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FIRST DEPARTMENT

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

DEFENDANT'S RELIANCE ON ITS INSURANCE BROKER TO HANDLE A LABOR LAW PERSONAL INJURY CLAIM WAS NOT, UNDER THE FACTS, A SUFFICIENT EXCUSE, THE DEFAULT JUDGMENT SHOULD NOT HAVE BEEN VACATED.

The First Department, over a dissent, determined the $900,000 default judgment in this Labor Law action should not have been vacated. The court noted that it had the power to overrule Supreme Court, even in the absence of an abuse of discretion. It has been held that a defendant's reliance on an insurance broker to handle a lawsuit, as argued here, is a valid excuse for a default. However defendant's principal, Mr. Gjonaj, received, over the course of years, papers sent by plaintiff's attorney which should have alerted him to fact that the lawsuit was progressing in defendant's absence. The court further determined plaintiff's installation of video cameras was a covered activity under the Labor Law and his falling from a ladder was therefore actionable: "... [Mr. Gjonaj's] assertion in this case that he believed his broker was forwarding the paperwork to the appropriate insurance carrier was unreasonable in light of his conceded receipt of the summons and complaint, two motions for a default judgment, a letter from the court and a court decision reflecting a $900,000 judgment against him. Surely Mr. Gjonaj knew that if his insurance company had retained a lawyer to appear for defendants, he and his corporations would not have continued to receive legal documents directly from plaintiff's attorney and the court for over three years. The fact that [the broker] kept assuring Mr. Gjonaj 'that everything in this matter was under control and that the claim was being handled by the proper insurance company,' does not help to establish reasonableness, objective or otherwise, on the part of Mr. Gjonaj, who should have known that everything was not under control after years of receiving so many legal documents from plaintiff's counsel relating to the same lawsuit." ***Gecaj v. Gjonaj Realty & Mgt. Corp.*, 2017 N.Y. Slip Op. 03109, 1st Dept 4-25-17**

CRIMINAL LAW.

DEFENDANT NEVER ADMITTED THE PRIOR FELONY CONVICTION AND WAS NEVER PROPERLY NOTIFIED THE PRIOR CONVICTION WOULD BE USED AS A PREDICATE, RESENTENCING REQUIRED.

The First Department determined the flawed procedure leading to sentencing defendant as a second felony offender required remittal for resentencing: "... [D]efendant never admitted the prior felony conviction upon which his second violent felony adjudication was predicated, and the court never adjudicated defendant a second violent felony offender. Moreover, there is no record evidence that the predicate felony statement was filed prior to sentencing, as required by CPL 400.15(2) ... . Further, the record does not reflect that defendant was given a copy of the predicate felony statement, as CPL 400.15(3) requires. Thus, the record is devoid of any indication that defendant received adequate notice that the prior felony conviction in question would be used as the basis for enhancement of his sentence or had an opportunity to be heard as to the validity of that conviction ... . The brief, incidental, logistical comments made by Supreme Court, the clerk and the prosecutor in defendant's presence during the plea proceedings concerning the existence of a predicate felony statement are insufficient to constitute substantial compliance with CPL 400.15 requirements ...". ***People v. Traylor*, 2017 N.Y. Slip Op. 03111, 1st Dept 4-25-17**

CRIMINAL LAW, APPEALS.

LOSS OF TRANSCRIPT OF LAST DAY OF BENCH TRIAL AND SENTENCING DID NOT PRECLUDE APPEAL.

The First Department determined the loss of the stenographic notes for the last day of the bench trial and sentencing did not preclude appeal: "Although the stenographic notes of the last day of the trial and the sentencing proceeding have been lost and no transcript is available for those dates, a reconstruction hearing sufficed to protect defendant's right to appeal. The judge's notes from the last day of trial, the prosecutor's detailed outline of her summation and trial counsel's affirmation, which were placed in the record at the hearing, provided an adequate basis to determine whether appealable issues existed ... . The fact that this was a nonjury trial, where the factfinder is presumed to have disregarded prejudicial matter ... , weighs strongly against the concern that the missing minutes may have revealed appealable issues." ***People v. Zuniga*, 2017 N.Y. Slip Op. 03264, 1st Dept 4-27-17**

MENTAL HYGIENE LAW.

15 MONTH DELAY IN ARTICLE 10 TRIAL DID NOT DEPRIVE RESPONDENT OF DUE PROCESS.
The First Department determined the 15-month delay in holding respondent sex-offender's Article 10 trial did not deprive him of due process. The court explained that the statutory 60-day time limit for holding the trial did not require dismissal of the petition and further explained and applied the four-point due process analysis: "Respondent's due process rights were not violated by the 15-month delay between his declaration of readiness for trial, after the probable cause determination, made upon his waiver of a probable cause hearing, and the start of the trial. Under the four-factor balancing test set forth in *Barker v. Wingo* (407 US 514 [1972] ... , the length of the delay may be considered presumptively prejudicial ... . The second factor, the reason given for the delay (id. at 531), weighs only slightly against petitioner, because a considerable portion of the delay is attributable to respondent, the unavailability of the experts, and circumstances beyond petitioner's control. ... The third *Barker* factor, respondent's assertion of his rights (407 US at 531-532), weighs in respondent's favor with respect to those adjournments to which he objected. However, his failure to retain any experts for, or to testify in, the article 10 proceedings, his consent to delays, his refusal to appear in court twice, and his engagement in abusive conduct directed against those associated with the proceeding suggest that respondent 'did not desire an early judicial hearing' ... . The fourth *Barker* factor, prejudice to respondent (407 US 532), weighs in petitioner's favor. There was no oppressive pretrial incarceration, since respondent chose to be confined at Rikers Island, rather than at a secure mental health facility, during the proceedings ... , and respondent's ability to put on a defense was not affected by the delay." ***Matter of State of New York v. Keith F.*, 2017 N.Y. Slip Op. 03276, 1st Dept 4-27-17**

PERSONAL INJURY.

INTERNAL RULE THAT BUS DRIVER MUST ASSIST PASSENGERS OFF THE BUS EXCEEDED THE STANDARD OF ORDINARY CARE AND THEREFORE COULD NOT BE THE BASIS FOR LIABILITY IN THIS SLIP AND FALL CASE.
The First Department determined defendant bus company's motion for summary judgment in this slip and fall case was properly granted. Plaintiff alleged she slipped on an oily substance of the step of a bus. Plaintiff's expert argued the hand-rails were inadequate, but the statutes and regulations cited related to buildings, not buses. Although the internal rules of defendant bus company required the driver to assist passengers off the bus, that rule exceeded the ordinary care standard and could not be the basis for liability. ***Ziman-Scheuer v. Golden Touch Transp. of NY, Inc.*, 2017 N.Y. Slip Op. 03124, 1st Dept 4-25-17**

SECOND DEPARTMENT

ARBITRATION, INSURANCE LAW.

FAILURE TO APPLY FOR A STAY OF ARBITRATION WAIVES ANY CLAIM THE ARBITRATOR HAS EXCEEDED HIS/HER POWERS.
The Second Department, in a loss-transfer action between two insurers, noted that the failure to apply for a stay of arbitration waives any claim that the arbitrator has exceeded his/her powers: "The petitioner's contention that, pursuant to 11 NYCRR 65-4.11(6), its 'good faith' retroactive denial of insurance coverage divested the arbitrator of jurisdiction is without merit … . Insurance Law § 5105(b) provides that arbitration is the only forum in which a loss-transfer claim may be litigated ... . Moreover, 'the contention that a claim proposed to be submitted to arbitration is in excess of the arbitrator's power is waived unless raised by an application for a stay' ... . By failing to apply for a stay of arbitration before arbitration, the petitioner waived its contention that the claim is not arbitrable under Insurance Law § 5105 ...". ***Matter of Infinity Indem. Ins. Co. v. Hereford Ins. Co.*, 2017 N.Y. Slip Op. 03177, 2nd Dept 4-26-17**

CIVIL PROCEDURE.

CROSS MOTION TO COMPEL PLAINTIFF TO ACCEPT A LATE ANSWER PROPERLY GRANTED.
The Second Department determined Supreme Court properly denied the motion for a default judgment and granted the cross-motion compelling plaintiff to accept the answer. The relevant analytical criteria were explained: "... 37 days after the defendant's statutory deadline to answer had expired, its newly assigned counsel asked the plaintiff to stipulate to an extension of its time to answer. The plaintiff refused and moved pursuant to CPLR 3215 for leave to enter a default judgment against the defendant. ... In light of the public policy favoring the resolution of cases on their merits, the Supreme Court may compel a plaintiff to accept an untimely answer (see CPLR 2004, 3012[d]) where the record demonstrates that there was only a short delay in appearing or answering the complaint, that there was no willfulness on the part of the defendant, that there would be no prejudice to the plaintiff, and that a potentially meritorious defense exists ... . Here, the record demonstrates that the defendant met these criteria." ***Yongjie Xu v. JJW Enters., Inc.*, 2017 N.Y. Slip Op. 03221, 2nd Dept 4-26-17**

CIVIL PROCEDURE, BANKRUPTCY.

CONFIRMED BANKRUPTCY PLAN DID NOT HAVE A RES JUDICATA EFFECT ON AN ACTION ON A MORTGAGE WHICH WAS PENDING WHEN THE BANKRUPTCY PROCEEDINGS WERE COMMENCED.

The Second Department determined the confirmation of a bankruptcy plan did not have a res judicata effect upon an action by plaintiff bank to require the recording of a mortgage that was pending when defendants' bankruptcy proceedings were commenced: "The plaintiff commenced this action in June 2013, inter alia, to direct the recording of a mortgage allegedly executed in September 2006 to encumber real property owned by the defendants ... (the McKennas), and for a judgment declaring that that mortgage is superior in priority over other recorded mortgages on the property. On or about September 24, 2013, the McKennas filed a petition for Chapter 13 bankruptcy ... , ... automatically stay[ing] this action pursuant to 11 USC § 362(a). By order dated August 25, 2014, the Bankruptcy Court reclassified the plaintiff's claim, for the purposes of that court, from 'secured' to 'unsecured,' and terminated the automatic stay for cause as to the plaintiff so that the plaintiff could continue the instant action through the entry of judgment. * * * While an order confirming a Chapter 13 bankruptcy plan may constitute a final judgment on the merits ... , the res judicata effect of a confirmed plan does not apply when a state court action concerning the validity of a lien remains unresolved at the time the bankruptcy proceedings were commenced ... . Here, the instant action was pending when the McKennas filed their bankruptcy petition, and, therefore, the Supreme Court properly concluded that the subsequent confirmation of the amended Chapter 13 bankruptcy plan had no res judicata effect on the instant action." ***U.S. Bank N.A. v. McKenna*, 2017 N.Y. Slip Op. 03215, 2nd Dept 4-26-17**

CIVIL PROCEDURE, EVIDENCE.

HEARSAY CAN BE SUBMITTED IN OPPOSITION TO A MOTION FOR SUMMARY JUDGMENT, BUT HEARSAY ALONE WILL NOT DEFEAT THE MOTION.

The Second Department noted that hearsay can be submitted in opposition to a summary judgment motion but, to raise a question fact, hearsay alone is not enough. ***Dindiyal v. Dindiyal*, 2017 N.Y. Slip Op. 03152, 2nd Dept 4-26-17**

CIVIL PROCEDURE, EVIDENCE, ANIMAL LAW.

HEARSAY ALONE CANNOT DEFEAT SUMMARY JUDGMENT, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT IN THIS DOG-BITE CASE PROPERLY GRANTED.

The Second Department, in affirming summary judgment for defendant in this dog bite case, noted that hearsay, standing alone, is insufficient to defeat a summary judgment motion. Defendant (Nicole) demonstrated she had no knowledge the dog had vicious propensities. In response, plaintiff presented only hearsay: "Here, the defendants made a prima facie showing of their entitlement to judgment as a matter of law by demonstrating, through Nicole's deposition testimony, that she was not aware, nor should she have been aware, that the dog had ever bitten anyone or exhibited any aggressive behavior ... . Nicole testified that she had purchased the dog when it was two months old, the dog had undergone obedience training, and the dog had never attacked or bitten anyone before the incident at issue. The plaintiff failed to raise a triable issue of fact in opposition. The only evidence offered by the plaintiff to demonstrate that, prior to this incident, the dog had exhibited fierce or hostile tendencies was hearsay, which is insufficient, on its own, to bar summary judgment ...". ***Ciliotta v. Ranieri*, 2017 N.Y. Slip Op. 03150, 2nd Dept 4-26-17**

CIVIL PROCEDURE, EVIDENCE, NEGLIGENCE.

MOTION TO RENEW SHOULD NOT HAVE BEEN DENIED AS A MOTION TO REARGUE, NEW EVIDENCE SUFFICIENT TO DEFEAT SUMMARY JUDGMENT WAS PRESENTED.

The Second Department, reversing Supreme Court, determined defendant's motion to renew in this rear-end collision case should not have been deemed a motion to reargue and denied. Plaintiff presented new evidence which was not available at the time the original motion was heard. The new evidence was sufficient to defeat the summary judgment motion: "The new evidence included a transcript of the plaintiff's deposition testimony, which had not been submitted to the court on the prior motion, as her deposition had not been completed until after the prior motion had been decided. Therefore, the motion was correctly denominated by the defendant as one for leave to renew his opposition to the plaintiff's motion for summary judgment. Furthermore, this new evidence raised triable issues of fact as to the plaintiff's comparative fault. Accordingly, the evidence was sufficient to change the court's prior determination, and should have resulted in the court, upon renewal, denying the plaintiff's motion for summary judgment on the issue of liability." ***Donovan v. Rizzo*, 2017 N.Y. Slip Op. 03154, 2nd Dept 4-26-17**

CIVIL PROCEDURE, NEGLIGENCE.

MOTION, ON THE EVE OF TRIAL, TO AMEND THE BILL OF PARTICULARS TO CHANGE THE DATE OF THE INJURY SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined plaintiff's motion to amend his bill of particulars to reflect a different date for the injury allegedly caused by defendant's employees during a carpet delivery should not have been

granted. The motion was made on the eve of trial more than four years after the action was commenced and after plaintiff had repeatedly asserted the date during discovery. It turned out that no delivery was made by defendant on the date alleged in the pleadings: " 'Generally, [i]n the absence of prejudice or surprise to the opposing party, leave to amend a pleading should be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit'... . Where, however, the application for leave to amend is made long after the action has been certified for trial, judicial discretion in allowing such amendments should be discreet, circumspect, prudent, and cautious... . 'Moreover, when . . . leave is sought on the eve of trial, judicial discretion should be exercised sparingly' ... . Here, the plaintiff moved for leave to amend his bill of particulars more than four years after the action was commenced, and almost a year after the matter was stricken from the trial calendar. Under the circumstances of this case, the Supreme Court improvidently exercised its discretion in granting that branch of the plaintiff's motion which was for leave to amend the bill of particulars, as the defendant demonstrated that it would suffer significant prejudice as a result of the unexplained delay ...". ***Tabak v. Shaw Indus., Inc.*, 2017 N.Y. Slip Op. 03213, 2nd Dept 4-26-17**

CIVIL PROCEDURE, LANDLORD-TENANT.

CRITERIA FOR A PRELIMINARY INJUNCTION NOT MET, ALLOWING PAYMENT OF REDUCED RENT DURING THE PENDING LANDLORD-TENANT DISPUTE WAS IMPROPER.

The Second Department, reversing Supreme Court, determined the criteria for issuance of a preliminary injunction were not met in this dispute between landlord and tenant. The court further noted that a preliminary injunction is designed to preserve the status quo and ordering the landlord to accept a reduced rent while the action was pending was not proper: "... [W]e find that the Supreme Court improvidently exercised its discretion in granting the plaintiff preliminary injunctive relief staying termination of the lease, and in further directing the plaintiff to pay rent in the reduced sum of $10,000 per month in lieu of the full amount of rent due under the lease. Although the plaintiff may ultimately be successful on the merits, it failed to establish that it would suffer irreparable harm or that the balance of the equities favor an injunction since its alleged damages are compensable in money damages and capable of calculation ... . Moreover, the plaintiff's vague and conclusory allegations regarding its inability to pay the full rent under the lease were insufficient to establish irreparable injury ... . Furthermore, the court went beyond preserving the status quo, which is the essence of a preliminary injunction, and impermissibly rewrote the terms of the lease by directing that the plaintiff be permitted to pay only part of the rent due under the lease while it continued to occupy the premises ...". ***Soundview Cinemas, Inc. v. AC I Soundview, LLC*, 2017 N.Y. Slip Op. 03209, 2nd Dept 4-26-17**

CONTRACT LAW, AGENCY, LANDLORD-TENANT, PERSONAL INJURY.

UNDISCLOSED PRINCIPAL CAN SUE ON A LEASE ENTERED INTO BY ITS AGENT.

The Second Department determined the owner of a parking lot (Berkshire) could assert cross claims against the lessee of the parking lot (Livingston), even though the lessee did not know the lease was entered into by an undisclosed agent of the owner. Plaintiff was injured in a slip and fall on the sidewalk adjacent to the parking lot. The owner cross-claimed for indemnification by the lessee: "Berkshire may enforce provisions of Livingston's lease for the parking lot. An undisclosed principal may sue on a contract made in the name of its agent unless there is a showing of fraud ... . Here, Livingston's submissions confirmed that Berkshire owned the property that Livingston was renting, and that the lease was valid. Livingston does not assert that it would not have entered into the lease had it known then that Berkshire was, in fact, the owner. Although Livingston was not aware that Berkshire had authorized an agent to enter into the lease on its behalf, Livingston cannot escape liability on the contract by claiming ignorance of the undisclosed principal's existence ...". ***Simmons v. Berkshire Equity, LLC*, 2017 N.Y. Slip Op. 03208, 2nd Dept 4-26-17**

CRIMINAL LAW.

PURSUIT OF DEFENDANT, WHO RAN, HOLDING HIS WAISTBAND, WHEN POLICE TOLD HIM TO STOP, NOT JUSTIFIED, FIREARM AND DRUGS SHOULD HAVE BEEN SUPPRESSED.

The Second Department, reversing Supreme Court, determined the police did not have a reasonable suspicion of criminal activity. Therefore the pursuit of the defendant was not justified and the firearm and drugs in his possession should have been suppressed. The police observed the car in which defendant was a passenger make a turn without signaling and roll through a stop sign. As the car was moving at one mile an hour, the defendant got out, holding his waistband. After an officer said "police, stop" defendant ran: " 'In order to justify police pursuit, the officers must have reasonable suspicion that a crime has been, is being, or is about to be committed' ... . 'Police pursuit of an individual significantly impede[s]' the person's freedom of movement and thus must be justified by reasonable suspicion that a crime has been, is being, or is about to be committed' ... . 'A suspect's [f]light alone . . . even [his or her flight] in conjunction with equivocal circumstances that might justify a police request for information, is insufficient to justify pursuit' ... . 'However, flight, combined with other specific circumstances indicating that the suspect may be engaged in criminal activity, could provide the predicate necessary to justify pursuit' ... . Here, the police officers' observations that the defendant exited a slow moving vehicle and

held his waistband did not constitute specific circumstances indicative of criminal activity so as to establish the reasonable suspicion that was necessary to lawfully pursue the defendant, even when coupled with the defendant's flight from the police ... . The People failed to adduce testimony showing, for example, that the police officers observed the defendant in possession of what appeared to be a gun or that the defendant's conduct in adjusting his waistband was indicative of gun possession ...". ***People v. Furrs*, 2017 N.Y. Slip Op. 03192, 2nd Dept 4-26-17**

CRIMINAL LAW.

PROSECUTOR'S FAILURE TO INSTRUCT THE GRAND JURY ON THE DEFENSE OF COMMON OWNERSHIP REQUIRED REVERSAL AND DISMISSAL OF THE INDICTMENT IN THE INTERESTS OF JUSTICE.

The Second Department, reversing Supreme Court, determined the grand jury proceedings were defective because of the prosecutor's failure to instruct the jury on the defense of common ownership. Defendant testified in the grand jury that the property alleged to have been stolen was jointly owned with the complainant, who was a partner in the business. The conviction was reversed in the interest of justice and the indictment was dismissed: 0 '" [A] prosecutor should instruct the Grand Jury on any complete defense supported by the evidence which has the potential for eliminating a needless or unfounded prosecution' ... . If the District Attorney 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 ... . Viewing the evidence before the grand jury in the light most favorable to the defendant ... , we find that there was a reasonable view of the evidence warranting instructions on the definition of joint or common owner and the defense of claim of right. Penal Law § 155.00(5) provides that '[a] joint or common owner of property shall not be deemed to have a right of possession thereto superior to that of any other joint or common owner thereof.' Consequently, a partner may not be charged with stealing the partnership's assets from another partner ... . Pursuant to Penal Law § 155.15(1) '[i]n any prosecution for larceny committed by trespassory taking or embezzlement, it is an affirmative defense that the property was appropriated under a claim of right made in good faith.' The defendant's grand jury testimony indicated that the defendant's relationship with the complaining witness was that of a partner, not an employee ... and that the defendant took the funds at issue under a claim of right ... . Consequently, the District Attorney's failure to instruct the grand jury with respect to the definition of joint or common owner and the defense of claim of right so substantially impaired the integrity of the proceedings as to require the dismissal of the indictment ... ". ***People v. Tunit*, 2017 N.Y. Slip Op. 03201, 2nd Dept 4-26-17**

CRIMINAL LAW.

JURY SHOULD HAVE BEEN INSTRUCTED ON THE JUSTIFICATION DEFENSE AND LAWFUL TEMPORARY POSSESSION OF A WEAPON.

The Second Department, reversing defendant's assault and weapons convictions, determined the defendant's testimony alleged facts which required that the jury be instructed on the justification defense and the lawful temporary possession of a weapon. Defendant testified he was attacked by the complainant from behind and he grabbed an object from defendant and started swinging at the complainant to protect himself as they rolled on the ground. The fact that defendant did not testify he stabbed the complainant did not preclude the applicability of the justification defense: "... [V]iewing the evidence in the light most favorable to the defendant, there was a reasonable view of the evidence that the complainant was the aggressor, that the defendant could not safely retreat, that the defendant's actions during the fight caused the complainant's injuries, and that the defendant's actions were justified. The fact that the defendant did not testify that he stabbed the complainant did not preclude a charge as to a justification defense, since the evidence, viewed as a whole, supported such a charge ... . * * * ... [W]e agree with the defendant that he was entitled to a jury charge on the defense of temporary and lawful possession of a weapon with respect to that count of the indictment ... . Although this contention was not preserved for appellate review, we review it in the exercise of our interest of justice jurisdiction ... . * * * The defendant testified that he only possessed the knife, if at all, when he attempted to disarm the complainant during the fight. Further, although the defendant's use of the knife thereafter resulted in the complainant being stabbed, should a jury believe that the defendant's use of the knife was justified, such use would have been lawful ... , and not 'utterly at odds with [the defendant's] claim of innocent possession . . . temporarily and incidentally [resulting] from . . . disarming a wrongful possessor' ...". ***People v. Sackey-El*, 2017 N.Y. Slip Op. 03198, 2nd Dept 4-26-17**

DISCIPLINARY HEARINGS (INMATES).

DETERMINATION THAT PETITIONER USED MARIJUANA WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE, DETERMINATION ANNULLED, RECORD EXPUNGED.

The Second Department determined the finding petitioner had used marijuana was not supported by the evidence. The hearing officer stipulated to the petitioner's claim that the medication he was taking produced false positive results for marijuana. The corrections officer's testimony that he smelled marijuana near where the petitioner was standing was not enough. Petitioner was standing outside with others at the time: "Since the hearing officer stipulated that the petitioner's medication produces false positives for cannabinoids in urinalysis tests, and since no evidence was submitted to contradict

the petitioner's evidence, the positive urinalysis tests results were of little probative value in establishing that the petitioner used cannabinoids. While the correction officer's observations were sufficient to raise suspicion that the petitioner had violated the prison disciplinary rule, they were not adequate to reasonably support the conclusion that the petitioner had, in fact, violated the rule, especially since the correction officer's detection of the marijuana odor was made outdoors where there were other inmates in the immediate vicinity of the petitioner. Accordingly, we find that the hearing officer's determination was not supported by substantial evidence." ***Matter of Jackson v. Annucci*, 2017 N.Y. Slip Op. 03178, 2nd Dept 4-26-17**

LABOR LAW-CONSTRUCTION LAW.

ELEVATOR REPAIR COVERED UNDER LABOR LAW § 240(1), STATIONARY LADDER WAS A SAFETY DEVICE, QUESTION OF FACT WHETHER THE LADDER AFFORDED ADEQUATE PROTECTION.

The Second Department determined neither defendant nor plaintiff's decedent was entitled to summary judgment on the Labor Law § 240(1) cause of action. Plaintiff's decedent had to climb up a stationary ladder to access an elevator motor for repair. He slipped off the ladder while descending. The ladder was deemed a safety device covered by Labor Law § 240(1) but there was question of fact whether the ladder offered adequate protection: "The defendant failed to establish, prima facie, that the plaintiff's decedent was not engaged in a covered activity at the time of the injury. To the contrary, the record evidence supports the plaintiff's contention that the decedent was repairing a malfunctioning elevator car when the accident occurred ... . Moreover, under the circumstances presented, the permanently affixed ladder, which provided the only means of access to the elevated motor room, functioned as a 'safety device' within the meaning of the statute ... . ,,, Supreme Court properly denied the plaintiff's motion for summary judgment on the issue of liability with respect to the Labor Law § 240(1) cause of action, as the evidence submitted on the plaintiff's motion raised triable issues of fact as to whether the ladder afforded the decedent adequate protection for entering and exiting the motor room ...". ***Esquivel v. 2707 Creston Realty, LLC*, 2017 N.Y. Slip Op. 03155, 2nd Dept 4-26-17**

MEDICAL MALPRACTICE, PERSONAL INJURY.

HOSPITAL NOT LIABLE OF ACTS OF SURGEON WHO WAS NOT AN EMPLOYEE, ANALYTICAL CRITERIA OUTLINED.

The Second Department determined defendant hospital (Beth Israel) could not be liable for the acts of a surgeon (Krikhely) who: (1) was not an employee; (2) was not subject to the emergency room exception; (3) did not order the hospital staff to perform an act which was contraindicated; and (4) was not acting under the ostensible or apparent authority of the hospital: "... [T]he Beth Israel defendants established, prima facie, that Krikhely was a private attending physician who was not an employee of the hospital and who was referred to [plaintiff] by his private physician ... . Furthermore, the Beth Israel defendants made a prima facie showing that the emergency room exception was inapplicable by demonstrating that Spiegel was referred to Krikhely's care by his private physician ... . In opposition, the plaintiffs failed to rebut the prima facie showing that Krikhely was not an employee of the hospital and that the emergency room exception did not apply ... . Moreover, the plaintiffs failed to raise a triable issue of fact as to whether the hospital's staff committed independent acts of malpractice and as to whether any order given by Krikhely was so contraindicated that it should not have been followed by the hospital's staff ... . Furthermore, the plaintiffs failed to raise a triable issue of fact as to whether the hospital may be held liable under a theory of ostensible or apparent agency ...". ***Spiegel v. Beth Israel Med. Center-Kings Highway Div.*, 2017 N.Y. Slip Op. 03211, 2nd Dept 4-26-17**

MUNICIPAL LAW, PERSONAL INJURY.

NOTICE OF CLAIM WHICH WAS MISDIRECTED BECAUSE OF A MINOR MISNOMER ON THE MAILED ENVELOPE DEEMED TIMELY SERVED.

The Second Department, over a dissent, reversing Supreme Court, determined that a notice of claim which named the correct party (New York City Housing Authority [NYCHA]) and address but mistakenly indicated the "Comptroller" of the NYCHA on the mailed envelope, was properly served. The envelope was misdirected to the Comptroller of the City of New York, despite the fact that the comptroller is at an entirely different address than that on the envelope: "As pertinent to this appeal, General Municipal Law § 50-e(3)(a) provides that the notice of claim should be mailed 'to the person designated by law as one to whom a summons in an action . . . may be delivered.' Although the statute requires that the notice be mailed to the designated 'person,' this generally refers to the public authority or government entity itself rather than a particular person employed thereby ... . Here, there is no real dispute that simply writing 'NYCHA' on the envelope would have satisfied the requirements of the statute. … In any event, the minor misnomer on the envelope need not be fatal to the action, especially where, as here, the plaintiff's attorney properly mailed the same notice of claim form to both the Comptroller and NYCHA in order to assert a claim against both the City of New York and NYCHA, and the notice of claim itself named NYCHA. Under these circumstances, we find that the envelope was properly addressed within the meaning of General Municipal Law § 50-e(3)(b) and the plaintiff properly served the notice of claim upon NYCHA within the requisite 90-day statutory period ...". ***Carroll v. City of New York*, 2017 N.Y. Slip Op. 03148, 2nd Dept 4-26-17**

PERSONAL INJURY.

DEFENDANTS DID NOT DEMONSTRATE (1) THE STAIRS DOWN WHICH PLAINTIFFS FELL WERE NOT REQUIRED TO HAVE A HANDRAIL; (2) THE STAIRS WERE ADEQUATELY ILLUMINATED; (3) OUT OF POSSESSION LANDLORD STATUS, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined defendants' summary judgment motion should not have been granted. Plaintiff fell down stairs on defendants' property while holding the infant plaintiff. Plaintiffs alleged the stairs should have had a hand rail (an alleged code violation) and were poorly illuminated. The defendants' papers did not negate those theories and did not demonstrate out-of-possession-landlord status: "Here, viewing the evidence in the light most favorable to the plaintiffs as the nonmoving parties, the defendants failed to establish, prima facie, that the subject staircase did not have to be equipped with a handrail pursuant to the code provisions alleged in the plaintiffs' pleadings and that the absence of the handrail and the alleged inadequate lighting condition did not proximately cause the plaintiffs to fall ... . The defendants also failed to establish, prima facie, that they were out-of-possession landlords who had no notice of the alleged hazardous conditions of the subject staircase ... . Since the defendants failed to meet their initial burden as the movants, it is not necessary to review the sufficiency of the plaintiffs' opposition papers ...". ***Lopez-Serrano v. Ochoa*, 2017 N.Y. Slip Op. 03167, 2nd Dept 4-26-17**

PERSONAL INJURY.

DEFENDANT CONCERT HALL'S MOTION FOR SUMMARY JUDGMENT PROPERLY DENIED, PLAINTIFF WAS INJURED AFTER BEING PUSHED INTO A MOSH PIT, QUESTIONS OF FACT ABOUT WHETHER PLAINTIFF ASSUMED THE RISK AND WHETHER THE CONCERT HALL WAS NEGLIGENT.

The Second Department determined the defendant concert/dance hall's (Knitting Factory's) motion for summary judgment was properly denied. Plaintiff alleged he was pushed into a mosh pit where someone hit him in the eye. The defendant argued plaintiff assumed the risk of the injury and no level of supervision could have prevented the injury: "A property owner must act in a reasonable manner to prevent harm to those on its premises, which includes a duty to control the conduct of persons on its premises when it has the opportunity to control such conduct, and is reasonably aware of the need to do so ... . The doctrine of primary assumption of risk 'applies when a consenting participant in a qualified activity is aware of the risks; has an appreciation of the nature of the risks; and voluntarily assumes the risks' ... . A person who chooses to engage in such an activity 'consents to those commonly appreciated risks which are inherent in and arise out of the nature of the [activity] generally and flow from such participation'... . The duty owed in these situations is 'a duty to exercise care to make the conditions as safe as they appear to be' ... . The doctrine has generally been restricted 'to particular athletic and recreative activities in recognition that such pursuits have enormous social value' even while they may involve significantly heightened risks' ... , and are, therefore, 'worthy of insulation from a breach of duty claim' ... . Here, even assuming, without deciding, that attending a metal music concert where 'moshing' takes place is a qualified activity to which the doctrine may properly be applied ... , under the facts presented here, the Knitting Factory failed to eliminate triable issues of fact as to whether it met its duty to exercise care to make the conditions at the subject venue as safe as they appeared to be ... , and did not unreasonably increase the usual risks inherent in the activity of concert going ... . The Knitting Factory also failed to eliminate triable issues of fact as to whether the plaintiff assumed the risk of injury ... , whether the plaintiff's alleged injuries were foreseeable, and whether it provided adequate security measures and, if not, whether its failure was a proximate cause of the plaintiff's alleged injuries ...". ***Nevo v. Knitting Factory Brooklyn, Inc.*, 2017 N.Y. Slip Op. 03186, 2nd Dept 4-26-17**

REAL ESTATE, INTENTIONAL TORTS, CONTRACT LAW.

ABUSE OF PROCESS AND ATTORNEY'S FEES COUNTERCLAIMS PROPERLY DISMISSED IN THIS DISPUTE BETWEEN BROKERS OVER A COMMISSION, CRITERIA FOR BOTH COUNTERCLAIMS EXPLAINED.

In a dispute between real estate brokers over plaintiff's entitlement to a percentage of a commission, the Second Department determined defendants' counterclaims for abuse of process, prima facie tort, tortious interference with prospective business relations, and attorney's fees were properly dismissed. The (unsuccessful) claim for attorney's fees was based upon language in a real estate policy and procedure manual the language of which was deemed too vague to supplant the general rule that parties are responsible for their own attorney's fees. With regard to the abuse of process and attorney's fees claims, the court explained: " 'The three essential elements of the tort of abuse of process are (1) regularly issued process, either civil or criminal, (2) an intent to do harm without excuse or justification, and (3) use of the process in a perverted manner to obtain a collateral objective' ... . '[T]he gist of the tort is the improper use of process after it is issued' by an unlawful interference with one's person or property'... . Here, the gravamen of the first counterclaim was that the plaintiff initiated this lawsuit with the intent to harm the defendants, knowing that the brokerage community would find out about the lawsuit, which would damage the defendants' ability to do business in that community. However, 'the institution of a civil action by summons and complaint is not legally considered process capable of being abused' ... . Moreover, there was no allegation that the plaintiff improperly used process after it was issued. Furthermore, 'a malicious motive alone does not give rise to

a cause of action to recover damages for abuse of process' ... . * * * In the fourth counterclaim the defendants sought to recover attorneys' fees incurred in defending this action pursuant to a provision in their 'Policy & Procedure Manual,' which states, inter alia, that '[i]f a dispute arises due to a commission and a legal action is commenced as a result thereof, the costs of the legal action will be deducted from the fee collected,' and '[i]f [a] suit is a result of an agent's action, he/she will be responsible for payment of damages incurred as a result.' … Here, the provision relied upon by the defendants is vague, and a promise by the plaintiff to indemnify the defendants for attorneys' fees incurred in litigation between them cannot be clearly implied from the language and purpose of the entire manual." ***Goldman v. Citicore I, LLC*, 2017 N.Y. Slip Op. 03156, 2nd Dept 4-26-17**

VEHICLE AND TRAFFIC LAW (DEALER ACT).

NEW AUDI DEALERSHIP WAS OUTSIDE PLAINTIFF DEALERSHIP'S MARKET AREA, SUIT UNDER THE DEALER ACT PROPERLY DISMISSED.

The Second Department determined plaintiff Audi dealership's suit claiming that the award of a new Audi dealership constituted a modification of the franchise in violation of the Dealer Act (Vehicle and Traffic Law § 463(2)) was properly dismissed. Plaintiff acknowledged that the new dealership was outside plaintiff's market area: "Here, the plaintiff does not dispute that the location of the proposed new Westbury dealership is outside the plaintiff's 'relevant market area,' and thus, the plaintiff cannot challenge the addition of that dealership under Vehicle and Traffic Law § 463(2)(cc). As a result, the plaintiff seeks to challenge the proposed addition of the new dealership under Vehicle and Traffic Law § 463(2)(ff), which provides that a franchisor must give notice to the dealer of any 'modification' to the dealer's franchise … . However, permitting the plaintiff to challenge the addition of the Westbury dealership under Vehicle and Traffic Law § 463(2)(ff) would essentially render the standing requirement and specific procedures set forth in Vehicle and Traffic Law § 463(2)(cc) superfluous … . As such, the Supreme Court properly determined that Vehicle and Traffic Law § 463(2)(cc) is the sole mechanism under the Dealer Act by which the plaintiff can challenge Audi's addition of the proposed new Westbury dealership, and properly directed the dismissal of the first cause of action." ***JJM Sunrise Automotive, LLC v. Volkswagen Group of Am., Inc.*, 2017 N.Y. Slip Op. 03160, 2nd Dept 4-26-17**

THIRD DEPARTMENT

CRIMINAL LAW.

SENTENCE NOT CONTEMPLATED BY THE PLEA AGREEMENT MUST BE VACATED AS THE RESULT OF AN INVOLUNTARY PLEA.

The Third Department determined the sentence imposed was not in accordance with the plea agreement. Therefore defendant's plea was not voluntarily made and must be vacated. Defendant was initially sentenced as a persistent felon and that sentence was overturned on appeal. The plea agreement contemplated sentencing either as a persistent felon, or, if the appeal succeeded, as a second felony offender. After the successful appeal, however, defendant was sentenced as a first-time felon: "The People concede, and we agree, that the parties' plea agreement, as set forth in the record before us, did not contemplate the possibility that defendant would be sentenced as a first-time felony offender in the event of a successful appeal to this Court ... . Indeed, the record before us establishes that the parties' contingent plea agreement and ensuing plea colloquy were limited to whether defendant could be sentenced as a second felony offender — versus sentencing as a mandatory persistent felony offender — upon a successful appeal. Accordingly, because the record reflects a mutual mistake at the time of defendant's plea regarding his predicate status and potential sentencing exposure in the event that he was successful on appeal, his decision to plead guilty was not a knowing, voluntary and intelligent one and, therefore, the plea must be vacated ...". ***People v. Brewington*, 2017 N.Y. Slip Op. 03224, 3rd Dept 4-27-17**

DISCIPLINARY HEARINGS (INMATES).

INMATE'S REQUESTS FOR UNIDENTIFIED WITNESSES IMPROPERLY DENIED.

The Third Department determined some of petitioner's requests for testimony from unidentified witnesses to the underlying incident were improperly denied. The hearing officer should have checked logs before denying the request for an unidentified corrections officer alleged to have been present. And petitioner's request for testimony from unidentified inmates who allegedly were delayed by the incident should not have been denied simply because of the number of potential inmate witnesses (50): "Petitioner requested the testimony of a correction officer that he believed was present with the sergeant during the incident. Petitioner did not know the name of the witness, but gave the Hearing Officer a description and requested that the Hearing Officer review the logbooks to identify the witness. The Hearing Officer denied the witness, based upon the testimony of the sergeant that he was alone during the incident with petitioner. Inasmuch as the record does not reflect that the Hearing Officer reviewed the logbooks or made any other effort to identify the witness, we cannot say that a diligent effort was made to locate the witness ... . Petitioner also requested the testimony of 50 unidentified inmates who, according to the misbehavior report and hearing testimony, were delayed in returning to their cells from breakfast because of the incident involving petitioner. A correction officer testified that, because of the incident, she was unable to release those

inmates to return to petitioner's cellblock for approximately five to seven minutes. The Hearing Officer denied petitioner's request, stating that he was not going to call 50 witnesses. We disagree with respondents' contention that the requested testimony was irrelevant because the inmates did not witness the incident involving petitioner, inasmuch as their testimony was relevant to the charge of interfering with staff. In our view, petitioner was improperly denied the right to call a reasonable number of these witnesses, who were all housed on the same cellblock and should have been easily identifiable. Although calling all 50 witnesses would be impractical and unnecessary, the requested testimony was not irrelevant or redundant, and the Hearing Officer's blanket denial of these witnesses was therefore improper ...". ***Matter of Harriott v. Koenigsmann*, 2017 N.Y. Slip Op. 03240, 3rd Dept 4-27-17**

INSURANCE LAW, CONTRACT LAW.

EXCLUSION OF INJURY FROM ASSAULT CONTROLLED, NEGLIGENCE CAUSES OF ACTION STEMMING FROM ASSAULT NOT COVERED.

The Third Department determined the policy exclusion for injury stemming from an assault controlled and defendant insurer was not required to defend the action by defendant bar patron, Christian, who alleged plaintiff bar's employee injured him when ejecting him from the bar. The language of the exclusion took precedence over the general liability provisions. Any negligence causes of action were not covered because the negligence claims stemmed from the assault: "The exclusion, which states that it 'is subject to the terms contained in the General Liability Coverage,' provides that '[n]otwithstanding anything contained herein to the contrary, . . . this policy excludes any and all claims arising out of any assault, battery, fight, altercation, misconduct or other similar incident,' including claims of negligent hiring and supervision. * * * Here ... Supreme Court properly found that the terms of the exclusion controlled over those in the general liability coverage, as 'language such as a 'notwithstanding' provision 'controls over any contrary language' in a contract' ... . Christian asserts that the assault and battery exclusion does not apply because the underlying action alleges acts of negligence. We disagree. '[I]f no cause of action would exist but for the assault, the claim is based on assault and the exclusion applies' and the fact that an insured might be liable under a theory of negligence does not change this ...". ***Graytwig Inc. v. Dryden Mut. Ins. Co.*, 2017 N.Y. Slip Op. 03229, 3rd Dept 4-27-17**

UNEMPLOYMENT INSURANCE.

NON-PROFIT PROVIDING WORK TRAINING TO PSYCHIATRIC PATIENTS IS EXEMPT FROM UNEMPLOYMENT INSURANCE COVERAGE.

The Third Department determined claimant was not eligible for unemployment insurance benefits and the statute which exempts rehabilitative non-profits is constitutional. Claimant was employed by a non-profit which provided work-training for psychiatric patients. Claimant worked 20 hours per week and sought unemployment benefits when the non-profit temporarily closed: "To file a valid original claim, a claimant must meet certain qualifications and satisfy employment requirements (see Labor Law § 527 [1]). Labor Law § 563 (2) (d) excludes certain employment from unemployment insurance coverage, including 'services rendered for a non-profit organization by a person who (1) receives rehabilitative services in a facility conducted for the purpose of carrying out a program of rehabilitation for individuals whose earning capacity is impaired by age or physical or mental deficiency or injury or (2) is given remunerative work in a facility conducted for the purpose of providing such work for persons who cannot be readily absorbed in the competitive labor market because of their impaired physical or mental capacity.' The Board credited the hearing testimony establishing that, as part of his vocational rehabilitation, claimant worked for Landmark, a non-profit organization that operates workshops and rehabilitative programs open exclusively to RPC [Rochester Psychiatric Center] patients." ***Matter of Janakievski (Commissioner of Labor)*, 2017 N.Y. Slip Op. 03253, 3rd Dept 4-27-17**

FOURTH DEPARTMENT

ADMINISTRATIVE LAW, CIVIL PROCEDURE.

SCHOOL DISTRICT'S TERMINATION OF A CERTAIN HEALTH INSURANCE OPTION FOR RETIREES WAS NOT QUASI-LEGISLATIVE, THEREFORE MAILING THE NOTIFICATION LETTER DID NOT TRIGGER THE FOUR-MONTH STATUTE OF LIMITATIONS FOR AN ARTICLE 78 CONTESTING THE ACTION.

The Fourth Department, reversing Supreme Court, over a concurrence and a two-justice dissent, determined the action by the respondent school district (re: terminating certain health insurance available to retirees) was not quasi-legislative. Therefore the four-month statute of limitations for petitioners' Article 78 contesting the school district's action did not start to run upon the mailing of the undated notification letter. The respondents, therefore, did not demonstrate the Article 78 proceeding was barred by the statute of limitations: "A quasi-legislative-type administrative determination is one having an impact far beyond the immediate parties at the administrative stage... . Thus, where a quasi-legislative determination is challenged, 'actual notice of the challenged determination is not required in order to start the statute of limitations clock' ... . The policy underlying the rule is that actual notice to the general public is not practicable ... . Instead, the statute of limitations begins to

run once the administrative agency's quasi-legislative determination of the issue becomes 'readily ascertainable' to the complaining party... . On the other hand, where the public at large is not impacted by a determination, actual notice, commonly in the form of receipt of a letter or other writing containing the final and binding determination, is required to commence the statute of limitations ... . * * * ... [I]nasmuch as respondents, in our view, failed to meet their burden to establish when the four-month statute of limitations commenced, the burden did not shift to petitioners to establish any particular date of individual receipt of the undated letter. In any event, respondents failed to establish any dates of receipt by petitioners in their moving papers." ***Matter of Knavel v. West Seneca Cent. Sch. Dist.*, 2017 N.Y. Slip Op. 03416, 4th Dept 4-28-17**

CRIMINAL LAW.

DEFENDANT WALKED BY POLICE OFFICER HOLDING HIS WAISTBAND, OFFICER WAS JUSTIFIED IN REQUESTING DEFENDANT TO SHOW HIM HIS HANDS REVEALING A GUN, SUPPRESSION PROPERLY DENIED.

The Fourth Department, over a dissent, determined the arresting officer had a founded suspicion of criminal activity justifying his request that defendant show him his hands. Defendant had walked by the officer holding his waistband. When the defendant complied with the officer's request and raised his hands the officer saw a gun: "... [W]e conclude that the location of this encounter in a high-crime area, the officer's training and his experience in investigating weapons possession crimes at this location, together with defendant's grabbing of his waistband with his hand concealed under his shirt, provided the requisite founded suspicion for the officer to command defendant to show his hands. Under the totality of the circumstances, we conclude that it is of no consequence that the officer did not observe a gun before commanding defendant to show his hands. Indeed, defendant's hand was concealed under his shirt while simultaneously grabbing his waistband. The Court of Appeals has noted that 'a handgun is often carried in the waistband' ... , and that it would be 'absurd to suggest that a police officer has to await the glint of steel before he can act to preserve his safety' ... . We recognize that a founded suspicion may not rest upon innocuous behavior that is susceptible of an innocent as well as a culpable interpretation ... . Viewed in isolation by an untrained observer, defendant's actions might not appear to be suspicious but, 'when viewed collectively and in the light of the officer's expertise,' we conclude that the officer had a founded suspicion of criminal activity warranting a level two inquiry ...". ***People v. Simmons*, 2017 N.Y. Slip Op. 03280, 4th Dept 4-28-17**

CRIMINAL LAW.

JUDGE DID NOT GIVE A COMPLETE JURY INSTRUCTION ON THE ELEMENTS OF BURGLARY, NEW TRIAL ORDERED.

The Fourth Department, reversing defendant's conviction, determined the burglary jury instruction was flawed. Defendant allowed her brother into the home where defendant resided and her brother assaulted a resident of the home in the resident's bedroom. The jury instruction did not make clear the definitions of a building or unit as those terms are used in the burglary statute: "A person is guilty of burglary in the first degree, in pertinent part, when he or she 'knowingly enters or remains unlawfully in a dwelling with intent to commit a crime therein' (Penal Law § 140.30 [2]). 'Dwelling' means a building which is usually occupied by a person lodging therein at night' (§ 140.00 [3]), and 'the definition of building' includes the following: Where a building consists of two or more units separately secured or occupied, each unit shall be deemed both a separate building in itself and a part of the main building' ... . Here, the court instructed the jurors that a .dwelling is a building which is usually occupied by a person lodging therein at night. A bedroom in a home, where there is more than one tenant, may be considered independent of the rest of the house and may be considered a separate dwelling within a building.' The court, however, failed to include the part of the definition of building that would require the jury to determine whether the house at issue consisted of 'two or more units' and whether the bedroom at issue was a unit that was 'separately secured or occupied' (Penal Law § 140.00 [2]). Consequently, 'given the omission of the definition of [unit'] and/or [separately secured or occupied,'] the instruction did not adequately convey the meaning of [building'] to the jury and instead created a great likelihood of confusion such that the degree of precision required for a jury charge was not met' ...". ***People v. Pritchard*, 2017 N.Y. Slip Op. 03287, 4th Dept 4-28-17**

CRIMINAL LAW.

DEFENDANT'S REFUSAL TO TURN AROUND AND HIS HANDS POSITIONED AT HIS WAISTBAND JUSTIFIED AN OFFICER'S DRAWING HIS WEAPON AND POLICE PURSUIT.

The Fourth Department determined defendant's refusal to turn around upon request and his hands positioned at his waistband justified a police officer's drawing his weapon and a pursuit of the defendant when he ran. Suppression of the weapon discarded by the defendant was properly denied: "... [W]e conclude that defendant's positioning and his refusal to comply with the officer's request to return to the vehicle, while not alone indicative of criminal behavior, could be 'considered in conjunction with other attendant circumstances' to establish the requisite reasonable suspicion of criminal activity ... . In our view, once defendant refused the officer's request to return to the vehicle and turned toward the officers, the officers could 'reasonably suspect[] that defendant was armed and posed a threat to their safety because his actions were directed to the area of his waistband, which was concealed from their view',,, . The officer who drew his weapon was justified in

doing so out of a concern for his own safety ... . We thus conclude that defendant's flight, 'in conjunction with the attendant circumstances, gave rise to the requisite reasonable suspicion justifying police pursuit' ...". ***People v. Walker*, 2017 N.Y. Slip Op. 03317, 4th Dept 4-28-17**

CRIMINAL LAW.

DESCRIPTION OF CLOTHES WORN BY THE SUSPECT DID NOT MATCH THE CLOTHES WORN BY THE MAN OBSERVED BY THE POLICE, THE STOP OF THE CAR THE MAN GOT INTO WAS NOT JUSTIFIED BY REASONABLE SUSPICION OF CRIMINAL ACTIVITY, SEIZED WEAPONS SHOULD HAVE BEEN SUPPRESSED.

The Fourth Department, reversing defendant's conviction, determined the stop of defendant's car was not supported by reasonable suspicion and the weapons seized should have been suppressed. The officer stopped the car after he saw an Hispanic man with tattoos on his neck get into the car. The shooting suspect the police were looking for at the time of the stop was an Hispanic man with tattoos on his neck. However, the clothing worn by the man who got into the car did not come close to matching the clothes the shooting suspect was said to be wearing. It turned out that the shooting suspect was also in the stopped car: "... [T]he inconsistencies between the suspect's clothing as described by the complainant and the clothing worn by the man who walked past the officer on North Goodman Street rendered the officer's suspicion that the man was the suspect less than reasonable ... . Contrary to the People's contention, moreover, we conclude that the man's conduct in staring straight ahead as he walked among the police cars was "innocuous and readily susceptible of an innocent interpretation" and, as such, did not generate a reasonable suspicion of criminality ... . Given that the stop of defendant's vehicle was not supported by a reasonable suspicion of criminality, the officer's observation of the actual suspect in the front seat with a weapon in his waistband was 'the unattenuated by-product of the [illegal] stop' ... and, inasmuch as the disposal of the weapons during the ensuing chase was precipitated by that illegality, the weapons should have been suppressed ... . In addition, because our determination results in the suppression of all evidence supporting the crimes charged, the indictment must be dismissed ...". ***People v. Lopez*, 2017 N.Y. Slip Op. 03327, 4th Dept 4-28-17**

CRIMINAL LAW, ATTORNEYS.

THE TRIAL JUDGE SHOULD NOT HAVE ACCEDED TO DEFENDANT'S REQUEST THAT THE JURY NOT BE INSTRUCTED ON A LESSER INCLUDED OFFENSE, AND, BASED UPON DEFENDANT'S BEHAVIOR, THE TRIAL JUDGE SHOULD HAVE ORDERED A COMPETENCY EXAMINATION.

The Fourth Department reversed defendant's conviction for two reasons: (1) the trial judge acceded to defendant's request that the jury not be instructed on a lesser included offense, and (2) the trial judge, in light of defendant's behavior during the trial, should have ordered a competency examination: "We agree with defendant … that he was denied his right to counsel when County Court permitted him, rather than defense counsel, to decide whether to request a jury charge on a lesser included offense. 'It is well established that a defendant, having accepted the assistance of counsel, retains authority only over certain fundamental decisions regarding the case' such as whether to plead guilty, waive a jury trial, testify in his or her own behalf or take an appeal' ... . '[D]efense counsel has ultimate decision-making authority over matters of strategy and trial tactics, such as whether to seek a jury charge on a lesser included offense' ... . Here, defense counsel requested a charge on the lesser included offense of criminal trespass. After defendant stated that he did not want such a charge, the court noted that defendant's consent was not required. Nevertheless, defense counsel stated that he was not requesting the charge based on defendant's decision not to follow his advice. Although defense counsel unequivocally and repeatedly stated that the charge was in defendant's best interest, and indicated that defendant was declining the charge against defense counsel's advice, the court abided defendant's choice and thus 'denied [defendant] the expert judgment of counsel to which the Sixth Amendment entitles him' ... . Although a defendant is presumed to be competent ... , whenever a court has a ' reasonable ground for believing that a defendant is in such state of idiocy, imbecility or insanity that he is incapable of understanding the charge, indictment or proceedings or of making his defense, it is the duty of the court to direct him to be examined in these respects' ... . Here, in light of the nature and frequency of defendant's outbursts, and the People's expressed concern about defendant's competency prior to trial, we conclude that the court abused its discretion in failing to insure that defendant was competent to stand trial ...". ***People v. Minckler*, 2017 N.Y. Slip Op. 03311, 4th Dept 4-28-17**

CRIMINAL LAW, ATTORNEYS, EVIDENCE.

DEFENSE COUNSEL WAIVED *BRUTON* OBJECTION TO CODEFENDANT'S STATEMENT IMPLICATING DEFENDANT, WAIVER OF *BRUTON* OBJECTION AND STRATEGIC DECISION NOT TO SEVER DEFENDANT'S TRIAL DID NOT CONSTITUTE INEFFECTIVE ASSISTANCE.

The Fourth Department, over a two justice dissent, affirmed defendant's conviction and sentence. The dissenters argued the sentence for this adolescent offender was harsh and excessive. The defense attorney allowed in evidence without objection statements made by a codefendant which implicated defendant, in violation of the *Bruton* rule. In addition, defense counsel did not move for a severance. The Fourth Department determined the waiver of the *Bruton* objection and defense counsel's decision not to move to sever defendant's trial were strategic decisions and did not constitute ineffective assistance: "While we agree with defendant that the admission of those statements violated Bruton and that Supreme Court's curative

instruction did not alleviate the prejudice ... , we consider defense counsel's strategic decisions to proceed with a joint trial and to consent to the admission of the codefendant's statements to constitute a waiver of any Bruton violation ... . Indeed, when the codefendant's statements were offered in evidence, defense counsel specifically stated that he had '[n]o objection' to their admission in evidence. * * * It is well settled that 'a reviewing court must avoid confusing true ineffectiveness with mere losing tactics' ... . Indeed, it 'is not for [the] court to second-guess whether a course chosen by defendant's counsel was the best trial strategy, or even a good one, so long as defendant was afforded meaningful representation' ... . 'To prevail on a claim of ineffective assistance of counsel, it is incumbent on defendant to demonstrate the absence of strategic or other legitimate explanations' for defense counsel's allegedly deficient conduct ... . Here, defense counsel specifically stated on the record that he made a decision for strategic reasons, and we conclude that defendant has not established that counsel's strategy 'was inconsistent with the actions of a reasonably competent attorney' ...". ***People v. Howie*, 2017 N.Y. Slip Op. 03298, 4th Dept 4-28-17**

CRIMINAL LAW, ATTORNEYS, EVIDENCE.

HEARING SHOULD HAVE BEEN HELD ON DEFENDANT'S MOTION TO VACATE HIS CONVICTION, HEARSAY EVIDENCE A THIRD PARTY CONFESSED TO THE MURDER MUST BE ASSESSED AND WHETHER DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILURE TO INVESTIGATE THE THIRD PARTY CONFESSION MUST BE DETERMINED.

The Fourth Department determined defendant was entitled to a hearing on his motion to vacate the judgment of conviction. There was hearsay evidence that a third party committed the murder and a hearing was necessary to determine the reliability of the hearsay. In addition, a hearing was required to determine whether defense counsel was ineffective in failing to investigate evidence that a third party committed the murder: "Here, ... information was received following defendant's conviction that a third party had allegedly confessed to the murder, and there are questions of fact whether the statements of that third party would have been admissible at trial as declarations against penal interest ... . Moreover, ... 'where, as here, the declarations exculpate the defendant, they are subject to a more lenient standard, and will be found sufficient if [the supportive evidence] establish[es] a reasonable possibility that the statement might be true . . . That is because [d]epriving a defendant of the opportunity to offer into evidence [at trial] another person's admission to the crime with which he or she has been charged, even though that admission may . . . be offered [only] as a hearsay statement, may deny a defendant his or her fundamental right to present a defense' ... . We thus conclude that the court should have conducted a hearing to determine, first, whether there is 'competent evidence independent of the declaration to assure its trustworthiness and reliability' ... and, second, whether the witness who heard the third party's declaration is both available to testify and credible in his or her testimony ... . We further conclude that defendant is entitled to a hearing on his claims that defense counsel was ineffective for failing to investigate potentially exculpatory information. Before trial, a witness informed police that two identified individuals had told the witness that the third party had committed the murder. 'A defendant's right to effective assistance of counsel includes defense counsel's reasonable investigation and preparation of defense witnesses . . . Consequently, the failure to investigate witnesses may amount to ineffective assistance of counsel' ...". ***People v. Davis*, 2017 N.Y. Slip Op. 03375, 4th Dept 4-28-17**

CRIMINAL LAW, CIVIL PROCEDURE, JUDGES.

JUDGE PROHIBITED FROM ADDING PROBATION TO DEFENDANT'S SENTENCE OUTSIDE OF DEFENDANT'S PRESENCE, ONCE DEFENDANT WAS RELEASED FROM JAIL ANY ATTEMPT TO INCREASE HIS SENTENCE PRECLUDED BY DOUBLE JEOPARDY RULE.

The Fourth Department, in an original Article 78 proceeding, determined the judge was prohibited from imposing on defendant a sentence of probation. Defendant was sentenced to 30 days in jail. Outside the defendant's presence the sentencing judge signed an order imposing a five-year probationary period and defendant agreed to the order by signing it in jail: "While a court possesses the inherent authority to correct a mistake or error in a criminal defendant's sentence ... , the process by which a court corrects such an error is by resentencing the defendant ... , which must be done in the defendant's presence (see CPL 380.40 [1]). We thus conclude that the Judge erred in imposing an additional component to the sentence outside of petitioner's presence ... We further conclude that petitioner cannot now be resentenced. It is well settled that, 'where a defendant is released from custody and returns to the community after serving the period of incarceration that was ordered by the sentencing court, and the time to appeal the sentence has expired or the appeal has been finally determined,' a legitimate expectation of the original sentence's finality arises and double jeopardy precludes the modification of that sentence to include a period of' probation ... . Here, ,,, petitioner has completed serving the period of incarceration and has been released from custody. Petitioner did not file a notice of appeal, and the time within which to do so has expired ... . Although petitioner, as of this writing, could still move for an extension of time to take an appeal ... , he cannot be forced

to do so. We thus conclude that petitioner's sentence is 'beyond the court's authority,' and an additional component to that sentence cannot be imposed ...". ***Matter of Brandon v. Doran*, 2017 N.Y. Slip Op. 03371, 4th Dept 4-28-17**

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA).

JUVENILE DELINQUENCY ADJUDICATION SHOULD NOT HAVE BEEN CONSIDERED UNDER RISK FACTOR 9.
The Fourth Department, reversing County Court, determined defendant's juvenile delinquency adjudication should not have been used to calculate his risk level under risk factor 9: "Defendant was assessed 15 points under risk factor 9 for a prior crime as a juvenile delinquent, and the court, relying on *People v. Catchings* (56 AD3d 1181 ... , rejected defendant's challenge to the assessment of points under risk factor 9. As we recently held in *People v. Brown* (148 AD3d 1705, ___), however, a juvenile delinquency adjudication may not be considered a crime for purposes of assessing points in a SORA determination, and Catchings should no longer be followed to that extent. Consequently, we conclude that the court erred in considering defendant's juvenile delinquency adjudication in assessing 15 points under risk factor 9. Removing the improperly assessed points under risk factor 9 renders defendant a presumptive level two risk. Under the circumstances of this case, we remit the matter to County Court for further proceedings to determine whether an upward departure is warranted ...". ***People v. Gibson*, 2017 N.Y. Slip Op. 03355, 4th Dept 4-28-17**

FAMILY LAW.

REQUEST FOR AN ADJOURNMENT IN THIS FAMILY OFFENSE PROCEEDING SHOULD HAVE BEEN GRANTED.
The Fourth Department determined Family Court abused its discretion when it refused mother's attorney's request for an adjournment because mother could not attend the proceeding in which she was accused of committing two family offenses: "We agree with the mother that the court abused its discretion in denying her attorney's motion to adjourn the hearing because the mother was unable to attend. We therefore reverse the order on appeal and remit the matter to Family Court for further proceedings on the amended petition. In Family Court Act article 8 proceedings, the court 'may adjourn a fact-finding hearing or a dispositional hearing for good cause shown on its own motion or on motion of either party' (Family Ct Act § 836 [a]). Although the court does not abuse its discretion in denying a request for an adjournment where the party making the request gives no reason for his or her absence ... , here, the mother explained her absence. Moreover, the proceedings were not protracted, and the mother made no prior requests for an adjournment ...". ***Matter of Drake v. Riley*, 2017 N.Y. Slip Op. 03282, 4th Dept 4-28-17**

FAMILY LAW.

MOTHER DID NOT DEFAULT IN THIS NEGLECT PROCEEDING BECAUSE HER ATTORNEY WAS PRESENT AND MOTHER'S ATTORNEY'S REQUEST FOR AN ADJOURNMENT SHOULD HAVE BEEN GRANTED.
The Fourth Department, reversing Family Court in this neglect proceeding, determined the matter should not have been disposed of based upon the mother's purported default and mother's attorney's request for an adjournment should have been granted. The court noted that when, as here, a party's attorney is present and participates in the proceeding a default finding is improper: " 'As we have repeatedly held, a respondent who fails to appear personally in a matter but nonetheless is represented by counsel who is present when the case is called is not in default in that matter' ... . Moreover, inasmuch as the mother's counsel objected on ten occasions during the inquest, this is not a situation where a default could be found based, at least in part, upon counsel's ' election to stand mute' during the inquest ... . We further agree with the mother that the court abused its discretion in denying her counsel's request to adjourn the hearing. The request was based on the fact that the mother was unable to attend the hearing owing to illness. It is well settled that the grant or denial of a request for an adjournment for any purpose is a matter resting within the sound discretion of the trial court ... . Here, the record demonstrates that the mother contacted her counsel and petitioner prior to the hearing to report her illness, that the proceedings in this matter were not protracted, that the mother personally appeared at all prior proceedings, and that the request for an adjournment was the mother's first ...". ***Matter of Cameron B.*, 2017 N.Y. Slip Op. 03299, 4th Dept 4-28-17**

FAMILY LAW.

FAMILY COURT DOES NOT HAVE THE AUTHORITY TO ORDER COUNSELING AS A PREREQUISITE FOR FATHER'S VISITATION.
The Fourth Department, after finding father's physical abuse of mother in the children's presence justified a modification of custody, determined Family Court did not have the authority to order counseling as a prerequisite to father's visitation: "We agree with the father, however, that the court erred to the extent that it ordered that future modification of the father's visitation is conditioned on completion of a parenting class. '[A]lthough a court may include a directive to obtain counseling as a component of a custody or visitation order, the court does not have the authority to order such counseling as a prerequisite to custody or visitation' ... . Thus, 'the court lack[s] the authority to condition any future application for modification

of [a parent's] visitation on her [or his] participation in . . . counseling' ... . Nevertheless, the court may order that a parent's completion of counseling and compliance therewith 'would constitute a substantial change of circumstances for any future petition for modification of the order' ... , provided that '[n]othing in the order prevents the [parent] from supporting a modification petition with a showing of a different change of circumstances' ... . We therefore modify the order by striking the provision requiring the father to complete a parenting class as a prerequisite for modification of visitation and substituting therefor a provision directing that he comply with that condition as a component of supervised visitation." ***Matter of Allen v. Boswell*, 2017 N.Y. Slip Op. 03312, 4th Dept 4-28-17**

FAMILY LAW.

PROOF INSUFFICIENT TO DEMONSTRATE INCARCERATED FATHER ABANDONED THE CHILDREN.

The Fourth Department, reversing Family Court, determined the proof did not demonstrate father, who was incarcerated, abandoned the children. The Fourth Department noted that the failure to offer a meaningful plan for the children's future is not relevant to an abandonment proceeding: " 'A child is deemed abandoned where, for the period six months immediately prior to the filing of the petition for abandonment . . . , a parent evinces an intent to forego his or her parental rights and obligations as manifested by his or her failure to visit the child and communicate with the child or [petitioner], although able to do so and not prevented or discouraged from doing so by [petitioner]' ... . Here, the evidence established that the father, who was incarcerated for most of the six-month period immediately prior to the filing of the petition, contacted the children or petitioner every month during that period. The father wrote letters to the children and called, met with, and wrote letters to the children's caseworker. We conclude that the father's contacts were not minimal, sporadic, or insubstantial ... . Moreover, during that period, the father filed a petition seeking custody or visitation with the children, which indicates that he did not intend to forego his parental rights ... . Although Family Court's finding that the father failed to offer a meaningful plan for the children's future is relevant to a termination proceeding based on permanent neglect ... , it is not relevant to a termination proceeding based on abandonment ...". ***Matter of John F. (John F., Jr.)*, 2017 N.Y. Slip Op. 03369, 4th Dept 4-28-17**

FRAUD, CIVIL PROCEDURE.

FRAUD ALLEGED TO HAVE BEEN COMMITTED IN A PRIOR PROCEEDING MUST BE ADDRESSED BY A MOTION TO VACATE THE JUDGMENT IN THAT PROCEEDING, NOT IN A SECOND PLENARY ACTION.

The Fourth Department determined that a second plenary action for fraud allegedly committed in a foreclosure proceeding is not proper. The proper remedy is a motion to vacate the judgment in the foreclosure proceeding: " 'To the extent that the [amended] complaint alleged fraud, misrepresentation, or other misconduct of an adverse party committed during the course of the prior litigation, plaintiff[s'] sole remedy was a motion to vacate the court's prior order pursuant to CPLR 5015 (a) (3). A litigant's remedy for alleged fraud in the course of a legal proceeding lies exclusively in that lawsuit itself, i.e., by moving pursuant to CPLR 5015 to vacate the [judgment] due to its fraudulent procurement, not a second plenary action collaterally attacking the' judgment ... . Contrary to plaintiffs' further contention, this case does not fit within the exception ... which applies when the alleged fraud or perjury 'is merely a means to the accomplishment of a larger fraudulent scheme,' i.e., one 'greater in scope than [that] in the prior proceeding' ...". ***MAA-Sharda, Inc. v. First Citizens Bank & Trust Co.*, 2017 N.Y. Slip Op. 03290, 4th Dept 4-28-17**

MEDICAL MALPRACTICE, CIVIL PROCEDURE, PRIVILEGE.

DOCTOR'S CREDENTIALING FILE PRIVILEGED AND NOT DISCOVERABLE, WHETHER CONTENTS OF PERSONNEL FILE ARE PRIVILEGED MUST BE DETERMINED DOCUMENT BY DOCUMENT.

The Fourth Department, reversing Supreme Court, determined defendant doctor's (Koll's) credentialing file was privileged and therefore not discoverable and the discovery request for his personnel file was too broad and whether any parts of it are privileged must be determined document by document: "Concerning the discoverability of Dr. Kolli's credentialing file, we note that such files 'fall squarely within the materials that are made confidential by Education Law § 6527 (3) and article 28 of the Public Health Law'... . That privilege shields from disclosure 'the proceedings [and] the records relating to performance of a medical or a quality assurance review function or participation in a medical . . . malpractice prevention program' .. . Here, defendants established that the credentialing file was 'generated in connection with a quality assurance review function pursuant to Education Law § 6527 (3) or a malpractice prevention program pursuant to [article 28 of the] Public Health Law' ... . We therefore conclude that the credentialing file is privileged and that the court improperly ordered defendants to disclose it ... . Although there is an exception to the privilege, the exception is limited to those statements made by a doctor to his or her employer-hospital concerning the subject matter of a malpractice action and pursuant to the hospital's quality-control inquiry into the incident underlying that action ... . Contrary to plaintiffs' contention, that excep-

tion does not apply here because the injury underlying this action was never the subject of such an inquiry." ***Jousma v. Kolli*, 2017 N.Y. Slip Op. 03308, 4th Dept 4-28-17**

MENTAL HYGIENE LAW.

CHANGE OF VENUE TO ALLOW PETITIONER'S MOTHER TO TESTIFY SHOULD HAVE BEEN GRANTED.

The Fourth Department, reversing Supreme Court, determined petitioner sex offender's motion for a change of venue for the annual review of his civil commitment under Article 10 should have been granted. The change was sought to allow petitioner's mother to testify: "In this annual review proceeding pursuant to Mental Hygiene Law § 10.09, petitioner appeals from an order that, inter alia, denied that part of his motion seeking a change of venue to New York County for the convenience of witnesses ... . Petitioner was previously determined to be a dangerous sex offender requiring civil confinement and confined to a secure treatment facility ... . He is currently confined at the Central New York Psychiatric Center in Oneida County. We now grant that part of the motion seeking a change of venue. The court may change the venue of an annual review proceeding 'to any county for good cause, which may include considerations relating to the convenience of the parties or witnesses or the condition of the [confined sex offender]' ... . We agree with petitioner that Supreme Court improvidently exercised its discretion in denying his motion inasmuch as the proposed testimony of his mother, who lives in New York County, is 'relevant to the issue of whether petitioner remained a dangerous sex offender in need of confinement' ... . Although respondent correctly notes that the subjects of the mother's proposed testimony also may be the subjects of expert testimony, '[t]he pertinent question is whether a witness—expert or lay—has material and relevant evidence to offer on the issues to be resolved' ... . We agree with petitioner that his mother's proposed testimony concerning his stated goals and priorities, likely living arrangements, and the availability and extent of a familial support system in the event of release, is material and relevant to the issue whether he 'is likely to be a danger to others and to commit sex offenses if not confined to a secure treatment facility' ...". ***Matter of Charada T. v. State of New York*, 2017 N.Y. Slip Op. 03379, 4th Dept 4-28-17**

LABOR LAW-CONSTRUCTION LAW.

QUESTION OF FACT WHETHER SCAFFOLD WAS AN ADEQUATE SAFETY DEVICE UNDER THE CIRCUMSTANCES, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON THE LABOR LAW § 240 (1) CAUSE OF ACTION SHOULD NOT HAVE BEEN GRANTED.

The Fourth Department, reversing (modifying) Supreme Court, determined defendants' motion for summary judgment on the Labor Law § 240 (1) cause of action should not have been granted. There was a question of fact whether the scaffold was an adequate safety device because defendant alleged he was ordered to work on the scaffold when it was not high enough to reach his work area: "Inasmuch as a modification to the scaffold was required and could have taken hours to be performed, we conclude that there are triable issues of fact whether an adequate safety device was 'readily available' for plaintiff's use ... . Moreover, based on plaintiff's testimony describing the third supervisor's instructions, we conclude that there are triable issues of fact whether plaintiff chose 'for no good reason' not to wait for the scaffold to be modified ... . Although the third supervisor denied making such a comment, that denial merely establishes that neither party is entitled to summary judgment on the Labor Law § 240 (1) claim." ***Videan v. NRG Energy, Inc.*, 2017 N.Y. Slip Op. 03315, 4th Dept 4-28-17**

PERSONAL INJURY.

SPEED BUMP NOT OPEN AND OBVIOUS AS A MATTER OF LAW.

The Fourth Department determined defendants' summary judgment motion in this slip and fall case was properly denied. A speed bump painted the same color as an adjacent walkway was not open and obvious as a matter of law: "Contrary to defendants' contention, we conclude that they failed to establish as a matter of law that the hazard posed by the speed bump was open and obvious and thus that they had no duty to warn plaintiff of a tripping hazard. It is well established that there is no duty to warn of an open and obvious dangerous condition 'because in such instances the condition is a warning in itself' ... . 'Whether a hazard is open and obvious cannot be divorced from the surrounding circumstances . . . A condition that is ordinarily apparent to a person making reasonable use of his or her senses may be rendered a trap for the unwary where the condition is obscured or the plaintiff is distracted'... . 'Some visible hazards, because of their nature or location, are likely to be overlooked . . . , and the facts here simply do not warrant concluding as a matter of law that the [speed bump] was so obvious that it would necessarily be noticed by any careful observer, so as to make any warning superfluous' ...". ***Schneider v. Corporate Place, LLC*, 2017 N.Y. Slip Op. 03300, 4th Dept 4-28-17**

PERSONAL INJURY.

STONE WALL ABUTTING A SIDEWALK IS NOT A FEATURE CONSTRUCTED ON THE SIDEWALK, THE SPECIAL USE DOCTRINE THEREFORE DID NOT APPLY, HERE THE WALL OBSTRUCTED PLAINTIFF BICYCLIST'S VIEW AND PLAINTIFF WAS STRUCK BY A CAR BACKING ACROSS THE SIDEWALK, PROPERTY OWNER OWED NO DUTY TO PLAINTIFF.

The Fourth Department, reversing Supreme Court, determined defendant property owner's motion for summary judgment should have been granted. Plaintiff bicyclist was struck by a car backing out of a driveway on defendant's property. It was alleged that both the bicyclist's and driver's view was obstructed by a stone fence on defendant's property abutting the sidewalk. The Fourth Department held that defendant did not owe a duty to plaintiff. The special use doctrine applies only when a special use of a sidewalk results in a structure on the sidewalk (not the case here): "Contrary to plaintiff's contention, defendant established that it owed no duty to plaintiff, a user of the public way ... . Although plaintiff contends that a duty arose because defendant made a special use out of the sidewalk by virtue of the fact that the driveway passed over the sidewalk, we conclude that the special use doctrine is inapplicable where, as here, there is no alleged defect in the sidewalk or driveway itself ... . 'In the absence of a special feature constructed in the sidewalk, the special use doctrine will not be applied even if the defendant makes continual, heavy use of the sidewalk'... . We thus conclude that defendant established that it owed no duty of care to plaintiff. 'In the absence of duty, there is no breach and without a breach there is no liability' ...". ***Weston v. Martinez*, 2017 N.Y. Slip Op. 03301, 4th Dept 4-28-17**

PERSONAL INJURY, CONTRACT LAW.

SNOW REMOVAL CONTRACTOR'S MOTION FOR SUMMARY JUDGMENT IN THIS SLIP AND FALL CASE SHOULD HAVE BEEN GRANTED, CONTRACTOR DID NOT LAUNCH AN INSTRUMENT OF HARM.

The Fourth Department, reversing Supreme Court, determined defendant snow removal contractor's (Krotz's) motion for summary judgment in this slip and fall case should have been granted. The contractor was hired to plow only the center driveway area, not the parking area where plaintiff fell. It could not be said, therefore, the contractor launched an instrument of harm, the only theory under which the contractor could possibly (under the facts) be liable in tort to plaintiff based upon the plowing contract. The court noted that since the only *Espinal* factor that may have been alleged sufficiently was "launching an instrument of harm," that was the only factor the contractor needed to negate in the motion for summary judgment: "Here, any duty that Krotz had with respect to snowplowing on the subject property arose exclusively out of its contract with the apartment defendants ... . It is well settled, however, that 'a contractual obligation, standing alone, will impose a duty only in favor of the promisee and intended third-party beneficiaries' ... , and 'will generally not give rise to tort liability in favor of a third party,' i.e., a person who is not a party to the contract ... . There are 'three situations in which a party who enters into a contract to render services may be said to have assumed a duty of care—and thus be potentially liable in tort—to third persons: (1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, launche[s] a force or instrument of harm' . . . ; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties . . . and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely' ... . Even assuming, arguendo, that the allegations in the pleadings are sufficient to require Krotz to negate the possible applicability of the first Espinal exception in establishing its prima facie entitlement to summary judgment ... , we conclude that Krotz met its initial burden of establishing that it did not launch a force or instrument of harm by creating or exacerbating a dangerous condition ...". ***Lingenfelter v. Delevan Terrace Assoc.*, 2017 N.Y. Slip Op. 03309, 4th Dept 4-28-17**

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