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CasePrepPlus

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FIRST DEPARTMENT

CONTRACT LAW, FRAUD, CIVIL PROCEDURE.

ALTHOUGH A PARTY WHO SIGNS AN AGREEMENT IS USUALLY DEEMED TO HAVE READ IT, A RELATIONSHIP OF TRUST AND CONFIDENCE BETWEEN THE PARTIES MAY ALLOW ONE PARTY TO RELY ON THE ASSURANCES OF THE OTHER; A CERTIFIED BUT UNSIGNED TRANSCRIPT OF A DEPOSITION WAS ADMISSIBLE BECAUSE IT HAD BEEN TIMELY MAILED TO OPPOSING COUNSEL.

The First Department determined, although the usual rule is one who signs an agreement is deemed to have read it, the rule may not apply when there is a relationship of trust and confidence between the parties and reliance on the assurances of a party (here the parties to a trust agreement were father and son). Plaintiff alleged he was fraudulently induced to sign the agreement. The court noted that a certified, unsigned transcript of a deposition was admissible because the transcript had been mailed to opposing counsel more than 60 days before the motion was brought: "Plaintiff's claim ... is that defendant led him to believe that the documentation that defendant presented for his signature (a trust agreement and two deeds) was for the conveyance of [one condominium unit] only. In fact, the paperwork provided for the conveyance of [two condominium units] to the trust. Ordinarily a person is bound by the terms of an instrument he or she signs, and may not claim to have justifiably relied on false representations concerning the contents of a document that he or she failed to read without valid excuse ... . In this case, however, whether this principle applies to bar plaintiff's fraudulent inducement claim ... cannot be determined as a matter of law because plaintiff alleges that he and defendant, his son, had a relationship of trust and confidence ...". ***Tsai Chung Chao v. Chao*, 2018 N.Y. Slip Op. 03620, First Dept 5-17-18**

CRIMINAL LAW.

NEW YORK LAW CONTROLS POLICE ENTRY AND SEARCH OF NEW JERSEY APARTMENT BUILDING, DEFENDANT DID NOT HAVE AN EXPECTATION OF PRIVACY IN THE COMMON AREAS OF THE BUILDING.

The First Department determined New York law controlled the police entry and search of defendant's apartment building in New Jersey, and defendant did not have an expectation of privacy in the common areas of the building: "We find it unnecessary to decide any questions of New Jersey search and seizure law, because we find that New York law governs the issues raised here. Suppression issues, including those arising out of a defendant's constitutional rights, are generally governed by the law of the forum, and 'New York has a paramount interest in the application of its laws to this case' ... . [W]e find that 'defendant has failed to establish a legitimate expectation of privacy in the common [areas] of his building, accessible to all tenants and their invitees' ... . The unremarkable fact that access to the building was controlled by a locked outer door does not create an expectation of privacy that would not otherwise exist ... . The basic principle ... is that general access to common areas negates a personal expectation of privacy in those areas for an individual resident. This principle applies except in unusual circumstances, such as where common areas are 'shared for eating and bathing purposes essential to daily living and facilities for which are commonly found in any home' ... . At least where common areas are used primarily as a means of ingress and egress, to be used by the residents of individual units and their invitees, the presence of a locked outer door does not create a legitimate expectation of privacy. Accordingly, defendant's rights were not violated when the police used his key to enter the building." ***People v. Espinal*, 2018 N.Y. Slip Op. 03613, First Dept 5-17-18**

EDUCATION-SCHOOL LAW, ADMINISTRATIVE LAW, MUNICIPAL LAW, CIVIL PROCEDURE.

PETITIONER, A PRIVATE SCHOOL FOR DEVELOPMENTALLY DISABLED CHILDREN, HAD EXHAUSTED ITS ADMINISTRATIVE REMEDIES IN SEEKING REIMBURSEMENT FROM THE NYC DEPARTMENT OF EDUCATION FOR 24-HOUR CARE FOR A STUDENT WITH AUTISM, MATTER REMITTED WITH INSTRUCTION THAT THE DOCTRINE OF ESTOPPEL, BASED UPON A PROMISE TO REIMBURSE, MAY APPLY.

The First Department, in a full-fledged opinion by Justice Manzanet-Daniels, reversing Supreme Court, determined the petitioner, a private residential school for children with intellectual and developmental disabilities (Center for Discovery), had exhausted its administrative remedies in seeking reimbursement from the NYC Department of Education for providing 24-hour care for a student with autism (pursuant to an Individualized Education Plan or IEP). The matter was therefore sent back to Supreme Court. The First Department noted that, although estoppel is usually not available in an action against a

governmental agency, it may be appropriate here based upon the respondent's alleged promise to reimburse petitioner and petitioner's reliance on that promise: "... [W]e disagree that the doctrine of 'exhaustion of remedies' precludes review of this case... . A 'final and binding' determination is one where the agency 'reached a definitive position on the issue that inflicts actual, concrete injury,' and the injury may not be 'significantly ameliorated by further administrative action or by steps available to the complaining party' ... . Respondent reached a definitive position concerning reimbursement for the additional services mandated by the amended IEP that inflicted concrete injury on petitioner. Counsel's ... email clearly stated that the City would not be reimbursing petitioner for the additional services mandated by the amended IEP. Petitioner had no available means of seeking review of respondent's decision from respondent or any other City or State agency empowered to review, overturn, or reverse the City's determination concerning reimbursement for the services explicitly mandated by the City in the amended IEP. The email was thus the 'final' determination of respondent City on the issue ... . Petitioner ... alleges that it relied on respondent's representation that it would be reimbursed for the additional services mandated and provided under the amended IEP. While estoppel is generally not available in an action against a government agency, this case presents a factual dispute as to the applicability of the doctrine that must be determined upon remand ...". ***Matter of Center for Discovery, Inc. v. NYC Dept. of Educ.*, 2018 N.Y. Slip Op. 03494, First Dept 5-15-18**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

FALL THOUGH AN UNGUARDED FLOOR OPENING AT A CONSTRUCTION SITE IS COVERED UNDER LABOR LAW § 240(1), THERE WAS A QUESTION OF FACT WHETHER PLAINTIFF WAS ABLE TO TIE OFF HIS HARNESS, PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The First Department, reversing Supreme Court, noted that, although the fall through an unguarded floor opening at a construction site was covered under Labor Law § 240(1), there was a question of fact whether plaintiff was able to tie off his harness. Therefore, plaintiff's motion for summary judgment shouldn't have been granted: " '[A] fall through an unguarded opening in the floor of a construction site constitutes a violation of Labor Law § 240(1) only where a safety device adequate to prevent such a fall was not provided. A safety line and harness may be an adequate safety device for a person working over an open area or near an elevated edge' ... . Here, the record demonstrates that although plaintiff was wearing a harness and lanyard at the time of the accident, triable issues exist as to whether static lines were in place for him to safely tie off." ***Maman v. Marx Realty & Improvement Co., Inc.*, 2018 N.Y. Slip Op. 03614, First Dept 5-17-18**

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

MOTORIZED SCAFFOLD BECAME STUCK AND PLAINTIFF WAS INJURED PUSHING IT FREE, THE INJURY FELL WITHIN THE GRAVITY-RELATED PROTECTIONS OF LABOR LAW § 240(1), PLAINTIFF'S MOTION TO AMEND HIS BILL OF PARTICULARS TO ADD AN ALLEGED VIOLATION OF THE INDUSTRIAL CODE SHOULD HAVE BEEN GRANTED, CRITERIA EXPLAINED.

The First Department, reversing (modifying) Supreme Court, determined defendant's motion for summary judgment in this scaffold-related Labor Law § 240(1) action should not have been granted. The plaintiff was on a motorized scaffold when it was prevented from elevating further by a horizontal beam (spandrel). Plaintiff pushed against the beam with his back to move the scaffold free of the beam and injured his back in the process. The First Department held that the injury fell within the gravity-related protections of Labor Law § 240(1). The court further found that plaintiff's motion to amend his bill of particulars to add an alleged violation of the Industrial Code should have granted: "... [T]he incident in which plaintiff was injured falls within the ambit of Labor Law § 240(1), because the scaffold proved inadequate to shield plaintiff from 'harm directly flowing from the application of the force of gravity to an object or person' ... . The force of gravity caused the scaffold to swing into the recessed areas between the spandrels, necessitating that plaintiff and his coworker use their backs to exert force to swing the scaffold out again. Nevertheless, neither side is entitled to summary judgment, because an issue of fact exists as to whether plaintiff's negligence was the sole proximate cause of his injuries ... . The testimony of plaintiff and his foreman conflict as to whether plaintiff had been instructed to push off the scaffold in the manner described. ... The court improvidently exercised its discretion in denying plaintiff's motion for leave to amend his bill of particulars to add allegations that 2008 Building Code of New York City (Administrative Code of City of NY) § 3314.10.1 was violated ... . Although plaintiff did not provide an excuse for his delay in seeking leave, the delay was relatively short, and defendants demonstrated no prejudice. The allegation that section 3314.10.1 was violated is consistent with plaintiff's original theory that the scaffold, as installed, was deficient and inadequate. That section mandated that suspended scaffolds 'be erected and operated in such a manner that suspension elements are vertical and in a plane parallel to the wall at all times.' Further, the evidence required to support this new allegation is contained in the record." ***Galvez v. Columbus 95th St. LLC*, 2018 N.Y. Slip Op. 03484, First Dept 5-15-18**

MEDICAID, MENTAL HYGIENE LAW.

PETITIONER DEMONSTRATED AN INTELLECTUAL DISABILITY QUALIFYING HER FOR MEDICAID-REIMBURSED HOME AND COMMUNITY BASED SERVICES, CONTRARY FINDING BY THE NYS OFFICE FOR PEOPLE WITH DEVELOPMENTAL DISABILITIES ANNULLED.

The First Department, annulling the determination of the NYS Office for People with Developmental Disabilities, held that the petitioner demonstrated an intellectual disability qualifying her for Medicaid-reimbursed home and community based services: "In order to obtain Medicaid-reimbursed home and community based services, an applicant must demonstrate that he or she suffers from a 'developmental disability.' An 'intellectual disability' that originated before age 22, is expected to continue indefinitely, and constitutes a "substantial handicap" to the person's ability to function normally in society, is a qualifying condition (Mental Hygiene Law § 1.03[22] [a][1], [b], [c] and [d]). The American Psychiatric Association Diagnostic and Statistical Manual of Mental Disorders (5th ed 2013) (Manual) defines 'intellectual disability' as a disorder characterized by, inter alia, (1) general deficits in areas such as reasoning, problem solving and abstract thinking and (2) deficits in adaptive functioning, such as how well the person meets community standards of personal independence and social responsibility as compared to others of similar age and social responsibility. The term 'intellectual disability' replaced the term 'mental retardation.' Here, respondent's determination is not supported by substantial evidence ... . Rather, the record demonstrates that petitioner met the qualifications as all of the evaluations that were performed before petitioner was 22 years old demonstrated an I.Q. below 70, which was the rough cut off for normal intellectual function. Deficits in her adaptive functioning were also noted repeatedly over the years. Moreover, it was entirely speculative to opine that petitioner's I.Q. would have been higher but for co-occurring conditions." ***Matter of Spencer-Cedeno v. Zucker*, 2018 N.Y. Slip Op. 03488, First Dept 5-15-18**

PERSONAL INJURY.

CITY DEMONSTRATED IT DID NOT CREATE, EXACERBATE OR HAVE ACTUAL OR CONSTRUCTIVE NOTICE OF THE BLACK ICE IN THE CROSSWALK WHERE PLAINTIFF SLIPPED AND FELL, DECISION ILLUSTRATES THE LEVEL OF PROOF REQUIRED OF A SLIP AND FALL DEFENDANT TO WIN SUMMARY JUDGMENT.

The First Department determined the defendant city demonstrated that it did not create or have actual or constructive notice of the black ice in the crosswalk where plaintiff slipped and fell. The decision illustrates the level of proof necessary for a defendant's successful summary judgment motion in a slip and fall case: "The City established entitlement to judgment as a matter of law in this action for personal injuries sustained when plaintiff slipped and fell on 'black ice,' while crossing a cleared crosswalk, eight days after there was a snowfall of about 20 inches. The City submitted evidence showing it neither created nor had actual or constructive notice of the black ice that allegedly caused plaintiff's fall, including deposition testimony from a Department of Sanitation supervisor detailing the City's extensive snow and ice removal efforts in the area of the accident in the days preceding the accident. The City also submitted climatological records showing temperature fluctuations above and below freezing in the two days before the date of the accident, and freezing temperatures in the hours immediately preceding plaintiff's fall. Thus, the City demonstrated that it would be speculative to conclude that it caused or had sufficient time to remedy the subject icy condition... . The City further showed lack of constructive notice by submitting plaintiff's deposition testimony that the crosswalk appeared to have been cleared for safe crossing and that she did not observe the black ice until after she fell ... . In opposition, plaintiff failed to raise an issue of fact. She provided no evidence of actual or constructive notice of the black ice in the crosswalk, which she admittedly did not see. Plaintiff also failed to provide any nonspeculative basis for finding that the City's snow clearing efforts were negligent or that they exacerbated the dangerous conditions that were created by the blizzard... . The opinion of plaintiff's expert that the City should have checked the crosswalk twice daily for possible 'thaw and refreeze,' was unsupported by reference to any authority, standard, or other corroborating evidence ...". ***Pena v. City of New York*, 2018 N.Y. Slip Op. 03477, First Dept 5-15-18**

SECOND DEPARTMENT

ADMINISTRATIVE LAW, EVIDENCE.

THE MEANING OF 'SUBSTANTIAL EVIDENCE' SUFFICIENT TO SUPPORT A DETERMINATION IN AN ADMINISTRATIVE HEARING EXPLAINED.

The Second Department, in confirming the Commissioner of Public Safety's termination of General Municipal Law § 207-a benefits for an injured firefighter, explained what the term "substantial evidence" means in the context of an administrative hearing: "... [A]fter an examination, the respondents' medical examiner found that the petitioner was capable of returning to light duty and that there would be a 'medium to moderate' chance that he would be able to resume full duty if he underwent spinal fusion surgery. Thereafter, the respondents' fire chief sent the petitioner a letter ordering him to return to work ... , to assume a light duty position, or risk losing his benefits. A second letter ... directed the petitioner to schedule the fusion surgery. The petitioner did not return to work ... , and did not undergo surgery, choosing instead to proceed with a challenge of the return to work order. After a hearing, the hearing officer concluded that the fire chief's orders were 'reasonable and

rational,' and that the petitioner's failure to comply with those orders was without justification. The respondents adopted the recommendations of the hearing officer. The petitioner commenced this CPLR article 78 proceeding to review the determination. The petitioner argues that the respondents' determination is not supported by substantial evidence. We disagree. 'Substantial evidence means more than a mere scintilla of evidence and the test of whether substantial evidence exists in a record is one of rationality, taking into account all the evidence on both sides'...". ***Matter of Sestito v. City of White Plains*, 2018 N.Y. Slip Op. 03528, Second Dept 5-16-18**

ATTORNEYS, LEGAL MALPRACTICE, EVIDENCE.

DEFENDANT ATTORNEYS DID NOT DEMONSTRATE PLAINTIFFS SUFFERED NO DAMAGES AS A RESULT OF DELAYS IN THE DEFENDANTS' HANDLING OF EVICTION PROCEEDINGS, ALLEGING THAT PLAINTIFFS' DAMAGES WERE SPECULATIVE MERELY POINTED TO GAPS IN PLAINTIFFS' PROOF AND WAS INSUFFICIENT TO SUPPORT SUMMARY JUDGMENT IN DEFENDANTS' FAVOR.

The Second Department, reversing Supreme Court, determined the defendant attorneys failed to demonstrate plaintiffs suffered no damages in this legal malpractice action. Plaintiffs alleged defendants delayed in evicting plaintiffs' tenants resulting in $500,000 in lost rent. Defendants, in their motion for summary judgment, alleged only that plaintiffs' damages were speculative, which merely pointed to gaps in plaintiffs' proof and is never enough for an award of summary judgment: "The defendants failed to submit evidence establishing, prima facie, that the plaintiffs are unable to prove at least one essential element of the cause of action alleging legal malpractice ... . The defendants' styling of the plaintiffs' damages theory as 'speculative' was merely an effort to point out gaps in the plaintiff's proof, which was insufficient to meet the defendants' burden as the party moving for summary judgment ... . Moreover, even if the plaintiffs' damages cannot be precisely calculated at this stage, expenses to the client resulting from attorney delays are deemed to be ascertainable damages in connection with a legal malpractice cause of action ...". ***Iannucci v. Kucker & Bruh, LLP*, 2018 N.Y. Slip Op. 03514, Second Dept 5-16-18**

CIVIL PROCEDURE.

MOTION TO VACATE DEFAULT JUDGMENT SHOULD HAVE BEEN GRANTED, CRITERIA EXPLAINED.

The Second Department, reversing Supreme Court, determined defendant's motion to vacate the default judgment and serve an amended answer should have been granted: "Pursuant to CPLR 5015(a)(1), a party seeking to vacate a default must demonstrate a reasonable excuse for his or her default and a potentially meritorious claim or defense ... . 'The determination of what constitutes a reasonable excuse lies within the Supreme Court's discretion' ... . 'Whether there is a reasonable excuse for a default is a discretionary, sui generis determination to be made by the court based on all relevant factors, including the extent of the delay, whether there has been prejudice to the opposing party, whether there has been willfulness, and the strong public policy in favor of resolving cases on the merits'... . '[T]he court has discretion to accept law office failure as a reasonable excuse ... where that claim is supported by a detailed and credible explanation of the default at issue' ... . 'While it is generally within the discretion of the court to determine what constitutes a reasonable excuse, reversal is warranted if that discretion is improvidently exercised' ... . Here, the affidavits and documentary evidence submitted by the defendant in support of his motion, taken together, set forth a detailed and credible explanation for the defendant's failure to appear at the hearing and for any delay in moving to vacate his default ... . In addition, there was no showing of prejudice to the plaintiff, and no evidence that the defendant willfully defaulted or otherwise intended to abandon his defense of this action ... . Furthermore, the defendant's submissions demonstrated a potentially meritorious defense to the complaint ...". ***Gately v. Drummond*, 2018 N.Y. Slip Op. 03507, Second Dept 5-16-18**

CIVIL PROCEDURE.

ARGUMENTS FIRST RAISED IN REPLY PAPERS PROPERLY REJECTED.

The Second Department noted that arguments first raised in reply papers were properly rejected: "After the plaintiff commenced this action, inter alia, to recover damages for malicious prosecution, the defendants moved to dismiss the complaint ... . [T]he Supreme Court granted the defendants' unopposed motion to dismiss the complaint ... . More than eight months later, the plaintiff moved for leave to enter a default judgment in her favor. After opposition papers were served, the plaintiff served a reply affirmation, in which she requested that the Supreme Court consider her motion to be one to vacate the order of dismissal, and thereupon, for leave to enter a default judgment in her favor. The court denied, as academic, the plaintiff's motion for leave to enter a default judgment in light of the dismissal order. The court also denied the plaintiff's application to deem her motion to also be considered as one to vacate the dismissal order, and the plaintiff appeals from that portion of the order. The function of reply papers is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of, or new grounds or evidence for, the motion ... . Here, the plaintiff's reply papers included new arguments in support of the motion, new grounds and evidence for the motion, and expressly requested relief that was dramatically unlike the relief sought in her original motion ... . Therefore, those contentions, and the grounds and evidence in support of them, were not properly before the Supreme Court ... . Accordingly,

we agree with the court's determination to deny the plaintiff's application to deem her motion to also be considered as one to vacate the dismissal order." ***Lee v. Law Offs. of Kim & Bae, P.C.*, 2018 N.Y. Slip Op. 03516, Second Dept 5-16-18**

CIVIL PROCEDURE, ATTORNEYS.

LAW OFFICE FAILURE REJECTED AS AN EXCUSE FOR FAILURE TO TIMELY ENTER A DEFAULT JUDGMENT, CRITERIA EXPLAINED.

The Second Department determined law office failure was not a sufficient excuse for plaintiff's failure to enter a default judgment in an action which alleged defendants failed to pay plaintiff the statutory minimum wage: " 'CPLR 3215(c) provides that [i]f the plaintiff fails to take proceedings for the entry of judgment within one year after the default, the court shall not enter judgment but shall dismiss the complaint as abandoned . . . unless sufficient cause is shown why the complaint should not be dismissed' ... . * * * Here, the plaintiff moved pursuant to CPLR 2004 for an extension of time to move for the entry of a default judgment and, thereupon, for leave to enter a default judgment against the defendants. CPLR 2004 allows a court to 'extend the time fixed by any statute, rule or order for doing any act, upon such terms as may be just and upon good cause shown.' 'In exercising its discretion to grant an extension of time pursuant to CPLR 2004, a court may consider such factors as the length of the delay, the reason or excuse for the delay, and any prejudice to the opponent of the motion' ... . The plaintiff's excuse of law office failure did not rise to the level of a reasonable excuse, as it was vague, conclusory, and unsubstantiated ... . The excuse was contained in a brief paragraph in the supporting affirmation of an associate who stated, in sum and substance, that the attorney who commenced the action left the employ of the law firm of record, and the plaintiff's file was only discovered in May 2016 when the firm was relocating its offices. There was no affirmation from a principal of the law firm and no indication in the associate's affirmation that he had any personal knowledge of the purported law office failure or that he was even employed by the firm at the time it allegedly occurred. The one-year period to move for the entry of a default judgment lapsed in August 2015, and there is no indication that the attorney had left prior thereto." ***Ibrahim v. Nablus Sweets Corp.*, 2018 N.Y. Slip Op. 03515, Second Dept 5-16-18**

CIVIL PROCEDURE, MEDICAL MALPRACTICE, PERSONAL INJURY.

ARGUMENT RAISED FOR THE FIRST TIME IN REPLY PAPERS SHOULD NOT HAVE BEEN CONSIDERED; HOSPITAL DID NOT DEMONSTRATE IT WAS NOT VICARIOUSLY LIABLE FOR A PHYSICIAN BECAUSE THE WRITTEN AGREEMENTS CONCERNING THE RELATIONSHIP BETWEEN THE HOSPITAL AND THE PHYSICIAN WERE NOT SUBMITTED.

The Second Department, reversing Supreme Court, noted the argument plaintiff did not allege in the bill of particulars that defendant hospital was vicariously liable for the actions of a physician (Devlin) was raised for the first time in reply papers and, therefore, should not have been considered by the motion court. The Second Department went on to find that the hospital's motion for summary judgment arguing that it was not vicariously liable for Devlin's actions should not have been granted. Whether Devlin acted as an agent for the hospital depended upon written agreements which were not submitted with the motion papers: "The function of reply papers is to address arguments made in opposition to the position taken by the movant, not to introduce new arguments or new grounds for the requested relief ... . Since the plaintiffs did not have the opportunity to oppose the new argument in a surreply, the court should not have granted relief based upon that argument ... . [T]he general rule is that a hospital may not be held vicariously liable for the acts of a physician who is not an employee of the hospital, but is one of a group of independent contractors ... . However, a hospital may be vicariously liable if a nonemployee physician acted as its agent or if it exercised control over the physician ... . Here, Devlin was an intensivist employed by the defendant Nassau Chest Physicians, P.C. (hereinafter Nassau Chest Physicians), who cared for [plaintiff] in the Hospital's intensive care unit after surgery was performed. She was the sole intensivist on duty for all four of the Hospital's intensive care units during her shift. Devlin only worked at the Hospital; she did not work for Nassau Chest Physicians at any other site. The Hospital claimed that she was not under its control and not its agent. However, the Hospital's relationship with Nassau Chest Physicians and Devlin's relationship with Nassau Chest Physicians were governed by written agreements, and those written agreements were not submitted in support of the motion. Since the defendants failed to submit this or other evidence establishing, prima facie, that Devlin was not under the Hospital's control and not its agent when she rendered care to Castro, they failed to demonstrate their prima facie entitlement to judgment as a matter of law ...". ***Castro v. Durban*, 2018 N.Y. Slip Op. 03503, Second Dept 5-16-18**

CRIMINAL LAW.

ALTERNATE JUROR'S PARTICIPATION IN DELIBERATIONS REQUIRED A NEW TRIAL.

The Second Department ordered a new trial for the defendant because an alternate juror deliberated with the other jurors. The trial judge attempted to fix the problem by having the jurors agree to start over and disregard the prior deliberations: "During the trial in this matter, an alternate juror briefly participated in deliberations with 11 sworn members of the jury while the12th sworn juror was absent from the jury room. The Supreme Court denied the defendant's motion for a mistrial. The court then questioned each of the jurors about their ability to disregard the prior deliberations and start deliberations

anew; each juror assured the court that he or she could do so. The court then denied the defendant's renewed motion for a mistrial, and instructed the jurors that all deliberations that had taken place with the alternate juror were a nullity which must be disregarded by the jury, and that deliberations were to start 'fresh, anew, ab initio, from the beginning.' After deliberations, the jury returned a verdict of guilty. The defendant appeals. The New York Constitution guarantees every criminal defendant a trial by jury ... . The constitutional right to a jury trial 'includes the right to a jury of 12' ... . Pursuant to CPL 270.30, after the jury has retired to deliberate, the court must either, (1) with the consent of the defendant and the People, discharge the alternate jurors, or (2) direct the alternate jurors not to discuss the case and further direct that they be kept separate and apart from the regular jurors. CPL 310.10 prohibits anyone, including alternate jurors, from communicating with deliberating jurors. The error here not only violated CPL 270.30 and 310.10, but it deprived the defendant of his fundamental right to a trial by a jury of 12 ... . The error was not cured by the Supreme Court's instructions to the reconstituted jury." ***People v. Davis*, 2018 N.Y. Slip Op. 03539, Second Dept 5-16-18**

CRIMINAL LAW, ATTORNEYS, IMMIGRATION LAW.

DEFENDANT WAS NOT INFORMED OF THE DEPORTATION CONSEQUENCES OF HIS PLEA, HE IS ENTITLED TO A HEARING ON HIS MOTION TO VACATE THE JUDGMENT OF CONVICTION.

The Second Department determined defendant was entitled to a hearing on his motion to vacate his conviction based upon ineffective assistance of counsel. Defendant demonstrated his attorney never informed him the plea included an aggravated felony which made deportation mandatory: "A defendant has the right to the effective assistance of counsel before deciding whether to plead guilty ... . 'Under the federal standard for ineffective assistance of counsel, a defendant must show that his or her attorney's performance fell below an objective standard of reasonableness, and that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different' ... . 'Under the state standard . . . the constitutional requirements for the effective assistance of counsel are met when the defense attorney provides meaningful representation'... . In cases asserting ineffective assistance of counsel in the plea context, a defendant must show that 'there is a reasonable probability that, but for counsel's errors, he [or she] would not have pleaded guilty and would have insisted on going to trial'... , or 'that the outcome of the proceedings would have been different' ... . Here, the defendant sufficiently alleged that defense counsel failed to fully inform him that a plea of guilty exposed him to mandatory removal from the United States and that, had he been so advised, a decision to reject the plea offer would have been rational ...". ***People v. Hungria*, 2018 N.Y. Slip Op. 03545, Second Dept 5-16-18**

FAMILY LAW.

DESPITE TERMINATION OF MOTHER'S PARENTAL RIGHTS, GRANDMOTHER HAD STANDING TO SEEK VISITATION AND VISITATION WITH GRANDMOTHER WAS IN THE BEST INTERESTS OF THE CHILD.

The Second Department, reversing (modifying) Family Court, determined, despite the termination of mother's parental rights, grandmother had standing to seek visitation with the child and visitation by the grandmother was in the bests interests of the child: "A biological grandparent may seek visitation with a child even after parental rights have been terminated or the child has been freed for adoption ... . Where a grandparent seeks visitation pursuant to Domestic Relations Law § 72(1), the court must undertake a two-part inquiry ... . First, the court must determine if the grandparent has standing to petition for visitation based on the death of a parent or equitable circumstances . Where the court concludes that the grandparent has established standing, the court must then determine whether visitation with the grandparent is in the best interests of the child ... . In determining whether equitable circumstances confer standing, the court must examine all relevant facts ... . '[A]n essential part of the inquiry is the nature and extent of the grandparent-grandchild relationship' ... . A grandparent must establish an existing relationship or sufficient efforts to establish one that have been unjustifiably frustrated by the parent ... . Here, the evidence demonstrated that the maternal grandmother developed a relationship with the child early on in her life and thereafter made repeated efforts to continue that relationship ... . Accordingly, the Family Court's determination that the grandmother lacked standing to seek visitation was not supported by a sound and substantial basis in the record. Moreover, visitation with the grandmother would be in the child's best interests. The grandmother had consistent visitation with the child until the DSS ceased allowing such visitation in November 2014. By all accounts, the grandmother's visitations conducted separately from the mother's visitations were positive, and the attorney for the child in the Family Court took the position that the child's best interests would be served by visitation with the grandmother conditioned on the requirement that the mother not be present for the visitation ...". ***Matter of Weiss v. Weiss*, 2018 N.Y. Slip Op. 03532, Second Dept 5-16-18**

FAMILY LAW, ATTORNEYS.

AWARD OF ATTORNEY'S FEES AND EXPERT WITNESS FEES IN THIS DIVORCE ACTION WAS AN ABUSE OF DISCRETION, ATTORNEY DID NOT COMPLY WITH BILLING RULES AND NO EXPERT AFFIDAVITS WERE SUBMITTED.

The Second Department, reversing Supreme Court, determined the award of attorney's fees and expert witness fees in this divorce action was an abuse of discretion: "In a matrimonial action, an award of counsel fees is a matter committed to the

sound discretion of the trial court ... . However, court rules impose certain requirements upon attorneys who represent clients in domestic relations matters ... . These rules were designed to address abuses in the practice of matrimonial law and to protect the public, and the failure to substantially comply with the rules will preclude an attorney's recovery of a fee from his or her client ... or from the adversary spouse ... . A showing of substantial compliance must be made on a prima facie basis as part of the moving party's papers ... . Here, the evidence proffered by the defendant in support of that branch of her motion which was for an award of counsel fees for work performed by Glynn demonstrates that Glynn failed to substantially comply with the rules requiring periodic billing statements at least every 60 days ... . Accordingly, the Supreme Court erred in granting that branch of the defendant's motion which pertains to Glynn's counsel's fees. ... 'The award of expert witness fees in a matrimonial action is left to the sound discretion of the trial court, and should be made upon a detailed showing of the services to be rendered and the estimated time involved'... . 'Absent affidavits from the expert witnesses at issue, the Supreme Court lacks a sufficient basis to grant a motion for the award of such fees' ... Here, the defendant failed to submit such expert affidavits." ***Greco v. Greco*, 2018 N.Y. Slip Op. 03509, Second Dept 5-16-18**

FAMILY LAW, JUDGES.

IN THIS DIVORCE PROCEEDING, THE JUDGE HAD THE POWER TO CORRECT AN INCONSISTENCY BETWEEN THE JUDGMENT AND THE UNDERLYING DECISION BUT DID NOT HAVE THE POWER TO CHANGE THE JUDGMENT BASED UPON NEW EVIDENCE.

The Second department, reversing (modifying) Supreme Court in a divorce action, determined that the judge properly corrected a mistake in the judgment of divorce, but improperly made a change in the judgment based on new evidence: "... [T]he Supreme Court, sua sponte, directed the parties to appear ... . [T]he defendant and his counsel appeared, but the plaintiff failed to appear. The court expressed its concern about a letter it had received indicating that the defendant had failed to disclose a variable supplemental pension plan. The court further noted that the third decretal paragraph of the judgment did not reflect the intent expressed in the court's underlying decision, inasmuch as the judgment failed to provide that changes in the value of the retirement assets since the commencement of the action were to be shared equally. An amended judgment was entered thereafter modifying so much of the third decretal paragraph of the original judgment as was necessary to conform the judgment to the underlying decision, and modifying the fourth decretal paragraph of the original judgment to include a reference to the previously undisclosed variable supplemental pension plan. The defendant appeals from the amended judgment. The Supreme Court had the authority to modify the third decretal paragraph of the original judgment, given the discrepancy between the terms of that decretal paragraph and the underlying decision. 'A judgment . . . must conform strictly to the court's decision. Where there is an inconsistency between a judgment . . . and the decision upon which it is based, the decision controls' ... However, the Supreme Court was without authority, sua sponte, to modify the fourth decretal paragraph of the original judgment to add a reference to the variable supplemental pension plan, as this was a substantive modification based on new evidence that had not previously been submitted to the court. Such a modification goes beyond the court's inherent authority to correct a 'mistake, defect or irregularity' in the original judgment 'not affecting a substantial right of a party' ...". ***Mascia v. Mascia*, 2018 N.Y. Slip Op. 03523, Second Dept 5-16-18**

FORECLOSURE, CIVIL PROCEDURE.

FORECLOSURE COMPLAINT SHOULD NOT HAVE BEEN DISMISSED, PLAINTIFF BANK TOOK PRELIMINARY STEPS TOWARD OBTAINING A DEFAULT JUDGMENT WITHIN ONE YEAR OF DEFENDANTS' DEFAULT.

The Second Department, reversing Supreme Court, determined the foreclosure complaint should not have been dismissed on the ground that the bank had not taken proceedings for the entry of a default judgment within a year of defendants' default. It was enough that the bank took preliminary steps toward obtaining a default judgment within the year: "CPLR 3215(c) provides that '[i]f the plaintiff fails to take proceedings for the entry of judgment within one year after [a] default, the court shall not enter judgment but shall dismiss the complaint as abandoned, without costs, upon its own initiative or on motion, unless sufficient cause is shown why the complaint should not be dismissed.' 'It is not necessary for a plaintiff to actually obtain a default judgment within one year of the default in order to avoid dismissal pursuant to CPLR 3215(c)' ... . 'Rather, it is enough that the plaintiff timely takes the preliminary step toward obtaining a default judgment of foreclosure and sale by moving for an order of reference' to establish that it initiated proceedings for entry of a judgment within one year of the default' for the purposes of satisfying CPLR 3215(c)' ... . Here, the plaintiff took the preliminary step toward obtaining a default judgment of foreclosure and sale by moving for an order of reference ... within one year of the defendants' default and, thus, did not abandon the action ...". ***Deutsche Bank Natl. Trust Co. v. Delisser*, 2018 N.Y. Slip Op. 03504, Second Dept 5-16-18**

GROSS NEGLIGENCE, CIVIL PROCEDURE, INSURANCE LAW, ENVIRONMENTAL LAW.

GROSS NEGLIGENCE CAUSE OF ACTION AND DEMAND FOR PUNITIVE DAMAGES IN THIS OIL-CONTAMINATION-REMEDIATION ACTION SHOULD NOT HAVE BEEN DISMISSED, CAUSES OF ACTION IN AMENDED COMPLAINT RELATED BACK TO THE ALLEGATIONS IN THE ORIGINAL COMPLAINT AND WERE NOT TIME-BARRED.

The Second Department, reversing Supreme Court, determined plaintiffs' gross negligence cause of action and demand for punitive damages should not have been dismissed. Plaintiffs alleged the defendant insurer (State Farm) and the defendant engineering firm (H2M) were grossly negligent in supervising the remediation of oil contamination on plaintiffs' property. The Second Department noted that the causes of action in the amended complaint related back to the allegations in the original complaint and were not, therefore time-barred: "The Supreme Court should not have granted those branches of State Farm's and H2M's motions which were to dismiss the cause of action alleging gross negligence insofar as asserted against each of them. As the original complaint gave notice of the transactions or occurrences to be proven as to the gross negligence causes of action, those causes of action related back to the date of timely filing of the original complaint ... . The amended complaint stated a viable gross negligence cause of action as against State Farm and H2M. Gross negligence 'differs in kind, not only degree, from claims of ordinary negligence' ... . 'To constitute gross negligence, a party's conduct must smack[ ] of intentional wrongdoing' or evince[ ] a reckless indifference to the rights of others' ... . Generally, the question of gross negligence is a matter to be determined by the trier of fact ... . The allegations, inter alia, that State Farm and H2M greatly exacerbated the existing damage to the property by causing the spread of the existing contamination and by directing the backfilling of areas of the property after leaving in place significant existing contamination are sufficient to support a gross negligence cause of action ...". ***Bennett v. State Farm Fire & Cas. Co.*, 2018 N.Y. Slip Op. 03499, Second Dept 5-16-18**

INSURANCE LAW.

RECOVERY FROM THE MOTOR VEHICLE ACCIDENT INDEMNIFICATION CORPORATION FOR INJURY BY AN UNKNOWN DRIVER DEPENDS ON WHETHER THE INJURY IS THE RESULT OF AN ACCIDENT OR INTENTIONAL CONDUCT, NO RECOVERY FOR INJURY RESULTING FROM INTENTIONAL CONDUCT.

The Second Department determined Supreme Court correctly ordered a framed issue hearing on the issue whether the injury to plaintiff bicyclist was caused by an "accident" or "intentional conduct" within the meaning of Article 52 of the Insurance Law. Plaintiff got into an argument with a driver and was then struck by the driver's car. The driver's identity is not known so plaintiff sought recovery from the Motor Vehicle Accident Indemnification Corporation (MVAIC). The Second Department held that the issue was not controlled by the recent Court of Appeals decision which found that an intentional act by a driver could be seen as an "accident" from the perspective of the injured person. In that Court of Appeals case (*State Farm Mut Auto Ins Co v. Langan*, 16 NY3d 349) the injured person was seeking recovery from the insurer under the injured person's own policy. Here the plaintiff was seeking recovery from the MVAIC and there can be no recovery from the MVAIC for injury resulting from intentional conduct: "Article 52 of the Insurance Law ('motor vehicle accident indemnification act') seeks to provide 'for the payment of loss on account of injury to or death of persons who, through no fault of their own, were involved in motor vehicle accidents caused by' vehicles that, for a variety of reasons, are not covered by insurance (Insurance Law § 5201[b]). Article 52 does not, however, cover incidents that are the result of intentional conduct by a tortfeasor, because those incidents are not caused 'by accident' ... . The Court of Appeals [in Langan] held that where recovery was sought from the insurer under the insured's own policy, the determination of whether the incident constituted an 'accident' was to be viewed from the perspective of the innocent insured, rather than of the tortfeasor: 'the intentional assault of an innocent insured is an accident within the meaning of his or her own policy. The occurrence at issue was clearly an accident from the insured's point of view' ... . The Court distinguished McCarthy v. Motor Veh. Acc. Indem. Corp. (16 AD2d at 41), where recovery was sought from a state fund administered by the MVAIC... . Here, as in McCarthy, the petitioner seeks to recover from the state fund administered by the MVAIC, and not from an insurer under an insurance policy as in Langan." ***Castillo v. Motor Veh. Acc. Indem. Corp.*, 2018 N.Y. Slip Op. 03502, Second Dept 5-16-18**

INSURANCE LAW, LANDLORD-TENANT, PERSONAL INJURY.

TENANT'S INSURANCE POLICY NAMED THE OWNER OF THE BUILDING AS AN ADDITIONAL INSURED, PLAINTIFF FELL ON A STAIRCASE IN AN AREA NOT LEASED TO THE TENANT, PLAINTIFF COULD NOT RECOVER UNDER THE ADDITIONAL INSURED PROVISION OF THE TENANT'S POLICY.

The Second Department, reversing Supreme Court, determined plaintiff's injury from a fall on a staircase was not covered by the "additional insured" provision of the subject policy. Yeshiva leased property in a building owned by Beth Medrash. Beth Medrash was listed as an additional insured in Yeshiva's insurance policy. The staircase where plaintiff fell was not leased by Yeshiva: "The additional insured provision named Beth Medrash as an additional insured 'only with respect to liability arising out of the ownership, maintenance or use of that part of the premises leased to [the Yeshiva].' The phrase 'arising out of' requires 'only that there be some causal relationship between the injury and the risk for which coverage is provided' ... . 'An insurer does not wish to be liable for losses arising from risks associated with . . . premises for which the insurer has not evaluated the risk and received a premium' ... . Moreover, 'unambiguous provisions of an insurance contract

must be given their plain and ordinary meaning'... . The interpretation of policy language is a question of law for the court ... . On his motion for summary judgment, the plaintiff failed to establish, prima facie, that the policy provided coverage to Beth Medrash as an additional insured for his injury. It is undisputed that the Yeshiva did not lease the staircase the plaintiff was descending when he fell, and that the plaintiff was not a student or invitee of the Yeshiva at the time of the accident. Therefore, there was no causal relationship between the plaintiff's injury and the risk for which coverage was provided ... . Consequently, the plaintiff's injury was not a bargained-for risk ...". ***Lissauer v. GuideOne Specialty Mut. Ins.*, 2018 N.Y. Slip Op. 03522, Second Dept 5-16-18**

LABOR LAW-CONSTRUCTION LAW.

QUESTION OF FACT WHETHER A SAFETY DEVICE WAS REQUIRED UNDER LABOR LAW § 240(1) IN THIS FALLING OBJECT CASE, QUESTION OF FACT WHETHER A HARD HAT THAT COULD BE WORN WITH A WELDING SHIELD WAS REQUIRED UNDER LABOR LAW § 241(6).

The Second Department determined there was a question of fact whether a safety device was necessary in this falling object case (Labor Law § 240(1)), and there was a question of fact whether plaintiff should have been supplied with a hard hat that could be worn with a welding shield (Labor Law § 241(6)). Plaintiff had used a scissors lift to raise a part up 16 feet to where it was welded just enough to hold it in place so further welding could be done (tack welds). The scissors lift was lowered, the tack welds broke and the part fell and struck plaintiff: "... [N]either the plaintiffs nor the defendants established their prima facie entitlement to judgment as a matter of law with respect to the Labor Law § 240(1) cause of action. The parties' submissions raised triable issues of fact as to whether the defendants were obligated to provide appropriate safety devices of the kind enumerated in Labor Law § 240(1) to secure the flange and whether the flange fell due to the absence or inadequacy of an enumerated safety device... . ... [A] safety manager ... testified ... that '[d]epending on . . . what the operation is,' '[s]lings, chokers [can be] used to . . . hold [a flange] in place' until it is permanently welded to the pipe. While it is true that no safety device such as a sling was provided, the injured plaintiff testified at his deposition that two tack welds should have been sufficient to secure the flange. Significantly, the plaintiffs' expert ... opined that 'the two tack welds should have been sufficient to hold the flange until the job was completed, unless the tack welds were defective.' Under these circumstances, a triable issue of fact exists as to whether '[t]his was . . . a situation where a hoisting or securing device of the kind enumerated in [Labor Law § 240(1)] would have been necessary or even expected' ... . Contrary to the defendants' contention, the tack welds do not constitute a safety device within the meaning of Labor Law § 240(1) ...". ***Carlton v. City of New York*, 2018 N.Y. Slip Op. 03500, Second Dept 5-16-18**

PERSONAL INJURY, LANDLORD-TENANT.

OUT-OF-POSSESSION LANDLORD ENTITLED TO SUMMARY JUDGMENT IN THIS SLIP AND FALL CASE.

The Second Department determined the out-of-possession landlord (Bagga) was properly granted summary judgment in this slip and fall case: "The plaintiff commenced this action to recover damages for personal injuries she allegedly sustained when she tripped and fell at the entrance of a grocery store operated by the defendant 63-28 99th St. Farm Ltd., located on premises owned by the defendant Dasshan S. Bagga. ... 'An out-of-possession landlord is not liable for injuries that occur on its premises unless the landlord has retained control over the premises and has a duty imposed by statute or assumed by contract or a course of conduct' ... . Here, where the complaint sounds in common-law negligence and the plaintiff does not allege the violation of a statute, Bagga demonstrated his prima facie entitlement to judgment as a matter of law dismissing the complaint insofar as asserted against him by establishing that he was an out-of-possession landlord who was not bound by contract or course of conduct to maintain the premises... . The mere reservation of a right to reenter the premises to make repairs does not impose an obligation on the landlord to maintain the premises ...". ***Fuzaylova v. 63-28 99th St. Farm Ltd.*, 2018 N.Y. Slip Op. 03506, Second Dept 5-16-18**

PERSONAL INJURY, VEHICLE AND TRAFFIC LAW, EVIDENCE.

DEFENDANT DRIVER'S DEPOSITION TESTIMONY, WHICH CONTRADICTED THE ACCIDENT REPORT AND MV-104 FORM, DID NOT RAISE A QUESTION OF FACT, PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT IN THIS TRAFFIC ACCIDENT CASE SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined that defendant driver's testimony in a deposition, which contradicted the accident report and the MV-104 form, did not create a question of fact and plaintiff's motion for summary judgment in this traffic accident case should have been granted. The accident report and MV-104 form indicated defendant driver was in the process of making a left turn when plaintiff, who was in the oncoming lane, collided with defendant. In the deposition, defendant testified he had not yet started to turn when the accident happened: "Pursuant to Vehicle and Traffic Law § 1141, the operator of a vehicle intending to turn left within an intersection must yield the right-of-way to any oncoming vehicle which is within the intersection or so close to it as to constitute an immediate hazard ... . A violation of this statute constitutes negligence per se ... . The operator of an oncoming vehicle with the right-of-way is entitled to assume that the opposing operator will yield in compliance with the Vehicle and Traffic Law ... . Here, the plaintiff established his prima facie entitlement to judgment as a matter of law by demonstrating that the defendant driver violated Vehicle and Traffic

Law § 1141 when he made a left turn directly into the path of the plaintiff's scooter when it was not reasonably safe to do so, and that this violation was the sole proximate cause of the accident ... . In opposition to the motion, the defendants failed to raise a triable issue of fact. The defendant driver testified at his deposition that, at the time of the occurrence, his taxi had not entered the intersection, was stopped, and was facing straight ahead. This testimony reflects a belated attempt to avoid the consequences of his earlier admissions in the police accident report and the MV-104 accident report that he was in the process of making a left turn, by raising a feigned issue of fact which was insufficient to defeat the motion ... . In particular, the MV-104 form, which was prepared and signed by the defendant, expressly stated that the defendant was proceeding to make a left turn onto eastbound Park Avenue when the collision occurred." ***Lebron v. Mensah*, 2018 N.Y. Slip Op. 03521, Second Dept 5-16-18**

REAL ESTATE.

LAW REGARDING SALE OF PROPERTY OWNED BY TENANTS BY THE ENTIRETY WHERE ONLY ONE SPOUSE SIGNS THE CONTRACT EXPLAINED.

In an action involving two contracts for the sale of property owned by tenants by the entirety, one contract with plaintiff and one with defendant, the Second Department determined questions of fact precluded defendant's motion for summary judgment. The court explained the law applicable to the sale of property owned by tenants by the entirety by only one of the spouses: "Where spouses own property as tenants by the entirety, a conveyance by one spouse, to which the other has not consented, cannot bind the entire fee or impair the nonconsenting spouse's survivorship interest ... . Thus, generally, where property is held by spouses as tenants by the entirety, an agreement of sale signed by only one spouse is ineffective to constitute an agreement to convey full title, unless it is shown, inter alia, that the nonsigning spouse had complete knowledge of and actively participated in the transaction, that he or she ratified the purchase option after the fact, or that the signing spouse was authorized in writing to act as the nonsigning spouse's agent in the matter ... . However, each spouse may sell, mortgage, or otherwise encumber his or her rights in the property, subject to the continuing rights of the other ...". ***Carpenter v. Crespo*, 2018 N.Y. Slip Op. 03501, Second Dept 5-16-18**

REAL ESTATE, REAL PROPERTY LAW, AGENCY, CORPORATION LAW.

FORMER PRESIDENT OF THE CORPORATION WHICH OWNED AN APARTMENT BUILDING HAD THE APPARENT AUTHORITY TO SELL THE BUILDING, BUYER WAS A BONA FIDE PURCHASER.

The Second Department determined that the ostensible president the corporation (Lowbet) which owned an apartment building, Liu, had the apparent authority to sell the building, and the buyer, 44th Street Realty, was a bona fide purchaser. Although Liu had been removed as president and replaced by petitioner, that information was not provided to the Department of State Division of Corporations: "The petitioner and Liu married in 1985 and then separated in 1995, after which the petitioner moved to China. Since 1995, Liu has run the day-to-day business of Lowbet, with the petitioner's knowledge and consent. In August 2006, Liu was removed as president of Lowbet and the petitioner and his son were named president and vice president, respectively. However, the petitioner did not update this information with the Department of State Division of Corporations. 44th Street Realty established, prima facie, that the subject deed was only voidable, not void ab initio, since the petitioner alleged that Liu's signature and authority to convey were acquired by fraudulent means, but did not allege that Liu's signature was forged ... . 44th Street Realty also established, prima facie, that Liu was cloaked with apparent authority to sign the deed on behalf of Lowbet. The petitioner had condoned Liu's unfettered control and operation of the day-to-day business of Lowbet, which gave rise to the appearance that Liu possessed authority to enter into a real estate transaction on behalf of Lowbet ... . Under the circumstances, 44th Street Realty's reliance upon the appearance of Liu's authority was reasonable ... . Further, 44th Street Realty made a prima facie showing that it was a bona fide purchaser by demonstrating that it had paid valuable consideration for the property, in good faith and without knowledge of any alleged fraud by Liu ... . Real Property Law §§ 266 and 291 protect the title of a bona fide purchaser for value who lacks knowledge of fraud by the grantor or affecting the grantor's title ... . 44th Street Realty's submissions established that it had no knowledge of facts that would lead a reasonably prudent purchaser to inquire about possible fraud ...". ***Matter of Shau Chung Hu v. Lowbet Realty Corp.*, 2018 N.Y. Slip Op. 03529, Second Dept 5-16-18**

THIRD DEPARTMENT

CIVIL PROCEDURE.

THE TIME PERIOD FOR LEARNING THE IDENTITY OF DEFENDANTS DOES NOT BEGIN TO RUN WHEN A PLAINTIFF RETAINS COUNSEL, HERE THE ACTION WAS COMMENCED WHEN COUNSEL WAS RETAINED THREE DAYS BEFORE THE EXPIRATION OF THE STATUTE OF LIMITATIONS, THE COMPLAINT NAMED DEFENDANTS AS 'JOHN DOES' WHO WERE NOT IDENTIFIED UNTIL AFTER THE STATUTE HAD RUN, THE ACTION WAS DEEMED TIME-BARRED.

The Third Department determined the time period for substituting a named defendant for a "John Doe" in a complaint does not begin to run when plaintiff retains counsel. Plaintiff alleged an overhead door fell on him and brought a negligence and products liability action naming "John Doe" defendants. The action was commenced when plaintiff retained counsel on August 1, 2014, three days before the statute of limitations expired. The attorney acted quickly by sending an investigator to the accident scene. The named defendants were added to amended complaints after the statute had run. The Third Department held Supreme Court correctly dismissed the action as time-barred: "A plaintiff who is unaware of the name or identity of a defendant may proceed against such defendant by designating so much of his or her name as is known (see CPLR 1024) and must show that he or she made timely and diligent efforts to ascertain the identity of an unknown defendant prior to the expiration of the statute of limitations... . In the absence of evidence that a plaintiff made the requisite timely and diligent efforts to identify an unknown defendant, he or she may not take advantage of the procedural mechanism provided by CPLR 1024 ... . … There is no explanation as to why plaintiff waited so long to retain counsel or any indication that he was somehow precluded from doing so prior to the expiration of the statute of limitations. Moreover, contrary to plaintiff's assertion, preaction discovery under CPLR 3102 (c) is not limited to those parties who appear with counsel. … [W]e reject plaintiff's assertion that whether he exercised due diligence must be measured from the point when he retained counsel ... . Plaintiff's additional contention that the duty to exercise due diligence for purposes of CPLR 1024 commences when litigation is reasonably foreseeable is improperly raised for the first time on appeal ... and, in any event, is without merit." ***Walker v. Glaxosmithkline, LLC*, 2018 N.Y. Slip Op. 03581, Third Dept 5-17-18**

CRIMINAL LAW.

NO INDICATION IN THE INDICTMENT OR THE ALLOCUTION THAT THE THREE 'POSSESSION OF A SEXUAL PERFORMANCE BY A CHILD' OFFENSES TOOK PLACE AT DIFFERENT TIMES OR LOCATIONS, CONSECUTIVE SENTENCES NOT AUTHORIZED.

The Third Department determined, based upon the wording of the indictment, the defendant should not have been given consecutive sentences the three counts of possession of a sexual performance of a child. The indictment alleged the offenses occurred at the same time and place: "... [T]he imposition of consecutive sentences for possession of a sexual performance by a child convictions were not authorized because his conduct amounted to a single criminal act ... . 'It is well settled that sentences are authorized to be imposed consecutively if multiple offenses are committed through separate and distinct acts, even though they may be part of a single transaction'... . To justify consecutive sentences in this context, the People were required to establish, either through the indictment or the facts adduced during the allocution, that defendant came into possession of the images at separate and distinct times ... . Here, the counts in the indictment to which defendant pleaded guilty contained identical language as to the time, date and place of possession. Inasmuch as neither the indictment nor the facts adduced during the allocution establish that the digital images came into defendant's possession at separate and distinct times, consecutive sentences were not authorized ...". ***People v. Stein*, 2018 N.Y. Slip Op. 03566, Third Dept 5-17-18**

LIEN LAW.

NOTICE SENT TO THE OWNER AND LIENHOLDER OF A CAR BY THE TOW SERVICE WHICH WAS STORING THE CAR DID NOT MEET THE REQUIREMENTS OF THE LIEN LAW, THEREFORE THE STORAGE FEES COULD NOT BE COLLECTED BY THE TOW SERVICE.

The Third Department determined the tow service's notice to the owner and lienholder of a car that was towed and then stored did not comply with the Lien Law and, therefore, no storage fees were due to the tow service: "... [R]espondent's purported lien for storage was invalid. Pursuant to Lien Law § 184 (5), where an entity seeks to assert a lien for the storage of a motor vehicle that it has towed and stored at the direction of a law enforcement agency, such entity must 'mail by certified mail, return receipt requested, a notice . . . to every person who has perfected a security interest in such motor vehicle or who is listed as a lienholder upon the certificate of title . . . within [20] days of the first day of storage.' Under the statute, which must be strictly construed ... , the 'notice shall include the name of the [entity] providing storage of the motor vehicle, the amount being claimed for such storage, and [the] address and times at which the motor vehicle may be recovered'... . In addition, '[t]he notice shall also state that the [entity] providing such notice claims a lien on the motor vehicle and that such motor vehicle shall be released upon full payment of all storage charges accrued on the date the motor vehicle is released'... . Here, the notice — which was mailed to petitioner by certified mail, return receipt requested — included respondent's

name, address and regular business hours, as well as the total amount being claimed for storage. The notice further stated that the vehicle would 'be released to the owner thereof, or his or her lawfully designed [sic] representative upon full payment of all charges accrued to the date that the said motor vehicle is released.' Fatally, however, the notice did not state, as required, that respondent "claim[ed] a lien" on the vehicle ... . The word 'lien' does not appear in the notice at all. Moreover, we are not persuaded by respondent's contention that the requirement was satisfied by the language indicating that the vehicle would be released 'upon full payment of all charges.' Strictly construed, Lien Law § 184 (5) requires that the notice state both that respondent "claims a lien on the motor vehicle and that such motor vehicle shall be released upon full payment of all storage charges accrued on the date the motor vehicle is released" ...". ***Matter of Nissan Motor Acceptance Corp v. All County Towing*, 2018 N.Y. Slip Op. 03583, Third Dept 5-17-18**

UNEMPLOYMENT INSURANCE.

TENDER AGE PT (TAPT), WHICH PROVIDED SUPPLEMENTAL EDUCATION SERVICES TO THE DEPARTMENT OF EDUCATION, WAS NOT THE EMPLOYER OF CLAIMANT, A BEHAVIORAL ANALYST THERAPIST WHO RECEIVED WORK ASSIGNMENTS FROM TAPT.

The Third Department, reversing the Unemployment Insurance Appeal Board, determined that Tender Age PT (TAPT), which provided supplemental education services to the Department of Education, was not required to make additional unemployment insurance contributions based on remuneration paid to claimant, a behavior analyst therapist who received assignments from TAPT: "TAPT's overall control over important aspects of the service professionals' work is lacking largely because the policies and procedures related thereto are 'dictated by statutes and regulations governing the provision of supplemental educational and related services'... . Indeed, although TAPT collected resumes and interviewed candidates wishing to be placed on its registry, this was primarily for the purpose of insuring that they met the requirements imposed by the Department of Health with regard to certification and licensing. Once candidates became approved service professionals, TAPT offered assignments based upon availability and other criteria, but the service professionals were free to reject an assignment or work for other agencies. If an assignment was accepted, TAPT supplied the service professionals with documentation furnished by the client, including the child's treatment plan and a prescription for the service, as well as other legally mandated documents. The service professionals then worked directly with the child and his or her parent, providing all necessary equipment and materials, and scheduling appointments without any involvement or oversight by TAPT, usually at the child's home, school or day care center. The compensation paid to the service professionals was negotiable, but was limited by the amount that TAPT received from its clients. Although the service professionals prepared daily work logs, as well as periodic status reports, on preprinted forms that they submitted to TAPT, this was done in order to comply with the requirements of TAPT's clients. In accordance with such requirements, they also submitted monthly invoices containing treatment information that TAPT compared with the daily logs. They would not, however, get paid until TAPT received payment from its clients." ***Matter of Giordano (Commissioner of Labor)*, 2018 N.Y. Slip Op. 03573, Third Dept 5-17-18**

REAL PROPERTY.

OWNERS OF PROPERTY ABUTTING A ROADWAY CANNOT PROHIBIT PARKING ALONG THE ROADWAY UNLESS PARKED CARS IMPEDE ACCESS TO THE OWNERS' PROPERTY.

The Third Department determined that plaintiffs, who owned property abutting a road, could not prohibit defendants from parking along the road unless plaintiffs' access to the property was blocked by the defendants: "Supreme Court properly ruled that plaintiffs cannot prevent others from parking their vehicles within the highway easement on the road front property along the shoulder of Route 34, unless those individuals unreasonably interfere with plaintiffs' right of ingress and egress ...". ***Augusta v. Kwortnik*, 2018 N.Y. Slip Op. 03574, Third Dept. 5-17-18**

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