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FIRST DEPARTMENT

LIMITED LIABILITY COMPANY LAW, CONTRACT LAW.

APPOINTMENT OF AN OUTSIDE ATTORNEY TO DETERMINE MERITS OF A DERIVATIVE SUIT NOT ALLOWED BY THE LIMITED LIABILITY COMPANY OPERATING AGREEMENTS.

The First Department, in a full-fledged opinion by Justice Manzanet-Daniels, reversing Supreme Court, determined the appointment of an outside attorney [Mr. Zauderer] to serve as the sole member of a Special Litigation Committee (SLC) to determine the merits of claims asserted in this LLC derivative suit was not allowed by the operating agreements: "Neither operating agreement provides for the delegation of decision-making authority to other than a member, or to an outsider like Mr. Zauderer to serve as SLC. The agreements are explicit that while day-to-day management is vested in the manager, "major decisions" need the consent of the other members. We reject the argument that the appointment of the SLC (as opposed to the ultimate decision as to whether to proceed with the derivative litigation) was not a 'Major Decision' within the meaning of the agreements. The SLC was specifically granted the authority to 'determine the positions and actions that the Companies should take with respect to the claims, considering, among other things, whether the claims have merit, whether they are likely to prevail, and whether it is in the Companies' best interests to pursue them.' That is not to say that the appointment of an SLC would in all cases be improper in the LLC context. Indeed, the members may so provide in the operating agreement, and such provision will be enforced in accordance with those same principles concerning the parties' freedom to contract ... ". ***LNYC Loft, LLC v. Hudson Opportunity Fund I, LLC*, 2017 N.Y. Slip Op. 06147, First Dept 8-15-17**

SECOND DEPARTMENT

CIVIL PROCEDURE.

SIGNIFICANT GAPS IN THE STENOGRAPHIC RECORD, COUPLED WITH THE DEATH OF THE STENOGRAPHER AND THE INABILITY TO RECONSTRUCT THE RECORD, REQUIRED A NEW TRIAL.

The Second Department determined a new trial was the only option where the stenographic record of the trial was incomplete and could not be reconstructed. Plaintiff's motion to set aside the verdict, therefore, could not be entertained. Apparently the stenographer had fallen asleep during testimony and subsequently died: "After the jury returned a verdict in favor of the defendants on the issue of liability, the plaintiff moved pursuant to CPLR 4404(a) to set aside the verdict and for a new trial, on the grounds that the trial could not be transcribed and that the verdict was contrary to the weight of the evidence. A senior court reporter submitted an affidavit in connection with the motion in which she stated that the court reporter who was assigned to the trial had died, and that there were 'significant gaps in [that court reporter's] notes which rendered the trial unable to be transcribed.' ... A stenographic transcript is an aid to the judge, who is tasked with the final responsibility to certify the record (see CPLR 5525[c], [d]). The parties may agree on a statement in lieu of a transcript and the court may adopt, according to its own recollection, a statement in lieu of transcript submitted by one of the parties ... . However, when no agreement and no reconstruction is possible, a new trial is required. Indeed, in civil cases, where a stenographer dies or is no longer in possession of minutes and the minutes cannot be obtained, meaningful appellate review is impaired and a new trial should be ordered if reconstruction is not possible ... ". ***Monaco v. New York City Tr. Auth.*, 2017 N.Y. Slip Op. 06178, Second Dept 8-16-17**

CIVIL PROCEDURE, EVIDENCE, INSURANCE LAW.

ATTORNEY LETTERS DID NOT CONSTITUTE DOCUMENTARY EVIDENCE WHICH WOULD SUPPORT A MOTION TO DISMISS.

The Second Department determined attorney letters did not constitute documentary evidence which would support a motion to dismiss in this insurance-coverage dispute: "A motion to dismiss a complaint pursuant to CPLR 3211(a)(1) may be granted only if the documentary evidence submitted utterly refutes the factual allegations of the complaint and conclusively establishes a defense to the claims as a matter of law ... . In order for evidence to qualify as documentary, it must be unambiguous, authentic, and undeniable ... . Neither affidavits, deposition testimony, nor letters are considered documentary evidence within the intendment of CPLR 3211(a)(1) ... . Accordingly, the letters from the attorney and claims services relied

upon by [the insurer] do not constitute documentary evidence for the purposes of CPLR 3211(a)(1). Additionally, the insurance policy, which does constitute documentary evidence, did not utterly refute the factual allegations of the complaint and did not conclusively establish a defense to the claims as a matter of law." ***Fox Paine & Co., LLC v. Houston Cas. Co.*, 2017 N.Y. Slip Op. 06162, Second Dept 8-16-17**

CIVIL PROCEDURE, EVIDENCE, APPEALS, REAL ESTATE.

LETTERS PURPORTING TO CONSTITUTE TIME OF THE ESSENCE NOTICE DID NOT CONSTITUTE DOCUMENTARY EVIDENCE WHICH CAN SUPPORT A MOTION TO DISMISS; ALTHOUGH NOT RAISED BELOW THE DOCUMENTARY EVIDENCE ISSUE WAS A PROPER BASIS FOR REVERSAL ON APPEAL.

The Second Department, reversing Supreme Court, determined the letters evincing a "time of the essence" notification in the underlying real estate transaction did not constitute "documentary evidence" which would support a motion to dismiss. Although the "documentary evidence" argument was not raised below, the court properly considered it as the basis for reversal as a matter of law: " '[J]udicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are essentially undeniable, would qualify as documentary evidence in the proper case' ... . 'At the same time, [n]either affidavits, deposition testimony, nor letters are considered documentary evidence within the intendment of CPLR 3211(a)' ... . Here, the letters submitted by the defendant did not constitute documentary evidence within the meaning of CPLR 3211(a)(1), and should not have been relied upon by the Supreme Court as a basis for granting the defendant's motion to dismiss the complaint. The only documentary evidence submitted in support of the defendant's motion was the purchase agreement, which did not 'utterly refute' the plaintiffs' allegations or conclusively establish a defense as a matter of law. Contrary to the defendant's contention, the issue of whether the letters constitute documentary evidence within the intendment of CPLR 3211(a)(1) can be raised for the first time on appeal because it is one of law which appears on the face of the record and could not have been avoided if it had been raised at the proper juncture ...". ***Feldshteyn v. Brighton Beach 2012, LLC*, 2017 N.Y. Slip Op. 06160, Second Dept 8-16-17**

CIVIL PROCEDURE, JUDGES.

COURT SHOULD NOT HAVE ORDERED AN ACCOUNTING BEFORE DETERMINING A SUMMARY JUDGMENT MOTION, NEITHER PARTY REQUESTED AN ACCOUNTING.

The Second Department determined the judge should not have ordered an accounting before deciding a summary judgment motion. Neither party had requested and accounting: "The plaintiffs, which are affiliated not-for-profit organizations, commenced this action against the defendant, their former accountant, alleging that it breached contractual and fiduciary duties by preparing misleading audit reports for them for several years, which caused the plaintiffs to suffer serious financial harm. In response, the defendant asserted counterclaims for an account stated and to recover damages pursuant to CPLR 3016(f) for breach of contract. Shortly after the plaintiffs filed a reply to the counterclaims, the defendant moved for summary judgment on the counterclaims. The plaintiffs opposed the motion. The Supreme Court held the defendant's motion in abeyance pending an accounting even though neither party requested an accounting. The defendant appeals, by permission. 'Generally, a court may, in its discretion, grant relief that is warranted by the facts plainly appearing on the papers on both sides, if the relief granted is not too dramatically unlike the relief sought, the proof offered supports it, and there is no prejudice to any party'... . Here, an accounting was not requested and, under the circumstances, it was an improvident exercise of discretion for the Supreme Court to, sua sponte, grant such relief ...". ***Samuel Field YM & YWHA, Inc. v. Irvings Roth & Rubin, PLLC*, 2017 N.Y. Slip Op. 06208, Second Dept 8-16-17**

CRIMINAL LAW, APPEALS.

FAILURE TO FOLLOW O'RAMA PROCEDURE FOR JURY NOTES REQUIRED REVERSAL, MODE OF PROCEEDINGS ERROR DID NOT REQUIRE PRESERVATION.

The Second Department reversed defendant's conviction because the trial judge did not follow the O'Rama procedure when addressing two notes sent out by the jury. Although the error was not preserved by objection, it was deemed a mode of proceedings error. The notes asked for a readback of testimony and instructions on the charged offense. Although the judge complied with the requests, the jury notes were not marked as exhibits, were not read to counsel, and counsel were not given an opportunity to respond to the notes outside the presence of the jury: "In *People v. O'Rama*, the Court of Appeals set forth the procedure for handling communications from the jury in accordance with CPL 310.30. 'The Court of Appeals held that whenever a substantive written jury communication is received by the Judge, it should be marked as a court exhibit and, before the jury is recalled to the courtroom, read into the record in the presence of counsel' ... . ' After the contents of the inquiry are placed on the record, counsel should be afforded a full opportunity to suggest appropriate responses. The court should then ordinarily apprise counsel of the substance of the responsive instruction it intends to give so that counsel can seek whatever modifications are deemed appropriate before the jury is exposed to any potentially harmful information. Once the jury is returned to the courtroom, the communication should be read in open court'... . Where a trial court fails to provide counsel 'with meaningful notice of the precise content of a substantive juror inquiry, a mode of proceedings error occurs, and reversal is therefore required even in the absence of an objection' ... . Here, although the defendant failed to

object to the manner in which the Supreme Court handled the two notes, under the circumstances of this case, the court violated O'Rama and committed a mode of proceedings error, obviating the need for preservation, by failing to provide the defendant with notice of the "precise contents" of the notes prior to giving its responses ...". ***People v. Webster*, 2017 N.Y. Slip Op. 06198, Second Dept 8-16-17**

CRIMINAL LAW, EVIDENCE.

DEFENDANT'S STATEMENT PROVIDING THE COMBINATION TO A SAFE TO SEARCHING PAROLE OFFICERS, AS WELL AS THE FIREARMS FOUND IN THE SAFE, SHOULD HAVE BEEN SUPPRESSED.

The Second Department, reversing Supreme Court, determined defendant's statement providing the searching parole officers with the combination to a safe and the guns found in the safe should have been suppressed. The search of defendant's girlfriend's apartment was conducted after defendant, who was present in the apartment, violated parole. Defendant was handcuffed and in his underwear when the officer asked for the combination. The officers had already found other weapons and counterfeit DVD's in the apartment. The People unsuccessfully argued the request for the combination was not designed to elicit an incriminating response: "The question—which arose after the parole officers had found counterfeit DVDs, a box filled with daggers, and a .22 caliber revolver—had only one logical purpose: to elicit a response from the defendant disclosing the combination to the safe, which would possibly lead to the discovery of incriminating evidence, and which would link the safe to the defendant ... . Therefore, the Supreme Court should have granted that branch of the defendant's motion which was to suppress his statement to law enforcement officials as to the combination to the safe, and should have suppressed the two handguns recovered from the safe, as well as a handwritten statement the defendant later made to the police about the handguns, as fruits of the poisonous tree ... . Without this evidence, there could not be legally sufficient evidence to support convictions of criminal possession of a weapon in the third degree based on those two handguns, or based on the defendant's possession of three or more firearms. Accordingly, the convictions of those three offenses must be vacated, and those three counts of the indictment must be dismissed." ***People v. Blacks*, 2017 N.Y. Slip Op. 06186, Second Dept 8-16-17**

CRIMINAL LAW, EVIDENCE.

FIREARMS FOUND IN THE PARTIALLY CLOSED CENTER CONSOLE OF A VEHICLE PROPERLY SUPPRESSED, DEFENDANTS WERE OUT OF THE VEHICLE AND HANDCUFFED WHEN THE CONSOLE WAS SEARCHED.

The Second Department determined handguns found inside the console of an SUV were properly suppressed. The police stopped the SUV based upon a report of a shooting involving a similar vehicle. After the defendants were handcuffed and removed from the SUV, but before the eyewitnesses to shooting arrived, the police opened the center console and found a firearm. The eyewitnesses subsequently told the police the defendants were not involved in the shooting: "On January 14, 2015, just before 9:30 p.m., two police officers responded to a report of a shooting involving a white Infiniti SUV with several occupants, including one female. Approximately 15 minutes later and eight or nine blocks away from the location of the reported shooting, the officers observed an SUV matching that description parked in a strip mall parking lot, and a woman standing next to it. As the officers approached in their vehicle, the woman walked away, and the driver of the SUV began to drive away. The officers pulled the SUV over, exited their vehicle, and approached the SUV on foot, one officer on each side of it. The officers observed that the two male occupants, the defendants herein, were leaning toward each other, and each had an elbow on the SUV's center console. The officers did not observe any contraband or firearms inside the SUV. The driver complied with the officers' request to provide his license and registration, following which the defendants were removed from the SUV, frisked, handcuffed, and seated on a nearby curb to wait for eyewitnesses to the shooting to arrive. Additional officers arrived, one of whom approached the SUV and, noticing that the center console was slightly elevated, opened it and found a handgun. The defendants were then arrested. The eyewitnesses subsequently arrived and confirmed that the defendants were not the persons who had committed the shooting. A second handgun was later found in the center console. '[A]bsent probable cause, it is unlawful for a police officer to invade the interior of a stopped vehicle once the suspects have been removed and patted down without incident, as any immediate threat to the officers' safety has consequently been eliminated' ... . Under the circumstances here, where the defendants had been removed from the SUV, the police lacked probable cause for a warrantless search of its center console, and the weapons found as a result were properly suppressed ...". ***People v. Morris*, 2017 N.Y. Slip Op. 06194, Second Dept 8-16-17**

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

PROOF DID NOT JUSTIFY ASSESSMENT FOR DRUG AND ALCOHOL USE, RISK LEVEL REDUCED IN THE INTEREST OF JUSTICE.

The Second Department, reversing Supreme Court, determined the proof did not support assessing 15 points for excessive drug and alcohol use. Defendant's risk level was reduced from three to two. Although the error was not preserved, the court reviewed it in the interest of justice: " 'In order to demonstrate that an offender was abusing [drugs or] alcohol at the time of the offense,' the People must show by clear and convincing evidence that the offender used [drugs or] alcohol in excess either at the time of the crime or repeatedly in the past' ... . Here, although the People offered evidence that the defendant

used drugs after the time of the offense, the People failed to prove by clear and convincing evidence that the defendant used alcohol or drugs in excess either at the time of the offense or repeatedly in the past ... . Accordingly, the Supreme Court should not have assessed the defendant 15 points under risk factor 11." ***People v. Madison*, 2017 N.Y. Slip Op. 06200, Second Dept 8-16-17**

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA).

THEFT DID NOT WARRANT UPWARD DEPARTURE FROM PRESUMPTIVE RISK LEVEL.

The Second Department determined Supreme Court should not have imposed an upward departure from the presumptive risk level based upon a theft: "The defendant's commission of a theft while the underlying criminal prosecution was pending was a factor not taken into account in the Guidelines ... . Moreover, the People proved by clear and convincing evidence that the defendant committed that theft. Nevertheless, the Supreme Court improvidently exercised its discretion in upwardly departing from the presumptive risk level on that basis. That theft, an opportunistic nonviolent theft committed while the defendant was house-sitting for a friend, did not indicate that the presumptive risk level would result in an underassessment of the risk of sexual reoffense ... . In sum, the defendant was properly assessed 75 points ... , within the range for a presumptive designation as a level two offender. However, the Supreme Court improvidently exercised its discretion in upwardly departing from the presumptive risk level. Accordingly, we reverse the order appealed from and designate the defendant a level two sex offender." ***People v. Garcia*, 2017 N.Y. Slip Op. 06199, Second Dept 8-16-17**

DEFAMATION, PRIVILEGE, EVIDENCE.

COMMON-INTEREST PRIVILEGE OVERCOME BY ALLEGATIONS OF MALICE, NO NEED FOR FACTUAL EVIDENCE OF MALICE AT THE MOTION TO DISMISS STAGE.

The Second Department determined that, although the common interest privilege applied to the allegedly defamatory statements, the allegations of malice were sufficient to overcome the privilege in the context of a motion to dismiss. The court noted that no evidence of malice need be presented at the motion-to-dismiss stage: " 'To state a cause of action to recover damages for defamation, a plaintiff must allege that the defendant published a false statement, without privilege or authorization, to a third party, constituting fault as judged by, at a minimum, a negligence standard, and it must either cause special harm or constitute defamation per se'.... . 'A communication made by one person to another upon a subject in which both have an interest is protected by a qualified privilege'... . However, this 'common-interest privilege' may be overcome by a showing of malice ... . 'To establish the malice necessary to defeat the privilege, the plaintiff may show either common-law malice, i.e., spite or ill will, or may show actual malice, i.e., knowledge of falsehood of the statement or reckless disregard for the truth' ... . Here, * * * the common-interest privilege applies to the allegedly defamatory communications... . However, accepting the facts as alleged in the amended complaint as true, and according the plaintiff the benefit of every possible favorable inference ..., the amended complaint sufficiently alleges malice to overcome the privilege... . '[A] plaintiff has no obligation to show evidentiary facts to support [his or her] allegations of malice on a motion to dismiss pursuant to CPLR 3211 (a) (7)' ...". ***Ferrara v. Bank*, 2017 N.Y. Slip Op. 06161, Second Dept 8-16-17**

EDUCATION-SCHOOL LAW.

LAW STUDENT FAILED TO COMPLY WITH SCHOOL RULES FOR MISSING EXAMS DUE TO ILLNESS, FAILING GRADES ALLOWED TO STAND.

The Second Department determined a law student's petition to contest failing grades issued after the student missed exams was properly dismissed. The student had not complied with the school's rules with respect to missing exams because of illness: "Unlike disciplinary measures taken against a student, institutional assessments of a student's academic performance, whether in the form of particular grades received or measures taken because a student has been judged to be scholastically deficient, necessarily involve academic determinations requiring the special expertise of educators... . Thus, to preserve the integrity of the credentials conferred by educational institutions, courts have long been reluctant to intervene in controversies involving purely academic determinations ... . Although determinations made by educational institutions as to the academic performance of their students are not completely beyond the scope of judicial review, that review is limited to the question of whether the challenged determination was arbitrary and capricious, irrational, made in bad faith, or contrary to constitution or statute ... . Here, the petitioner did not submit any evidence establishing that he complied with BLS's policy for missing an exam due to illness. Pursuant to BLS's [Brooklyn Law School's] policy, since the petitioner failed to take two final exams, failed to promptly notify the Registrar that he was unable to take those exams due to illness, and failed to submit medical documentation of his illness necessary to schedule make-up exams, he received a failing grade in each course. BLS's determination to let the petitioner's failing grades stand and to refuse to allow him to withdraw from those courses so as to avoid the failing grades was not arbitrary and capricious, irrational, made in bad faith, or contrary to constitution or statute ...". ***Matter of Daniel v. Brooklyn Law Sch.*, 2017 N.Y. Slip Op. 06181, Second Dept 8-16-17**

FAMILY LAW, CONSTITUTIONAL LAW, RELIGION.

RELIGIOUS LIFESTYLE RESTRICTIONS PLACED UPON MOTHER VIOLATED HER CONSTITUTIONAL RIGHTS, FATHER'S DESIRE TO RAISE AND EDUCATE THE CHILDREN IN THE HASIDIC TRADITION WAS IN THE CHILDREN'S BEST INTERESTS.

The Second Department, in a full-fledged per curiam opinion, determined that a change in circumstances warranted a modification of the stipulation of settlement of a divorce action. The opinion is too detailed to fairly summarize here. At issue was the extent of the religion-related requirements of the stipulation of settlement. Father objected to the lifestyle changes associated with mother's open acknowledgment that she is gay and the presence of O, a transgender man, in the home. The court held that the religion-based restrictions placed upon mother's lifestyle, stemming from Supreme Court's finding that the religious aspects of the stipulation were paramount, violated her constitutional rights. Rather than the religious concerns, the analysis must focus on the best interests of the children. To that end, the Second Department determined certain aspects of the stipulation concerning the father's desire to raise and educate the children in the Hasidic tradition were in the children's best interests: "... [T]he Supreme Court improperly directed that enforcement of the parties' stipulation of settlement required the mother to practice full religious observance in accordance with the Hasidic practices of ultra Orthodoxy during any period in which she has physical custody of the children and at any appearance at the children's schools. Although the court accepted the father's argument that the religious upbringing clause 'forb[ids] [the mother from] living a secular way of life in front of the children or while at their schools,' the plain language of the parties' agreement was 'to give the children a Hasidic upbringing' … . The parties' agreement does not require the mother to practice any type of religion, to dress in any particular way, or to hide her views or identity from the children. Nor may the courts compel any person to adopt any particular religious lifestyle ... . * * * Contrary to the mother's contention, the weight of the evidence demonstrates that it is in the children's best interests to continue to permit the father to exercise final decision-making authority over the children's education and to continue to permit him to require the children to practice full religious observance in accordance with the Hasidic practices of ultra Orthodoxy while they are in his custody, or in the custody of a school that requires adherence to such practices." ***Weisberger v. Weisberger*, 2017 N.Y. Slip Op. 06212, Second Dept 8-16-17**

FORECLOSURE, CIVIL PROCEDURE, ATTORNEYS.

LAW OFFICE CONFUSION NOT A SUFFICIENT EXCUSE FOR BANK ATTORNEY'S FAILURE TO ATTEND A SETTLEMENT CONFERENCE, DEFAULT JUDGMENT DISMISSING THE COMPLAINT SHOULD NOT HAVE BEEN VACATED.

The Second Department, reversing Supreme Court, determined the bank's (OneWest's) motion to vacate a default judgment dismissing the complaint should not have been granted. One West's attorney did not show up for a scheduled settlement conference: "OneWest moved pursuant to CPLR 5015(a)(1) to vacate the order entered upon its default in appearing at the conferences and to restore the action to the active calendar. In support of its motion, OneWest alleged that it was unaware of the scheduled conferences 'due to law office confusion' following the substitution of counsel. The Supreme Court granted the motion. [Defendant] appeals. A plaintiff seeking to vacate a default in appearing at a conference is required to demonstrate both a reasonable excuse for its default and a potentially meritorious cause of action... . Although '[a] motion to vacate a default is addressed to the sound discretion of the motion court' ... , the defaulting party must submit evidence in admissible form establishing both a reasonable excuse and a potentially meritorious cause of action or defense ... . A court has the discretion to accept law office failure as a reasonable excuse for a party's default ... . However, 'it was not the Legislature's intent to routinely excuse such defaults' ... , and mere neglect is not a reasonable excuse... . Contrary to OneWest's contention, it failed to provide a detailed and credible explanation of the default... . Rather, counsel's affirmation in support of the motion contained only the conclusory and undetailed allegation of 'law office confusion' after being substituted as counsel for OneWest, which does not constitute a reasonable excuse... . No other evidence was submitted to corroborate the allegation. OneWest, therefore, failed to demonstrate a reasonable excuse for its default ...". ***OneWest Bank, FSB v. Singer*, 2017 N.Y. Slip Op. 06184, Second Dept 8-16-17**

INTENTIONAL TORTS, ABUSE OF PROCESS.

COMMENCING A LAWSUIT, STANDING ALONE, DOES NOT CONSTITUTE ABUSE OF PROCESS.

The Second Department determined defendants' motion for summary judgment was properly granted, noting that commencing a lawsuit, standing alone, does not constitute abuse of process: " 'Abuse of process has three essential elements: (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'... . The mere commencement of a lawsuit cannot serve as the basis for a cause of action alleging abuse of process ... . '[T]here must be an unlawful interference with one's person or property under color of process in order that action for abuse of process may lie' ...". ***Lynn v. McCormick*, 2017 N.Y. Slip Op. 06169, Second Dept 8-16-17**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

LABOR LAW § 240(1) NOT APPLICABLE TO INJURY FROM A PORTION OF A FENCE WHICH FELL ON PLAINTIFF.
The Second Department determined defendant property owner was entitled to summary judgment dismissing the Labor Law § 240(1) cause of action. Plaintiff alleged a portion of a plywood fence around the work site fell on him. The 'falling object' provisions of the Labor Law § 240(1) did not apply: " 'To prevail on a cause of action pursuant to section 240(1) in a 'falling object' case, the injured worker must demonstrate the existence of a hazard contemplated under that statute and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein'... . This requires a showing that at the time the object fell, it either was being hoisted or secured, or required securing for the purposes of the undertaking ... . Labor Law § 240(1) 'does not automatically apply simply because an object fell and injured a worker' ... . In support of their cross motion, the defendants made a prima facie showing of their entitlement to summary judgment dismissing the Labor Law § 240(1) cause of action by demonstrating that the plywood fence was not an object being hoisted or that required securing for the purpose of the undertaking, and that it did not fall because of the absence or inadequacy of an enumerated safety device ...". ***Berman-Rey v. Gomez*, 2017 N.Y. Slip Op. 06151, 2nd Dept 8-16-**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

CONSTRUCTION MANAGER DID NOT EXERCISE SUFFICIENT CONTROL TO BE LIABLE UNDER LABOR LAW § 240(1).
The Second Department determined plaintiff's Labor Law § 240(1) cause of action against the construction manager was properly dismissed. Plaintiff fell from a ten-foot-high stack of blasting mats. The construction manager demonstrated it did not exercise supervisory control over plaintiff's work or site safety: "A construction manager of a work site is generally not responsible for injuries under Labor Law § 200, § 240(1), or § 241(6) unless it functions as an agent of the property owner or general contractor in circumstances where it has the ability to control the activity which brought about the injury ... 'A party is deemed to be an agent of an owner or general contractor under the Labor Law when it has supervisory control and authority over the work being done where a plaintiff is injured'... . An agent's liability is limited 'to those areas and activities within the scope of the work delegated or, in other words, to the particular agency created' ... . Here, the construction management services contract ... provided that the defendants were responsible for coordinating the work relating to the ... project, namely liaising with contractors to ensure that the project was completed in accordance with cost, time, safety, and quality control requirements and reporting ... . However, the contract did not confer upon the defendants the authority to control the methods used by the contractors, including the plaintiff's employer, to complete their work. The defendants were authorized only to review and monitor safety programs and requirements and make recommendations, provide direction to contractors regarding corrective action to be taken if an unsafe condition was detected, and stop work only in the event of an emergency. The parties' deposition testimony also demonstrated that the defendants did not have control or a supervisory role over the plaintiff's day-to-day work and that they did not assume responsibility for the manner in which that work was conducted." ***Lamar v. Hill Intl., Inc.*, 2017 N.Y. Slip Op. 06167, Second Dept 8-16-17**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

PLAINTIFF'S STEPPING ON AN UNSECURED PLANK HE HAD JUST PLACED, RATHER THAN AN AVAILABLE SECURED PLANK, CONSTITUTED THE SOLE PROXIMATE CAUSE OF HIS FALL, DEFENDANTS' PROPERLY GRANTED SUMMARY JUDGMENT ON THE LABOR LAW § 240(1) CAUSE OF ACTION.
The Second Department determined defendants were entitled to summary judgment dismissing plaintiff's Labor Law § 240(1) cause of action. Plaintiff was constructing a scaffold floor by laying planks. He fell when he stepped on an unsecured plank he had just put down, instead of an available secured plank. Therefore plaintiff's action was the sole proximate cause of his fall: "To succeed on a cause of action alleging a violation of Labor Law § 240(1), a plaintiff must demonstrate that there was a violation of the statute and that the violation was a proximate cause of the accident ... . Where the plaintiff is the sole proximate cause of his or her own injuries, there can be no recovery under Labor Law § 240(1)... . Here, the defendants established their prima facie entitlement to judgment as a matter of law dismissing the Labor Law § 240(1) cause of action by demonstrating that the plaintiff was the sole proximate cause of the accident that caused his alleged injuries, since he chose to step upon an unsecured plank that he had just seconds before placed on a narrow steel beam, rather than standing upon the secured planking available to him, which he had used in the minutes leading up to the accident." ***Melendez v. 778 Park Ave. Bldg. Corp.*, 2017 N.Y. Slip Op. 06175, Second Dept 8-16-17**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

QUESTION OF FACT WHETHER PLAINTIFF'S ACTIONS CONSTITUTED THE SOLE PROXIMATE CAUSE OF HIS INJURIES IN THIS LABOR LAW § 240(1) ACTION.
The Second Department determined there was a question of fact whether plaintiff's actions constituted the sole proximate cause of his injuries in this Labor Law § 240(1) action. Plaintiff fell after he had stacked two Baker scaffolds and a closed a-frame ladder on top of one another to install sheetrock: "... [T]he defendant raised a triable issue of fact as to whether

pipe scaffolds, which were available to the plaintiff, constituted adequate protection for the work that the plaintiff was performing and, if so, whether the plaintiff, based on his training, prior practice, and common sense, knew or should have known to use pipe scaffolds instead of Baker scaffolds ... . The defendant also raised a triable issue of fact as to whether the scaffolds alone were adequate for the job, thereby negating any need for the plaintiff to place a closed ladder on top of the scaffolds ... . Therefore, the defendant submitted evidence that would permit a jury to find that 'the plaintiff had adequate safety devices available; that he knew both that they were available and that he was expected to use them; that he chose for no good reason not to do so; and that had he not made that choice he would not have been injured' ...". ***Nalvarte v. Long Is. Univ.*, 2017 N.Y. Slip Op. 06183, Second Dept 8-16-17**

MEDICAL (DENTAL) MALPRACTICE, PERSONAL INJURY.

QUESTION OF FACT WHETHER PLAINTIFF WAS PROPERLY INFORMED OF THE POTENTIAL COMPLICATIONS OF A DENTAL PROCEDURE, DESPITE PLAINTIFF'S SIGNING OF A CONSENT FORM.

The Second Department determined defendants' (Herman's and Capuano's) motions for summary judgment in this dental malpractice action were properly denied. With respect to the lack-of-informed consent cause of action, despite plaintiff's signing of a consent form, the deposition testimony raised a question of fact whether plaintiff was properly informed before signing it: " 'To establish a cause of action to recover damages for malpractice based on lack of informed consent, a plaintiff must prove (1) that the person providing the professional treatment failed to disclose alternatives thereto and failed to inform the patient of reasonably foreseeable risks associated with the treatment, and the alternatives, that a reasonable medical practitioner would have disclosed in the same circumstances, (2) that a reasonably prudent patient in the same position would not have undergone the treatment if he or she had been fully informed, and (3) that the actual procedure performed for which there was no informed consent was the proximate cause of the injury' ... . 'The mere fact that the plaintiff signed a consent form does not establish the defendants' prima facie entitlement to judgment as a matter of law' ... . Here, both Herman and Capuano failed to establish their prima facie entitlement to judgment as a matter of law dismissing the cause of action alleging lack of informed consent. Although Herman and Capuano each submitted a consent form signed by the plaintiff for the respective procedures, they also submitted, in support of their respective motions, the plaintiff's deposition testimony, which revealed factual disputes as to whether the plaintiff was properly advised before signing each of the forms ... ". ***Mathias v. Capuano*, 2017 N.Y. Slip Op. 06174, Second Dept 8-16-17**

MEDICAL MALPRACTICE, PRIVILEGE, EVIDENCE, PERSONAL INJURY.

DOCUMENTS REGARDING PLAINTIFF'S DECEDENT'S FALLS IN DEFENDANT'S NURSING HOME WERE NOT PRIVILEGED UNDER THE PUBLIC HEALTH LAW.

The Second Department, reversing Supreme Court, determined documents sought from a nursing home were not shielded from discovery by the Public Health Law. The documents concerned plaintiff's decedent's falls: "Public Health Law § 2805-j requires nursing homes, among other healthcare-related entities, to maintain a program for the identification and prevention of medical malpractice, including the establishment of a quality assurance committee which, among other things, is required to insure that information gathered pursuant to the program is utilized to review and to revise hospital policies and procedures. A New York State Department of Health regulation also requires nursing homes to establish and maintain a quality assessment and assurance program (see 10 NYCRR 415.27). Public Health Law § 2805-m and Education Law § 6527(3) both protect from disclosure documents created 'by or at the behest of a quality assurance committee for quality assurance purposes' ... . 'It is the burden of the entity seeking to invoke the privilege to establish that the documents sought were prepared in accordance with the relevant statutes' ... . The party asserting the privilege ' is required at a minimum, to show that it has a review procedure and that the information for which the exemption is claimed was obtained or maintained in accordance with that review procedure'... . Records that are duplicated or used by a quality assurance committee are not necessarily privileged ... . Here, in support of its cross motion for a protective order shielding the reports from disclosure, the Nursing Home submitted, among other things, the affidavit of its administrator, a privilege log, and, in camera, the three reports it was able to locate. Contrary to the determination of the Supreme Court, the Nursing Home's showing was insufficient to demonstrate that the reports were generated by or at the behest of the Nursing Home's Quality Assurance Committee." ***Robertson v. Brookdale Hosp. Med. Ctr.*, 2017 N.Y. Slip Op. 06204, Second Dept 8-16-17**

MUNICIPAL LAW, CIVIL RIGHTS LAW (42 U.S.C. § 1983).

1983 CAUSE OF ACTION PROPERLY DISMISSED, PLAINTIFF DID NOT ADEQUATELY ALLEGE THE ARRESTING OFFICERS ACTED PURSUANT TO AN UNCONSTITUTIONAL POLICY OR CUSTOM.

The Second Department determined the 42 U.S.C. § 1983 cause of action was properly dismissed. The action stemmed from an arrest. Plaintiff did not adequately allege the police officers acted pursuant to an unconstitutional policy or custom: "To hold a municipality liable under section 1983 for the conduct of employees below the policymaking level, a plaintiff must show that the violation of his or her constitutional rights resulted from a municipal custom or policy ... . Here, '[a]lthough the complaint alleged as a legal conclusion that the defendant[ ] engaged in conduct pursuant to a policy or custom which deprived the plaintiff of certain constitutional rights, it was wholly unsupported by any allegations of fact identifying the

nature of that conduct or the policy or custom which the conduct purportedly advanced' ...". ***Martin v. City of New York*, 2017 N.Y. Slip Op. 06172, Second Dept 8-16-17**

PERSONAL INJURY.

PLAINTIFF DEMONSTRATED FREEDOM FROM COMPARATIVE FAULT IN THIS TRAFFIC ACCIDENT CASE, DEFENDANT RAN A RED LIGHT, PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined plaintiff was entitled to summary judgment in this traffic accident case. Plaintiff demonstrated freedom from comparative fault. Defendant had run a red light: "To prevail on a motion for summary judgment on the issue of liability, a plaintiff must establish, prima facie, not only that the opposing party was negligent, but also that the plaintiff was free from comparative fault... . Here, the plaintiff established her prima facie entitlement to judgment as a matter of law on the issue of liability. The evidence submitted on her motion, which included her deposition testimony and a certified copy of the police accident report, demonstrated, prima facie, that she was not at fault in the happening of the accident, and that the sole proximate cause of the accident was the conduct of the defendant driver in entering the intersection without stopping at a red traffic signal, in violation of Vehicle and Traffic Law §§ 1110(a) and 1111(d)(1) ...". ***Lanicci v. Hansen*, 2017 N.Y. Slip Op. 06168, Second Dept 8-16-17**

PERSONAL INJURY.

ONE INCH GAP BETWEEN SIDEWALK SLABS WAS A NON-ACTIONABLE TRIVIAL DEFECT.

The Second Department, reversing Supreme Court, determined a one-inch gap between sidewalk slabs was a non-actionable trivial defect: "Generally, the issue of whether a dangerous or defective condition exists on the property of another depends on the facts of each case and is a question of fact for the jury... . However, a property owner may not be held liable for trivial defects, not constituting a trap or nuisance, over which a pedestrian might merely stumble, stub his or her toes, or trip ... . 'A defendant seeking dismissal of a complaint on the basis that the alleged defect is trivial must make a prima facie showing that the defect is, under the circumstances, physically insignificant and that the characteristics of the defect or the surrounding circumstances do not increase the risks it poses. Only then does the burden shift to the plaintiff to establish an issue of fact' ... . In determining whether a defect is trivial, the court must examine all of the facts presented, including the 'width, depth, elevation, irregularity and appearance of the defect along with the time, place and circumstance of the injury' ... . There is no 'minimal dimension test' or 'per se rule' that the condition must be of a certain height or depth in order to be actionable ... . 'Photographs which fairly and accurately represent the accident site may be used to establish that a defect is trivial and not actionable' ... . Here, the evidence submitted by the defendants in support of their motion for summary judgment, including the deposition testimony of the plaintiff and photographs of the accident site, was sufficient to establish, prima facie, that, given the characteristics of the defect and the surrounding circumstances, the gap at issue was trivial, and therefore, not actionable ... ." ***Melia v. 50 Ct. St. Assoc.*, 2017 N.Y. Slip Op. 06176, Second Dept 8-16-17**

PERSONAL INJURY, EDUCATION-SCHOOL LAW.

QUESTIONS OF FACT RAISED ABOUT THE SCHOOL'S KNOWLEDGE OF A STUDENT'S VIOLENT PROPENSITIES AND THE SCHOOL'S ABILITY TO PREVENT THE STUDENT ON STUDENT ASSAULT, SCHOOL'S MOTION FOR SUMMARY JUDGMENT PROPERLY DENIED.

The Second Department determined the defendant school's motion for summary judgment in this student on student assault case was properly denied: "... [C]ontrary to the defendant's assertions, it failed to demonstrate, prima facie, that the classmate's grabbing of the infant plaintiff's head and pushing it down into the table was not foreseeable or that the defendant's alleged negligent supervision was not a proximate cause of the infant plaintiff's injuries ... . The defendant's motion papers demonstrated the existence of triable issues of fact as to whether the defendant had knowledge of the offending classmate's dangerous propensities due to his involvement in other altercations with classmates in the recent past ... . Thus, the defendant failed to establish, prima facie, that it lacked sufficiently specific knowledge or notice of the dangerous conduct that caused the alleged injuries to the infant plaintiff. As to proximate cause, the defendant did not demonstrate, prima facie, that the subject incident occurred so quickly and spontaneously 'that even the most intense supervision could not have prevented it' ...". ***Rt v. Three Vil. Cent. Sch. Dist.*, 2017 N.Y. Slip Op. 06207, Second Dept 8-16-17**

PERSONAL INJURY, EVIDENCE.

CAUSE OF PLAINTIFF'S SLIP AND FALL COULD NOT BE ESTABLISHED WITHOUT SPECULATION, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined defendant's (CML's) motion for summary judgment in this slip and fall case should have been granted because the cause of plaintiff's fall could not be established without resort to speculation. Plaintiff alleged that her foot went under a mat which had been lifted up by a leaf blower. However she did not see anyone operating a leaf blower and did not see the mat lift up off the ground: "In a trip-and-fall case, a defendant may establish its prima facie entitlement to judgment as a matter of law by submitting evidence that the plaintiff cannot identify

the cause of his or her fall... A plaintiff's inability to identify the cause of his or her fall is fatal to the cause of action, because a finding that the defendant's negligence, if any, proximately caused the plaintiff's injuries would be based on speculation ... . Here, CML established its prima facie entitlement to judgment as a matter of law by submitting, inter alia, the injured plaintiff's deposition testimony, which demonstrated that she was unable to identify the cause of her fall without resorting to speculation ... . The injured plaintiff testified at her deposition that when she exited the convenience store, her left foot went underneath the floor mat, causing her to trip and fall. While the injured plaintiff assumed that a leaf blower operated by an employee of CML caused the mat to lift up immediately prior to her fall, she did not see anyone in the area using a leaf blower prior to her fall and she never observed the mat lift up from the ground ... ". ***Razza v. LP Petroleum Corp.*, 2017 N.Y. Slip Op. 06202, Second Dept 8-16-17**

PERSONAL INJURY, MUNICIPAL LAW.

TESTIMONY AT THE 50-H HEARING COULD NOT BE THE BASIS FOR THE ASSERTION OF THEORIES NOT MENTIONED IN THE NOTICE OF CLAIM.

The Second Department noted that testimony at a Municipal Law 50-h hearing cannot be relied upon to assert a cause of action not included in the notice of claim. Here the notice of claim alleged the city failed to provide timely medical care to plaintiff's decedent, who died of a heart attack after he was arrested. Although plaintiff testified at the 50-h hearing that plaintiff's decedent told a doctor he had been beaten by the police, the notice of claim made no mention of any causes of action based on that allegation: " 'In making a determination on the sufficiency of a notice of claim, a court's inquiry is not limited to the four corners of the notice of claim'... . A court may consider the testimony provided during an examination conducted pursuant to General Municipal Law § 50-h and any other evidence properly before it to correct a good faith and nonprejudicial technical mistake, omission, irregularity, or defect in the notice of claim... . However, in determining the sufficiency of a notice of claim, testimony during an examination conducted pursuant to General Municipal Law § 50-h cannot be used to substantively change the nature of the claim or the theory of liability set forth in the notice of claim ... . Here, the notice of claim was limited to allegations that the police officers involved in the decedent's arrest failed to obtain timely medical assistance for the decedent while he was in their custody, and that the hospital staff negligently treated the decedent. There were no allegations, either express or implied, that the police had assaulted the decedent, or that the defendants negligently hired, supervised, or retained the police officers who were involved in the decedent's arrest. The plaintiff's testimony at the General Municipal Law § 50-h examination cannot be used to amend the theories of liability set forth in the notice of claim ...". ***Davis v. City of New York*, 2017 N.Y. Slip Op. 06155, Second Dept 8-16-17**

PROFESSIONAL (ARCHITECT) MALPRACTICE, EVIDENCE.

NECESSARY EXPERT EVIDENCE WAS NOT PRESENTED BY THE PLAINTIFF IN THIS ARCHITECT MALPRACTICE CASE, ARCHITECT'S MOTION TO SET ASIDE THE VERDICT SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined defendant architect's motion to set aside the verdict in this professional malpractice case should have been granted. Expert testimony was required and was not presented: "... [T]he plaintiff in this case alleged that the defendants committed professional malpractice by submitting defective plans to the New York City Department of Buildings (hereinafter the DOB), and by failing to diligently pursue the approval process and timely deal with objections raised by the DOB. Such questions are not within the competence of untutored laypersons to evaluate, as 'common experience and observation offer little guidance' ... . The only expert proffered by the plaintiff conceded that he 'didn't see' the defendants' plans, and when asked, for instance, to opine on whether the defendants' plans 'would have caused a problem' regarding the roof's ability to bear the weight of certain HVAC equipment, he demurred, answering, 'No, I only work for myself.' Moreover, the expert offered no opinion regarding the defendants' alleged delay in getting their plans approved by the DOB. Given the absence of any expert testimony that the defendants departed from accepted architectural standards of practice ... , the jury lacked any rational basis for its finding that the defendants committed professional malpractice ...". ***Michael v. He Gin Lee Architect Planner, PLLC*, 2017 N.Y. Slip Op. 06177, Second Dept 8-16-17**

THIRD DEPARTMENT

MENTAL HYGIENE LAW, CRIMINAL LAW.

RECORD OF A RETENTION HEARING FOR AN INSANITY ACQUITTEE NEED NOT BE SEALED.

The Third Department, in a full-fledged opinion by Justice Clark, over a two-justice dissent, determined that the record of a retention hearing for an insanity acquittee need not be sealed: "Mental Hygiene Law § 33.13 does not, as respondent contends, require that the record of his retention proceeding be sealed. ... Respondent accepted a plea of not responsible by reason of mental disease or defect and, therefore, 'avoid[ed] criminal penalties and . . . [became] subject to the CPL 330.20 scheme' ... . As the Court of Appeals has consistently recognized, '[t]his places insanity acquittees in a significantly different posture than involuntarily committed civil patients' and, thus, justifies 'rational differences between procedures for com-

mitment and release applicable to defendants found not responsible and persons involuntarily committed under the Mental Hygiene Law' ... . The distinction between an insanity acquittee, as we have here, and an involuntarily committed civil patient is apparent by the Legislature's enactment of a separate statutory scheme — CPL 330.20 — to address the commitment and retention procedures for persons found not responsible for their crimes by reason of mental disease or defect. The detailed statutory framework of CPL 330.20 does not include a provision that requires, or even contemplates, the sealing of these commitment and retention proceedings. Nor does the relevant legislative history indicate that the Legislature intended for these proceedings — which arise only after a criminal defendant affirmatively places his or her mental competency in issue — to be sealed from the public ...". ***Matter of James Q.*, 2017 N.Y. Slip Op. 06222, 3rd Dept 8-17-17**

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