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FIRST DEPARTMENT

CONSUMER LAW, FRAUD.

CIVIL ENFORCEMENT COMPLAINT BROUGHT BY THE ATTORNEY GENERAL STATED CAUSES OF ACTION AGAINST DEFENDANT INTERNET SERVICE PROVIDER ALLEGING FRAUDULENT AND DECEPTIVE PRACTICES CONCERNING THE ADVERTISING OF BROADBAND SPEEDS AND ACCESS TO ONLINE CONTENT.

The First Department determined the civil enforcement complaint stated causes of action under the Executive Law and the General Business Law for fraudulent practices in advertising Internet speeds and reliable access to online content: "Defendants make official disclosures about broadband speeds (actual speeds measured according to a testing protocol on the modems of consumers deemed representative) in accordance with the federal rule [Transparency Rule, 47 CFR 8.3]. The complaint alleges that defendants' use of their official disclosures in consumer advertisements is misleading, because other statements in the advertisements give consumers the false impression that the disclosed speeds represent speeds that consumers can expect to experience on their devices, including wireless devices, consistently ... . The Transparency Rule does not preempt state laws 'that prevent fraud, deception and false advertising' ... . The court correctly determined that the complaint's allegations about the advertisements' representations of speeds 'up to' a certain level state a cause of action ... . Issues of fact exist as to whether defendants delivered the advertised speed levels consistently. The court correctly declined to dismiss claims based on allegations about network quality and reliability on the ground that some of the language in the advertisements is mere puffery, because other statements in the advertisements are not mere puffery and are actionable ...". ***People v. Charter Communications, Inc.*, 2018 N.Y. Slip Op. 04644, First Dept 6-21-18**

CONTRACT LAW, UNIFORM COMMERCIAL CODE.

PURPORTED ORAL AGREEMENT TO PURCHASE ART WORKS BY PLAINTIFF PETER BEARD BARRED BY THE STATUTE OF FRAUDS, PAYMENTS ALLEGEDLY MADE TO PLAINTIFF WERE NOT UNEQUIVOCALLY REFERABLE TO THE ALLEGED CONTRACT.

The First Department, over a detailed, comprehensive two-justice dissent, determined that a purported oral agreement to sell works of art by Peter Beard was barred by the statute of frauds. Plaintiffs' motion for summary judgment on the causes of action for declaration, conversion and replevin was properly granted. Plaintiff Peter Beard was properly declared to be the sole owner of the art works. The dissent includes a detailed rendition of the facts which is not summarized here: "The motion court correctly found that the works of art at issue were goods, and thus that the purported oral agreement to sell them was barred by the statute of frauds (see UCC 2-201...). Defendants' wire transfers to a third party, who then purportedly remitted the funds to plaintiffs, were not unequivocally referable to the agreement alleged, such as to deem the agreement partially completed and outside the statute of frauds ... . Alternative explanations, including that the funds were for financing other projects involving the third party, defeat such claims ...". ***Beard v. Chase*, 2018 N.Y. Slip Op. 04636, First Dept 6-21-18**

PERSONAL INJURY.

ALLEGATION THAT CHAIN OVER WHICH PLAINTIFF TRIPPED AND FELL WAS OPEN AND OBVIOUS RELATES TO PLAINTIFF'S COMPARATIVE NEGLIGENCE WHICH DOES NOT PRECLUDE SUMMARY JUDGMENT IN PLAINTIFF'S FAVOR.

The First Department determined plaintiff was entitled to summary judgment in this slip and fall case. Plaintiff tripped over a yellow plastic chain lying on the ground. Because plaintiff need not show freedom from comparative fault, the allegation that the chain was open and obvious did not preclude summary judgment: "... [P]laintiff was not required to demonstrate his own freedom from comparative negligence to be entitled to summary judgment as to defendant's liability (see Rodriguez v. City of New York, ___ NY3d ___, 2018 N.Y. Slip Op. 02287 [2018]). For this reason, we also reject defendant's argument that the chain on which plaintiff tripped was open and obvious, since that issue too is relevant to comparative fault and does not preclude summary resolution of the issue of defendant's liability ... " ***Derix v. Port Auth. of N.Y. & N.J.*, 2018 N.Y. Slip Op. 04507, First Dept 6-19-18**

PERSONAL INJURY, EVIDENCE.

FAILURE TO PRESERVE VIDEO WHICH WOULD HAVE SHOWN THE CONDITION OF THE FLOOR PRIOR TO PLAINTIFF'S SLIP AND FALL JUSTIFIED THE AWARD OF SUMMARY JUDGMENT TO PLAINTIFF.

The First Department determined summary judgment was properly granted to the plaintiff in this slip and fall case because the defendant store did not preserve video which would have shown the condition of the floor prior to the fall: "Although it was demanded within days of plaintiff's slip and fall, defendants failed to preserve a video recording of its store that depicted the area of plaintiff's fall prior to it occurring. Instead, a store employee selectively edited the video to retain only that portion showing approximately 30 seconds prior to plaintiff's fall and the fall itself. Without the video recording, plaintiff may be unable to establish the origin of the liquid on the floor that she claims caused her to fall, and thus be unable to establish the requisite notice of the alleged condition ... . Despite a court order and a discovery conference stipulation, defendants failed to explain why the remainder of the video became unavailable." ***Davis v. Pathmark*, 2018 N.Y. Slip Op. 04656, First Dept 6-21-18**

PERSONAL INJURY, UTILITIES.

PLAINTIFF'S DECEDENT'S RECKLESSNESS WAS THE SOLE LEGAL CAUSE OF HER DEATH BY ELECTROCUTION BY DOWNED POWER LINES

The First Department determined plaintiff's decedent's recklessness was the sole legal cause of her death. During Superstorm Sandy plaintiff's decedent went outside, barefoot, to photograph downed power lines and was electrocuted: "The decedent was killed during Superstorm Sandy when she twice ventured outside her home to photograph downed power lines, and was electrocuted when one of the lines came in contact with her ankle. Her friend, who witnessed the incident, provided statements attesting to the fact that decedent left her home to investigate whether there was a fire, was shocked when she touched a metal gate in her front yard, returned to her home, and then exited the house again, barefoot this time, in order to photograph the scene. Decedent's friend stated that he warned her repeatedly to stay away from the live wires and to get back inside, but she disregarded his warnings. Defendants' motion for summary judgment was properly granted since decedent's recklessness in approaching live power wires in the midst of a major storm in order to take photographs was the sole legal cause of her death... . Plaintiffs contend that defendants were negligent in failing to properly maintain the power wires, adequately prepare for the storm, and respond rapidly enough to the notice of the emergency situation resulting from the downed wires. However, even if defendants were negligent, decedent's recklessness was a superseding cause of her death ...". ***Abraham v. Consolidated Edison Co. of N.Y., Inc.*, 2018 N.Y. Slip Op. 04517, First Dept 6-19-18**

REAL ESTATE.

EASEMENT COVENANT CONCERNING A THREE INCH ENCROACHMENT WAS A PERMITTED EXCEPTION UNDER THE REAL ESTATE PURCHASE AGREEMENT AND COULD NOT SERVE AS A GROUND FOR DEMONSTRATING SELLER WAS NOT READY, WILLING AND ABLE TO SELL THE PROPERTY ON THE TIME OF THE ESSENCE DATE, SELLER ENTITLED TO SECURITY DEPOSIT AND ATTORNEY'S FEES.

The First Department determined defendant buyer failed to demonstrate the seller was not ready, willing and able to close on the time-of-the-essence date. The seller was entitled to keep the deposit. The buyer claimed that an easement-covenant addressing a three inch encroachment was an encumbrance which violated the purchase agreement. The court held that the encroachment was a "permitted exception" under the purchase agreement: "... [B]uyer claimed that seller had not been ready, willing, and able to close because the property had an easement-covenant that had not been removed and therefore seller's representation in the contract that there would be no encumbrances on the property at closing was untrue. The easement-covenant, which allowed the subject property to encroach three inches onto neighboring property, was disclosed in a title report issued eight months prior to the scheduled closing. ... [D]efendant buyer failed to demonstrate that it had a lawful basis for refusing to close since the easement-covenant, which benefitted the property and was evident in the title survey, was a 'permitted exception' as defined in schedule 1.21 of the contract for sale. Thus, buyer materially breached the contract when it failed to appear on the time-is-of-the-essence closing date, and, under the limited amendment to the Contract of Sale, seller is entitled to retain the deposit as liquidated damages ... Pursuant to the contract, plaintiff seller is also entitled to recover its attorneys' fees for both the proceedings before Supreme Court and this Court, to be determined, as directed by the court, by a referee." ***45 Renwick St., LLC v. Lionbridge, LLC*, 2018 N.Y. Slip Op. 04641, First Dept 6-21-18**

SECOND DEPARTMENT

ACCOUNT STATED, ATTORNEYS.

ATTORNEY ENTITLED TO THE REMAINDER OF HER FEE UNDER AN ACCOUNT STATED THEORY.

The Second Department determined plaintiff attorney was entitled to her fees from the defendant client under an account stated theory and the defendant's counterclaim for legal malpractice was properly dismissed: "The plaintiff represented the defendant from January 2009 through June 2011, and periodically sent invoices to the defendant for legal services ren-

dered in accordance with a retainer agreement executed by the defendant. The defendant received the invoices and made payments with respect thereto through October 22, 2010. Thereafter, he made no further payments to the plaintiff. ... ' An account stated is an agreement between parties, based upon their prior transactions, with respect to the correctness of the account items and the specific balance due' ... . 'Although an account stated may be based on an express agreement between the parties as to the amount due, an agreement may be implied where a defendant retains bills without objecting to them within a reasonable period of time, or makes partial payment on the account' ... . The 'agreement' at the core of an account stated is independent of the underlying obligation between the parties ...". ***Holtzman v. Griffith*, 2018 N.Y. Slip Op. 04540, Second Dept 6-20-18**

CIVIL PROCEDURE.

DEFENDANT'S MOTION TO VACATE A DEFAULT JUDGMENT SHOULD HAVE BEEN GRANTED, DEFENDANT WAS NOT SERVED WITH THE SUMMONS BY PERSONAL DELIVERY AND MOVED TO VACATE WITHIN ONE YEAR OF LEARNING OF THE SUIT.

The Second Department, reversing Supreme Court, determined defendant's motion to vacate a default judgment should have been granted. Defendant had not changed the address for service on file with the Secretary of State and did not receive the summons and complaint. Plaintiff knew where defendant's place of business was and had communicated with defendant at that address: "A defendant who has been served with a summons other than by personal delivery may be allowed to defend the action within one year after he or she obtains knowledge of entry of the judgment upon a finding of the court that the defendant did not personally receive notice of the summons in time to defend and has a potentially meritorious defense (see CPLR 317 ...). ... There is no evidence in the record that the defendant or its agent received actual notice of the summons, which was delivered to the Secretary of State, in time to defend this action ... . Although the defendant did not explain why it failed to update its address with the Secretary of State, 'there is no necessity for a defendant moving pursuant to CPLR 317 to show a reasonable excuse' for its delay' ... . [T]hrough the affidavit of the defendant's principal averring that the plaintiff failed to comply with the terms of the parties' oral lease, the defendant met its burden of demonstrating the existence of a potentially meritorious defense ...". ***Benchmark Farm, Inc. v. Red Horse Farm, LLC*, 2018 N.Y. Slip Op. 04522, Second Dept 6-20-18**

CIVIL PROCEDURE.

PARTY MOVING TO PRECLUDE THE OTHER PARTY FROM PRESENTING EVIDENCE BASED UPON VIOLATIONS OF DISCOVERY ORDERS HAS THE BURDEN OF PROVING WILLFUL OR CONTUMACIOUS CONDUCT, BURDEN NOT MET HERE.

The Second Department, reversing Supreme Court, determined defendant's motion to preclude the plaintiff from presenting evidence at trial should not have been granted. Plaintiff had failed to provide discovery and failed to appear for her court ordered deposition three times. A so-ordered stipulation was entered requiring plaintiff to be deposed on or before March 16, 2015, at a time and place to be agreed upon. Defendant moved to preclude when plaintiff did not appear on March 16, 2015. The court noted that no date for the deposition had been agreed to and therefore preclusion was not warranted: "When a litigant fails to comply with the terms of a conditional order of preclusion, the terms of that order become absolute ... . However, the burden of establishing noncompliance rests with the party seeking preclusion ... . Because the remedy of preclusion is the functional equivalent of striking a party's pleading... , it may not be granted where the party can demonstrate a justifiable excuse and a potentially meritorious cause of action or defense ... . Here, the so-ordered stipulation did not set a time, date, or place for the plaintiff's deposition, instead stating merely that the plaintiff's deposition was to be held 'on or before' March 16, 2015, 'at a time and location to be agreed upon.' In light of this, the defendants' minimal assertion that the plaintiff failed to appear, which relied on the hearsay assertion of an unnamed employee of defense counsel, was insufficient to demonstrate that the plaintiff willfully and contumaciously violated the so-ordered stipulation ... . Similarly, the defendants did not allege in their motion that the plaintiff had failed to provide the outstanding written discovery that was included in the so-ordered stipulation. Therefore, since the defendants failed to demonstrate that the plaintiff knew when and where to appear for her deposition, there was no evidence of ongoing willful or contumacious conduct ...". ***Cannon v. 111 Fulton St. Condominium, Inc.*, 2018 N.Y. Slip Op. 04523, Second Dept 6-20-18**

CIVIL PROCEDURE.

ALTHOUGH SUPREME COURT PROPERLY PRECLUDED DEFENDANT FROM PRESENTING EVIDENCE AT TRIAL BECAUSE OF DISCOVERY ORDER VIOLATIONS, SUPREME COURT ABUSED ITS DISCRETION BY STRIKING DEFENDANT'S ANSWER.

The Second Department determined defendant (Koonin), the owner/operator of a car involved in an accident with plaintiff, had violated discovery orders and was guilty of willful or contumacious conduct warranting sanction. Supreme Court both struck Koonin's answer and precluded Koonin from submitting any evidence at trial. The Second Department held that striking the answer was an abuse of discretion: " 'The nature and degree of a penalty to be imposed under CPLR 3126 for discovery violations is addressed to the court's discretion' ... . 'The general rule is that the court will impose a sanction

commensurate with the particular disobedience it is designed to punish and go no further than that' ... . This Court is vested with corresponding power to substitute its own discretion for that of the motion court, even in the absence of abuse... . In light of Koonin's failure to comply with multiple court orders and so-ordered stipulations directing him to appear for the EBT, the Supreme Court properly concluded that Koonin engaged in willful and contumacious conduct... . However, under the circumstances, it was an improvident exercise of discretion to grant those branches of the motion and cross motion which were to strike Koonin's answer in light of the fact that the court also granted those branches of the motion and cross motion which were to preclude Koonin from offering any evidence at the time of trial ...". ***Chowdhury v. Hudson Val. Limousine Serv., LLC*, 2018 N.Y. Slip Op. 04526, Second Dept 6-20-18**

CIVIL PROCEDURE.

STATUTORY CRITERIA OF CPLR 3216 NOT MET, COURT SHOULD NOT HAVE DISMISSED ACTION FOR NEGLECT TO PROSECUTE.

The Second Department, reversing Supreme Court, determined the statutory criteria in CPLR 3216 were not met and the court should not have dismissed the action for neglect to prosecute: "The Supreme Court issued a compliance conference order dated December 3, 2014, directing the plaintiff to serve and file a note of issue on or before May 15, 2015, and warning that the failure to do so 'shall result in dismissal of the action for unreasonably neglecting to proceed, without further notice.' ... 'A court may not dismiss an action based on neglect to prosecute unless the statutory preconditions to dismissal, as articulated in CPLR 3216, are met' ... . 'Effective January 1, 2015, the Legislature amended, in several significant respects, the statutory preconditions to dismissal under CPLR 3216' ... . One such precondition is that where a written demand to resume prosecution of the action is made by the court, as here, "the demand shall set forth the specific conduct constituting the neglect, which conduct shall demonstrate a general pattern of delay in proceeding with the litigation' ... . Here, the compliance conference order did not set forth any specific conduct constituting neglect by the plaintiff. Accordingly, since one of the statutory preconditions to dismissal was not met, the court should not have directed dismissal of the complaint pursuant to CPLR 3216 ...". ***Goetz v. Public Serv. Truck Renting, Inc.*, 2018 N.Y. Slip Op. 04534, Second Dept 6-20-18**

CIVIL PROCEDURE, APPEALS.

MOTION FOR A CHANGE OF VENUE ON DISCRETIONARY GROUNDS WAS MADE IN THE WRONG COUNTY, ISSUE PROPERLY HEARD ON APPEAL ALTHOUGH NOT RAISED BELOW.

The Second Department, reversing Supreme Court, determined the motion for a change of venue on discretionary grounds was not brought in the correct county and should not have been granted. The issue was properly before the appellate court despite not having been raised below: "It is undisputed that, pursuant to CPLR 503(a), venue of the Ulster County Action is properly in Ulster County, where Bacci, one of the Ulster plaintiffs, resided at the time the action was commenced ... . A motion to change venue on discretionary grounds, unlike motions made as of right, must be made in the county in which the action is pending, or in any county in that judicial district, or in any adjoining county (see CPLR 2212[a]...). The Fenstermen parties, therefore, were required to make a motion pursuant to CPLR 510(3) either in Ulster County, where the Ulster County Action was pending, in another county in the 3rd Judicial District, or in a county contiguous to Ulster County (see CPLR 2212[a] ...). Since Ulster County and Nassau County are not contiguous, and Nassau County is not in the 3rd Judicial District, the Fensterman parties' motion to change venue pursuant to CPLR 510(3) based on discretionary grounds was improperly made in the Supreme Court, Nassau County ... . Although not argued by the parties in the Supreme Court, Nassau County, but argued on appeal, we reach this issue in the exercise of our discretion because it appears on the face of the record and could not have been avoided or explained if raised in the Supreme Court ...". ***Fensterman v. Joseph*, 2018 N.Y. Slip Op. 04532, Second Dept 6-20-18**

CONTRACT LAW, CIVIL PROCEDURE, COOPERATIVES.

CONTINUING WRONG DOCTRINE TOLLED THE STATUTE OF LIMITATIONS IN THIS BREACH OF CONTRACT AND BREACH OF WARRANTY OF HABITABILITY ACTION BASED UPON THE ALLEGED FAILURE TO REPAIR DAMAGE TO A COOPERATIVE APARTMENT.

The Second Department, modifying Supreme Court, determined the continuing wrong doctrine operated to toll the statute of limitations in this breach of contract/breach of warranty of habitability action involving damage to plaintiff's cooperative apartment during a 2004 renovation. Plaintiff alleged the damage had never been repaired and brought his action in 2016. The Second Department held that the continuing wrong doctrine tolled the statute of limitations but damages were recoverable for only the six years preceding the commencement of the action: "The continuing wrong doctrine 'is usually employed where there is a series of continuing wrongs and serves to toll the running of a period of limitations to the date of the commission of the last wrongful act' ... . 'In contract actions, the doctrine is applied to extend the statute of limitations when the contract imposes a continuing duty on the breaching party' ... . Here, the plaintiff alleged that the damage to his unit persisted and had not been repaired, and that such breach constituted a continuing breach of the defendants' contractual duty to keep the building in good repair and to provide habitable premises ... . However, where, as here, the sole rem-

edy sought for the alleged continuing contractual breaches is monetary damages, the plaintiff's recovery must be limited to damages incurred within the six years prior to commencement of the action ...". ***Garron v. Bristol House, Inc.*, 2018 N.Y. Slip Op. 04533, Second Dept 6-20-18**

CRIMINAL LAW.

CRIME OF ATTEMPTED ASSAULT IN THE SECOND DEGREE IS A LEGAL IMPOSSIBILITY.

The Second Department vacated defendant's conviction of attempted assault in the second degree, noting that the crime is a legal impossibility: "The crime of attempted assault in the second degree is a legal impossibility (see Penal Law § 120.05[3]; People v. Campbell, 72 NY2d 602, 605...). As correctly conceded by the People, the inclusion of that nonexistent crime in the superior court information constituted a nonwaivable jurisdictional defect, necessitating vacatur of the defendant's conviction of attempted assault in the second degree, vacatur of the sentence imposed thereon, and dismissal of that count of the superior court information ...". ***People v. Jones*, 2018 N.Y. Slip Op. 04565, Second Dept 6-20-18**

CRIMINAL LAW.

THERE WAS GOOD CAUSE FOR THE 31 YEAR DELAY IN INDICTING DEFENDANT FOR MURDER.

The Second Department determined there was good cause for a 31 year delay in indicting the defendant for murder: "Cecil Schiff (hereinafter the decedent) was murdered in September 1980 during a robbery of his apartment. With no eyewitnesses and no match to latent fingerprints that were recovered from the crime scene, the investigation stalled. In 2008, a detective with the New York City Police Department's Latent Print Unit randomly selected the case for fingerprint analysis, and determined that the defendant's fingerprints matched three fingerprints recovered from a jewelry box and two other boxes found in the decedent's bedroom. Further investigation revealed that the defendant, who was a 17-year-old high school student at the time of the murder, was absent from school on the day of the murder. The defendant was arrested and indicted in 2012, more than 31 years after the crime was committed. * * * ... [A] significant amount of the delay was due to a lack of evidence identifying a viable suspect. After the defendant's fingerprints were matched to the fingerprints recovered from the three boxes in the decedent's bedroom, further investigation was conducted. The People had a good-faith basis to wait until they had sufficient evidence to arrest the defendant. Accordingly, we agree with the Supreme Court's determination that the People met their burden of demonstrating good cause for the delay ... . The reasons for the delay establishing the People's good cause, the nature of the crime, and the fact that there was no period of pre-indictment incarceration in connection with this matter outweigh the extent of the delay. The court appropriately balanced the requisite factors in denying the defendant's motion to dismiss the indictment ...". ***People v. Mattison*, 2018 N.Y. Slip Op. 04569, Second Dept 6-20-18**

FORECLOSURE, CIVIL PROCEDURE, APPEALS.

BANK WAS REQUIRED TO GIVE DEFENDANT NOTICE OF ITS MOTIONS FOR AN ORDER OF REFERENCE AND JUDGMENT OF FORECLOSURE BECAUSE DEFENDANT'S DEFAULT OCCURRED MORE THAN A YEAR BEFORE, DEFENDANT'S MOTION TO VACATE SHOULD HAVE BEEN GRANTED, FAILURE OF NOTICE PROPERLY RAISED FOR THE FIRST TIME ON APPEAL.

The Second Department, reversing Supreme Court, determined that plaintiff bank was required to provide notice of its motions for an order of reference and a judgment of foreclosure which were made more than a year after defendant's default. Therefore defendant's motion to vacate the order of reference and judgment of foreclosure should have been granted. The court noted that the failure of notice was properly raised for the first time on appeal: "The defendant was entitled to notice of the plaintiff's motions for an order of reference and for a judgment of foreclosure and sale pursuant to CPLR 3215(g)(1), which provides, in relevant part, that such notice to a defendant who has not appeared is required 'if more than one year has elapsed since the default.' Here, the defendant defaulted in November 2009, and the plaintiff moved for an order of reference in March 2013, more than three years later. Contrary to the plaintiff's contention, the issue of its failure to comply with CPLR 3215(g)(1) may be raised for the first time on appeal ... . The failure to give a party proper notice of a motion deprives the court of jurisdiction to entertain the motion and renders the resulting order void ...". ***Citimortgage, Inc. v. Reese*, 2018 N.Y. Slip Op. 04527, Second Dept 6-20-18**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

QUESTION OF FACT WHETHER LADDERS WERE AVAILABLE, PLAINTIFF FELL WHEN AN INVERTED BUCKET HE WAS STANDING ON TIPPED, PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT IN THIS LABOR LAW § 240(1) ACTION PROPERLY DENIED.

The Second Department determined there was a question of fact whether ladders were available at the work site such that plaintiff did not need to stand on an inverted bucket to install sheetrock. Plaintiff was injured when the bucket tipped and he fell: " 'Under Labor Law § 240(1), owners and general contractors, and their agents, have a nondelegable duty to provide safety devices necessary to protect workers from risks inherent in elevated work sites' ... . 'To prevail on a Labor Law § 240(1) cause of action, a plaintiff must establish that the statute was violated and that the violation was a proximate

cause of his or her injuries' ... . 'Liability under section 240(1) does not attach when the safety devices that plaintiff alleges were absent were readily available at the work site, albeit not in the immediate vicinity of the accident, and plaintiff knew he was expected to use them but for no good reason chose not to do so, causing an accident. In such cases, plaintiff's own negligence is the sole proximate cause of his injury'... . Here, the plaintiff failed to establish his prima facie entitlement to judgment as a matter of law on the issue of liability on the Labor Law § 240(1) cause of action. In support of his motion, the plaintiff submitted transcripts of his deposition, in which he testified that there were ladders and Bakers scaffolds kept on the job site." ***Lorde v. Margaret Tietz Nursing & Rehabilitation Ctr.*, 2018 N.Y. Slip Op. 04542, Second Dept 6-20-18**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

KNEE INJURY CAUSED BY CARRYING A HEAVY STEEL BEAM DOWN STAIRS IS NOT A COVERED ACCIDENT UNDER LABOR LAW § 240(1).

The Second Department, modifying Supreme Court, determined plaintiff's motion for summary judgment on his Labor Law § 240(1) cause of action was properly granted and defendant's (Premier's) motion for summary judgment dismissing the Labor Law § 240(1) cause of action should have been granted. Plaintiff injured his knee carrying a heavy steel beam down some stairs. The court held that the incident was not encompassed by Labor Law § 240(1): "... [T]he plaintiff did not establish his prima facie entitlement to judgment as a matter of law, since he failed to demonstrate that his injury was caused by an elevation-related hazard encompassed by Labor Law § 240(1). The plaintiff's evidence demonstrated that the cause of his injury was the weight of the beam he was carrying. The mere fact that the plaintiff was injured by the weight of a heavy object being lifted or carried does not give rise to liability pursuant to Labor Law § 240(1) ... . The Court of Appeals has 'repeatedly held, implicitly and explicitly, that it is not enough that a plaintiff's injury flowed directly from the application of the force of gravity to an object or person, even where a device specified by the statute might have prevented the accident' ... . Accordingly, the Supreme Court properly denied the plaintiff's cross motion for summary judgment on the issue of liability on the cause of action alleging a violation of Labor Law § 240(1). Premier established its prima facie entitlement to judgment as a matter of law dismissing the Labor Law § 240(1) cause of action through evidence that the plaintiff was injured by the weight of the beam as opposed to an elevation-related risk ...". ***Sullivan v. New York Athletic Club of City of N.Y.*, 2018 N.Y. Slip Op. 04590, Second Dept 6-20-18**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

GENERAL CONTRACTOR DID NOT EXERCISE SUFFICIENT SUPERVISORY CONTROL OVER PLAINTIFF'S WORK TO BE LIABLE UNDER LABOR LAW § 200 OR COMMON LAW NEGLIGENCE.

The Second Department determined plaintiff's knee injury stemming from carrying a heavy beam down stairs was not covered under Labor Law § 240(1). The court further found that defendant general contractor (Talisen) did not exercise sufficient supervisory control over plaintiff's work to be liable under Labor Law § 200 or common law negligence: "Labor Law § 200 codifies the common-law duty imposed on an owner or a general contractor to provide construction site workers with a safe place to work ... . Where a plaintiff's claims implicate the means and methods of the work, an owner or a contractor will not be held liable under Labor Law § 200 unless it had the authority to supervise or control the performance of the work. General supervisory authority to oversee the progress of the work is insufficient to impose liability... . ' A defendant has the authority to control the work for the purposes of Labor Law § 200 when that defendant bears the responsibility for the manner in which the work is performed' ... . If the challenged means and methods of the work are those of a subcontractor, and the owner or contractor exercises no supervisory control over the work, no liability attaches under Labor Law § 200 or the common law ... . In this case, Talisen met its prima facie burden of demonstrating a lack of sufficient supervisory control over the plaintiff's work to subject it to liability under either Labor Law § 200 or common-law negligence. In support of its motion, Talisen presented the deposition testimony of its project superintendent as well as the owner of Premier showing that decisions regarding the means and methods for carrying the beam were the responsibility of Premier. In opposition, the plaintiff failed to raise a triable issue of fact." ***Sullivan v. New York Athletic Club of City of N.Y.*, 2018 N.Y. Slip Op. 04591, Second Dept 6-20-18**

MUNICIPAL LAW, CIVIL PROCEDURE.

PETITIONER WAS REQUIRED TO FILE A NOTICE OF CLAIM PURSUANT TO CPLR 9802 IN AN ACTION SEEKING A DECLARATORY JUDGMENT THAT A LOCAL LAW WAS INVALID, DECLARATORY JUDGMENT CAUSE OF ACTION SHOULD HAVE BEEN DISMISSED.

The Second Department, reversing Supreme Court, determined petitioner's (BT Holdings') cause of action for a declaratory judgment declaring a local law invalid should have been dismissed because petitioner did not file a notice of claim as required by CPLR 9802: "Contrary to BT Holdings' contention, the notice of claim requirements of CPLR 9802 apply to the causes of action for declaratory relief ...". ***Matter of BT Holdings, LLC v. Village of Chester*, 2018 N.Y. Slip Op. 04544, Second Dept 6-20-18**

MUNICIPAL LAW, PERSONAL INJURY.

APPLICATION FOR LEAVE TO FILE A LATE NOTICE OF CLAIM SHOULD HAVE BEEN GRANTED, ALTHOUGH THE EXCUSE WAS NOT REASONABLE, THE NOTICE WAS ONLY TWO WEEKS LATE AND THERE WAS NO SHOWING DEFENDANT WAS PREJUDICED.

The Second Department, reversing Supreme Court, determined petitioner's application for leave to file a late notice of claim in this sidewalk slip and fall case should have been granted. Petitioner's counsel served a timely notice on the city but the abutting owner was the NYC Housing Authority (NYCHA). The notice was served on the NYCHA two weeks after the expiration of the 90-day period: "... [W]hile the petitioner's counsel's error concerning the identity of the responsible public corporation does not provide a reasonable excuse for the delay in giving notice ... , the absence of a reasonable excuse is not, standing alone, fatal to the petitioner's application ... . Notably, considering that the petitioner's application was made approximately two weeks after the expiration of the 90-day period, NYCHA acquired actual knowledge of the essential facts constituting the claim within a 'reasonable time' after the expiration of the 90-day period (General Municipal Law § 50-e[5]...). Moreover, the petitioner met her initial burden of showing that the late notice will not substantially prejudice NYCHA, thereby requiring NYCHA 'to rebut that showing with particularized evidence' ... . NYCHA's conclusory assertion of substantial prejudice was insufficient to rebut the petitioner's showing." ***Matter of Ramos v. New York City Hous. Auth.*, 2018 N.Y. Slip Op. 04547, Second Dept 6-20-18**

MUNICIPAL LAW, PERSONAL INJURY, IMMUNITY.

COMPLAINT STATED A NEGLIGENCE CAUSE OF ACTION AGAINST THE TOWN STEMMING FROM THE SHOOTING DEATH OF PLAINTIFF'S DECEDENT BY HER LIVE-IN COMPANION, THE COMPLAINT ALLEGED A SPECIAL RELATIONSHIP BETWEEN THE TOWN AND PLAINTIFF'S DECEDENT AND THE TOWN DID NOT DEMONSTRATE THAT GOVERNMENTAL IMMUNITY APPLIED AS A MATTER OF LAW.

The Second Department, in a comprehensive and informative analysis, determined plaintiff had stated a negligence cause of against the town for the shooting death of plaintiff's decedent, Nigro. The town police had responded to Nigro's residence where she told the police her live-in companion, Groesbeck, had assaulted her. She also told the police Groesbeck, a former New Jersey police officer, had an unlicensed handgun. The police did not arrest Groesbeck, but took possession of the handgun. The police later returned the handgun to Groesbeck who subsequently shot and killed Nigro with it. The Second Department found that the complaint adequately alleged a special relationship between Nigro and the town, and further found that the town did not demonstrate the doctrine of governmental immunity applied as matter of law: "... [C]onstruing the complaint liberally and according the plaintiff the benefit of every possible favorable inference, it was sufficient to allege the existence of a special relationship between the Town and Nigro. The complaint adequately alleged 'direct contact' between the agents of the Town and Nigro ... , and that the Town police department undertook 'through promises or actions' an affirmative duty, on behalf of Nigro, to safeguard Groesbeck's handgun ... . In addition, the complaint adequately alleged circumstances indicating that the Town, through its agents, knew that the return of the handgun to Groesbeck 'could lead to harm' ... . The Town's evidentiary submissions failed to 'utterly refute' these factual allegations as a matter of law ... . [T]he complaint was also sufficient to allege Nigro's 'justifiable reliance' on the Town's affirmative undertaking to safeguard Groesbeck's handgun ... . * * * ... [A] factfinder could reasonably conclude that Groesbeck's use of the allegedly illegal handgun to harm Nigro was a 'foreseeable consequence of the situation created by the [Town's] negligence' ... . * * * The issue of whether a defendant is entitled to governmental immunity is distinct from the issue of whether a special duty exists in a particular case... . The doctrine of governmental immunity refers to 'an affirmative defense on which [a defendant] bears the burden of proof' ... . * * * Even assuming that the allegedly negligent act of returning the handgun was discretionary in nature, it cannot be said, as a matter of law, that 'the discretion possessed by [the Town] was in fact exercised' ... , or that any such exercise of discretion was 'in compliance with the municipality's procedures' ...". ***Santaiti v. Town of Ramapo*, 2018 N.Y. Slip Op. 04584, Second Dept 6-20-18**

PERSONAL INJURY.

PLAINTIFF INJURED WHEN LAWN CHAIR SANK INTO A HOLE CONCEALED BY GRASS, QUESTION OF FACT WHETHER LANDOWNER HAD ACTUAL NOTICE OF THE CONDITION.

The Second Department determined defendant property owner's motion for summary judgment should not have been granted. Plaintiff was injured when she sat down in a lawn chair which sank into a hole concealed by grass: "Landowners have a duty to maintain their property in a reasonably safe condition under all of the circumstances, including the likelihood of injury to others, the seriousness of the potential injuries, and the burden of avoiding the risk... . Contrary to the defendants' contention, viewing the evidence in the light most favorable to the plaintiff, the defendants failed to demonstrate, prima facie, that the alleged concealed hole in the lawn was a 'naturally occurring topographic condition,' inherent in the nature of the property, that the defendants 'could not reasonably be expected to remedy' ... . The defendants established their prima facie entitlement to judgment as a matter of law dismissing the complaint by demonstrating, prima facie, that they did not create the allegedly dangerous condition or have actual or constructive notice of it prior to the subject acci-

dent... . However, in opposition, the plaintiff raised a triable issue of fact, at least, as to whether the defendants had actual notice of the condition prior to the accident." ***Mustafaj v. Macri*, 2018 N.Y. Slip Op. 04554, Second Dept 6-20-18**

PERSONAL INJURY, LANDLORD-TENANT.

TENANT WAS INJURED TRYING TO MOVE A HEAVY RADIATOR THAT HAD BEEN LEFT OUTSIDE HIS APARTMENT FOR MONTHS, DEFENDANT LANDLORD'S MOTION FOR SUMMARY JUDGMENT CLAIMING PLAINTIFF'S CONDUCT WAS THE SOLE PROXIMATE CAUSE OF THE ACCIDENT WAS PROPERLY DENIED.

The Second Department determined defendant landlord's motion for summary judgment in this negligence action by a tenant was properly denied. Plaintiff was injured attempting to move a heavy radiator that was in the common area outside his apartment. Plaintiff's family members had complained that the radiator obstructed the path from the apartment to the staircase, but the radiator had remained there for months: "... [T]he defendant landlord moved for summary judgment dismissing the complaint insofar as asserted against it, contending that the plaintiff's conduct was the sole proximate cause of the accident. ... The defendant landlord failed to establish, prima facie, that it was not foreseeable that the plaintiff would attempt to move the heavy radiator and that the plaintiff's conduct constituted a superseding and intervening act which severed any nexus between the defendant landlord's alleged negligence and the plaintiff's injuries ...". ***Munoz v. Kiryat Stockholm, LLC*, 2018 N.Y. Slip Op. 04552, Second Dept 6-20-18**

REAL ESTATE.

DEFENDANT SELLER DID NOT DEMONSTRATE PLAINTIFF BUYER COULD NOT BE READY, WILLING AND ABLE TO CLOSE ON THE PROPERTY BY POINTING TO REQUIREMENTS IN THE COMMITMENT LETTER, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT IN THIS SPECIFIC PERFORMANCE ACTION PROPERLY DENIED.

The Second Department determined the defendant seller did not demonstrate the plaintiff buyer would not have been ready, willing and able to close on the property in this specific performance action. Pointing to the requirements of the plaintiff's commitment letter was not enough to warrant summary judgment in defendant's favor: "Even when a seller repudiates a contract, the buyer asserting a cause of action for specific performance or to recover damages for breach of contract must demonstrate that he or she was ready, willing, and able to perform... . As the movant on a motion for summary judgment, however, it was the defendant's burden to demonstrate the absence of any issues of fact and make a prima facie showing that the plaintiff would not and could not perform ... . Here, the defendant did not meet its prima facie burden. The defendant relied solely upon the nonconforming commitment letter, which does not conclusively demonstrate that the plaintiff would not have been able to satisfy the conditions prior to or at the closing." ***Mendoza v. Sterling Props., Inc.*, 2018 N.Y. Slip Op. 04543, Second Dept 6-20-18**

REAL PROPERTY, CIVIL PROCEDURE.

PLAINTIFFS' MOTION FOR LEAVE TO REPLEAD WITH AN AMENDED COMPLAINT ALLEGING DEFENDANTS' PLANTING AND WATERING ON DEFENDANTS' SIDE OF PLAINTIFFS' RETAINING WALL CONSTITUTED NEGLIGENCE, TRESPASS AND A PRIVATE NUISANCE SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined plaintiffs' motion for leave to replead a private nuisance and trespass action should have been granted. Plaintiffs alleged defendants had negligently planted and watered on their side of plaintiffs' retaining wall, damaging the wall: "... [T]he court improvidently exercised its discretion in denying the plaintiffs' motion, in effect, for leave to replead ... . The standard to be applied on such a motion 'is consistent with the standard governing motions for leave to amend pursuant to CPLR 3025'... . In particular, such motions 'should be freely granted absent prejudice or surprise to the opposing party, unless the proposed amendment is devoid of merit or palpably insufficient'... . The proposed amended complaint alleged that the defendants had (1) engaged in 'digging, excavating, grading and altering the soil, past the property line with [the] plaintiffs' property and abutting [the plaintiffs'] property and wall,' (2) planted bushes, shrubs, and trees, and added significant amounts of mulch on the plaintiffs' property, near the property line, and along the plaintiffs' wall, and (3) excessively watered the location where the work was performed. The amended complaint further alleged that the 'lateral load and pressure has been increased as a result of the planting of trees, bushes, shrubs and plants and the lack of drainage' so as to damage the plaintiffs' retaining wall. The complaint alleges that this conduct was negligent, and that it constituted a private nuisance and trespass. Contrary to the defendants' contention, these amended causes of action were neither palpably insufficient nor patently devoid of merit ... , and no unfair prejudice or surprise to the defendants would arise from permitting the amendment ...". ***Chaikin v. Karipas*, 2018 N.Y. Slip Op. 04525, Second Dept 6-20-18**

UNJUST ENRICHMENT.

THE RELATIONSHIP BETWEEN PLAINTIFF AND DEFENDANT WAS NOT CLOSE ENOUGH TO ALLOW AN UNJUST ENRICHMENT ACTION, DEFENDANT'S ACTIONS COULD NOT HAVE CAUSED PLAINTIFF'S RELIANCE OR INDUCEMENT.

The Second Department determined the relationship between plaintiff and defendant (Trovato) was not close enough to allow an unjust enrichment suit. Plaintiff had paid for shares in a corporation which were later sold to defendant. Plaintiff alleged the price paid by defendant was reduced by the amount plaintiff had already paid: "To recover for unjust enrichment, a plaintiff must show that (1) the defendant was enriched, (2) at the plaintiff's expense, and (3) that it is against equity and good conscience to permit the defendant to retain what is sought to be recovered... . 'Although privity is not required for an unjust enrichment claim, a claim will not be supported if the connection between the parties is too attenuated' ... . The relationship must be one that could have caused reliance or inducement ... . Here, the defendant established her prima facie entitlement to judgment as a matter of law by demonstrating that the plaintiff and Trovato did not have a relationship that could have caused reliance or inducement on the plaintiff's part." ***Crescimanni v. Trovato*, 2018 N.Y. Slip Op. 04529, Second Dept 6-20-28**

THIRD DEPARTMENT

CRIMINAL LAW, APPEALS.

DEFENDANT DID NOT HAVE STATUTORY AUTHORITY TO APPEAL COUNTY COURT'S RULING GIVING THE DISTRICT ATTORNEY ACCESS TO A PRE-SENTENCE INVESTIGATION REPORT (PSI) RELATING TO DEFENDANT'S PRIOR CONVICTION.

The Third Department, in a full-fledged opinion by Justice Devine, determined that the defendant did not have statutory authorization to appeal from a ruling by County Court which allowed the prosecutor access to a pre-sentence investigation report (PSI) prepared in connection with defendant's prior conviction: "Defendant pleaded guilty to attempted criminal possession of a weapon in the third degree in Saratoga County, and a presentence investigation report (hereinafter PSI) was prepared for County Court prior to his 2006 sentencing. Several years later, an indictment was handed up in Schenectady County charging defendant with various offenses. The Schenectady County District Attorney believed that the PSI contained information relevant to the new criminal action and, as a result, applied to County Court for the limited disclosure and use of the PSI. County Court granted that request, prompting this appeal by defendant. * * * ... [T]he Schenectady County District Attorney's Office applied for disclosure of the PSI with the aim of using it in a pending criminal action against defendant. The application therefore 'relate[s] to a prospective, pending or completed criminal action' so as to constitute a criminal matter, and statutory authorization is required to appeal from any order emanating from it (CPL 1.20 [18] [b]). No such authorization can be found in CPL 450.10 or 450.15 and, thus, the present appeal must be dismissed ...". ***People v. Young*, 2018 N.Y. Slip Op. 04596, Third Dept 6-21-18**

CRIMINAL LAW, CIVIL PROCEDURE.

PETITIONER ENTITLED TO RENEWED STATUTE OF LIMITATIONS UNDER THE SON OF SAM LAW TO SEEK FUNDS IN THE CONVICTED MURDERER'S INMATE ACCOUNT, THE INMATE'S EARNED AND UNEARNED INCOME ARE AVAILABLE FOR RECOVERY.

The Third Department determined petitioner was entitled to the renewed statute of limitations under the Son of Sam Law to seek earned and unearned income in the account of an inmate convicted of murder in 1986: "Generally, a crime victim of a violent felony offense has 10 years from the date of the crime to bring a civil action against the individual convicted of said crime to recover money damages for any injury or loss resulting therefrom (see CPLR 213-b [2]; Executive Law § 632-a [1] [d], [e] [i] [A]; Penal Law § 70.02 [1] [a]). The Son of Sam Law, however, creates a renewed limitations period whereby a crime victim may bring an action within three years of the discovery of 'funds of a convicted person' (Executive Law § 632-a [3]). Here, the subject crimes occurred in 1986 ... , thus, the statute of limitations has long since passed. Contrary to respondent's assertion, however, the applicability of the extended statute of limitations provided for in Executive Law § 632-a (3) is not tethered to the $10,000 requirement that triggers the notice provisions of the statute... . Moreover, although Executive Law § 632-a does not statutorily mandate the type of notice that was provided for here, it does not prohibit it either. Thus, having received notice of newly discovered 'funds of a convicted person' ... , respondent's victims are entitled to the benefit of the extended limitations period, without regard to the amount of funds in respondent's inmate account. Next, to the extent that respondent argues that his earned income should be excluded from any future recovery, and, thus, excluded from the purview of the subject preliminary injunction, this Court has previously held that '[t]he distinction between earned and unearned income is relevant only to determine whether petitioner must be notified, and has no effect on the ability of a crime victim or a victim's representative to recover such income in a civil action' ...". ***Matter of New York State Off. of Victim Servs. v. Vigo*, 2018 N.Y. Slip Op. 04608, Third Dept 6-21-18**

DISCIPLINARY HEARINGS (INMATES).

PETITIONER WAS NEVER INFORMED OF HIS RIGHT TO CALL WITNESSES, DETERMINATION ANNULLED AND RECORD EXPUNGED.

The Third Department annulled the determination and expunged the inmate's record because he was never informed of his right to call witnesses: "While petitioner did not, at the hearing, request that the inmate be called to testify or demand that there be a further inquiry into his refusal... , the record does not reflect that petitioner was ever advised of his constitutional or regulatory right to call witnesses at the hearing ... . The constitutional right to call witnesses at a prison disciplinary proceeding 'is not waivable in the absence of [an inmate] being informed of its existence'... . As such, the determination must be annulled. Given that petitioner's due process rights were violated and that this situation is comparable to the outright denial of the constitutional right to call witnesses, expungement is the proper remedy ...". ***Matter of Ballard v. Annucci*, 2018 N.Y. Slip Op. 04625, Third Dept 6-21-18**

DISCIPLINARY HEARINGS (INMATES).

PRISON'S FAILURE TO COMPLY WITH DEPARTMENT OF CORRECTIONS DIRECTIVE RE OPENING INMATES' MAIL REQUIRED ANNULMENT OF THE MISBEHAVIOR DETERMINATION.

The Third Department annulled the misbehavior determination because there was no proof the superintendent provided written permission to open petitioner's mail as required by a Department of Corrections directive. All the disciplinary rule violations stemmed from the contents of the mail: "Petitioner's sole claim is that the Superintendent did not provide written authorization pursuant to Department of Corrections and Community Supervision Directive No. 4422 (III) (B) (9) (see 7 NYCRR 720.3 [e]) for opening the outgoing correspondence that led to the investigation implicating him as the sender. Significantly, such correspondence provided the basis for all of the disciplinary rule violations of which petitioner was found guilty. The directive at issue specifically provides that '[o]utgoing correspondence . . . shall not be opened, inspected, or read without express written authorization from the facility superintendent' ... . It further states that '[s]uch written authorization shall set forth the specific facts forming the basis for the action' ... . Here, there was no proof presented that the Superintendent issued a written authorization supported by specific facts permitting the correction official to open the correspondence. Rather, the record suggests that the authorization was verbal, as no written instrument was ever produced and the Superintendent did not testify at the hearing. Under these circumstances, the determination of guilt must be annulled ...". ***Matter of Sudler v. Annucci*, 2018 N.Y. Slip Op. 04629, Third Dept 6-21-18**

PERSONAL INJURY.

QUESTION OF FACT WHETHER A FLOOR MAT NINE-SIXTEENTHS OF AN INCH THICK CREATED A TRIPPING HAZARD IN THIS SLIP AND FALL CASE.

The Third Department, reversing Supreme Court, determined plaintiff, in response to defendant's motion for summary judgment, had raised a question of fact about whether mats outside shower stalls created a dangerous condition, Plaintiff alleged she tripped on the exposed edge of a mat, which was nine-sixteenths of an inch thick: "... [P]laintiff submitted, among other things, her affidavit, photographs of the mats and the affidavit of Frederick Bremer, an architect who investigated the condition of the locker room. Plaintiff also relied on her own deposition testimony. Plaintiff testified that she was familiar with the locker room and showers because she had been utilizing them five days each week for 11 years and that the photographs accurately depict the condition of the mats. She noted that there were two large, square mats in the shower area that were each comprised of nine smaller interlocking squares. Plaintiff claimed that because the larger mats were never connected, they often moved in relation to each other so that they sometimes overlapped and at other times were located several inches apart — a condition that she claimed had existed continuously since the mats were installed. Plaintiff also stated that she had personally rearranged the mats on several occasions prior to her injury to eliminate the risk of her tripping on them. According to plaintiff, she fell when the toe of her sneaker caught the exposed edge of a mat near the exit to the shower in the location that she marked on one of the photographs that she had submitted. Bremer concluded that the mats were not properly installed. Specifically, he opined that a gap was created between the mats because they were neither attached to each other nor otherwise properly secured. The resulting gap exposed the edges of the mats, and Bremer opined that the nine-sixteenth-inch height of the exposed mat edges constituted a tripping hazard that violated applicable design standards. He also noted that the manufacturer of the mats recommended installation of a sloped transition piece to eliminate such exposed edges, and that transition pieces were not utilized in the location where plaintiff fell." ***Facteau v. Mediquest Corp.*, 2018 N.Y. Slip Op. 04631, Third Dept 6-21-18**

PERSONAL INJURY, CIVIL PROCEDURE.

DEFENDANT OFFERED TWO NON-NEGLIGENT EXPLANATIONS FOR THE REAR-END COLLISION SUFFICIENT TO DEFEAT PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT, A WAIVED AFFIRMATIVE DEFENSE MAY BE CONSIDERED IN OPPOSITION TO SUMMARY JUDGMENT WHERE THE MOVING PARTY IS NOT SURPRISED AND HAS AN OPPORTUNITY TO RESPOND.

The Third Department determined defendant Kain had raised two non-negligent explanations for rear-ending the car in front of him and therefore plaintiffs' motion for summary judgment was properly denied. Kain had testified that his brakes didn't work properly and the cars in front of him stopped abruptly. Although Kain had not raised brake failure as an affirmative defense, the court noted that the defense could be considered in opposition to a summary judgment motion absent surprise and provided the moving party has a chance to respond: "The claim that an accident was unavoidable due to brake failure is an affirmative defense ... . However, '[e]ven an unpleaded defense may be raised on a summary judgment motion, as long as it would not be likely to surprise the adverse party or raise issues of fact not previously apparent' ... .. Accordingly, a nonmovant may invoke a waived defense to defeat a motion for summary judgment if the movant has the opportunity to respond ... . Kain testified at his deposition that the brakes in his vehicle failed, and plaintiffs addressed that issue in their moving papers and again in their reply. ... [D]efendants met their burden to provide a nonnegligent explanation for the accident. Kain testified that the brakes did not operate normally when he applied them and, further, that the application of the brakes did not appreciably slow the speed of the vehicle as he approached the vehicles that were stopped at the traffic signal. Further, he testified that his vehicle was relatively new and was in good working order, and that the only mechanical problems he had experienced prior to the accident were unrelated to the brakes. He further testified that the brakes operated properly prior to the accident, the inspection was current and the malfunction caused him to apply his emergency brake. ... Kain also testified [the two cars in front of him] abruptly stopped directly in front of his vehicle. He specifically stated that [plaintiffs'] vehicle approached the intersection without slowing, as if it was going to proceed, and that it stopped immediately when the light turned red, thereby forcing the [car behind plaintiffs'] to also stop abruptly. He further testified that he was traveling at or below the speed limit and that he applied his brakes immediately upon seeing that both vehicles had stopped abruptly in his path." ***Warner v. Kain*, 2018 N.Y. Slip Op. 04630, Third Dept 6-21-18**

REAL PROPERTY.

DEFENDANT PROPERTY OWNER DID NOT REBUT THE PRESUMPTION THAT THE DEED WAS DELIVERED AND ACCEPTED ON THE DATE OF THE DEED IN THIS SLIP AND FALL CASE, THE PLAINTIFF'S ALLEGED FALL OCCURRED THE DAY AFTER THE DATE OF THE DEED.

The Third Department determined that defendant did not rebut the presumption that the deed to the property where plaintiff fell was delivered and accepted the day before plaintiff's fall: "... [D]efendant submitted, among other things, an executed copy of the referee's deed transferring ownership of the subject property to defendant, dated March 28, 2013, one day before plaintiff's alleged accident. Based on the foregoing, there is a strong presumption that the deed was delivered and accepted as of that date (see Real Property Law § 244...). The only additional documentation that defendant submitted to overcome the presumption was an affidavit from Anthony Iacchetta, an attorney who represented defendant's predecessor in interest in its acquisition of the subject premises and a letter from Iacchetta's firm dated April 11, 2013. In his affidavit, Iacchetta represents 'that the transfer documents executed by the referee were not received by [his] firm until April 11, 2013,' and he provided a copy of the letter sent that same day forwarding said documentation to be countersigned. The documents submitted by defendant, however, do not address the parties' intent or whether the deed was intended to be delivered and accepted as of April 11, 2013, as opposed to the deed's March 28, 2013 execution date. Defendant, therefore, failed to rebut the presumption that the deed was delivered and accepted on March 28, 2013 ...". ***Wisdom v. Reoco, LLC*, 2018 N.Y. Slip Op. 04628, Third Dept 6-21-18**

SOCIAL SERVICES LAW, CIVIL PROCEDURE.

IN DETERMINING ELIGIBILITY FOR PUBLIC ASSISTANCE, THE APPLICANT'S EQUITY IN AN AUTOMOBILE, NOT ITS FAIR MARKET VALUE, MUST BE CONSIDERED; THE APPLICANT WAS ENTITLED TO DISCOVERY TO DETERMINE HOW MANY OTHERS HAVE BEEN AFFECTED BY THE WRONG ASSET-CALCULATION TECHNIQUE IN SEEKING CLASS CERTIFICATION.

The Third Department, in a full-fledged opinion by Justice Rumsey, modifying Supreme Court, determined the amount of an applicant's equity in an automobile, not the fair market value (FMV), should be used in calculating whether an applicant is eligible for public assistance. Here the applicant owed more than the car was worth, but she was erroneously deemed ineligible because of the fair market value of the car. The Third Department further determined that the applicant was entitled to discovery in her effort to get class action certification seeking retroactive relief for persons who had been wrongly denied public assistance under similar circumstances: "Only the net amount that could be received upon the sale of an asset that is encumbered by an outstanding loan balance, i.e., the FMV less the outstanding loan balance, could be available to eliminate or reduce an applicant's need for public assistance. The arbitrary nature of OTDA's [Office of Temporary and Disability Assistance's] contrary position is aptly illustrated in this case, where the sale of the vehicle would not have generated

any resources that petitioner could have used to meet her own support needs. Indeed, based on the automobile's FMV, she would not have received enough upon its sale to pay the entire outstanding loan balance. For these reasons, we conclude that Supreme Court properly held that the extent to which the FMV of an automobile that exceeds the exempt amount is an available resource must be determined based on the applicant's equity interest therein, and that OTDA's contrary interpretation was irrational and unreasonable. * * * ... [T]he present record does not permit identification of the number of individuals who were the subject of adverse action based on application of respondent's erroneous rule within the specified time period. The petition seeks a judgment directing respondent to identify all individuals meeting the characteristics of the proposed class and, in her brief on appeal, she again seeks discovery regarding class size. Timely requests for disclosure on the issue of numerosity must be granted ...". ***Matter of Stewart v. Roberts*, 2018 N.Y. Slip Op. 04609, Third Dept 6-21-18**

UNEMPLOYMENT INSURANCE.

COURIER FOR A WEB BASED DELIVERY SERVICE NOT AN EMPLOYEE.

The Third Department, reversing the Unemployment Insurance Appeals Board, over a two-justice dissent, determined that a courier for a web based delivery service (Postmates) was not an employee entitled to unemployment insurance benefits: "... [I]n order to work as a courier or delivery professional for Postmates, claimant and others similarly situated need only download Postmates' application software platform and provide his or her name, telephone number, Social Security number and driver's license number; there is no application and no interview. Although Postmates thereafter obtains a criminal background check from a third-party provider and provides an orientation session on how to utilize the application software platform, significantly, claimant and those similarly situated are not thereafter required to report to any supervisor, and they unilaterally retain the unfettered discretion as to whether to ever log on to Postmates' platform and actually work. When a courier does elect to log on to the platform, indicating his or her availability for deliveries, he or she is free to work as much or little as he or she wants — there is no set work schedule, there is no minimum time requirement that a courier must remain logged on to the platform and there is no minimum or maximum requirement with respect to the number of deliveries a courier must perform. In fact, once logged on to the platform, a courier may decline to do anything. When a customer requests a delivery using Postmates' platform, the platform identifies the closest available courier(s) and sends basic information about the delivery request. Couriers, however, may accept, reject or ignore a delivery request, without penalty. Moreover, while logged on to Postmates' platform, couriers maintain the freedom to simultaneously work for other companies, including Postmates' direct competitors. Further, they are free to choose the mode of transportation they wish to use for deliveries, they provide and maintain their own transportation, they choose the route they wish to take for the delivery, they are not required to adhere to a stringent delivery schedule, they are not required to wear a uniform, they are not provided any identification card or logo, they are only paid for the deliveries they complete and they are not reimbursed for any of their delivery-related expenses." ***Matter of Vega (Commissioner of Labor)*, 2018 N.Y. Slip Op. 04610, Third Dept 6-21-18**

ZONING, CIVIL PROCEDURE, APPEALS.

PETITIONER WAS ENTITLED TO A VARIANCE ON FINANCIAL HARDSHIP GROUNDS, REGULATORY TAKING CAUSE OF ACTION WAS NOT RIPE FOR REVIEW.

The Third Department, modifying Supreme Court, determined petitioner's application for a variance should have been granted on financial hardship grounds, but the action alleging a regulatory taking was not ripe, an issue which can be raised on appeal for the first time. Petitioner demonstrated the character of the surrounding area had changed from residential to commercial over the past 30 years rendering the property unmarketable as residential property: "The ZBA [zoning board of appeals] actually agreed that 'the location of this property on a corner may impact its value,' and its ultimate conclusion that the financial hardship was not unique seemingly ran counter to that observation ... . Moreover, in light of the proof that the need for a use variance only arose decades after the property was acquired due to a gradual shift in the character of the area that rendered the permitted residential use onerous and obsolete, petitioners sufficiently alleged 'that the hardship identified by [them] . . . was [not] self-created' ... . Accepting the foregoing as true, as we must, petitioners stated a viable claim attacking the ZBA's determination. ... [T]he remaining regulatory taking claim must be dismissed. The petition/complaint states, and petitioners' arguments on appeal reflect, that the owner's taking claim is solely premised upon a deprivation of rights afforded under the Federal Constitution (see US Const 5th Amend; 42 USC § 1983). In order for a 42 USC § 1983 claim based upon a regulatory taking to be ripe, however, it is necessary for a petitioner/plaintiff to 'demonstrate that [he or] she has both received a 'final decision regarding the application of the [challenged] regulations to the property at issue' from 'the government entity charged with implementing the regulations,' and sought 'compensation through the procedures the [s]tate has provided for doing so'... . The denial of the application for a use variance constituted a final decision regarding the application of the zoning regulations to its property... , but there is no indication that the owner then asserted a state claim for inverse condemnation... . Thus, inasmuch as ripeness is a 'matter[] pertaining to subject matter jurisdiction which

can be raised at any time' and the second cause of action founded upon 42 USC § 1983 is 'unripe because [the owner] failed to seek compensation from the [s]tate before' asserting it... , it must be dismissed." ***Matter of 54 Marion Ave., LLC v. City of Saratoga Springs*, 2018 N.Y. Slip Op. 04611, Third Dept 6-21-18**

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