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COURT OF APPEALS

CRIMINAL LAW.

WARRANTS ISSUED TO FACEBOOK UNDER THE STORED COMMUNICATIONS ACT CANNOT BE TREATED AS CIVIL SUBPOENAS, UNDER THE CRIMINAL PROCEDURE LAW THERE IS NO MECHANISM FOR APPEALING THE DENIAL OF A MOTION TO QUASH A WARRANT.

The Court of Appeals, in a full-fledged opinion by Judge Stein, over a concurring opinion and an extensive dissenting opinion, determined that the Criminal Procedure Law (CPL) did not allow a motion to quash a warrant issued pursuant to the federal Stored Communications Act (SCA) and did not allow an appeal from the denial of the motion. The motions and appeals were brought by Facebook in response to SCA warrants seeking information about subscriber accounts in connection with criminal investigations. Facebook argued that the warrants were actually subpoenas which could be quashed under civil standards. The Court of Appeals held the warrants were not subpoenas and the CPL therefore controlled: "That the SCA draws a distinction between warrants and subpoenas, and the content that may be obtained therewith, is of critical significance with respect to a determination of appellate jurisdiction over the appeal from the denial of Facebook's motion to quash. It is a fundamental precept of the jurisdiction of our appellate courts that '[n]o appeal lies from a determination made in a criminal proceeding unless specifically provided for by statute' ... . No provision of the Criminal Procedure Law articles that govern appeals — which are among 'the most highly structured and highly particularized articles of procedure' ... — authorizes an appeal to either an intermediate appellate court or to this Court from an order denying a motion to quash or vacate a search warrant ... . Moreover, no civil appeal may be brought from an order entered in a criminal action or proceeding ...". ***Matter of 381 Search Warrants Directed to Facebook, Inc.*, 2017 N.Y. Slip Op. 02586, CtApp 4-4-17**

CRIMINAL LAW, ATTORNEYS.

INACCURATE ANNOTATIONS ON TRIAL EXHIBITS DISPLAYED BY THE PROSECUTOR IN A POWERPOINT PRESENTATION DURING SUMMATION DID NOT DEPRIVE THE DEFENDANT OF A FAIR TRIAL, THE TRIAL JUDGE TOOK APPROPRIATE STEPS TO ADDRESS THE PROBLEM.

The Court of Appeals, in a full-fledged opinion by Judge DiFiore, determined the inaccurate labeling of trial exhibits (photographs) in a PowerPoint presentation by the prosecutor during summation did not deprive the defendant of a fair trial. One photo, for example, was annotated with text indicating the photo depicted the defendant, but the witness who testified about the photo could not definitively say it was the defendant. The trial judge recognized the problem, stopped the PowerPoint presentation, and instructed the jury to disregard the slides: "There is no inherent problem with the use of a PowerPoint presentation as a visual aid in connection with closing arguments. Indeed, it can be an effective tool. But, the long-standing rules governing the bounds of proper conduct in summation apply equally to a PowerPoint presentation. In other words, if it would be improper to make a particular statement, it would likewise be improper to display it ... . If counsel is going to superimpose commentary to images of trial exhibits, the annotations must, without question, accurately represent the trial evidence ... . Moreover, any type of blatant appeal to the jury's emotions or egregious proclamation of a defendant's guilt would plainly be unacceptable ... . Here, defendant argues that he was deprived of a fair trial by the annotation of images of the trial exhibits to imply that the victim's brother, in his testimony, had positively identified either his truck or defendant from the surveillance video because this misrepresented the witness's testimony. Significantly, the trial court was very attuned to the annotated slides and, in the exercise of its discretion, ultimately stopped the slideshow and instructed the jury to disregard the slides ... . To the extent any slides may have misrepresented the trial evidence, the trial court instructed the jury on more than one occasion that the attorneys' arguments were not evidence and that the jury was the sole judge of the facts. Defense counsel also rejected the court's offer of any less drastic relief after the denial of the mistrial motion. Thus, under these circumstances, defendant was not deprived of a fair trial." ***People v. Williams*, 2017 N.Y. Slip Op. 02588, CtApp 4-4-17**

CRIMINAL LAW, ATTORNEYS.

POWERPOINT PRESENTATION OF ANNOTATED TRIAL EXHIBITS DURING PROSECUTOR'S SUMMATION WAS PROPER BECAUSE THE ANNOTATIONS WERE CONSISTENT WITH THE TRIAL EVIDENCE.

The Court of Appeals, in a full-fledged opinion by Judge Abdus-Salaam, over a two-judge, extensive, dissenting opinion, determined that the prosecutor's use of a PowerPoint presentation of annotated trial exhibits during summation was proper because the annotations fairly described the evidence: "At bottom, a visual demonstration during summation is evaluated in the same manner as an oral statement. If an attorney can point to an exhibit in the courtroom and verbally make an argument, that exhibit and argument may also be displayed to the jury, so long as there is a clear delineation between argument and evidence, either on the face of the visual demonstration, in counsel's argument, or in the court's admonitions. We reject defendant's position that trial exhibits in a PowerPoint presentation may only be displayed to the jury in unaltered, pristine form, and that any written comment or argument superimposed on the slides is improper. Rather, PowerPoint slides may properly be used in summation where, as here, the added captions or markings are consistent with the trial evidence and the fair inferences to be drawn from that evidence. When the superimposed text is clearly not part of the trial exhibits, and thus could not confuse the jury about what is an exhibit and what is argument or commentary, the added text is not objectionable. The slides, in contrast to the exhibits, are not evidence. The court properly instructed the jury that what the lawyers say during summations is not evidence, and that in finding the facts, the jury must consider only the evidence. In this case, as was appropriate, the jury was told that the physical exhibits admitted into evidence would be made available to them, while the slides were not supplied to the jury during deliberations." ***People v. Anderson*, 2017 N.Y. Slip Op. 02589, CtApp 4-4-17**

LANDLORD-TENANT, LIEN LAW, MUNICIPAL LAW (NYC).

THE REASONABLENESS OF THE COSTS OF TEMPORARILY RELOCATING A TENANT FORCED TO VACATE AN UNINHABITABLE BUILDING MUST BE DETERMINED IN A LIEN FORECLOSURE PROCEEDING, THE LIEN CANNOT BE SUMMARILY DISCHARGED BY FINDING THE COSTS AS STATED IN THE NOTICE OF LIEN FACIALLY UNREASONABLE.

The Court of Appeals, in a full-fledged opinion by Judge Garcia, resolving a conflict between the First and Second Departments, determined a dispute about the reasonableness of the costs of temporarily relocating a tenant forced to vacate an uninhabitable building, as stated in a Notice of Lien, is not subject to summary disposition but rather must be resolved in a foreclosure proceeding. The First Department had erroneously held that such a lien imposed by the NYC Department of Housing Preservation and Development (HPD) could be summarily discharged if the relocation costs stated in the Notice of Lien were deemed unreasonable: "Facial invalidity [of a Notice of Lien] occurs only in limited circumstances not present here. In both cases at issue, the notices of lien contained all required elements under Lien Law § 9 and Administrative Code § 26-305 (4) (a) and were properly filed. While summary discharge is proper when a notice of lien includes non-lienable expenses ... , the notices of lien here demonstrated no such defect. The notices stated that they sought 'hotel expenses,' 'administration costs,' and 'relocation costs,' which sufficed to meet the requirement that the notice contain a statement of 'the labor performed or materials furnished.' Rather than challenge those categories of expenses as 'lienable,' both [property owners] object to the amount claimed for such expenses. Such a dispute is not properly resolved through a summary discharge proceeding." ***Rivera v. Department of Hous. Preserv. & Dev. of the City of N.Y.*, 2017 N.Y. Slip Op. 02587, CtApp 4-4-17**

PERSONAL INJURY, EVIDENCE.

THERE WAS LEGALLY SUFFICIENT EVIDENCE TO SUPPORT THE VERDICT FINDING THAT THE NEW YORK TRANSIT AUTHORITY WAS NEGLIGENT AND THE NEGLIGENCE WAS THE PROXIMATE CAUSE OF PLAINTIFF'S INJURIES, PLAINTIFF HAD FALLEN OFF A SUBWAY PLATFORM AND ALLEGED HE WAS STRUCK BY A TRAIN.

The Court of Appeals, reversing the Appellate Division, over a dissenting memorandum, determined there was sufficient evidence to support the verdict that the New York Transit Authority was negligent and the negligence was the proximate cause of plaintiff's injuries. The matter was remitted to the Appellate Division. Only the dissent discussed the facts. Plaintiff, who had just left a methadone clinic and had no memory of the accident, alleged he was struck by a subway train after he had fallen off a subway platform. FROM THE DISSENT: "Plaintiff — while 'high on Xanax and Klonopin' — left a methadone clinic, fell off a subway platform, and was struck by a train. The jury returned a verdict apportioning fault 60% to plaintiff and 40% to defendant New York City Transit Authority (NYCTA), and awarding plaintiff a total of approximately $2 million in damages. Supreme Court set aside the verdict and dismissed the complaint. The Appellate Division affirmed. I agree with both lower courts, and therefore I dissent. Plaintiff entered the subway station around 11:15 a.m. and was discovered injured on the tracks at 11:58 a.m. During those forty-three minutes, at least two trains passed through the station. Neither train operator saw plaintiff, although the operator of the second train reported observing white sneakers on the train tracks. Plaintiff had no memory of the incident, but contended at trial that the second train caused his injuries, and that the driver of that train had acted negligently." ***Obey v. City of New York*, 2017 N.Y. Slip Op. 02590, CtApp 4-4-17**

FIRST DEPARTMENT

FAMILY LAW.

TITLE TO ARTWORK PURCHASED DURING THE MARRIAGE CANNOT BE DETERMINED BY REFERENCE TO INVOICES ALONE.

The First Department, in a full-fledged opinion by Justice Webber, reversing Supreme Court, held that the person who holds title to artwork purchased during the marriage cannot be determined by reference to invoices alone (as Supreme Court had done). The couple purchased art worth millions of dollars. The prenuptial agreement stated that any art not owned jointly by husband and wife would be deemed to belong to the party holding title without reference to the source of the funds for the purchase: "An invoice cannot be said to be dispositive of ownership. The purpose of the invoice is not to identify the titled owner. Moreover, there is always the potential unreliability of the information contained on the invoice. For example, for one reason or another, the price of the item(s) purchased may be inflated or deflated or the description of the merchandise or services rendered may be inaccurate or distorted. The unreliability of an invoice as sole proof of title is evidenced by various invoices in the record before us. The parties concede that some of the invoices are inconsistent on their face, in that the name of the only party listed is not consistent with the name of that party's account with the auction house of purchase or conflicts with the party to whom the item purchased should have been shipped. For example, the wife points to a jointly acquired and owned Jeff Koons painting, 'the Empire State of Scotch, Dewars,' the invoice for which lists only the husband's name." ***Anonymous v. Anonymous*, 2017 N.Y. Slip Op. 02613, 1st Dept 4-4-17**

FAMILY LAW, CONTRACT LAW.

CHILD SUPPORT PROVISIONS OF A STIPULATION OF SETTLEMENT WOULD NOT BE ENFORCED BECAUSE THE CAP ON CHILD SUPPORT MAY DEPRIVE CHILDREN OF THEIR RIGHT TO SUPPORT.

The First Department, over a two-justice dissent, determined that the child support provisions of a stipulation of settlement in this divorce action should not be enforced because the children's right to child support was jeopardized. Because the stipulation put a cap on father's child support obligations, it was possible payment of room and board (college) for one sibling could exceed the cap leaving the other siblings without support: " '[T]he parties cannot contract away the duty of child support. Despite the fact that a separation agreement is entitled to the solemnity and obligation of a contract, when children's rights are involved the contract yields to the welfare of the children. The duty of a parent to support his or her child shall not be eliminated or diminished by the terms of a separation agreement, nor can it be abrogated by contract' ... . The agreement here violates this rule. The credit sought by the father takes away that portion of child support intended for the welfare of the other two children. Taken to its logical end, the agreement threatens to completely deprive the other children of any support whatsoever, if monthly room and board costs for one child were to exceed $2,500." ***Keller-Goldman v. Goldman*, 2017 N.Y. Slip Op. 02723, 1st Dept 4-6-17**

LANDLORD-TENANT, MUNICIPAL LAW (NYC)

FAIR MARKET RENT APPEAL PROPERLY DISMISSED.

The First Department, in a full-fledged opinion by Justice Gische, affirmed the dismissal of an Article 78 petition seeking a ruling on the status of petitioners' apartment and the legality of the rent: "The disputes before us arise from the Fair Market Rent Appeal (FMRA) petitioners filed with respondent New York State Division of Housing and Community Renewal (DHCR), implicating both the regulatory status of their apartment and the legality of the rent they were charged from the time they first took occupancy in 2010. The DHCR decision being challenged in this article 78 proceeding denied the FMRA as untimely because it was filed more than four years after the apartment was no longer subject to the rent control laws following the death of the previous tenant in 2004. DHCR rejected petitioners' contention that the applicable statute of limitations should be disregarded because the owner had engaged in fraud. DHCR also rejected petitioners' claim that the owner's late notices and/or registrations had extended the time period within which petitioners could file an FMRA challenging the owner's efforts to set an initial rent following the apartment's removal from rent control. Finally, on the merits, DHCR concluded that petitioners were not entitled to either a rent-regulated apartment or regulated rent because in 2010, when they first took occupancy, the apartment was no longer receiving any J-51 tax benefits and had become vacant at a time when the legal vacancy rent clearly exceeded $2,000 per month, an amount sufficient to make it high-rent/vacancy, 'luxury' decontrolled ...". ***Matter of Park v. New York State Div. of Hous. & Community Renewal*, 1st Dept 4-6-17**

PERSONAL INJURY.

KILLING OF PLAINTIFF IN HER OFFICE WAS NOT FORESEEABLE BY THE BUILDING OWNERS OR TENANTS.

The First Department determined the killing of plaintiff in her office (caused by nonparty Tarloff) was not foreseeable and the building owners and tenants could not therefore be liable in negligence: "Even though the building contained a psychiatric suite, defendants had no duty to protect decedent from the violent actions of third parties, including former patients like Tarloff; such actions were not foreseeable, given the absence of prior violent criminal activity by Tarloff or other

third parties in the building ... . Even assuming that defendants had a duty to provide 'minimal precautions' ... , that duty was satisfied by the provision of 24/7 doorman coverage, surveillance cameras, controlled building access, and functioning locks on the doors of the office suite and decedent's personal office ... . It is purely speculative that additional security measures — such as announcing visitors, installing an office intercom or buzzer, or keeping the office doors locked after hours — would have prevented Tarloff from killing decedent. Any claims that the door man was negligent in failing to recognize Tarloff's suspicious behavior was not a proximate cause of decedent's death because it was still not foreseeable that Tarloff was about to engage in a murderous rampage. Tarloff's conduct was a superceding cause severing the causal chain. Given that the attack was targeted and premeditated, it is 'unlikely that any reasonable security measures would have deterred [Tarloff]' ...". ***Faughey v. New 56-79 IG Assoc., L.P.*, 2017 N.Y. Slip Op. 02608, 1st Dept**

PERSONAL INJURY.

NO DUTY TO KEEP BUS STEPS FREE OF TRACKED IN WATER DURING RAINSTORM.

The First Department, reversing Supreme Court, determined that defendant bus company did not have a duty to keep the entry steps free of tracked in water during a rainstorm. Plaintiff slipped and fell on the steps while attempting to board the bus: "Plaintiff's claim that [defendant] negligently allowed a slippery condition to persist on the stairs leading into the bus was precluded, as a matter of law, by plaintiff's testimony that it was raining at the time of the accident ... . 'Defendant is not obligated to provide a constant remedy for the tracking of water onto a bus during an ongoing storm' ... , and here, the evidence showed that plaintiff was the last of a group of people to board the bus during the rainstorm ...". ***Collins v. Nate Tours Bus Co.*, 2017 N.Y. Slip Op. 02739. 1st Dept 4-6-17**

SECOND DEPARTMENT

ATTORNEYS, NEGLIGENCE, LEGAL MALPRACTICE. CIVIL PROCEDURE.

QUESTION OF FACT WHETHER CONTINUOUS REPRESENTATION DOCTRINE RENDERED LEGAL MALPRACTICE ACTION TIMELY.

The Second Department, reversing Supreme Court, determined there was a question of fact whether the continuous representation doctrine rendered the legal malpractice cause of action timely. The malpractice allegation stemmed from the alleged failure of the attorneys to recognize that the sale of plaintiff's business required the creation of a pension fund ($500,000). There was evidence a meeting was held to discuss the pension fund problem at a time which would rendered the malpractice action timely: "A claim to recover damages for legal malpractice accrues when the malpractice is committed ... . 'However, pursuant to the doctrine of continuous representation, the time within which to sue on the claim is tolled until the attorney's continuing representation of the client with regard to the particular matter terminates' ... . For the continuous representation doctrine to apply, 'there must be clear indicia of an ongoing, continuous, developing, and dependant relationship between the client and the attorney which often includes an attempt by the attorney to rectify an alleged act of malpractice' ... . Here, the defendant satisfied its initial burden by demonstrating, prima facie, that the alleged legal malpractice occurred more than three years before this action was commenced in March 2015 ... . In opposition, however, the plaintiffs raised a question of fact as to whether the applicable statute of limitations was tolled by the continuous representation doctrine. The plaintiffs submitted Andrew Stein's affidavit, in which he averred that he met with members of the defendant on July 26, 2012, to determine how to rectify the pension liability issue. Andrew indicated that he was not satisfied with their recommendations concerning how to rectify the issue and directed them to formulate another idea. Andrew's affidavit was sufficient to raise a question of fact as to whether the defendant engaged in a course of continuous representation intended to rectify or mitigate the initial act of alleged malpractice ...". ***Stein Indus., Inc. v. Certilman Balin Adler & Hyman, LLP*, 2017 N.Y. Slip Op. 02688, 2nd Dept 4-5-17**

CIVIL PROCEDURE.

LAWSUIT SHOULD NOT HAVE BEEN DISMISSED BASED ON THE DIAGNOSIS PLAINTIFF WAS SEVERELY MENTALLY RETARDED, HEARING ABOUT APPOINTMENT OF A GUARDIAN AD LITEM SHOULD HAVE BEEN HELD.

The Second Department determined plaintiff's lawsuit should not have been dismissed on the ground he was severely mentally retarded. Plaintiff had not been judicially declared incompetent. Supreme Court should have held a hearing about the appointment of a guardian ad litem to aid plaintiff: "The plaintiff, who has never been judicially declared incompetent, commenced this action to recover damages for personal injuries. By way of background information, he alleged, inter alia, that he previously had been diagnosed as 'severely mentally retarded,' that he receives ongoing medical and psychiatric treatment at a residential facility for the developmentally disabled, and that he is entirely dependent on others for his care. Based on these allegations, the defendants separately moved pursuant to CPLR 3211(a)(3) to dismiss the complaint insofar as asserted against each of them on the ground that the plaintiff lacked the legal capacity to sue. The Supreme Court granted

the motions. An individual who is of unsound mind, but who has not been judicially declared incompetent, may sue or be sued in the same manner as any other person ... . Therefore, the Supreme Court erred in directing summary dismissal of the complaint based upon the plaintiff's alleged lack of mental capacity. Rather, since the plaintiff may require the assistance of a guardian ad litem to protect his interests, the court should have conducted a hearing to determine whether a guardian should be appointed for the plaintiff pursuant to CPLR 1201 ...". ***Piggott v. Lifespire, Inc.*, 2017 N.Y. Slip Op. 02686, 2nd Dept 4-5-17**

CIVIL RIGHTS LAW (18 U.S.C. § 1983), MUNICIPAL LAW, IMMUNITY, CIVIL PROCEDURE.

HANDCUFFING PLAINTIFF DURING EXECUTION OF SEARCH WARRANT CAUSED NO PHYSICAL INJURY AND WAS ENTITLED TO QUALIFIED IMMUNITY, CITY'S MOTION TO SET ASIDE THE JURY VERDICT AS A MATTER OF LAW SHOULD HAVE BEEN GRANTED.

The Second Department determined the defendant city's motion to set aside the verdict as a matter of law should have been granted (criteria explained). Plaintiff, a 72-year-old woman (who was not named in the search warrant) was handcuffed while the police searched her house. Plaintiff alleged she suffered anxiety-related symptoms but no physical injury. Only the excessive force cause of action went to the jury. The Second Department held that physical injury, not emotional injury, was required, and further held that qualified immunity applied to the act of placing her in handcuffs (which was deemed reasonable): "Here, although the plaintiff did not resist or attempt to flee, the actions of the officers were reasonable given that they had reason to believe that illegal drugs were being sold from the premises, and that a known drug dealer might be present. Under the circumstances, where the police were executing a search warrant to find illegal drugs and did not know who they might encounter or whether any occupants of the house might have weapons, it was reasonable for them to handcuff the plaintiff for a few minutes until they determined that she was not a threat, notwithstanding her age at the time of the incident. ... Furthermore, a plaintiff must have sustained some injury to maintain a claim of excessive force, although that injury need not be severe ... . Emotional pain and suffering cannot form the basis of an excessive force claim ... . Here, the plaintiff failed to establish that she sustained any injury that resulted from the act of handcuffing her ...". ***Boyd v. City of New York*, 2017 N.Y. Slip Op. 02619, 2nd Dept 4-5-17**

CONTRACT LAW.

HOME RENOVATION CONTRACTOR, WHO PERFORMED WORK WITHOUT A WRITTEN CONTRACT, DID NOT DEMONSTRATE ENTITLEMENT TO QUANTUM MERUIT RELIEF, HOMEOWNERS ENTITLED TO DAMAGES TO COMPLETE OR REPAIR CONTRACTOR'S WORK.

The Second Department determined the dismissal of the quantum meruit action by the plaintiff home renovation contractor and the award of damages on the homeowners' counterclaim was proper. The court noted that General Business Law § 771 generally prohibits recovery by a home renovation contractor in the absence of a contract, however the contractor can bring an action in quantum meruit. Here the contractor did not prove entitlement to quantum meruit relief and the homeowners proved (by expert opinion) the damages related to needed corrections of the contractors' work: "Although a contractor cannot enforce a contract that fails to comply with General Business Law § 771, a contractor may seek to recover based on the equitable theory of quantum meruit ... . 'The elements of a cause of action sounding in quantum meruit are (1) performance of services in good faith, (2) acceptance of services by the person to whom they are rendered, (3) expectation of compensation therefor, and (4) reasonable value of the services rendered' ... . Although an unenforceable writing may provide evidence of the value of services rendered in quantum meruit ... , here, the record is devoid of evidence which would establish the reasonable value of the services [the contractor] may have provided to the defendants ... . In contrast, the defendants, on their counterclaim, offered the testimony of experts regarding the cost they expended in completing or repairing roofing, flooring, brickwork, and other aspects of the project as set forth in the architectural plans." ***Home Constr. Corp. v. Beaury*, 2017 N.Y. Slip Op. 02628, 2nd Dept 4-5-17**

EMPLOYMENT LAW, HUMAN RIGHTS LAW.

DISCRIMINATION AND RETALIATION CAUSES ACTION, AS WELL AS A FAMILY AND MEDICAL LEAVE ACT CAUSE OF ACTION, SHOULD NOT HAVE BEEN DISMISSED.

The Second Department, modifying Supreme Court determined the discrimination and retaliation causes of action under the New York State Human Rights Law (NYSHRL) and the New York City Human Rights Law (NYCHRL) should not have been dismissed. In addition, the court determined the Family and Medical Leave Act (FMLA) cause of action should not have been dismissed on the ground the defendant companies had less than 50 employees because there was question of fact whether single or joint employer doctrine should apply: "Here, the defendants established their prima facie entitlement to judgment as a matter of law dismissing the first and second causes of action insofar as they alleged discrimination and retaliation in violation of the NYSHRL and the NYCHRL, and the third cause of action pursuant to the NYSHRL and the NYCHRL, by proffering, among other things, a legitimate, nondiscriminatory reason for the plaintiff's termination. The defendants cited, among other things, the plaintiff's disciplinary record, which included numerous infractions. The plaintiff,

however, raised triable issues of fact, inter alia, on the issue of pretext, by referring to his good disciplinary record for the first three years of his employment, followed by frequent citations for disciplinary issues which commenced only after he allegedly began complaining of discriminatory treatment on the basis of association, ancestry, and religion. Under these circumstances, the Supreme Court erred in determining that the plaintiff failed to raise triable issues of fact regarding so much of his first through third causes of action as alleged discrimination and retaliation in violation of the NYSHRL and NYCHRL." ***Macchio v. Michaels Elec. Supply Corp.*, 2017 N.Y. Slip Op. 02636, 2nd Dept 4-5-17**

FAMILY LAW.

DOMESTIC RELATIONS LAW NO LONGER REQUIRES EXHAUSTION OF ENFORCEMENT REMEDIES BEFORE A MOTION FOR CIVIL CONTEMPT CAN BE BROUGHT.

The Second Department, reversing Supreme Court, determined that plaintiff-husband's motion to hold defendant-wife in contempt for failure to comply with the court's order concerning the couple's finances and debts should have been granted. Supreme Court denied the motion on the ground plaintiff had not exhausted other enforcement procedures. The Second Department noted that the Domestic Relations Law had been changed to remove the exhaustion requirement: "Here, the plaintiff demonstrated that the defendant violated certain provisions of the separation agreement ... . Through his affidavit, the plaintiff demonstrated that when the defendant took over management of [the couple's business's] finances following the sale of the marital home, she refused to pay off their joint credit card debt and did not share the proceeds from [the business's] monthly rental income equally with him, thereby prejudicing his rights under the separation agreement ... . Although the Supreme Court found that the plaintiff had not met his burden, in part, because he did not exhaust other enforcement remedies before filing the instant motion, we note that Domestic Relations Law § 245 was amended, effective September 29, 2016, to remove the exhaustion requirement (L 2016, ch 365, § 1). The Legislature directed the amendment to 'take effect immediately,' and apply 'to all actions whenever commenced as well as all judgments or orders previously entered' (id. § 2). Accordingly, the plaintiff's failure to show that he exhausted other enforcement remedies before seeking to hold the defendant in contempt does not bar him from obtaining that relief." ***Cassarino v. Cassarino*, 2017 N.Y. Slip Op. 02623, 2nd Dept 4-5-17**

INSURANCE LAW, CORPORATION LAW, EVIDENCE.

INSURER'S FRAUDULENT INCORPORATION DEFENSE TO ITS REFUSAL TO PAY NO-FAULT BENEFITS TO A CORPORATION RUN BY NON-PHYSICIANS WAS PROPERLY PRESENTED TO THE JURY; DEPOSITION TESTIMONY IN WHICH NON-PARTIES INVOKED THE FIFTH AMENDMENT SHOULD NOT HAVE BEEN READ TO THE JURY.

The Second Department, in a full-fledged opinion by Justice Duffy, determined defendant insurance company was entitled to the fraudulent incorporation defense in support of its refusal to pay no-fault benefits to plaintiff corporation for MRI's administered by plaintiff corporation. The Business Corporation Law required that plaintiff corporation be run by physicians. There was substantial evidence the corporation was being run by two non-physicians with a physician as a cover. The Second Department found that the jury instructions explaining the criteria for the fraudulent incorporation defense were proper. The Second Department noted that the deposition testimony in which the two non-physician operators of plaintiff corporation refused to answer questions (invoking the Fifth Amendment) should not have been read to the jury because they were non-party witnesses. However, the error was deemed harmless. With respect to the fraudulent incorporation defense, the court wrote: "... [T]he jury charge, read as a whole, adequately conveyed the correct legal principles on 'fraudulent incorporation' ... . The instructions asked the jury to consider whether, under the totality of the circumstances, the plaintiff was operating as a proper professional medical corporation in compliance with state regulations or whether, in order to obtain money that insurers were otherwise entitled to deny, the plaintiff was organized under the facially valid cover of [a physician] but was, in actuality, operated and controlled by [two non-physicians] to funnel profits to themselves." ***Carothers v. Progressive Ins. Co.*, 2017 N.Y. Slip Op. 02614. 2nd Dept 4-5-17**

PERSONAL INJURY.

PEDESTRIAN STRUCK WHILE LAWFULLY IN CROSSWALK ENTITLED TO SUMMARY JUDGMENT, SUPREME COURT REVERSED.

The Second Department, reversing Supreme Court, determined plaintiffs were entitled to summary judgment in this pedestrian wrongful death case. Plaintiffs' decedent was crossing the street with the walk signal when she was struck. There was no evidence of the pedestrian's comparative negligence: "A pedestrian who has the right of way is entitled to anticipate that motorists will obey the traffic laws that require them to yield ... . Here, the plaintiffs established, through admissible evidence, that [defendant driver] failed to yield the right of way to the decedent, who was crossing the street within the crosswalk with the pedestrian 'WALK' signal in her favor ... . The plaintiffs' prima facie showing was buttressed by [defendant driver's] admission that he did not see the decedent and that he struck her ... . As neither the plaintiffs' submissions nor the defendants' opposition papers revealed any triable issue of fact regarding the decedent's comparative negligence ... , the Supreme Court should have granted that branch of the plaintiffs' motion which was for summary judgment on the issue of liability ...". ***Huang v. Franco*, 2017 N.Y. Slip Op. 02629, 2nd Dept 4-5-17**

PERSONAL INJURY.

COMMON CARRIER DID NOT HAVE A DUTY TO KEEP SIDEWALK CLEAR OF ICE AND SNOW BECAUSE THE SIDEWALK SERVED AS INGRESS AND EGRESS FOR SEVERAL COMMON CARRIERS, NOT SOLELY DEFENDANT COMMON CARRIER.

The Second Department determined defendant common carrier (Long Island Railroad) did not have a duty to keep the sidewalk where plaintiff fell free of ice and snow because the sidewalk served as ingress and egress for several common carriers. The duty to keep the sidewalk clear would apply to defendant only if the sidewalk service as ingress and egress solely for defendant: "In 'areas that serve primarily for ingress and egress to a subway or other similar station that is served by a single carrier,' a common carrier must maintain a safe means of ingress and egress for the use of its passengers, even if the area is owned and maintained by another, so long as the area is constantly and notoriously used by its passengers as a means of approach ... . This duty of care 'has not been extended to common areas in a multi-carrier facility' ...". ***Mashall v. Long Is. R.R.*, 2017 N.Y. Slip Op. 02637, 2nd Dept 4-5-17**

PERSONAL INJURY.

DEFENDANT PROPERTY OWNERS DID NOT DEMONSTRATE SNOW REMOVAL EFFORTS DID NOT EXACERBATE THE ICY CONDITION AND DID NOT DEMONSTRATE A LACK OF CONSTRUCTIVE NOTICE OF THE CONDITION, SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined defendant property owners did not demonstrate defendant's snow removal efforts did not create the condition and did not demonstrate a lack of constructive notice of the icy condition of the sidewalk where plaintiff fell. Defendants motion for summary judgment should not, therefore, have been granted: "Here, in support of their motion, the defendants failed to eliminate all triable issues of fact as to whether the snow removal efforts of the defendant Marc V. Antiones preceding the subject accident created the ice condition upon which the plaintiff allegedly fell ... . Moreover, the defendants failed to demonstrate a lack of constructive notice of the ice condition alleged. While the defendants demonstrated a lack of actual notice of the ice condition alleged, the evidence submitted in support of their motion did not show when the area of the sidewalk where the subject accident occurred was last inspected in relation to when the subject accident occurred ...". ***Rong Wen Wu v. Arniotes*, 2017 N.Y. Slip Op. 02687, 2nd Dept 4-5-17**

PERSONAL INJURY, EDUCATION-SCHOOL LAW, CIVIL PROCEDURE.

MOTION TO SET ASIDE VERDICT IN THIS PERSONAL INJURY CASE WAS PROPERLY GRANTED, PLAINTIFF, A SCHOOL BUS MATRON INJURED ON THE BUS, DID NOT HAVE A SPECIAL RELATIONSHIP WITH THE SCHOOL DISTRICT.

The Second Department determined defendant school district's motion to set aside the verdict in this personal injury case was properly granted. Plaintiff was a matron on a school bus. The bus suddenly stopped when a student grabbed the steering wheel and plaintiff fell. The Second Department explained the criteria for a motion to set aside a verdict as a matter of law and held the school district could not be liable unless there was a special relationship between the plaintiff and the district (no special relationship was demonstrated): "With regard to teachers, administrators, or other adults on or off school premises, a special relationship with a municipal defendant can be formed in three ways: '(1) when the municipality violates a statutory duty enacted for the benefit of a particular class of persons; (2) when it voluntarily assumes a duty that generates justifiable reliance by the person who benefits from the duty; or (3) when the municipality assumes positive direction and control in the face of a known, blatant and dangerous safety violation' ... . A special relationship based upon a duty voluntarily assumed by the municipality requires proof of the following four elements: '(1) an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part of the municipality's agents that inaction could lead to harm; (3) some form of direct contact between the municipality's agents and the injured party; and (4) that party's justifiable reliance on the municipality's affirmative undertaking' ... . Moreover, '[t]he assurance by the municipal defendant must be definite enough to generate justifiable reliance by the plaintiff' ...". ***Destefano v. City of New York*, 2017 N.Y. Slip Op. 02626, 2nd Dept 4-5-17**

PERSONAL INJURY, EVIDENCE.

SURVEILLANCE TAPE SHOULD HAVE BEEN CONSIDERED IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT, IT WAS PROPERLY AUTHENTICATED BY DEFENDANT'S STATEMENT THE TAPE ACCURATELY DEPICTED WHAT HAPPENED IN THIS CAR ACCIDENT CASE.

The Second Department, reversing Supreme Court, determined a surveillance tape which depicted the defendant's car pulling out into traffic as plaintiff's (Nesbitt's) car was closely approaching should have been considered by the motion court and summary judgment should have been awarded to defendant. The tape was sufficiently authenticated by defendant's statement the tape accurately depicted what happened: "Here, in support of his motion for summary judgment, the defendant submitted, among other things, a surveillance tape that depicted Nesbitt's vehicle leaving the gas station and entering Middle Country Road as the defendant's vehicle approached. The Supreme Court refused to consider this evidence on the

ground that it was not properly authenticated. The court improvidently exercised its discretion in declining to consider the surveillance tape, because the defendant adequately authenticated the tape by averring that it accurately depicted what had occurred at the time of the accident ... . The surveillance tape and the additional evidence submitted by the defendant in support of his motion established, prima facie, that he was not at fault in the happening of the accident and that the sole proximate cause was Nesbitt's conduct in entering the roadway when the defendant's vehicle was so close ...". ***Nesbitt v. Gallant*, 2017 N.Y. Slip Op. 02665, 2nd Dept 4-5-17**

PERSONAL INJURY, MUNICIPAL LAW.

EVIDENCE A SIDEWALK DEFECT DEVELOPED OVER TIME DID NOT RAISE A QUESTION OF FACT ABOUT WHETHER THE DEFECT AROSE UPON INSTALLATION, VILLAGE'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined demonstrating that a sidewalk defect developed over time is not sufficient to raise a question of fact whether the defect was there upon installation of the sidewalk: "Contrary to the plaintiff's contention, evidence suggesting that the defendant actually knew of the alleged defect did not satisfy the requirement in Village of Scarsdale Local Law § 209-1 that prior written notice of the alleged defect be given to the Village Clerk ... . Moreover, the plaintiff failed to raise a triable issue of fact as to the affirmative negligence exception, as she did not identify any evidence demonstrating that the allegedly defective condition arose immediately upon installation ... . The plaintiff's evidence, which includes an expert affidavit and statements by Village officials, at most established that environmental effects created the alleged defect over time, which is not sufficient to establish the defendant's liability ...". ***Beiner v. Village of Scarsdale*, 2017 N.Y. Slip Op. 02617, 2nd Dept 4-5-17;** Same issues and result in ***Loghry v. Village of Scarsdale*, 2017 N.Y. Slip Op. 02635, 2nd Dept 4-5-17**

THIRD DEPARTMENT

CONTRACT LAW, BANKRUPTCY.

AFTER TERMINATION OF BANKRUPTCY PROCEEDINGS PLAINTIFF CANNOT SUE ON INVOICES NOT INCLUDED IN THE SCHEDULE OF ASSETS.

The Third Department determined plaintiff could not sue on invoices submitted for payment (which was refused) while plaintiff was in bankruptcy proceedings. Causes of action not listed in the bankruptcy proceedings cannot be sued upon after termination of the bankruptcy proceedings: " 'Upon the filing of a voluntary bankruptcy petition, all property which a debtor owns, including a cause of action, vests in the bankruptcy estate' ... . As such, a debtor's failure to list a legal claim as an asset in its bankruptcy proceeding precludes the debtor from pursuing such claim on its own behalf inasmuch as the claim remains the property of the bankruptcy estate ... . 'The only property that may revest in the debtor in its individual capacity at the conclusion of the proceeding is property that was dealt with in the bankruptcy or abandoned' ... . [T]he claims asserted by plaintiff ... accrued prior to the termination of the bankruptcy proceeding ... . [T]he omission of these claims from the ... schedule of assets in the bankruptcy proceeding precludes plaintiff from pursuing them on its own behalf because they were not 'dealt with' in such proceeding ...". ***Lightning Capital Holdings LLC v. Erie Painting & Maintenance, Inc.*, 2017 N.Y. Slip Op. 02716, 3rd Dept 4-6-17**

CRIMINAL LAW.

RARE CIRCUMSTANCE WHERE COURT SHOULD HAVE DIRECTLY QUESTIONED DEFENDANT ABOUT WHETHER HE KNOWINGLY AND INTELLIGENTLY WAIVED HIS RIGHT TO TESTIFY.

The Third Department, reversing defendant's conviction, determined the facts presented the rare scenario that required the court's inquiry into whether defendant waived his right to testify. After proof had closed, the defendant made it clear that he wanted to testify and that he and his attorney did not agree on the question: "Defendant's request to testify, coupled with his statements that he and defense counsel had disagreed on the issue, gave rise to one of those rare circumstances in which County Court was required to engage in a direct colloquy with defendant so as to discern whether he had been advised that the decision to testify ultimately belonged to him and whether, at the time that the defense rested, defendant's failure to testify had been a knowing, voluntary and intelligent waiver of that right ... . However, County Court failed to engage in the required inquiry so as to ensure that defendant's constitutional right to testify was protected. While County Court asked whether there was an application to reopen the proof and indicated that it would consider such a request, it directed that question only to defense counsel, even in the face of defendant's repeated statements that he and defense counsel had differing opinions on the matter. By directing its question solely to defense counsel, County Court demonstrated an apparent misapprehension of longstanding precedent holding that a represented defendant has final decision-making authority over the decision to testify ...". ***People v. Morgan*, 2017 N.Y. Slip Op. 02692, 3rd Dept 4-6-17**

CRIMINAL LAW.

COUNTY COURT DID NOT HAVE THE AUTHORITY TO ALLOW PEOPLE TO AMEND A DEFECTIVE CONSPIRACY COUNT BY ADDING AN ALLEGED OVERT ACT.

The Third Department determined County Court should not have allowed the People to amend a conspiracy count which did not charge the commission of an overt act: "Given that '[a]n indictment may not be amended in any respect . . . for the purpose of curing: (a) [a] failure . . . to charge or state an offense; or (b) '[l]egal insufficiency of the factual allegations' (CPL 200.70 [2]), County Court had no authority to grant the People's motion to amend the indictment to allege an overt act. Moreover, the People's contention that defendant consented to the amendment is directly contradicted by the fact that defendant specifically argued that the proper remedy for the People's failure was dismissal of count 2 of the indictment. Accordingly, as count 2 was jurisdictionally defective and not subject to amendment, we reverse the conviction for conspiracy in the fourth degree and the sentence imposed thereon ...". ***People v. Placido*, 2017 N.Y. Slip Op. 02694, 3rd Dept 4-6-17**

CRIMINAL LAW, ATTORNEYS.

DEFENDANT ARGUED HAD SHE BEEN INFORMED DEPORTATION WAS NOT AN ISSUE SHE WOULD HAVE PLED GUILTY AND THEREBY AVOIDED THE LONGER SENTENCE IMPOSED AFTER TRIAL, HEARING ON MOTION TO SET ASIDE HER CONVICTION ON INEFFECTIVE ASSISTANCE GROUNDS SHOULD HAVE BEEN HELD.

The Third Department determined a hearing should have been held on defendant's motion to set aside her conviction after trial on ineffective assistance grounds. Defendant argued that had she known she could not be deported based upon a guilty plea she would not have gone to trial and thereby been subject to a longer sentence: "Defendant maintains that, had counsel properly determined her immigration status during the course of her representation, she would likely have entered a guilty plea. She would have thus been exposed to less prison time than she received after trial, much like that of her codefendant. We note that miscommunications in matters such as this have provided a basis for finding that a defendant was denied the effective assistance of counsel ...". ***People v. Monterio*, 2017 N.Y. Slip Op. 02693, 3rd Dept 4-6-17**

EDUCATION-SCHOOL LAW, ADMINISTRATIVE LAW, EVIDENCE.

SUNY POTSDAM'S SEXUAL MISCONDUCT DETERMINATION ANNULLED, NOT SUPPORTED BY SUBSTANTIAL EVIDENCE, IMPOSITION OF A HARSHER PENALTY AFTER STUDENT'S APPEAL CRITICIZED.

The Third Department, hearing an Article 78 petition, over an extensive two-justice dissent, annulled the determination of SUNY Potsdam which found student petitioner guilty of sexual misconduct and expelled him. The court noted its discomfort with several procedural issues and with the punishment imposed. The Third Department held that the determination was not supported by substantial evidence: "The complainant's account was set forth by others who had conversed with her, with the Hearing Board considering written notes prepared by respondent Annette Robbins, SUNY's director of student conduct and community standards, and the hearing testimony of a campus police officer. * * * ... [H]earsay must be 'sufficiently relevant and probative [if it is] to constitute substantial evidence' ... and, 'when the hearsay evidence is seriously controverted, common sense and elemental fairness suggest that it may not constitute the substantial evidence necessary to support the [challenged] determination' ... . Petitioner testified at the hearing and, while the broad contours of his account matched those of the complainant, their accounts differed on the critical issue of consent. * * * ... [W]e feel the need to comment on the circumstances leading to its imposition. Upon petitioner's appeal from the decision of the Hearing Board, the Appellate Board, sua sponte and without any explanation, recommended enhancing the penalty to expulsion. ... While nothing in the student code of conduct expressly prohibits the Appellate Board from recommending, and SUNY's president from ultimately imposing, a more severe sanction upon a disciplined student's appeal, nor does the student code of conduct explicitly advise an appealing student that such a consequence may inure as a result of an appeal. We are troubled by the absence of any such clear articulation that an enhanced penalty may result from a student's choice to appeal the underlying determination and believe that, in this context, fairness warrants a clear and conspicuous advisement to that effect." ***Matter of Haug v. State Univ. of N.Y. At Potsdam*, 2017 N.Y. Slip Op. 02708, 3rd Dept 4-6-17**

FAMILY LAW.

GRANDMOTHER DID NOT DEMONSTRATE A PROLONGED SEPARATION OF THE CHILD FROM MOTHER OR THE MOTHER'S RELINQUISHMENT OF CONTROL AND CARE, CUSTODY SHOULD NOT HAVE BEEN AWARDED TO GRANDMOTHER.

The Third Department, reversing Family Court, determined grandmother (petitioner) did not demonstrate extraordinary circumstances justifying the award of custody of the child to her. Despite mother's move to Florida while the child remained with grandmother, the proof did not demonstrate either a prolonged separation from mother or mother's relinquishment of care and control. The decision includes a detailed explanation of the relevant law: "While petitioner demonstrated that the child continuously resided with her for an 11-month period following the mother's move to Florida, she failed to proffer sufficient evidence to establish that this was a prolonged separation of the mother and the child during which the mother voluntarily relinquished care and control of the child to her. Indeed, petitioner's testimony demonstrated that the mother

maintained consistent contact with the child throughout her 11-month residence in Florida. In particular, petitioner stated that the mother regularly called the child, visited the child over Christmas and paid for petitioner and the child to fly to Florida over the child's April vacation. With respect to voluntary relinquishment, petitioner merely stated that she and the mother had discussed the mother's move to Florida, but had never discussed whether the mother intended the child to move with her. In stark contrast, the mother testified that, prior to moving, she and petitioner had a discussion about the child remaining in New York only until such time as she had secured employment and prepared suitable living arrangements for herself and the child in Florida. * * * Moreover, petitioner offered little to no evidence as to her role, if any, in making important decisions affecting the child's life." ***Matter of Donna SS. v. Amy TT.*, 2017 N.Y. Slip Op. 02710, 3rd Dept 4-6-17**

FAMILY LAW.

DESPITE THE PRESUMPTION OF LEGITIMACY IN THIS PATERNITY PROCEEDING, FAMILY COURT SHOULD HAVE HELD A BEST INTERESTS HEARING.

The Third Department determined Family Court should not have dismissed the paternity petition based solely on the presumption of legitimacy and should have held a best interests hearing: "We agree with petitioner that, as he made the requisite threshold showing of 'a nonfrivolous controversy as to paternity' ... , his request for genetic testing should not have been denied in the absence of a best interests finding. In enacting the statutory provisions, the Legislature plainly anticipated that cases involving the presumption of legitimacy may present themselves in which, based upon all of the circumstances, it will not be in a child's best interests to order genetic testing... . Although respondents ask us to find that this is such a case, we are unable to exercise our broad power of review to render the best interests determination upon the present record. The limited testimony that was taken at the hearing failed to address many of the factors that have been recognized in similar proceedings as relevant to the issue of the child's best interests. These include such factors as the child's interest in knowing the identity of his or her biological father, whether testing may have a traumatic effect on the child, and whether continued uncertainty may have a negative impact on a parent-child relationship in the absence of testing ... . * * * Accordingly, the matter must be remitted for a hearing and a determination as to whether, based upon all of the circumstances, including the presumption of legitimacy, genetic testing would be in the child's best interests ...". ***Matter of Mario WW. v. Kristin XX.*, 2017 N.Y. Slip Op. 02715, 3rd Dept 4-6-17**

FAMILY LAW.

RESPONDENT NOT INFORMED OF HIS RIGHT TO REMAIN SILENT IN THIS PINS PROCEEDING, ORDER OF DISPOSITION VACATED.

The Third Department vacated Family Court's order of disposition in the PINS matter finding that respondent had violated the terms of his probation. Respondent was never informed of his right to remain silent: " 'Family Court Act § 741 (a) requires that at a respondent's initial appearance in a proceeding and at the commencement of any hearing under Family Court Act article 7, the respondent and his or her parent or other person legally responsible for his or her care be advised of the respondent's right to remain silent' ... . Respondent ... argues that Family Court did not comply with Family Ct Act § 741 in this proceeding, ... and our review confirms that Family Court failed to apprise him of his right to remain silent at either the initial appearance or fact-finding hearing. As a result, the appealed-from order of disposition must be vacated ...". ***Matter of Daniel XX.*, 2017 N.Y. Slip Op. 02717, 3rd Dept 4-6-17**

REAL PROPERTY.

SPECIFIC PERFORMANCE OF A RECORDED OPTION TO BUY LAND WAS PROPERLY ORDERED DESPITE THE INABILITY TO IMMEDIATELY RECORD THE DEED UPON PURCHASE, TRANSFER OF THE DEED, NOT RECORDING OF THE DEED, WAS ALL THAT WAS REQUIRED BY THE OPTION AGREEMENT.

The Third Department, over a two-justice dissent, determined a recorded option agreement allowing plaintiff to buy back a portion of the parcel of land sold by the plaintiff was enforceable against subsequent purchasers of the parcel, even though the deed to the option property could not be recorded at the time the option was exercised (subdivision approval would be necessary to record the deed). The court held that because only transfer of the deed, not the recording of the deed, was required under the option agreement, the agreement could be enforced by an action for specific performance (which requires that the buyer be ready, willing and able to purchase the property when the option is exercised): "... '[N]othing within the four corners of the option agreement requires plaintiff to obtain subdivision approval prior to exercising its option with respect to the 3.5-acre parcel, nor does the option agreement provide that the failure to obtain such approval renders the underlying agreement null and void' ... . Further, as Supreme Court correctly noted, Real Property Law § 291 does not compel plaintiff to actually record the reconveyance deed for the subject parcel, as "recording is not required in order to transfer title to real property" (... see Real Property Law § 291). Rather, title to property vests upon the execution and delivery of the deed (see Real Property Law § 244 ...), and the fact that the deed may not be recorded until a later date — or at all — does not affect the validity of the conveyance ... . While it is true that, generally speaking, prudence would suggest that a grantee

record his or her deed, there is no requirement that he or she do so. More to the point, we do not interpret the option agreement before us as requiring plaintiff to record the deed obtained subsequent to exercising its rights relative to the 3.5-acre parcel — only a provision that, if it elects to do so, it be at its expense." ***Tomhannock, LLC v. Roustabout Resources, LLC*, 2017 N.Y. Slip Op. 02712, 3rd Dept 4-6-17**

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