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FIRST DEPARTMENT

CONTRACT LAW, DEBTOR-CREDITOR.

ABSENCE OF ADMISSIBLE EVIDENCE OF CONSIDERATION RENDERED ANY WRITTEN OR ORAL GUARANTEE UNENFORCEABLE.

The First Department, reversing Supreme Court, determined a written guarantee to pay the debt of another was not enforceable because no consideration for the guarantee was included in the written guarantee. The Second Department further held that an oral guarantee would have been enforceable if it was induced by plaintiff's promise to hold off on bringing suit. But only plaintiff's counsel made that argument unsupported by an affidavit from the plaintiff: "... '[N]othing' in the writing supported the plaintiff's claim that [she] had agreed to 'forbear() pursuing a claim' in exchange for the promised payments]). In the absence of such a binding promise by plaintiff, the guaranty is unenforceable for want of consideration. 'Unless both parties to a contract are bound, so t\hat either can sue the other for a breach, neither is bound' ... . Case law has established that an oral promise to guarantee the debt of another may be enforced, notwithstanding General Obligations Law § 5-701(a)(2), if the plaintiff 'prove[s the promise] is supported by new consideration moving to the promisor and beneficial to him and that the promisor has become in the intention of the parties a principal debtor primarily liable' ... . Thus, plaintiff could enforce [the] guaranty if she could prove, through parol evidence, that he gave her the guaranty in exchange for her unwritten promise to forbear from suing him until the due date of the guaranty, which would constitute new consideration beneficial to him. Plaintiff fails, however, to offer any admissible evidence (as opposed to unsupported assertions by her counsel) that she actually made such a promise." ***Reddy v. Mihos*, 2018 N.Y. Slip Op. 02565, First Dept 4-17-18**

CRIMINAL LAW.

SENTENCING JUDGE'S MISINFORMATION ABOUT THE LENGTH OF THE PRISON SENTENCE THE JUVENILE OFFENDER COULD RECEIVE IF SHE FAILED TO MEET THE CONDITIONS IMPOSED BY A PLEA AGREEMENT RENDERED THE PLEA INVOLUNTARY, THE MOTION TO WITHDRAW THE PLEA SHOULD HAVE BEEN GRANTED.

The First Department, reversing Supreme Court, determined juvenile defendant's motion to withdraw her guilty plea should have been granted. Defendant, who was 15, in connection with a robbery charge, was offered a youthful offender adjudication and a conditional discharge if she met certain conditions, including school attendance and curfews, for a year. The sentencing judge told defendant she could face 25 years in prison if she did not meet the conditions. Defendant did not meet the conditions. She moved to withdraw her plea because the judge's statement she could receive a 25 year sentence was wrong. As a juvenile, the maximum possible sentence was 3 1/2 to 10: "Whether a plea is knowing, intelligent and voluntary is dependent upon a number of factors 'including the nature and terms of the agreement, the reasonableness of the bargain, and the age and experience of the accused' ... . This Court has repeatedly held that defendants must also be made aware of the sentencing parameters so that they may access the propriety of entering a plea of guilty ... . To that end, a defendant's receipt of inaccurate information regarding her possible sentence exposure is clearly a factor which must be considered by the court on a plea withdrawal motion ... . That defendant was offered an extremely beneficial plea that would allow her to be afforded youthful offender treatment and avoid incarceration does not, as argued by the People, detract from the fact that defendant was misinformed as to her sentencing exposure. Similarly, that defendant received a lesser sentence than what was promised by the court does not remedy the involuntariness of her plea of guilty ... . Under the circumstances presented, it cannot be found that defendant would have accepted the promised plea and entered a plea of guilty, if she had been accurately informed of the sentencing parameters." ***People v. Johnson*, 2018 N.Y. Slip Op. 02566, First Dept 4-17-18**

PERSONAL INJURY.

DEFENDANTS DEMONSTRATED THEY HAD NO NOTICE OF A JAGGED EDGE ON A DOOR WHICH WAS ALLEGED TO HAVE INJURED PLAINTIFF'S FOOT, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT PROPERLY GRANTED.

The First Department determined the defendants' motion for summary judgment in this "injury from a door" case was properly granted. Plaintiff alleged her foot was injured by a jagged edge at the bottom of a door. There had been no complaints about the door or any other injuries caused by the door. The defendants demonstrated that the door was inspected

upon installation in 2008, no jagged edge was observed, and the door opened and closed properly: "Defendants established prima facie that they neither created nor had notice of the defect in the door ... . They submitted evidence that an outside contractor installed the door in 2008, that defendant Art Farm's manager inspected it at that time and saw no jagged edge or other visible defect, and tested it to ensure that it opened and closed properly, and that, before plaintiff's accident, there had been no reports of difficulties with the door or complaints of injuries. In opposition, plaintiffs failed to raise an issue of fact as to defendants' creation or notice of the defect. There is no evidence that anyone ever saw or reported the door's sharp, jagged bottom edge until after plaintiff's accident, and therefore no evidence that the defect existed long enough for defendants to discover and remedy it ... . Nor does the affidavit by plaintiff's expert engineer raise any issues of fact. The engineer offered no opinion about the alleged jagged edge, which did not exist at the time of his inspection of the door nearly three years after the accident." ***Samuels v. Lee*, 018 N.Y. Slip Op. 02716, First Dept 4-19-18**

PERSONAL INJURY.

DEFENDANT DID NOT DEMONSTRATE IT DID NOT CREATE OR HAVE NOTICE OF THE WATER ON THE FLOOR WHERE PLAINTIFF FELL, WHETHER PLAINTIFF HAD PRIOR NOTICE OF THE CONDITION IS A COMPARATIVE NEGLIGENCE ISSUE THAT DOES NOT PRECLUDE SUMMARY JUDGMENT.

The First Department determined defendant's motion for summary judgment in this "water on floor" slip and fall case was properly denied. The defendant did not demonstrate it did not create or have notice of the condition. The fact that plaintiff may have had prior awareness of the condition was a comparative negligence issue that does not preclude summary judgment: "Defendant failed to sustain its prima facie burden of showing that it did not create or have notice of the puddle of water in front of a nurses' station in the emergency room. Although its operations manager testified to general cleaning and inspection procedures, he did not state that they were followed on the day of the accident, did not know if he worked that day, and did not know when the area was last inspected ... . Defendant's argument that plaintiff's negligence was the sole proximate cause of the accident in that she admitted that she saw the puddle several times before she fell, is unavailing. Plaintiff testified that she did not see the water immediately prior to the fall as she was looking straight ahead. Plaintiff did not deliberately undertake a course of action severing the nexus between defendant's alleged negligence and her injury ... . Plaintiff's prior awareness of the water condition does not require dismissal of the complaint because it is relevant only to the issue of her comparative negligence ...". ***Socorro v. New York Presbyt. Weill Cornell Med. Ctr.*, 2018 N.Y. Slip Op. 02723, First Dept 4-19-18**

PERSONAL INJURY, VEHICLE AND TRAFFIC LAW.

EMERGENCY DOCTRINE DOES NOT USUALLY APPLY IN REAR-END COLLISION CASES, VEHICLE AND TRAFFIC LAW RE FOLLOWING TOO CLOSELY CAN BE VIOLATED EVEN WHEN THERE IS NO COLLISION, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT IN THIS SUDDEN-STOP BUS-PASSENGER INJURY CASE SHOULD NOT HAVE BEEN GRANTED.

The First Department, reversing Supreme Court, determined that defendants' motion for summary judgment, based upon the emergency doctrine, should not have been granted in this "sudden stop" bus-passenger injury case. The defendants alleged that the bus driver reacted to an emergency when a car in front of the bus stopped suddenly. However, the emergency doctrine does not usually apply in this situation: "Defendants contend that the driver of the bus on which plaintiff was a passenger was not negligent in braking to a sudden, hard stop that allegedly caused plaintiff to be injured, but reacted reasonably to the sudden stop of a car in front of the bus. However, the emergency doctrine is typically not available to the rear driver in a rear-end collision, who is responsible for maintaining a safe distance ... . The bus driver's affidavit demonstrates that he was confronted with a 'common traffic occurrence' when the vehicle in front of the bus stopped short ... . A factfinder could reasonably conclude that the bus driver was negligent in failing to maintain a safe distance between the bus and the car in front of it (see Vehicle and Traffic Law § 1129[a]) and that his own conduct caused or contributed to the emergency situation ... . Contrary to defendants' contention, a violation of Vehicle and Traffic Law § 1129(a) may be found even where there was no collision ...". ***Vanderhall v. MTA Bus Co.*, 2018 N.Y. Slip Op. 02720, First Dept 4-19-18**

SECOND DEPARTMENT

CIVIL PROCEDURE, PERSONAL INJURY.

PURPORTED SUPPLEMENTAL BILLS OF PARTICULARS ALLEGING NEW INJURIES WERE ACTUALLY AMENDED BILLS OF PARTICULARS WHICH WERE PROPERLY STRUCK.

The Second Department determined the defendants' motion to strike the purported supplemental bills of particulars was properly granted. The supplemental bills of particulars alleged new injuries in this rear-end collision case. The supplemental bills of particulars were actually amended bills of particulars. Plaintiff failed to demonstrate the defendants were not prejudiced by the new allegations and failed to explain the delay: "Contrary to the plaintiff's contention, the documents he denominated the 'second supplemental bill of particulars' and 'third supplemental bill of particulars' were, in reality,

amended bills of particulars, as they sought to add new injuries (see CPLR 3403[b]...). While leave to amend a bill of particulars is ordinarily to be freely given in the absence of prejudice or surprise, here, the plaintiff failed to establish the absence of prejudice or surprise to the defendants, and failed to adequately explain the delay in seeking to add the new injuries ...". ***Kirk v. Nahon*, 2018 N.Y. Slip Op. 02604, Second Dept 4-18-18**

CIVIL PROCEDURE, PERSONAL INJURY, EVIDENCE.

BECAUSE PLAINTIFF WAS UNABLE TO SHOW THE DOCUMENTS SOUGHT FROM THE DEFENDANTS EVER EXISTED HE WAS NOT ENTITLED TO STRIKE THE ANSWER FOR SPOLIATION OF EVIDENCE, HOWEVER PLAINTIFF WAS ENTITLED TO AN ORDER PRECLUDING THE DEFENDANTS FROM INTRODUCING ANY SUCH DOCUMENTS AT TRIAL.

The Second Department, reversing Supreme Court, determined that although plaintiff did not demonstrate spoliation of evidence warranting striking the answer, the plaintiff was entitled to an order of preclusion regarding any requested documents which defendants claimed did not exist. Plaintiff was shot by an intruder in his apartment building and had demanded any documents concerning the doors, locks and security measures in force at the building: "... [T]he Supreme Court providently exercised its discretion in denying that branch of the plaintiff's motion which was pursuant to CPLR 3126 to impose a sanction upon the defendants for spoliation of evidence. The plaintiff failed to sustain his burden of establishing that spoliation occurred as there was no evidence submitted that the requested documents ever actually existed ... . The plaintiff also did not establish that the absence of any such documents deprived him of his ability to prove his claim ... . [U]nder the circumstances of this case, the Supreme Court should have exercised its discretion to grant the plaintiff the alternative relief of an order of preclusion. An order of preclusion may be entered where the offending party's lack of cooperation with disclosure was willful, deliberate, and contumacious ... . 'The willful and contumacious character of a party's conduct may be inferred from the party's repeated failure to comply with court-ordered discovery, and the absence of any reasonable excuse for those failures, or a failure to comply with court-ordered discovery over an extended period of time' ... . Here, the defendants failed to produce relevant documents that were directed to be produced by the preliminary conference order. That failure led to two motions by the plaintiff to compel compliance, only to have the defendants assert that the building had been sold shortly after the preliminary conference order had been issued and that all documents had been transferred to the new owner. The new owner then denied having any of the requested documents. The defendants offer no excuse for their conduct. The defendants' dilatory discovery conduct cannot be condoned, and it would be manifestly unfair to the plaintiff for the defendants to attempt to offer any of the subject documents at trial, should the documents be located." ***Watson v. 518 Pa. Hous. Dev. Fund Corp.*, 2018 N.Y. Slip Op. 02666, Second Dept 4-18-18**

CRIMINAL LAW, EVIDENCE.

MOTION TO VACATE DEFENDANT'S CONVICTION FOR A 1991 MURDER PROPERLY GRANTED BASED IN PART ON SUBSEQUENT SERIOUS MISCONDUCT BY ONE OF THE POLICE INVESTIGATORS, CRITERIA FOR NEWLY DISCOVERED EVIDENCE IN THIS CONTEXT EXPLAINED.

The Second Department, in a full-fledged, exhaustive opinion by Justice Miller (too detailed to be fairly summarized here), determined defendant's motion to vacate his conviction for a 1991 murder was properly granted (requiring a new trial). The early 90's trial lasted one day. One of the police investigators has since been implicated in facilitating false identification testimony. The finger and palm print evidence did not match the defendant or his co-defendant. The blood evidence didn't match. Crucial blood evidence was never tested and may have been lost. The identification evidence, the only evidence upon which the conviction could be based, was problematic. With respect to the criteria for newly discovered evidence in this context, the court wrote: "... [A] motion for a new trial based on newly discovered evidence should only be granted if the court finds, as a factual matter, that the movant has demonstrated that "[1] [n]ew evidence has been discovered since the entry of a judgment . . . [2] which could not have been produced by the defendant at the trial even with due diligence on his part and [3] which is of such character as to create a probability that had such evidence been received at the trial the verdict would have been more favorable to the defendant" (CPL 440.10[1][g]). The remaining three criteria should be used to evaluate the ultimate issue of whether the new evidence would 'create a probability' of a more favorable verdict... . In assessing the probable impact of the new evidence, the court should consider whether and to what extent the new evidence is (1) material to the pertinent issues in the case, (2) cumulative to evidence that was already presented to the jury, and (3) merely impeaching or contradicting the evidence presented at trial ...". ***People v. Hargrove*, 2018 N.Y. Slip Op. 02649, Second Dept 4-18-18**

EMPLOYMENT LAW, MUNICIPAL LAW, WORKERS' COMPENSATION LAW, PERSONAL INJURY.

COUNTY DID NOT DEMONSTRATE THAT A TOWN POLICE OFFICER WHO WAS INJURED UNDERGOING A PHYSICAL FITNESS TEST AS A CANDIDATE FOR A COUNTY SWAT TEAM WAS A SPECIAL EMPLOYEE OF THE COUNTY SUCH THAT THE POLICE OFFICER'S ONLY REMEDY WAS WORKERS' COMPENSATION.

The Second Department, reversing Supreme Court, determined the county's motion for summary judgment should not have been granted in this personal injury action. The plaintiff is a police officer employed by a town. He was a candidate for

a position in a county counter-terrorism outfit (REACT). During a fitness test for the county plaintiff was injured (suffered heat stroke). The county moved for summary judgment arguing, inter alia, plaintiff was their special employee and therefore his only remedy was workers' compensation: "The determination as to whether a special employment relationship exists is generally an issue of fact requiring consideration of many factors, including who controls and directs the manner of the employee's work, who is responsible for payment of wages and benefits, who furnishes equipment, who has the right to discharge the employee, and whether the work being performed was in furtherance of the special employer's or the general employer's business ... . General employment is presumed to continue, and the presumption can only be rebutted by a 'clear demonstration of surrender of control by the general employer and assumption of control by the special employer' ... . Here, the County defendants failed to meet their initial burden of submitting sufficient evidence demonstrating the absence of any triable issues of fact ... . They did not submit sufficient evidence to rebut the presumption that [plaintiff] remained a general employee under the control of the Town at the time of the incident. [Plaintiff] was under the control of the County defendants for the limited purpose of the physical test to evaluate his ability to join REACT. However, his general employer, the Town, paid his wages, gave him permission to attend the REACT test on his regular work day, paid his workers' compensation benefits, and retained the authority to discharge or discipline him." ***Dube v. County of Rockland*, 2018 N.Y. Slip Op. 02597, Second Dept 4-18-18**

ENVIRONMENTAL LAW, MUNICIPAL LAW, ZONING, LAND USE.

TOWN'S COMPREHENSIVE PLAN, WHICH WAS ADOPTED WHILE PETITIONER'S DEVELOPMENT PROJECT APPLICATION WAS PENDING AND NEGATIVELY AFFECTED IT, WAS PROPERLY ADOPTED UNDER THE GENERAL MUNICIPAL LAW, TOWN LAW AND STATE ENVIRONMENTAL QUALITY REVIEW ACT (SEQRA), AND WAS A VALID EXERCISE OF THE TOWN'S POLICE AND ZONING POWERS.

The Second Department determined that the town's comprehensive plan, which was adopted while petitioner's development project application was pending and negatively affected the project, was properly adopted under the General Municipal Law and Town Law, did not violate the State Environmental Quality Review Act (SEQRA), and was a constitutional exercise of the police and zoning powers: "Prior to adopting a comprehensive plan, a town board must "refer the proposed comprehensive plan or any amendment thereto to the county planning board or agency or regional planning council for review and recommendation as required by" General Municipal Law § 239-m (Town Law § 272-a[5][b]). General Municipal Law § 239-m, in turn, requires a town to 'submit to the county planning agency a full statement of such proposed action' ... . We agree with the Supreme Court that the Town Board complied with the procedural and substantive requirements of SEQRA. First, ' SEQRA mandates literal compliance with its procedural requirements and substantial compliance is insufficient to discharge the responsibility of the agency under the act' ... . Second, ' [j]udicial review of an agency determination under SEQRA is limited to whether the agency procedures were lawful and whether the agency identified the relevant areas of environmental concern, took a hard look at them, and made a reasoned elaboration of the basis for its determination' ... .. 'The agency decision should be annulled only if it is arbitrary, capricious, or unsupported by the evidence' ... . Here, the Comprehensive Plan's proposed designation of a largely contiguous swath of cultivated and undeveloped land as an agricultural protected zone bore a rational relationship to numerous legitimate purposes, including, but not limited to, the preservation and promotion of agriculture ...". ***Matter of Calverton Manor, LLC v. Town of Riverhead*, 2018 N.Y. Slip Op. 02608, Second Dept 4-18-18**

ENVIRONMENTAL LAW, MUNICIPAL LAW, ZONING, LAND USE.

AGRICULTURAL PROTECTION ZONE (APZ) COMPONENT OF TOWN'S COMPREHENSIVE PLAN PROPERLY ADOPTED UNDER THE GENERAL MUNICIPAL LAW, TOWN LAW, AND STATE ENVIRONMENTAL QUALITY REVIEW ACT (SEQRA), QUESTION OF FACT WHETHER PETITIONER'S DEVELOPMENT PROJECT APPLICATION WAS COMPLETE BEFORE THE NEW COMPREHENSIVE PLAN WAS ADOPTED, ENTITLING PETITIONER TO THE APPLICATION OF THE PRIOR LAW.

The Second Department determined the town properly implemented the Agricultural Protection Zone (APZ) component of its comprehensive plan under the General Municipal Law, Town Law, State Environmental Quality Review Act (SEQRA) and the implementation was a proper exercise of the town's zoning and police powers. The court further determined there were questions of fact whether petitioner's development project application was completed before the new comprehensive plan was adopted, entitling petitioner to consideration of the plan under the law at the time the application was completed: "Although the general rule is that a court should apply the zoning provisions in effect at the time it renders its decision ... , pursuant to the 'special facts' exception, a court may apply the law in effect at the time the landowner's application was made. The special facts exception may be applied where the landowner 'establishes entitlement as a matter of right to the underlying land use application,' and 'extensive delay[ ] indicative of bad faith . . . unjustifiable actions by the municipal officials . . . or abuse of administrative procedures'... . The record contains inconsistencies as to whether the petitioner's application was a 'completed application' when it submitted the last revised version of its site plan application in September 2003. There is evidence in the record that the petitioner needed to make additional revisions before the application could be

treated as a 'completed application' under the Town's rules, meaning that the petitioner was not entitled as a matter of right to the underlying land use application... . However, there is evidence in the record that the Town Board had determined the application to be a 'completed application' when it was submitted in September 2003, meaning the Town Board may have delayed processing the petitioner's application in a manner indicative of bad faith ...". ***Matter of Calverton Manor, LLC v. Town of Riverhead*, 2018 N.Y. Slip Op. 02609, Second Dept 4-18-18**

ENVIRONMENTAL LAW, MUNICIPAL LAW, ZONING, LAND USE.

RURAL CORRIDOR (RLC) COMPONENT OF TOWN'S COMPREHENSIVE PLAN PROPERLY ADOPTED UNDER THE GENERAL MUNICIPAL LAW, TOWN LAW, AND STATE ENVIRONMENTAL QUALITY REVIEW ACT (SEQRA), QUESTION OF FACT WHETHER PETITIONER'S DEVELOPMENT PROJECT APPLICATION WAS COMPLETE BEFORE THE NEW COMPREHENSIVE PLAN WAS ADOPTED, ENTITLING PETITIONER TO THE APPLICATION OF THE PRIOR LAW.

The Second Department determined the town properly implemented the Rural Corridor (RLC) component of its comprehensive plan under the General Municipal Law, Town Law, State Environmental Quality Review Act (SEQRA) and the implementation was a proper exercise of the town's zoning and police powers. The court further determined there were questions of fact whether petitioner's development project application was completed before the new comprehensive plan was adopted, entitling petitioner to consideration of the plan under the law at the time the application was completed: "Here, the stated purpose of the RLC law was 'to allow a very limited range of roadside shops and services that are compatible with the agricultural and rural setting along major arterial roads, such as New York State Route 25, leading into Downtown Riverhead and areas zoned Hamlet Center (HC) or Village Center (VC).' Contrary to the petitioner's arguments, the RLC law's designation of property along New York State Route 25 a few miles west of the hamlet of Riverhead as a rural corridor zone bore a rational relationship to its stated objective. Although the general rule is that a court should apply the zoning provisions in effect at the time it renders its decision ... , pursuant to the 'special facts' exception, a court may apply the law in effect at the time the landowner's application was made. The special facts exception may be applied where the landowner 'establishes entitlement as a matter of right to the underlying land use application,' and 'extensive delay[ ] indicative of bad faith . . . unjustifiable actions by the municipal officials . . . or abuse of administrative procedures'... . The record contains inconsistencies as to whether the petitioner's application was a 'completed application' when it submitted the last revised version of its site plan application in September 2003. There is evidence in the record that the petitioner needed to make additional revisions before the application could be treated as a 'completed application' under the Town's rules, meaning that the petitioner was not entitled as a matter of right to the underlying land use application... . However, there is evidence in the record that the Town Board had determined the application to be a 'completed application' when it was submitted in September 2003, meaning the Town Board may have delayed processing the petitioner's application in a manner indicative of bad faith ...". ***Matter of Calverton Manor, LLC v. Town of Riverhead*, 2018 N.Y. Slip Op. 02610, Second Dept 4-18-18**

ENVIRONMENTAL LAW, MUNICIPAL LAW, ZONING, LAND USE.

TRANSFER OF DEVELOPMENT RIGHTS (TDR) COMPONENT OF TOWN'S COMPREHENSIVE PLAN WAS NOT PROPERLY ADOPTED UNDER THE GENERAL MUNICIPAL LAW.

The Second Department, reversing Supreme Court, determined the transfer of development rights (TDR) component of its comprehensive plan was not properly adopted under the General Municipal Law: "The instant hybrid proceeding/action challenges the Town Board's adoption of Local Law No. 12 (2005), which amended the Town's zoning code to implement the transfer of development rights component of the Comprehensive Plan (hereinafter the TDR law). The TDR law designated the property subject to the petitioner's site plan application as a sending district, meaning that it was an area of land from which development rights were to be transferred to receiving districts ... . 'General Municipal Law § 239-m provides that a proposed amendment of a zoning ordinance by a town must be referred to the county planning agency if the amendment affects real property located within 500 feet of the boundary of any city, village, or town'... . That statute requires a town to refer a 'full statement'... of its proposed action, which is defined as including 'the complete text of the proposed ordinance or local law,' to the relevant county planning agency ... . Here, the Town Board adopted a resolution on January 19, 2005, in which it directed the Town Clerk to publish a copy of the final draft of the TDR law and notice of a hearing to be held 10 days later regarding the proposal. Around that time, the Town Board attempted to refer the proposed TDR law to the Suffolk County Planning Commission (hereinafter the Planning Commission) in accordance with General Municipal Law § 239-m. The Planning Commission, however, responded by letter dated February 9, 2005, in which it explained that the proposed TDR law would 'not be reviewed until the following information is submitted through the offices of the municipal referring agency. Complete revised text of proposed TDR amendment.' There is no evidence in the record contradicting the Planning Commission's statement that it never received the text of the proposed TDR law. Consequently, the Town Board failed to refer a 'full statement' of its proposed TDR law before enacting it as required under the statute ... ". ***Matter of Calverton Manor, LLC v. Town of Riverhead*, 2018 N.Y. Slip Op. 02611, Second Dept 4-18-18**

FORECLOSURE, EVIDENCE.

QUESTION OF FACT WHETHER PLAINTIFF BANK HAD POSSESSION OF THE NOTE AT THE TIME THE FORECLOSURE ACTION WAS COMMENCED, THE DOCUMENTARY EVIDENCE SUBMITTED BY PLAINTIFF CONTRADICTED THE DATE OF POSSESSION DESCRIBED IN PLAINTIFF'S AFFIDAVIT.

The Second Department, reversing Supreme Court, determined there were questions of fact about whether plaintiff had standing to bring the foreclosure action. i.e., whether it had possession of the note at the time the action was brought: "Here, the plaintiff produced the mortgage, the unpaid note, and evidence of [defendant's] default. However, the plaintiff failed, prima facie, to establish its standing. Where, as here, the note has been endorsed in blank, the purported holder of the note must establish its standing by demonstrating that the original note was physically delivered to it prior to the commencement of the action... . The plaintiff attempted to establish its standing through the affidavit of Chelsie Hall, a document execution specialist ... . Based on her review of the plaintiff's business records, Hall averred, in relevant part, that '[the] [p]laintiff acquired the original [n]ote on July 25, 2005."'However, the additional documentary evidence submitted by the plaintiff in support of its motion for summary judgment showed that [defendant] continued to deal with the originating lender ... until at least 2012." ***Green Tree Servicing, LLC v. Vitaliti*, 2018 N.Y. Slip Op. 02601, Second Dept 4-18-18**

FORECLOSURE, MORTGAGES, REAL PROPERTY LAW.

MORTGAGE WAS AMBIGUOUS BECAUSE IT DESCRIBED THE SUBJECT PROPERTY BY A SINGLE LOT NUMBER AND BY METES AND BOUNDS WHICH ENCOMPASSED TWO LOTS, QUESTION OF FACT ABOUT THE INTENT OF THE PARTIES PRECLUDED SUMMARY JUDGMENT.

The Second Department determined there was a question of fact about the intent of the parties with respect to the property to which the plaintiff's mortgage applied. The mortgage indicated the subject property by lot number and by metes and bounds. The metes and bounds description encompassed two lots: "Real Property Law § 240(3) provides that an instrument 'creating, transferring, assigning or surrendering an estate or interest in real property' must be construed 'according to the intent of the parties, so far as such intent can be gathered from the whole instrument, and is consistent with the rules of law.' 'Where the language used in [a mortgage] is ambiguous such that it is susceptible of more than one interpretation, the courts will look beyond the written instrument to the surrounding circumstances'... . Contrary to the plaintiff's contention, there is no rule that it is the metes and bounds description that determines what property is encumbered by any mortgage and not the street address or tax lot numbers. Rather, where, as here, there is a conflict between the metes and bounds description and the street address and/or tax lot numbers given in the mortgage, there is an ambiguity that requires consideration of parol evidence ... Here, the ... mortgage was 'ambiguous on its face,' because 'it refer[red] to one lot, but contain[ed] a metes and bounds description' for two lots ...". ***JPMorgan Chase Bank, N.A. v. Zhan Hua Cao*, 2018 N.Y. Slip Op. 02603, Second Dept 4-18-18**

FORECLOSURE, TRUSTS AND ESTATES, CIVIL PROCEDURE, EVIDENCE.

BANK'S MOTION TO CHANGE THE CAPTION IN THIS FORECLOSURE PROCEEDING SHOULD NOT HAVE BEEN GRANTED, NO ADMISSIBLE PROOF OF AN ASSIGNMENT OF THE NOTE TO A NEW PLAINTIFF, AND NO PROCEDURAL STEPS TO REMOVE A DECEASED DEFENDANT FROM THE ACTION WERE TAKEN.

The Second Department, reversing Supreme Court, determined plaintiff bank's motion to change the caption in this foreclosure action to substitute and new bank plaintiff (FNMA) and eliminate one of the defendants who had died should not have been granted. The motion papers did not demonstrate with admissible evidence that the note had been assigned to the new plaintiff and did not take any of the required steps to remove the deceased defendant (George Bredehorn) from the action: "Although the plaintiff submitted evidence that the mortgage was assigned to FNMA, there was no evidence in admissible form of an assignment of the note or a transfer of possession of the note to FNMA. The only evidence offered by the plaintiff that the note had in fact been transferred to FNMA was the statement in the plaintiff's attorney's affirmation that 'based on telephonic conversations,' the attorney had been advised that FNMA was the holder of the note as of February 1, 2014. This statement is inadmissible hearsay ... . Further, the Supreme Court improvidently exercised its discretion in granting that branch of the plaintiff's motion which was to omit George Bredehorn from the caption. The plaintiff did not establish that George Bredehorn died intestate, move to substitute a representative for George Bredehorn's estate as a defendant, move to discontinue the action insofar as asserted against him, or represent that it would not seek a deficiency judgment against his estate. In light of the plaintiff's failure to take any one of those actions, the action against George Bredehorn was not extinguished ...". ***Citimortgage, Inc. v. Bredehorn*, 2018 N.Y. Slip Op. 02595, Second Dept 4-18-18**

INSURANCE LAW, CONTRACT LAW.

ANY CONDUCT ON THE PART OF THE INSURER WAS NOT THE PROXIMATE CAUSE OF PLAINTIFF'S CLOSING OF ITS BUSINESS AFTER INCURRING WATER DAMAGE, THEREFORE THE INSURER WAS NOT LIABLE FOR THE LOSS OF BUSINESS CONSEQUENTIAL DAMAGES.

The Second Department determined the insurer was entitled to summary judgment because, notwithstanding the way the insurer handled the water damage claim, the insurer's actions were not the proximate cause of the plaintiff's closing of its business: "Consequential damages are damages that do not directly flow from a breach of contract ... . Proximate cause is an essential element of a breach of contract cause of action ... . '[E]very contract contains an implied covenant of good faith and fair dealing' ... . In an insurance contract context, consequential damages resulting from a breach of the implied covenant of good faith and fair dealing may be asserted, 'so long as the damages were within the contemplation of the parties as the probable result of a breach at the time of or prior to contracting' ... . 'Consequential damages, designed to compensate a party for reasonably foreseeable damages, must be proximately caused by the breach' ... Generally, it is for the trier of fact to determine the issue of proximate cause. However, the issue of proximate cause may be decided as a matter of law where only one conclusion may be drawn from the established fact ... . Here, the defendants established, prima facie, that their alleged injurious conduct in handling the plaintiff's claim was not a proximate cause of the plaintiff's loss of business. It was undisputed that the stop work order issued shortly after the water leak, for reasons unrelated to the defendants, prevented the plaintiff from securing the necessary work permits prior to ceasing operations permanently." ***Lola Roberts Beauty Salon, Inc. v. Leading Ins. Group Ins. Co., Ltd.*, 2018 N.Y. Slip Op. 02605, Second Dept 4-18-18**

LABOR LAW-CONSTRUCTION LAW, CIVIL PROCEDURE, WORKERS' COMPENSATION LAW, PERSONAL INJURY.

QUESTIONS OF FACT WHETHER THE WORK ON A BOILER WAS ROUTINE MAINTENANCE (NOT COVERED BY LABOR LAW § 240(1)) AND WHETHER A SAFETY DEVICE WAS REQUIRED, CONTRACTOR'S DEFAULT CONSTITUTED AN ADMISSION TO THE ALLEGATIONS IN THE COMPLAINT, INCLUDING THAT PLAINTIFF SUFFERED A GRAVE INJURY (TAKING THE INJURY OUT FROM UNDER THE WORKERS' COMPENSATION LAW).

The Second Department determined there were questions of fact about whether the disassembly of a boiler was maintenance (not covered by Labor Law § 240(1)) or repair (which is covered) and whether a safety device was required to stabilize a portion of the boiler which fell and injured plaintiff. The court also determined that the striking of the contractor's (Siteworks's) answer for failure to comply with discovery demands resulted in an admission to the allegations in the complaint, including the allegation of grave injury (taking the injury out from under the Workers' Compensation Law): "... [T]he plaintiff testified at his deposition that, at the time of the accident, Siteworks employees were disassembling the subject boiler section by section to fix a leak. However, the head custodian at the school where the plaintiff's injury occurred testified at his deposition that the boiler was disassembled every summer for routine cleaning and refurbishing. The head custodian was also not aware of any problem with the boiler in need of repair during the summer of 2014, which is when the plaintiff was injured. As the record does not otherwise clarify the degree to which boiler sections are 'components that require replacement in the normal course of wear and tear' ... , the Supreme Court properly determined that triable issues of fact exist with respect to whether the plaintiff's activity was covered under Labor Law § 240(1). ... Here, since Siteworks' third-party answer has been stricken as a result of a default, it has admitted all traversable allegations in the complaint, including the basic allegations of liability and that the plaintiff sustained a grave injury." ***Garbett v. Wappingers Cent. Sch. Dist.*, 2018 N.Y. Slip Op. 02600, Second Dept 4-18-18**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

PLAINTIFF WAS NOT ENGAGED IN 'CLEANING' WITHIN THE MEANING OF LABOR LAW § 240(1) WHEN SHE FELL FROM A LADDER, DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT PROPERLY GRANTED.

The Second Department determined the "cleaning" being done by plaintiff when she fell from a ladder was not covered by Labor Law § 240(1): "The plaintiff was an employee of a cleaning services company which was hired to clean a condominium apartment following a renovation by the defendant Morgan Interiors, Inc. (hereinafter Morgan Interiors). On the day of the occurrence in question, the plaintiff arrived at the apartment along with a cleaning crew, where she was directed by her supervisor to clean certain floor-to-ceiling cabinets and was given a stepladder and a cloth for this purpose. ... The determination of whether an activity may be considered "cleaning" within the meaning of Labor Law § 240(1), as opposed to routine maintenance, has been held to depend on four factors, considered as a whole. An activity will not be considered 'cleaning' under the statute (1) if it is 'routine,' that is, it is performed on a daily, weekly, or other relatively frequent recurring basis as part of ordinary maintenance; (2) if it does not require specialized equipment or expertise, nor unusual deployment of labor; (3) if it involves insignificant elevation risks comparable to those encountered during typical domestic or household cleaning, and (4) if it is unrelated to any ongoing construction, renovation, painting, alteration, or repair project ... . Here, the moving defendants demonstrated, prima facie, that the plaintiff was not engaged in 'cleaning' within

the meaning of Labor Law § 240(1), as her work did not require specialized equipment, and was unrelated to any ongoing construction or renovation of the apartment." ***Holguin v. Barton*, 2018 N.Y. Slip Op. 02602, Second Dept 4-18-18**

MUNICIPAL LAW.

PETITION FOR A REFERENDUM CONCERNING THE SALE OF TOWN LAND FOR THE DEVELOPMENT OF A RECREATIONAL PARK SHOULD NOT HAVE BEEN INVALIDATED, THE PETITION MET THE REQUIREMENTS OF TOWN LAW § 91.

The Second Department, reversing Supreme Court, determined that the petition for a referendum concerning the sale by the town of land to be used for a recreational park should not have been invalidated, and a vote on the referendum should be held: "... [T]he petition sheets set forth the purpose for which each elector signed, namely, to protest the resolution authorizing the sale of Town-owned property ... and to request a referendum on its adoption. Indeed, by the inclusion of language simply tracking the requirements of Town Law § 91, the petition sheets satisfied the 'statement of purpose'' requirement set forth in Matter of McComb (18 AD2d at 663). To require more detail would be to read a new requirement into Town Law § 91 that the legislature did not include. To the extent that Matter of Mathewson v. Town of Kent (41 Misc 3d 572, 574 [Sup Ct, Putnam County]) required an 'affirmative articulation of the objections upon which the petition is founded,' it should not be followed." ***Matter of Merlin Entertainments Group U.S. Holdings, Inc. v. 409 Signatories to the challenged Referendum Petition*, 2018 N.Y. Slip Op. 02627, Second Dept 4-18-18**

PERSONAL INJURY.

PLAINTIFF, A PASSENGER IN A STOPPED CAR HIT FROM BEHIND, WAS ENTITLED TO SUMMARY JUDGMENT, WHETHER THE PLAINTIFF'S DRIVER WAS COMPARATIVELY NEGLIGENT NO LONGER PRECLUDES SUMMARY JUDGMENT.

The Second Department determined plaintiff, a passenger in a stopped car struck from behind by a bus, was entitled to summary judgment against the bus defendants. The court noted that whether the car in which plaintiff was a passenger stopped quickly did not preclude summary judgment: "The [bus defendants'] assertion that the vehicle [in which plaintiff was a passenger] was operating made a sudden stop, in and of itself, was insufficient to raise a triable issue of fact as to whether there was a nonnegligent explanation for the collision ... . Supreme Court properly searched the record and awarded summary judgment to the plaintiff on the issue of liability against them. The issue of whether the plaintiff contributed to the happening of the accident was before the court... and the evidence showed that the plaintiff was an innocent passenger who did not engage in any culpable conduct that contributed to the happening of the accident ... . In any event, to be entitled to summary judgment on the issue of liability, a plaintiff is no longer required to show freedom from comparative fault in establishing his or her prima facie case ...". ***Edgerton v. City of New York*, 2018 N.Y. Slip Op. 02598, Second Dept 4-18-18**

PERSONAL INJURY, MUNICIPAL LAW.

TOWN DID NOT DEMONSTRATE IT DID NOT CREATE THE CONDITION WHICH RESULTED IN THE FORMATION OF ICE, TOWN'S MOTION FOR SUMMARY JUDGMENT IN THIS SLIP AND FALL CASE PROPERLY DENIED.

The Second Department determined the Town's motion for summary judgment in this icy-road slip and fall case was properly denied. Although the Town demonstrated it did not have written notice of the condition, it did not demonstrate it did not create the condition: "The plaintiff alleges that he was injured when he slipped and fell on ice on a roadway in the vicinity of his residence in the Town ... . He commenced this action against the Town ... alleging that the Town affirmatively created, through its negligence in constructing and paving the road, a condition which allowed water to accumulate and freeze on the roadway, and that the condition caused his fall. ... In support of its motion, the Town was required to demonstrate that it did not receive prior written notice of the alleged defective condition, and that it did not create that condition through an affirmative act of negligence that permitted water to accumulate and freeze on the roadway ... . The Town failed to establish ... that it did not create the alleged defective condition through an affirmative act of negligence. ... [T]he evidence submitted in support of its motion failed to demonstrate ... that it did not negligently construct or pave the road in a manner that permitted water to accumulate and freeze on the roadway, or that it subsequently successfully repaired the alleged defective condition prior to the plaintiff's accident ...". ***Casciano v. Town/Village of Harrison*, 2018 N.Y. Slip Op. 02593, Second Dept 4-18-18**

PERSONAL INJURY, MUNICIPAL LAW.

PETITIONER'S CHILD, A PRE-KINDERGARTEN STUDENT, FELL AND HIT HER HEAD, THE ACCIDENT REPORT DID NOT INFORM THE CITY OF THE ESSENTIAL FACTS OF THE NEGLIGENCE CLAIM, PETITION TO FILE LATE NOTICE OF CLAIM PROPERLY DENIED.

The Second Department determined the petition for leave to file a late notice of claim was properly denied. Petitioner's chlid, a pre-kindergarten student, fell and hit her head. Although a teacher filled out an accident report, the report did not inform the city of the essential facts of the negligence claim (i.e., clutter on the floor). The excuse for the delay was not sufficient and petitioner did not demonstrate the city was not prejudiced by the delay: "... [T]he petitioner failed to establish that

the City acquired actual knowledge of the essential facts constituting the claim within 90 days after the child's accident or a reasonable time thereafter. Although a teacher prepared an accident report on the day of the incident, it merely indicated that the child ran into the classroom, 'slipped,' and hit her head on a table. This report did not provide the City with timely, actual knowledge of the essential facts underlying the claims later asserted—that the City was negligent in allowing clutter and debris to accumulate on the floor which caused the child to 'trip,' and that it was negligent in supervising the students by failing to have a sufficient number of teachers in the classroom ...". ***Matter of Quinones v. City of New York*, 2018 N.Y. Slip Op. 02630, Second Dept 4-18-18**

PERSONAL INJURY, MUNICIPAL LAW, TRUSTS AND ESTATES.

PETITION FOR LEAVE TO FILE LATE NOTICE OF CLAIM AGAINST THE TOWN AMBULANCE IN THIS WRONGFUL DEATH, MEDICAL MALPRACTICE AND PUBLIC HEALTH LAW ACTION SHOULD NOT HAVE BEEN GRANTED, NO REASONABLE EXCUSE FOR THE DELAY AND NO TIMELY KNOWLEDGE ON THE PART OF THE MUNICIPALITY.

The Second Department, reversing Supreme Court, determined the petition for leave to file a late notice of claim should not have been granted. Petitioner's decedent was transported from a nursing home to a hospital by a town ambulance. He was pronounced dead at the hospital. Petitioner sought to file a notice of claim against the town one month after the deadline for the wrongful death cause of action (the deadline is 90 days following the appointment of a representative of the estate) and 11 months after the deadline for the medical malpractice and Public Health Law causes of action: "The petitioner failed to provide a reasonable excuse for her failure to serve a timely notice of claim. The failure of the petitioner and her attorneys to review the medical records and ascertain a claim against the appellants in a timely manner is not an acceptable excuse ... . Furthermore, the petitioner failed to submit evidence establishing that the appellants acquired actual knowledge of the facts constituting the claims within 90 days or a reasonable time thereafter. The petitioner provided no records or documentation in support of the petition demonstrating such actual knowledge on the part of the appellants ... . The notice of claim was served on the appellants together with the petition more than 1 month after the 90-day statutory period applicable to the wrongful death claim had elapsed and 11 months after the 90-day statutory period applicable to the remaining claims had elapsed. This service occurred too late to provide the appellants with actual knowledge of the essential facts constituting the claims within a reasonable time after the expiration of the applicable statutory period ... . Inasmuch as the petitioner failed to present any evidence or plausible argument that the appellants have not been substantially prejudiced by the delay, the appellants never became required to make 'a particularized evidentiary showing' that they were substantially prejudiced ...". ***Matter of Mangino v. Town of Mamaroneck*, 2018 N.Y. Slip Op. 02625, Second Dept 4-18-18**

REAL PROPERTY ACTIONS AND PROCEEDINGS LAW.

COMPLAINT STATED A CAUSE OF ACTION TO QUIET TITLE AND SHOULD NOT HAVE BEEN DISMISSED, CRITERIA EXPLAINED.

The Second Department, reversing Supreme Court, determined the complaint stated a cause of action to quiet title: " 'To maintain a cause of action to quiet title [to real property], a plaintiff must allege actual or constructive possession of the property and the existence of a removable cloud on the property, which is an apparent title to the property, such as in a deed or other instrument, that is actually invalid or inoperative' ... . Here, the complaint alleged, in relevant part, that the plaintiff acquired title to the subject property pursuant to a deed dated September 10, 2008, from nonparty Joon Asset Mgmt. Corp. (hereinafter Joon). The complaint also alleged that the plaintiff is in possession of the property and that there exists a removable cloud on the property in the form of a deed dated January 7, 2008, and recorded November 6, 2008, purporting to convey title to the property from Joon to the defendant Edna Rios. The complaint further alleged that the deed to Rios was invalid and part of a fraudulent scheme, and that Rios's role in the scheme was that of a "straw buyer." The complaint sought to adjudge the deed dated January 7, 2008, to be a fraudulent deed, the plaintiff to be the holder of an undivided fee interest in the premises pursuant to the deed dated September 10, 2008, and Rios to be barred from all claims to any estate or interest in the premises. Accepting these allegations as true, the complaint pleads a viable cause of action to quiet title ...". ***Nurse v. Rios*, 2018 N.Y. Slip Op. 02640, Second Dept 4-18-18**

THIRD DEPARTMENT

FAMILY LAW, CONTRACT LAW.

NO CHILD SUPPORT OR MAINTENANCE ORDER WAS IN EFFECT AT THE TIME HUSBAND MOVED TO REDUCE HIS OBLIGATION BECAUSE OF A LOSS OF EMPLOYMENT, THE CHILD SUPPORT AND MAINTENANCE PROVISIONS OF THE SEPARATION AGREEMENT, WHICH WAS NOT MERGED INTO THE DIVORCE DECREE, CONTROLLED, HUSBAND DID NOT DEMONSTRATE THE SETTLEMENT AGREEMENT WAS INVALID.

The Third Department, reversing Supreme Court, determined that husband did not present sufficient proof to warrant a change in the support provisions of the settlement agreement, as opposed to a child support order. No child support order was in effect at the time the husband sought to reduce the support obligation described in the settlement agreement: " 'The

case law distinguishes between modification of a separation agreement and that of a divorce decree. A separation agreement that is incorporated into but not merged with a divorce decree is an independent contract binding on the parties unless impeached or challenged for some cause recognized by law. Indeed, courts of this [s]tate enjoy only limited authority to disturb the terms of a separation agreement' ... . The husband sought modification of the terms of the agreement with respect to his child support and maintenance obligations, by motion, on the ground that his loss of employment constituted a change in circumstances that warranted modification — a standard that applies to modification of orders and judgments ... — but he made no argument that the settlement agreement was invalid. Supreme Court may, upon a proper showing establishing a change in circumstances, modify an order or judgment of divorce that incorporates a settlement agreement. However, the court had no authority under the present circumstances to grant the husband's motion by modifying the settlement agreement." ***Abdelrahman v. Mahdi*, 2018 N.Y. Slip Op. 02698, Third Dept 4-19-18**

MEDICAID, MORTGAGES.

SUBSTANTIAL EVIDENCE SUPPORTED THE DEPARTMENT OF HEALTH'S DETERMINATION THAT LOANS, NOTES AND MORTGAGES WERE PROHIBITED TRANSFERS UNDER THE MEDICAID LAW, TRIGGERING A PENALTY PERIOD BEFORE ELIGIBILITY FOR MEDICAID NURSING HOME BENEFITS.

The Third Department determined substantial evidence supported the Department of Health's (DOH's) determination that loans, notes and mortgages were transfers for less than market value in an attempt to qualify for Medicaid payments for nursing home care. Therefore a penalty period of ineligibility was properly imposed: "Assets conveyed through a note or a mortgage during the look-back period are considered to be transfers for full market value when the underlying loan is actuarially sound based upon the lender's life expectancy, provides for equal payments throughout the life of the loan — with no deferrals or balloon payments — and includes a provision prohibiting cancellation upon the lender's death ... . Here, the mortgage was not actuarially sound, as its 30-year repayment term significantly exceeded the anticipated life expectancy of the spouse, who was 76 years old at the time of the transfer. After the rejection of petitioner's Medicaid application, the spouse executed an amended mortgage that reduced the repayment term to five years. However, this amended mortgage provided for the same monthly payment as had the original document, with a balloon payment at the end of the five-year term; it thus did not comply with the separate requirement for equal payments throughout the life of the loan. Moreover, neither the original nor the amended version of the mortgage included the required provision prohibiting cancellation upon the spouse's death; the 2010 note likewise included no such provision. Accordingly, substantial evidence supports DOH's determination that neither transaction was made for fair market value ...". ***Matter of Wellner v. Jablonka*, 2018 N.Y. Slip Op. 02701, Third Dept 4-19-18**

MUNICIPAL LAW, IMMUNITY.

COMPLAINT STATED NEGLIGENCE CAUSES OF ACTION AGAINST THE TOWN, A SPECIAL RELATIONSHIP BETWEEN PLAINTIFFS AND THE TOWN WAS SUFFICIENTLY ALLEGED, AND IT WAS SUFFICIENTLY ALLEGED THAT GOVERNMENTAL IMMUNITY DID NOT APPLY BECAUSE THE TOWN ENGINEER DID NOT HAVE THE AUTHORITY OR DISCRETION TO ACT AS HE DID.

The Third Department determined the complaint stated causes of action in negligence against the town. Plaintiffs operated and owned property on which they were placing fill. The town issued a permit allowing the filling. The fill caused a substantial landslide. The Third Department found that the complaint alleged a special relationship between the town and plaintiffs, and further alleged that the town engineer did not have the discretion to issue the truncated permit which was issued. Therefore the complaint sufficiently alleged governmental immunity could not be invoked: Plaintiffs alleged that the Town Engineer directly stated to them that he can 'override' the requirements of the Town Code 'if [he] is confident that the fill will 'increase stability' of the slope' and that, on this basis, he did not require plaintiffs to submit all of the mandated components of a fill permit application. The complaint also alleged that defendant was aware of prior landslides along the same creek and that, after the incident on plaintiffs' property, the Town Engineer cited a recent study indicating that the local soil was prone to landslides but, regardless of this knowledge, he had suggested to third parties that they dispose of fill at the property. ... Alternatively, plaintiffs have alleged sufficient facts to show that a special relationship existed because defendant assumed positive direction and control in the face of a known, blatant and dangerous safety violation. Plaintiffs alleged that the filling activities at the property 'created a blatant risk of catastrophic failure of the bank,' that defendant 'had been made aware of this blatant risk when it intervened at the [p]roperty' and that defendant demonstrated control over the property by directing plaintiffs to cease filling activities and obtain a fill permit and referring third parties to the property to dispose of fill. ... * * * The complaint alleges that the Town Code requires that a full application be submitted for a fill permit, the Town Code mandates that the Town Engineer require that all application components be submitted and that, as regards plaintiffs, the Town Engineer did not require submission of a completed application. Considering these Town Code requirements, the Town Engineer did not have the authority to make a discretionary determination to either grant or deny a fill permit until he had received a completed application, which never occurred here because he told plaintiffs that they

did not need to submit some of the components of the application that are required under the Town Code ...". ***Normanskill Cr., LLC v. Town of Bethlehem*, 2018 N.Y. Slip Op. 02697, Third Dept 4-19-18**

PERSONAL INJURY.

QUESTIONS OF FACT PRECLUDED SUMMARY JUDGMENT IN THIS SLIP AND FALL CASE, RECENTLY MOPPED FLOOR WAS EXTREMELY WET, PLACEMENT OF CAUTION SIGNS DID NOT ELIMINATE NEGLIGENCE QUESTIONS. The Third Department determined defendant's motion for summary judgment in this slip and fall case was properly denied. Defendant's employee had recently mopped the area to clean up dog feces and then placed caution signs in the area. There was evidence the floor was extremely wet. The placement of the warning signs did not eliminate all questions of fact about defendant's negligence: "Defendant's submissions establish that approximately 20 minutes prior to plaintiff's fall, defendant's employee mopped the area where plaintiff fell due to dog feces having been tracked into the store. After the employee mopped the area, he placed two 3½-foot-tall yellow caution signs, one in close proximity to the entrance door, which plaintiff walked directly by when she entered the store. Deposition testimony of several witnesses and a surveillance video established that the floor was extremely wet. One witness, who assisted plaintiff after her fall, stated that the floor was so wet that plaintiff could not get enough traction to get up off the floor. This witness asked for paper towels to dry the floor around plaintiff and only after doing so was plaintiff able to get off the floor. This testimony expressly contradicted the affidavit of the employee who completed the mopping. Therefore, issues of material fact were raised as to whether defendant kept the entrance in a reasonably safe condition, created the condition or had actual or constructive notice of the condition ... . Further, the presence of the warning signs does not prima facie establish entitlement to summary judgment as there is a question of fact as to the adequacy of the warning, particularly given the otherwise dry conditions outside, the placement and height of the signs and the heavy customer traffic where the signs were set ...". ***Firment v. Dick's Sporting Goods, Inc.*, 2018 N.Y. Slip Op. 02700, Third Dept 4-19-18**

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