, we cannot conclude that petitioner's fiber optic installations distribute light 'without resorting to an artificial or forced construction' ...". ***Matter of Level 3 Communications, LLC v. Chautauqua County*, 2017 N.Y. Slip Op. 02322, 4th Dept 3-24-17**

ZONING, ENVIRONMENTAL LAW.

PLANNING BOARD ACTED ARBITRARILY AND CAPRICIOUSLY WHEN IT DENIED PETITIONER'S CHALLENGE TO A WOODLOT ENVIRONMENTAL PROTECTION OVERLAY DISTRICT (EPOD) FINDING, PLANNING BOARD DID NOT CONSIDER THE CRITERIA LAID OUT IN THE TOWN CODE.

The Fourth Department determined the respondent town planning board acted arbitrarily and capriciously when it denied petitioner's challenge to the finding his property was within the boundaries of a woodlot environmental protection overlay district (EPOD). The Fourth Department held that the respondent was obligated to consider the EPOD criteria laid out in the Town Code and failed to do so: "Petitioner owns property located within a Woodlot Overlay Protection District in the Town of Irondequoit, as set forth on the Woodlots Map of the Town of Irondequoit. Irondequoit Town Code (Town Code) § 235-43 provides that the locations and boundaries of an environmental protection overlay district (EPOD) shall be delineated on the official set of maps, but further states that those maps 'shall be used for reference purposes only and shall not be used

to delineate specific or exact boundaries of the various overlay districts. Field investigations and/or other environmental analyses may be required in order to determine whether or not a particular piece of property is included within one or more of the overlay districts.' Section 235-44 then provides that the 'Town Department of Planning and Zoning shall be responsible for interpreting [EPOD] boundaries based on an interpretation of the Official Town of Irondequoit EPOD Maps, as well as the use of various criteria set forth in this article for determining such district boundaries.' For a Woodlot EPOD, those criteria are set forth at section 235-53 (B) of the Town Code and include, inter alia, that the property have 'communities' of certain species of trees. Finally, section 235-44 provides that '[a]ppeals from a determination of the Town Department of Planning and Zoning regarding boundaries of overlay districts shall be made to the Town Planning Board in accordance with the public hearing procedures.' * * * We conclude that petitioner stated a claim that respondent acted arbitrarily and capriciously in denying the appeal because the criteria set forth in Town Code § 235-53 (B) were not considered by respondent. Based on Town Code §§ 235-43 and 235-44, respondent is responsible for interpreting the boundary of the particular Woodlot EPOD encompassing petitioner's property, based on the criteria set forth in Town Code ...". ***Matter of Gilbert v. Planning Bd. of Town of Irondequoit*, 2017 N.Y. Slip Op. 02210, 4th Dept 3-24-17**

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