November 8, 2017

CasePrepPlus

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FIRST DEPARTMENT

CIVIL PROCEDURE.

HOLOCAUST EXPROPRIATED ART RECOVERY ACT CONTROLS THE APPLICABLE STATUTE OF LIMITATIONS IN AN ACTION SEEKING RECOVERY OF A PAINTING CONFISCATED DURING THE GERMAN OCCUPATION OF FRANCE.

The First Department determined the Holocaust Expropriated Art Recovery Act of 2016 (HEAR) controlled an action in New York making a claim to a painting that was confiscated during the German occupation of France in 1944. Under HEAR the action was timely commenced: "HEAR supplants the statute of limitations provisions otherwise applicable to civil claims such as these (see Pub L 114-308, § 5[a]). Under HEAR, the applicable statute of limitations is six years from the date of 'actual discovery' of 'the identity and location of the artwork' and 'a possessory interest of the claimant in the artwork' … . We reject defendants' argument that HEAR can be displaced by a choice-of-law analysis. Under section 5(c) of HEAR, for purposes of starting the running of the six-year statute of limitations provided by section 5(a), a preexisting claim covered by HEAR is 'deemed to have been actually discovered on the date of enactment of [HEAR].' However, section 5(c) is made subject to the exception provided in section 5(e), which, as here relevant, provides that HEAR does not save a preexisting claim that was 'barred on the day before the date of enactment of [HEAR] by a Federal or State statute of limitations' where 'not less than 6 years have passed from the date [the] claimant . . . acquired such knowledge and during which time the civil claim or cause of action was not barred by a Federal or State statute of limitations.' Accordingly, to establish that HEAR does not save the subject claim, defendants were required to show that [plaintiff] discovered the claim on or before December 15, 2010 (six years before the day before the date of HEAR's enactment). This they have failed to do." ***Maestracci v. Helly Nahmad Gallery, Inc.*, 2017 N.Y. Slip Op. 07676, First Dept 11-2-17**

CONTRACT LAW, CIVIL PROCEDURE.

CONTRACT NOT ACTIONABLE BECAUSE IT DID NOT SPELL OUT THE CONSIDERATION FOR A PAST OR EXECUTED PROMISE; DECISION ON A MOTION TO DISMISS DOES NOT BECOME THE LAW OF THE CASE IN A SUBSEQUENT MOTION FOR SUMMARY JUDGMENT.

The First Department, reversing (modifying) Supreme Court, determined a contract was not actionable because the consideration for a past or executed promise was not spelled out in it. The court noted that a decision on a motion to dismiss does not become the law of the case in a subsequent motion for summary judgment: "General Obligations Law (GOL) § 5-1105 provides: 'A promise in writing and signed by the promisor or by his agent shall not be denied effect as a valid contractual obligation on the ground that consideration for the promise is past or executed, if the consideration is expressed in the writing and is proved to have been given or performed and would be a valid consideration but for the time when it was given or performed.' It essentially codifies the notion that '[g]enerally, past consideration is no consideration and cannot support an agreement because the detriment did not induce the promise.' That is, since the detriment had already been incurred, it cannot be said to have been bargained for in exchange for the promise'... . However, General Obligations Law § 5-1105 makes an exception where the past consideration is explicitly recited in a writing. To qualify for the exception, the description of the consideration must not be 'vague' or 'imprecise,' nor may extrinsic evidence be employed to assist in understanding the consideration ... . * * * ... '[T]he law of the case doctrine does not apply when a motion to dismiss is followed by a summary judgment motion' ...". ***Korff v. Corbett*, 2017 N.Y. Slip Op. 07677, First Dept 11-2-17**

FORECLOSURE, EVIDENCE.

AFFIDAVIT WAS SUFFICIENT TO DEMONSTRATE PLAINTIFF BANK'S ENTITLEMENT TO SUMMARY JUDGMENT IN THIS FORECLOSURE ACTION UNDER THE CONTROLLING ADMINISTRATIVE ORDER AND THE BUSINESS RECORDS EXCEPTION TO THE HEARSAY RULE.

The First Department, reversing Supreme Court, in a full-fledged opinion by Justice Andrias, over a dissent, determined plaintiff bank (BOA) was entitled to summary judgment in this foreclosure action. At issue was whether an affidavit (by Mattera) in support of a prior summary judgment proceeding satisfied the operative Administrative Order and the business records exception to the hearsay rule: "Administrative Order 431/11 ... requires the plaintiff's counsel in a residential mort-

gage foreclosure action to file an affirmation confirming that he or she communicated with a representative of the plaintiff who confirmed the factual accuracy of the plaintiff's pleadings, supporting documentation and submissions to the court ... . To fulfill his obligations under Administrative Order 431/11, plaintiff's counsel submitted an affidavit that comported with the form provided in Administrative Order 431/11. Counsel stated that ... he had communicated with Mattera ... . The dissent finds this affidavit deficient, stating that 'because Mattera's affidavits do not establish a complete review of, or the indicia of reliability necessary to lay a business records foundation for, the records pre-dating … acquisition of defendant's mortgage, counsel may not rely upon alleged communications with Mattera to comply with the requirements of the Administrative Order.' However, defendant, who has continued to reside on the premises for the last 10 years without paying her mortgage, did not dispute her default or challenge the accuracy or sufficiency of Mattera's affidavit on the third summary judgment motion. Furthermore, CLPR 4518(a) does not require a person to have personal knowledge of each of the facts asserted in the affidavit of merit put before the court as evidence of a defendant's default in payment ... . Thus, in seeking to enforce a loan, an assignee of an original lender or intermediary predecessor may use an original loan file prepared by its assignor, when it relies upon those records in the regular course of its business... .. Here, Mattera … satisfied these standards ... ". ***Bank of Am., N.A. v. Brannon*, 2017 N.Y. Slip Op. 07578, First Dept 10-31-17**

SECOND DEPARTMENT

CRIMINAL LAW.

HOT PURSUIT JUSTIFIED WARRANTLESS ARREST IN DEFENDANT'S HOME.

The Second Department determined defendant's motion to suppress his statements based upon his warrantless arrest in the garage of his home was properly denied. Defendant had failed to stop, led the arresting officer on a high speed chase, and hid in the rafters of his garage: "... [T]he People established that the detective's entry was justified by the doctrine of hot pursuit. '[S]ubject only to carefully drawn and narrow exceptions, a warrantless search of an individual's home is per se unreasonable and hence unconstitutional' ... . However, 'exigent circumstances or a true hot pursuit' may justify a warrantless entry'... . '[A] criminal suspect may not thwart an otherwise proper arrest which has been set in motion in a public place by retreating into his residence'... . Here, the exigent circumstances justifying the hot pursuit of the defendant into his garage included the defendant's observed erratic and dangerous driving, the crashing and abandoning of his vehicle, and the police officers' peaceful entry through the open door of the garage ... ". ***People v. Caputo*, 2017 N.Y. Slip Op. 07614, Second Dept 11-1-17**

CRIMINAL LAW, JUDGES, EVIDENCE.

EXCESSIVE INTERVENTION IN THE QUESTIONING OF DEFENDANT AND WITNESSES BY THE TRIAL JUDGE REQUIRED A NEW TRIAL, DEFENDANT SHOULD NOT HAVE BEEN QUESTIONED ABOUT HIS BEING INCARCERATED DURING THE TRIAL.

The Second Department reversed defendant's conviction in this murder case because the trial judge took over the questioning of one of the complaining witness and intervened in the questioning of the defendant. The court noted the prosecutor should not have questioned the defendant about his being incarcerated during the trial: "During the course of the trial, the Supreme Court repeatedly and prejudicially questioned the defendant, who testified in his own behalf, and also extensively intervened in the questioning of prosecution witnesses. Although defense counsel did not specifically object to the court's questioning of the witnesses ... . While trial judges play a vital role in 'clarifying confusing testimony and facilitating the orderly and expeditious progress of the trial,' their power to examine witnesses 'is one that should be exercised sparingly' ... . Indeed, such power 'carries with it so many risks of unfairness that it should be a rare instance when the court rather than counsel examines a witness' ... . Here, the Supreme Court effectively took over the direct examination of one of the complaining witnesses at key moments in her testimony where she was describing how the defendant shot the victim ... . Moreover, in its extensive questioning of the defendant, the court repeatedly highlighted apparent inconsistencies in the defendant's testimony. Viewing the record as a whole, the court assumed the appearance, if not the function, of an advocate at the trial by its extensive examination of certain witnesses ... . Accordingly, we must remit the matter to the Supreme Court, Kings County, for a new trial. As a new trial must be ordered, we note that it was improper for the prosecutor to elicit from the defendant the fact that he was incarcerated pending trial ... , as no legitimate State interest was served by disclosing that information under the circumstances of this case ...". ***People v. Estevez*, 2017 N.Y. Slip Op. 07615, Second Dept 11-1-17**

EMPLOYMENT LAW.

AGE DISCRIMINATION LAWSUIT PROPERLY DISMISSED FOR FAILURE TO STATE A CAUSE OF ACTION.

The Second Department determined plaintiff teacher's age discrimination suit was properly dismissed for failure to state a cause of action: "The Age Discrimination in Employment Act of 1967 (hereinafter the ADEA) provides, in relevant part: 'It shall be unlawful for an employer . . . to discharge any individual or otherwise discriminate against any individual with respect to [her] compensation, terms, conditions, or privileges of employment, because of such individual's age' ... . 'To es-

tablish a prima facie case of age discrimination under the ADEA, a claimant must demonstrate that: 1) [she] was within the protected age group; 2) [she] was qualified for the position; 3) [she] was subject to an adverse employment action; and 4) the adverse action occurred under circumstances giving rise to an inference of discrimination' ... . [T]he general allegation in the amended complaint that the plaintiff and two other 'older' teachers had been 'continuously harassed' by the principal and the assistant principal are vague and conclusory ... . Furthermore, the specific instances of discrimination described in the amended complaint, which allegedly occurred over a period of more than three years, were isolated and episodic. For instance, the amended complaint alleged that the plaintiff 'was required to teach a class that she was not qualified to teach,' that the principal left her name off an art fair newsletter, that the assistant principal gave the plaintiff 'a useless laptop to complete a survey,' and that on two separate occasions the principal slammed her hand on the table and screamed at her. These occurrences were 'not severe or pervasive enough to create an objectively hostile or abusive work environment' ...". ***Murphy v. Department of Educ. of the City of New York*, 2017 N.Y. Slip Op. 07609, Second Dept 11-1-17**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON PLAINTIFFS' LABOR LAW §§ 240(1), 241(6) AND 200 CAUSES OF ACTION SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined defendants' motion for summary judgment should not have been granted in this Labor Law §§ 240(1), 241(6) and 200 action. Plaintiff alleged he was directed to work without a scaffold. He rigged up a ladder with planks on it placed horizontally over a fire escape as a makeshift scaffold. The ladder tipped when a heavy object was placed on it and plaintiff fell: "Under Labor Law § 240(1), owners and general contractors, and their agents, have a nondelegable duty to provide safety devices necessary to protect workers from risks inherent in elevated work sites ... . 'In order to prevail on a claim under Labor Law § 240(1), a plaintiff must establish that the statute was violated and that this violation was a proximate cause of his or her injuries' ... . No recovery is available under Labor Law § 240(1) when the plaintiff's actions were the sole proximate cause of the accident ... . Here, the evidence submitted on the defendants' motion for summary judgment failed to establish, prima facie, that no [Labor Law 240(1)] violation occurred, or that the alleged violation was not a proximate cause of the accident ... . Labor Law § 200 codifies the common-law duty of an owner or contractor to provide workers with a reasonably safe place to work ... . * * * Here, the cause of action arose out of alleged defects or dangers in the methods or materials of the work. The defendants failed, prima facie, to eliminate triable issues of fact as to whether [defendant] had the authority to supervise or control the injured plaintiff's work, and as to causation ... . Labor Law § 241(6) imposes a nondelegable duty on owners and contractors to provide reasonable and adequate protection and safety for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor ... . Here, the plaintiffs alleged, inter alia, a violation of Industrial Code (12 NYCRR) § 23-1.16, which requires, in relevant part, that safety belts and harnesses be properly attached to a tail line or lifeline so that 'if the user should fall such fall shall not exceed five feet' ...". ***King v. Villette*, 2017 N.Y. Slip Op. 07596, Second Dept 11-1-17**

PERSONAL INJURY.

DEFENDANT PROPERTY OWNER AND DEFENDANT ELEVATOR COMPANY DEMONSTRATED THEY DID NOT HAVE NOTICE OF THE ELEVATOR DEFECT WHICH CAUSED PLAINTIFF'S INJURY, DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined defendant property owner and defendant elevator company were entitled to summary judgment in this personal injury action. Plaintiff was employed by a building maintenance company and was working in the building when he was injured. The door to the elevator was open. When plaintiff attempted to enter the elevator the cab was below the open door and he fell to the roof of the cab. The building owner demonstrated it did not have notice of the defect. And the elevator company demonstrated it did not have notice and did not have the opportunity to discover the defect: "Property owners have a duty to maintain their premises in a reasonably safe condition ... . In order to hold a property owner liable for a breach of this duty, a plaintiff must prove not only that a defective condition existed and was a proximate cause of his or her injuries, but also that the property owner either created the defective condition or had actual or constructive notice of its existence ... . Similarly, an elevator company that agrees to maintain an elevator in safe operating condition may be held liable to an injured passenger for failing to correct conditions of which it has knowledge, or its failure to use reasonable care to discover and correct a condition which it ought to have found ... . In order to recover damages resulting from a breach of a property owner's or elevator company's duty, a plaintiff must prove all of the essential elements of the cause of action. By contrast, a defendant property owner or elevator company moving for summary judgment dismissing such a claim meets its prima facie burden by negating a single essential element ... ". ***Nunez v. Chase Manhattan Bank*, 2017 N.Y. Slip Op. 07610, Second Dept 11-1-17**

THIRD DEPARTMENT

CRIMINAL LAW, ATTORNEYS.

ALTHOUGH SOME OF THE INEFFECTIVE ASSISTANCE ISSUES SHOULD HAVE BEEN RAISED ON APPEAL, BECAUSE SOME OF THE INEFFECTIVE ASSISTANCE ISSUES COULD ONLY BE RAISED IN THE MOTION TO VACATE, ALL THE INEFFECTIVE ASSISTANCE ISSUES SHOULD HAVE BEEN CONSIDERED PURSUANT TO THE MOTION TO VACATE THE CONVICTION, HERE INEFFECTIVE ASSISTANCE WARRANTED A NEW TRIAL.

The Third Department, in a full-fledged opinion by Justice Taylor, over a dissent, reversing County Court, determined defendant's motion to vacate his conviction on ineffective assistance grounds should have been granted. Even though some of the ineffective assistance claims could be determined from the original record (and therefore should have been raised on appeal), because some of the claims could not be determined from the record, the court could consider all the ineffective assistance issues: "... [W]e do not find that all of the alleged failures on the part of trial counsel involve matters adequately reflected in the record that could have been raised upon direct appeal. Defendant's argument that trial counsel was ineffective for failing to impeach the cabdriver 'is dependent upon [a] statement[] to the police that [is] outside the record' and, therefore, was properly raised in the context of the instant CPL 440.10 motion ... . Defendant also faults trial counsel for failing to request that the crime of assault in the third degree ... be submitted to the jury as a lesser included offense of assault in the second degree ... . While it is apparent from the face of the record that counsel did not request submission of assault in the third degree as a lesser included offense, it is axiomatic that 'the decision to request or consent to the submission of a lesser included offense is often based on strategic considerations, taking into account a myriad of factors, including the strength of the People's case' ... . Because defendant's complaint about counsel in this regard is predicated on counsel's strategy, or lack thereof, which is not discernable from the face of the record, we likewise find that this claim of ineffectiveness may properly be advanced by way of a CPL 440.10 motion ... . The two other allegations of ineffectiveness raised on the motion — that counsel failed to object to County Court's Allen charge and failed to sufficiently articulate and support a request for an instruction on the defense of justification under Penal Law § 35.05 — are, as defendant concedes, based on matters that appear on the face of the record. Yet, relying on People v. Maxwell (89 AD3d 1108 [2d Dept 2011]), defendant claims that these record-based allegations of ineffectiveness may appropriately be considered together with his nonrecord-based allegations in the context of this CPL 440.10 motion, thereby permitting review of his claim of ineffective assistance in its entirety. ... [W]e agree." ***People v. Taylor*, 2017 N.Y. Slip Op. 07649, Third Dept 11-2-17**

CRIMINAL LAW, EVIDENCE.

MOTION TO VACATE A CONVICTION CAN BE BASED UPON A SHOWING OF ACTUAL INNOCENCE, NOT SHOWN HERE.

The Third Department determined defendant's motion to vacate his conviction, in part on the ground of actual innocence, was properly denied. The court explained the standard of proof for actual innocence: "In People v. Hamilton (115 AD3d 12 [2014]), the Second Department determined that a claim of actual innocence must be established with clear and convincing evidence of 'factual innocence, not mere legal insufficiency of evidence of guilt and must be based upon reliable evidence which was not presented at the trial' ... . While we recognize that in People v. Caldavado (26 NY3d 1034 [2015]) the Court of Appeals opted not to determine whether a freestanding claim of actual innocence is viable ... , we concur with the analysis set forth in Hamilton and find that such a claim may be raised pursuant CPL 440.10 (1) (h) ... . * * * In our view, the evidence submitted at the hearing failed to establish by clear and convincing evidence that defendant did not murder the victims. Much of the evidence presented at the hearing was also presented to the jury, which considered and rejected defendant's explanation, and the jury's verdict was upheld on appeal ... . At best, the additional evidence submitted in support of the motion to vacate arguably raised '[m]ere doubt as to the defendant's guilt, or a preponderance of conflicting evidence as to the defendant's guilt,' neither of which is sufficient to support a motion to vacate a judgment based on actual innocence ...". ***People v. Mosley*, 2017 N.Y. Slip Op. 07648, Third Dept 11-2-17**

CRIMINAL LAW, VEHICLE AND TRAFFIC LAW.

DRIVING WITH HIGH BEAMS ON JUSTIFIED THE VEHICLE STOP WHICH LED TO A DWI ARREST.

The Third Department determined the state trooper properly stopped the defendant, which led to his arrest for DWI, because the defendant had his high beams on as he approached the trooper: "Petitioner contends that the revocation of his driver's license must be reversed because the trooper's testimony at the revocation hearing was insufficient to establish that he violated Vehicle and Traffic Law § 375 (3), thereby rendering the traffic stop unlawful. We disagree. A police officer may lawfully execute a traffic stop of a vehicle when he or she has probable cause to believe that the driver of the vehicle has committed a violation of the Vehicle and Traffic Law ... . Pursuant to Vehicle and Traffic Law § 375 (3), a driver shall operate his or her headlights in such a manner 'that dazzling light does not interfere with the driver of [an] approaching vehicle.' To establish such a violation, it must be shown that the operator of the motor vehicle used his or her high beams within 500

feet of an approaching vehicle and that the use of such high beams interfered with the vision of that driver by 'hampering or hindering [his or her] vision' ... . At the hearing, the trooper testified that he was traveling westbound ... , when he observed petitioner's vehicle approximately 500 feet away in the eastbound lane of travel with his high beams activated. The trooper testified that petitioner's high beams caused 'a glare to [his] vision' and affected his driving insofar as he had to 'adjust [his] eyes.' In our view, such testimony sufficiently established that he had probable cause to believe that petitioner had committed a violation of the Vehicle and Traffic Law ... and, together with the negative inference that the Appeals Board permissibly drew from petitioner's failure to testify at the hearing ... , we conclude that the determination was supported by substantial evidence ...". ***Matter of Barr v. New York State Dept. of Motor Vehicles*, 2017 N.Y. Slip Op. 07664, Third Dept 11-2-17**

FAMILY LAW, CRIMINAL LAW.

BECAUSE INCARCERATION IMPOSED AS PART OF A FAMILY COURT NEGLECT/PROTECTIVE-ORDER-VIOLATION DISPOSITION WAS REMEDIAL, NOT PUNITIVE, CRIMINAL PROSECUTION FOR CONTEMPT STEMMING FROM THE VIOLATIONS OF THE PROTECTIVE ORDER NOT PRECLUDED BY THE DOUBLE JEOPARDY RULE.

The Third Department determined criminal contempt charges were not precluded by the double jeopardy rule. As part of a neglect proceeding defendant admitted violating orders of protection. Although a 60-day period of incarceration was part of the disposition, it was repeatedly delayed as the court monitored defendant's compliance (and was never imposed). Because the incarceration was deemed to induce compliance with Family Court's orders, it was remedial, not punitive in nature. Therefore a subsequent prosecution for criminal contempt, arising from the violations of the orders of protection, did not violate the double jeopardy prohibition: "The double jeopardy protections of the US and NY Constitutions 'shield a defendant from multiple criminal punishments arising from the same offense' ... . Whether double jeopardy bars a criminal prosecution subsequent to a finding of contempt or similar violation of a court order depends not on the labels used to describe the previously imposed sentence, but on 'the character and purpose' of that sentence ... . In a contempt matter, the sentence imposed for violation of a court order is remedial if it was intended 'to coerce compliance' with a court order ... . By contrast, when 'a contemnor is sentenced to imprisonment for a definite period which cannot be affected — that is, ended — by the contemnor's compliance with the law [or a court order], then the contempt is not remedial but punitive' ... . Double jeopardy precludes 'a subsequent prosecution where a prior contempt sentence serves a punitive rather than remedial purpose' ... . However, if the imposed sentence was remedial, double jeopardy does not apply ...". ***People v. Lamica*, 2017 N.Y. Slip Op. 07646, Third Dept 11-2-17**

PERSONAL INJURY.

QUESTIONS OF FACT WHETHER PARENTS WERE AWARE OF A PARTY HELD BY THEIR SON AND WHETHER IT WAS FORESEEABLE PLAINTIFF WOULD BE INJURED IN A FIGHT AT THE PARTY.

The Third Department determined defendant property owners (Richard and Jeannie Denero) were not entitled to summary judgment in this action by a guest at a party held by defendants' son. The plaintiff alleged he was assaulted by a guest at the party. The court determined there were questions of fact whether defendants were aware or should have been aware of the party and whether it was foreseeable that someone would get drunk at the party and engage in a fight: "Where, as here, a guest is injured by a third party, the landowner may be held responsible only when the landowner has 'the opportunity to control [the third party] and [is] reasonably aware of the need for such control' ... . 'Without the requisite awareness, there is no duty' ... . The record shows that defendants had prohibited their son from hosting parties on the property and were not present at the party. Defendants testified that they did not learn about the party until November 2010. Their son testified that he did not inform his parents about the party, but rather assured them that he would not have a party on the property. There is, however, record evidence indicating that defendants were either aware or should have been aware that the party, which was attended by upwards of 80 underaged guests consuming alcohol, was being held. … [V]iewed in a light most favorable to plaintiffs, the nonmoving parties, we consider [the] evidence sufficient to raise a question of fact as to whether defendants were aware or should have been aware that a party would take place and 'whether it was foreseeable 'that someone would get drunk at the party, engage in a fight, and cause injury to a third party' ...". ***Lathers v. Denero*, 2017 N.Y. Slip Op. 07672, Third Dept 11-2-17**

PERSONAL INJURY.

BUS DRIVER'S GESTURE TO PLAINTIFF TO CROSS THE STREET WAS NOT THE PROXIMATE CAUSE OF PLAINTIFF'S INJURY, PLAINTIFF WAS SUBSEQUENTLY STRUCK BY A DRIVER WHO RAN THE STOP SIGN.

The Second Department, reversing Supreme Court, determined the defendant bus company's (Trans Express's) motion for summary judgment in this pedestrian accident case should have been granted. At an intersection controlled by a stop sign, the bus driver motioned for plaintiff to cross the street. Plaintiff was struck by a driver (Narian) that did not stop at the stop sign: "A driver of a motor vehicle may, under certain circumstances, be liable to a pedestrian where the driver 'undertakes to direct a pedestrian safely across the road in front of his vehicle, and negligently carries out that duty' ... . However, even

if a pedestrian is injured because he or she relied on a driver's gesture directing him or her to cross a roadway, the acts of another driver may constitute a superseding, intervening act that breaks the causal nexus ... . Whether an intervening act is a superseding cause is generally a question of fact, but there are circumstances where it may be determined as a matter of law ... . Here, Trans Express established, prima facie, that Narian's failure to stop at the stop sign constituted an unforeseeable, superseding cause of the accident which severed any causal nexus between the plaintiff's injuries and any negligence on the part of Trans Express's bus driver ...". ***Esen v. Narian*, 2017 N.Y. Slip Op. 07592, Third Dept 11-1-17**

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