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CasePrepPlus

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FIRST DEPARTMENT

CIVIL PROCEDURE, LANDLORD-TENANT, MUNICIPAL LAW.

CLASS ACTION COMPLAINT BY TENANTS AGAINST LANDLORDS ALLEGING FAILURE TO PROVIDE RENT-STABILIZED LEASES SHOULD NOT HAVE BEEN DISMISSED AT THE PRE-ANSWER STAGE.

The First Department, over a two-justice dissent, determined that the class action complaint by tenants alleging the failure to provide rent-stabilized leases should not have been dismissed at the pre-answer stage: " 'Pursuant to CPLR 902, a motion to determine whether a class action may be maintained is to be made within 60 days after the time to serve the responsive pleading has expired' ... . Because the time to make such a motion had not occurred, it was premature, in this case, for the court to engage in a detailed analysis of whether the requirements for class certification were met ... . It does not appear conclusively from the complaint that, as a matter of law, there is no basis for class action relief... . For example, plaintiffs allege that some defendants receive J-51 tax benefits and are therefore required to provide tenants with rent-stabilized leases but failed to do so. This claim was also made in Borden (see 24 NY3d at 390), and the Court of Appeals found that the plaintiffs satisfied the class action requirements of numerosity, predominance of common issues of law or fact, typicality of the named plaintiffs' claims, adequate representation, and superiority of class action versus other methods (see id. at 399-400). Although the instant action involves 11 buildings and 8 owners, all the buildings are allegedly managed by Big City Realty Management, and all the owners are allegedly part of one holding company, Big City Acquisitions. Moreover, Downing — another putative class action about J-51 (see 107 AD3d at 88) — involved 'a residential complex owned by defendants' (id.)." ***Maddicks v. Big City Props., LLC*, 2018 N.Y. Slip Op. 05523, First Dept 7-26-18**

CONTRACT LAW.

NEGLIGENCE ACTION STEMMING FROM AN ALLEGED BREACH OF CONTRACT SHOULD HAVE BEEN DISMISSED, CRITERIA FOR A VALID NEGLIGENCE CAUSE OF ACTION IN THIS CONTEXT EXPLAINED.

The Second Department determined a negligence cause of action, which was based upon a breach of contract allegation, should have been dismissed: " '[A] simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated' ... . 'This legal duty must spring from circumstances extraneous to, and not constituting elements of, the contract, although it may be connected with and dependent upon the contract' … . 'Merely charging a breach of a duty of due care', employing language familiar to tort law, does not, without more, transform a simple breach of contract into a tort claim' ... . '[W]here [a] plaintiff is essentially seeking enforcement of the bargain, the action should proceed under a contract theory' ... . Here, the complaint did not allege facts that would give rise to a duty owed to the plaintiff that is independent of the duty imposed by the parties' agreement." ***Ocean Gate Homeowners Assn., Inc. v. T.W. Finnerty Prop. Mgt., Inc.*, 2018 N.Y. Slip Op. 05475, Second Dept 7-25-18**

CONTRACT LAW, MEDICAID, MEDICAL MALPRACTICE, PERSONAL INJURY.

HOSPITAL'S SETTLEMENT AGREEMENT WITH PLAINTIFF IN A MEDICAL MALPRACTICE ACTION TO PAY ALL MEDICAID COSTS WAS ENFORCEABLE BY THE MEDICAID ADMINISTRATOR AS A THIRD-PARTY BENEFICIARY OF THE AGREEMENT.

The First Department, reversing Supreme Court, in a full-fledged opinion by Justice Friedman, over a dissenting opinion, determined that Medicaid was a third-party beneficiary of a settlement agreement entered into by a hospital (NYPH) in a medical malpractice action: "At issue on this appeal is an agreement settling a prior medical malpractice action against a hospital, in which the hospital agreed to 'assume full responsibility for any monies which are ultimately found to be due to Medicaid in connection with' the injured patient's lengthy hospitalization. We hold, as a matter of law, that this provision may be enforced against the hospital in this action by plaintiff Commissioner of the New York City Department of Social Services (DSS), the relevant Medicaid administrator, as an intended third-party beneficiary of this aspect of the settlement agreement. We also hold that DSS's claim against the hospital is not barred by the doctrine of res judicata. * * * The provision of the settlement agreement under which NYPH agreed to 'assume full responsibility' for any Medicaid claim in the settlement agreement makes it 'apparent from the face of the contract'... that the parties intended to confer a direct benefit on DSS. NYPH's 'assum[ption] [of] full responsibility' for any Medicaid claim is more than a promise merely to indemnify

[plaintiff]. against such a claim, which would not, by itself, confer third-party beneficiary status on DSS ... . Rather, the settlement agreement, by requiring NYPH to 'assume full responsibility for any monies which are ultimately found to be due to Medicaid,' plainly contemplates that 'performance is to be rendered directly to [the] third party,' a reliable indication that 'the third party is deemed an intended beneficiary of the covenant and is entitled to sue for its breach' ...". ***Commissioner of the Dept. of Social Servs. of the City of N.Y. v. New York-Presbyterian Hosp.*, 2018 N.Y. Slip Op. 05524**

CONTRACT LAW, REAL ESTATE.

CONTRACT WAS AMBIGUOUS CONCERNING WHETHER PLAINTIFF BROKER WAS ENTITLED TO A COMMISSION, SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS SHOULD NOT HAVE BEEN GRANTED.

The First Department, in a full-fledged opinion by Justice Tom, reversing Supreme Court, determined that a contract concerning plaintiff-broker's entitlement to a commission was ambiguous requiring a trial. The facts are too complex to fairly summarize here: "Crucially, an agreement can be deemed unambiguous 'if the language it uses has a definite and precise meaning, unattended by danger of misconception in the purport of the [agreement] itself, and concerning which there is no reasonable basis for a difference of opinion' ... . However, a contract is ambiguous when 'read as a whole, [it] fails to disclose its purpose and the parties' intent' ... , or when specific language is 'susceptible of two reasonable interpretations'... . Moreover, the agreement must be read as a whole 'to ensure that excessive emphasis is not placed upon particular words or phrases' ... . Stated differently, the existence of ambiguity is determined by examining 'the entire contract and consider[ing] the relation of the parties and the circumstances under which it was executed,' with the wording viewed 'in the light of the obligation as a whole and the intention of the parties as manifested thereby' ... . And, importantly, '[i]n construing a contract, one of a court's goals is to avoid an interpretation that would leave contractual clauses meaningless' ... . We find that the agreement here is ambiguous with regard to which parties are bound to its terms." ***Georgia Malone & Co., Inc. v. E&M Assoc.*, 2018 N.Y. Slip Op. 05525, First Dept 7-26-18**

BREACH OF FIDUCIARY DUTY, COOPERATIVES, CORPORATION LAW, NEGLIGENCE.

NO CAUSE OF ACTION FOR BREACH OF FIDUCIARY DUTY AGAINST INDIVIDUAL COOPERATIVE BOARD MEMBERS, MEMBERS OF THE BOARD DID NOT PARTICIPATE IN A CORPORATE TORT.

The First Department determined plaintiff shareholder in a cooperative could not bring a "breach of fiduciary duty" cause of action against individual members of the cooperative board. Plaintiff alleged her cooperative apartment was damaged by water from a greenhouse above the apartment. The first department found that that was no corporate tort for which individual members of the board could be liable: "It is well-settled that a breach of fiduciary duty claim does not lie against individual cooperative board members where there is no allegation of 'individual wrongdoing by the members . . . separate and apart from their collective actions taken on behalf of the' cooperative ... . Here, the complaint does not allege that any of the individual board members committed an independent wrong that was distinct from the actions taken as a board collectively. Thus, the breach of fiduciary duty claim is not viable. ... Contrary to plaintiff's contention, this result is entirely consistent with Fletcher v. Dakota, Inc. (99 AD3d 43 [1st Dept 2012]). In Fletcher, we concluded that 'although participation in a breach of contract will typically not give rise to individual director liability, the participation of an individual director in a corporation's tort is sufficient to give rise to individual liability' (id. at 47). Thus, we declined to dismiss claims against a cooperative board director who was alleged to have participated in the cooperative's violation of the State and City Human Rights Laws. Here, in contrast, there is no viable corporate tort alleging breach of fiduciary duty, because a corporation owes no fiduciary duty to its shareholders ... . Thus, in the absence of a corporate tort in which the individual board members could have participated, the breach of fiduciary duty claim as against them was properly dismissed. Indeed, Fletcher made this very point by dismissing the breach of fiduciary duty cause of action against an individual board director, while at the same time sustaining Human Rights Law claims against him." ***Hersh v. One Fifth Ave. Apt. Corp.*, 2018 N.Y. Slip Op. 05522, First Dept 7-26-18**

LABOR LAW-CONSTRUCTION LAW, CONTRACT LAW, LANDLORD-TENANT, NEGLIGENCE.

VENTILATOR FROM WHICH PLAINTIFF FELL WAS NOT A SAFETY DEVICE, HOWEVER THE FACT THAT PLAINTIFF COULD NOT REACH THE VENTILATOR FROM THE LADDER ENTITLED HIM TO SUMMARY JUDGMENT ON THE LABOR LAW § 240(1) CAUSE OF ACTION, A VIOLATION OF LABOR LAW § 240(1) IS NOT A FINDING OF NEGLIGENCE, LANDLORD ENTITLED TO INDEMNIFICATION UNDER THE LEASE TERMS.

The First Department determined (1) the ventilator on which plaintiff was crouching when it detached and he fell was not a safety device within the meaning of Labor Law § 240(1), (2) plaintiff's testimony that he couldn't reach the ventilator, which he was attempting to remove, from the A-frame ladder he was provided entitled him to summary judgment on the Labor Law § 240(1) cause of action, and (3) the landlord was entitled to summary judgment on the cross-claim for indemnification by the tenant, noting that the indemnification clause in the lease did not require that the tenant be negligent and that a Labor Law § 240(1) violation is not a finding that the tenant was negligent: "Contrary to plaintiff's contention, the ventilator he was standing on and disassembling when he fell was not a safety device; it was the object of the demolition project on which he was employed, and was not intended to protect him from elevation-related risks ... . Despite Eight Oranges'

[tenant's] argument to the contrary, this indemnification provision does not require a finding of negligence on the part of the tenant before it is triggered. Nor does it violate General Obligations Law § 5-321, 'since a finding of liability under Labor Law § 240 is not the equivalent of a finding of negligence and does not give rise to an inference of negligence' ... . It is clear from the contractual language at issue that the landlord ... intended to be indemnified by the tenant, Eight Oranges, for any 'damage or injury occurring or arising to any person' on the property, that is caused by the tenant." ***Hong-Bao Ren v. Gioia St. Marks, LLC*, 2018 N.Y. Slip Op. 05520, First Dept 7-26-18**

SECOND DEPARTMENT

ANIMAL LAW.

DEFENDANTS DEMONSTRATED THEY DID NOT HAVE NOTICE OF THE DOG'S VICIOUS PROPENSITIES IN THIS DOG-BITE CASE, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined defendants' motion for summary judgment in this dog-bite case should have been granted. The defendants demonstrated they did not have notice of the dog's vicious propensities: "Aside from the limited exception set forth in Hastings v. Sauve (21 NY3d 122, 125-126) regarding a farm animal that strays from the place where it is kept... , which is not at issue here, 'New York does not recognize a common-law negligence cause of action to recover damages for injuries caused by a domestic animal' ... . … To recover upon a theory of strict liability in tort for damages caused by a dog, a plaintiff must establish that the dog had vicious propensities, and that the owner of the dog knew or should have known of the dog's vicious propensities ... . Vicious propensities include the propensity to do any act that might endanger the safety of the persons and property of others ... . 'Evidence tending to prove that a dog has vicious propensities includes a prior attack, the dog's tendency to growl, snap, or bare its teeth, the manner in which the dog was restrained, and a proclivity to act in a way that puts others at risk of harm' ... . Here, the defendants established their prima facie entitlement to judgment as a matter of law by demonstrating that their dog did not have vicious propensities and, in any event, that they neither knew nor should have known that their dog allegedly had vicious propensities ...". ***Cintorrino v. Rowsell*, 2018 N.Y. Slip Op. 05446, Second Dept 7-25-18**

ATTORNEYS.

ATTORNEY'S MOTION TO WITHDRAW BECAUSE OF CLIENT'S FAILURE TO PAY AND LACK OF COOPERATION SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined the appellant-attorney's motion for permission to withdraw from representing plaintiff-client should have been granted. The attorney had submitted upwards of $40,000 in bills. Plaintiff did not pay any of the bills and refused to provide documents requested by the attorney. In addition, plaintiff did not oppose the attorney's motion to withdraw: " 'The decision to grant or deny permission for counsel to withdraw lies within the discretion of the trial court, and the court's decision should not be overturned absent a showing of an improvident exercise of discretion' ... . 'An attorney may be permitted to withdraw from employment where a client refuses to pay reasonable legal fees' ... . 'Additionally, an attorney may withdraw from representing a client if the client fails to cooperate in the representation or otherwise renders the representation unreasonably difficult for the lawyer to carry out employment effectively' ...". ***Applebaum v. Einstein*, 2018 N.Y. Slip Op. 05437, Second Dept 7-25-18**

CIVIL PROCEDURE.

DISCOVERY VIOLATIONS WARRANTED DISMISSAL OF THE COMPLAINT.

The Second Department determined plaintiff's complaint was properly dismissed because of plaintiff's discovery violations: " 'The nature and degree of the sanction to be imposed on a motion pursuant to CPLR 3126 is within the broad discretion of the motion court' ... . 'The drastic remedy of striking a pleading is warranted where the party's failure to comply with court-ordered discovery is willful and contumacious' ... . 'The willful or contumacious character of a party's conduct can be inferred from the party's repeated failure to respond to demands or to comply with discovery orders' ... and the absence of a reasonable excuse for these failures ... . 'Absent an improvident exercise of discretion, the determination to impose sanctions for conduct that frustrates the purpose of the CPLR should not be disturbed' ... . Here, the willful and contumacious character of the plaintiff's conduct can be inferred, initially, from his inadequate verified bill of particulars and response to the notice for discovery and inspection, both served nearly one year after service of the demand for a verified bill of particulars and the notice for discovery and inspection. Thereafter, the plaintiff failed to comply with the Supreme Court's directive at the January 8, 2016, conference to produce any outstanding discovery within 30 days, and this failure to comply was followed by further noncompliance after the February 24, 2016, conference. Moreover, the plaintiff failed to respond in any manner to the other discovery demands." ***Westervelt v. Westervelt*, 2018 N.Y. Slip Op. 05519, Second Dept 7-25-18**

CIVIL PROCEDURE, TRUSTS AND ESTATES, MEDICAL MALPRACTICE, NEGLIGENCE.

MEDICAL MALPRACTICE ACTION SHOULD NOT HAVE BEEN DISMISSED BASED ON A FINDING THE MOTION TO SUBSTITUTE THE REPRESENTATIVE OF THE ESTATE OF THE PLAINTIFF WAS UNTIMELY.

The Second Department, reversing Supreme Court, determined that the medical malpractice action should not have been dismissed on the ground that a motion to substitute the representative of plaintiff's estate was not timely made: "In October 2004, Patricia Tokar (hereinafter Patricia) commenced this action to recover damages for medical malpractice based upon treatment she received from 2000 to 2002. Patricia's deposition was taken in September 2006 and again in August 2009, while the defendant's deposition was taken in April 2008. A note of issue was filed in December 2009. The matter was called for trial on 12 separate occasions between 2011 and 2012. By letter dated October 19, 2012, Patricia's attorney informed the defendant's attorney that Patricia had died two weeks before, and that her husband, Stanley Tokar (hereinafter Stanley), would be seeking to be appointed administrator of Patricia's estate after he completed his mourning period. In October 2014, Stanley filed a petition for letters of administration of Patricia's estate. By order to show cause dated May 12, 2015, the defendant moved pursuant to CPLR 1021 to dismiss the complaint for failure to seek a timely substitution of parties on behalf of Patricia. On June 5, 2015, letters of administration were issued to Stanley, who then moved, seven days later, on June 12, 2015, pursuant to CPLR 1012, to be substituted, as administrator of Patricia's estate, as the plaintiff in the action. The Supreme Court denied Stanley's motion and granted the defendant's motion ... . CPLR 1021 provides, in pertinent part, that '[i]f the event requiring substitution occurs before final judgment and substitution is not made within a reasonable time, the action may be dismissed as to the party for whom substitution should have been made.' The determination of reasonableness requires consideration of several factors, including the diligence of the party seeking substitution, prejudice to the other parties, and whether the party to be substituted has shown that the action or defense has potential merit ... . Here, the record does not support a finding that there was a lack of diligence in the filing of the petition for Stanley to be substituted, or that the defendant was prejudiced by the delay in the appointment of Stanley as administrator, particularly since this case turns on medical records in the defendant's possession ... . Further, Stanley sufficiently demonstrated that the action has potential merit ... . Moreover, there is a strong public policy that matters should be disposed of on the merits ...". ***Tokar v. Weissberg*, 2018 N.Y. Slip Op. 05516, Second Dept 7-25-18**

CRIMINAL LAW.

DEFENDANT'S ABSENCE FROM AN IN CAMERA INTERVIEW WITH A JUROR CONCERNING POSSIBLE DISQUALIFICATION WAS NOT SHOWN TO HAVE HAD A SUBSTANTIAL EFFECT ON THE DEFENDANT'S ABILITY TO DEFEND AGAINST THE CHARGES.

The Second Department determined defendant's right to be present at all material stages of the trial was not violated by his absence from an in camera interview with a sworn juror about possible disqualification: "The defendant's right to be present at all material stages of the trial was not violated by his absence from an in camera interview with a sworn juror, conducted in the presence of the prosecutor and defense counsel, to determine whether there was a possible juror disqualification. Although a defendant has a statutory right to be present at all material stages of the trial ... , this right is only a qualified right where the proceedings involved are ancillary ... . A conference to determine whether a sworn juror should be excluded ... is an ancillary proceeding ... . As such, the defendant's presence is required only if it could have had 'a substantial effect on [his or her] ability to defend against the charges' ... , or 'where defendant has something valuable to contribute' ... Given that the issue of whether a seated juror is grossly unqualified is, generally, a legal determination... , and, given the circumstances presented here, there is no basis to conclude that the defendant's presence at the in camera interview would have had a substantial effect on the defendant's ability to defend against the charges, or that the defendant would have made a valuable contribution to the proceeding ...". ***People v. Robinson*, 2018 N.Y. Slip Op. 05496, Second Dept 7-25-18**

CRIMINAL LAW, ATTORNEYS.

DEFENDANT NOT GIVEN THE OPPORTUNITY TO EXPLAIN HIS REQUEST TO WITHDRAW HIS GUILTY PLEA, DEFENSE COUNSEL INDICATED THERE WAS NO REASON FOR THE WITHDRAWAL, MATTER REMITTED FOR CONSIDERATION OF THE REQUEST WITH NEW COUNSEL.

The Second Department determined defendant should have been given an opportunity to explain the reasons for his request to withdraw his plea and defense counsel should not have indicated he did not believe there was a basis for the request. Matter was remitted for consideration of the request with new counsel: " 'The nature and extent of the fact-finding procedures prerequisite to the disposition of [motions to withdraw a plea of guilty] rest largely in the discretion of the Judge to whom the motion is made' ... . While in 'are instance[s]' a defendant will be entitled to an evidentiary hearing, often 'a limited interrogation by the court will suffice' ... , and when a motion 'is patently insufficient on its face, a court may simply deny the motion without making any inquiry' ... . Nevertheless, '[t]he defendant should be afforded reasonable opportunity to present his contentions and the court should be enabled to make an informed determination' ... . Moreover, 'a defendant has a right to the effective assistance of counsel on his or her motion to withdraw a guilty plea' ... . Counsel 'takes a position

adverse to his client,' depriving him or her of meaningful representation, 'when stating that the defendant's motion lacks merit' ...". ***People v. Caputo*, 2018 N.Y. Slip Op. 05481, Second Dept 7-25-18**

CRIMINAL LAW, EVIDENCE.

AFFIDAVIT IN SUPPORT OF WARRANT FOR A DNA SWAB INSUFFICIENT, MOTION TO SUPPRESS SHOULD HAVE BEEN GRANTED.

The Second Department, reversing defendant's conviction, determined the affidavit submitted in support of a warrant application for a DNA swab was insufficient and the motion to suppress should have been granted: " 'To establish probable cause, a search warrant application must provide sufficient information to support a reasonable belief that evidence of a crime may be found in a certain place'... . Here, as the People correctly concede, the affidavit of the detective submitted in support of the search warrant application was conclusory and insufficient to establish probable cause to issue the warrant ... . The detective stated that he believed evidence related to the victim's murder may be found in the defendant's saliva based on his interview of witnesses, information supplied to him by fellow police officers, and his review of police department records. However, the detective did not identify the witnesses or indicate what information he obtained from them, and did not specify what police department records he reviewed, or what information was contained in the records." ***People v. Augustus*, 2018 N.Y. Slip Op. 05480, Second Dept 7-25-18**

DEFAMATION, CIVIL RIGHTS LAW, PRIVILEGE.

DEFAMATION ACTION PROPERLY SURVIVED PRE-DISCOVERY MOTION TO DISMISS, APPLICABILITY OF THE CIVIL RIGHTS LAW PRIVILEGE FOR REPORTING ON A JUDICIAL PROCEEDING NOT DEMONSTRATED AS A MATTER OF LAW.

The Second Department determined defendant publisher (Bloomberg) was not entitled to dismissal of a defamation action based upon the publication of articles about police investigations of a Hong Kong investment company. The court found that the Civil Rights Law privilege for reporting on a judicial proceeding could not be applied as a matter of law at the pre-discovery stage: "New York Civil Rights Law § 74 states, in pertinent part: 'A civil action cannot be maintained . . . for the publication of a fair and true report of any judicial proceeding, legislative proceeding or other official proceeding.' Here, we disagree with the Supreme Court's determination that the privilege is inapplicable to reporting on foreign official proceedings ... . Nevertheless, we agree with the court's denial of that branch of Bloomberg's motion which was to dismiss pursuant to CPLR 3211(a)(7), inasmuch as the challenged statements were not privileged under Civil Rights Law § 74. When the challenged statements are viewed in context, it cannot be said as a matter of law that the statements provide a substantially accurate reporting of the two police investigations ... . Moreover, we agree with the court's determination that the plaintiff, at this pre-discovery stage, adequately alleged the element of gross irresponsibility ...". ***Stone v. Bloomberg L.P.*, 2018 N.Y. Slip Op. 05515, Second Dept 7-25-18**

EMPLOYMENT LAW, LABOR LAW, CONTRACT LAW, MUNICIPAL LAW.

PLAINTIFF STATED A BREACH OF CONTRACT CAUSE OF ACTION BASED UPON DEFENDANT CONTRACTOR'S ALLEGED FAILURE TO PAY THE PREVAILING WAGE FOR WORK ON PROPERTIES OWNED BY THE NYC HOUSING AUTHORITY.

The Second Department, reversing Supreme Court, determined plaintiff had stated a cause of action for violation of the "prevailing wage" requirement of the Labor Law when plaintiff did work for a contractor (Zoria Housing) on properties owned by the NYC Housing Authority (NYCHA): "... [T]he plaintiff stated viable breach of contact causes of action based on violations of statutorily mandated provisions in agreements between Zoria Housing and NYCHA, requiring the payment of prevailing wages and overtime pay. 'In situations where the Labor Law requires the inclusion of a provision for payment of the prevailing wage in a labor contract between a public agency and a contractor, a contractual obligation is created in favor of the contractor's employees, and an employee covered by or subject to the contract, in his or her status as third-party beneficiary to the contract, possesses a common-law cause of action against the contractor to recover damages for breach of such a contractual obligation' ... . Here, the complaint alleges, in effect, that Zoria Housing failed to pay the plaintiff 'prevailing wages' and overtime pay in breach of municipal contracts that included prevailing-wage and overtime provisions pursuant to the Labor Law (see generally Labor Law §§ 220, 231). The complaint thus stated viable breach of contract causes of action ... ". ***Singh v. Zoria Hous., LLC*, 2018 N.Y. Slip Op. 05513, Second Dept 7-25-18**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

PLAINTIFF WAS NOT ENGAGED IN CONSTRUCTION WORK OR IN A CONSTRUCTION AREA WHEN HE WAS INJURED, HE WAS BRINGING IN SUPPLIES WHICH WERE BEING STOCKPILED AND WERE NOT FOR IMMEDIATE USE, THEREFORE THE LABOR LAW §§ 240(1) AND 241(6) CAUSES OF ACTION WERE PROPERLY DISMISSED,

The Second Department determined the owner of the building (Sussex) and plaintiff's employer (Berkoff) were entitled to summary judgment in this Labor Law §§ 240(1), 241(6) and 200 action. Plaintiff was injured when he fell bringing in boxes of

tile and thin set using a hand truck. Plaintiff was not performing construction work within the mean of Labor Law §§ 240(1) and 241(6) because the material he was bringing in were not for immediate use. Both defendants established they did not supervise plaintiff's work or have notice of any dangerous condition: "Sussex and Berkoff each established their prima facie entitlement to judgment as a matter of law dismissing the causes of action alleging violations of Labor Law §§ 240(1) and 241(6) insofar as asserted against Sussex. The evidence supporting the motions established that at the time of the accident, the plaintiff was not engaged in construction work within the meaning of Labor Law § 240(1), and was not working in a construction area within the meaning of Labor Law § 241(6), since the building materials were not being 'readied for immediate use' ... , but were instead being 'stockpil[ed] for future use' ... . Sussex and Berkoff each established, prima facie, both that Sussex did not create or have actual or constructive notice of the alleged condition which caused the plaintiff's injury, and that it did not supervise or control the means and methods of the plaintiff's work ...". ***Kusayev v. Sussex Apts. Assoc., LLC*, 2018 N.Y. Slip Op. 05458, Second Dept 7-25-18**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT IN THIS LABOR LAW § 240(1) ACTION SHOULD NOT HAVE BEEN GRANTED, PLAINTIFF FELL WHEN A PLANK ON A SCAFFOLD HE WAS ERECTING BROKE.

The Second Department, reversing Supreme Court, determined defendant's (MJRB'S) motion for summary judgment in this Labor Law § 240(1) action should not have been granted. Plaintiff fell when a plank on a scaffold he was erecting broke: "[T]he plaintiff established his prima facie entitlement to judgment as a matter of law by submitting evidence that he was not provided with necessary protection from the gravity-related risk of his construction work, and that the absence of the necessary protection was a proximate cause of his injuries ... . In opposition, MJRB failed to raise a triable issue of fact ... . MJRB contends that the plaintiff's failure to use a safety harness was the sole proximate cause of his accident. There was, however, no evidence that the plaintiff was informed as to where the harnesses were kept and that he was instructed in their use ... . Moreover, MJRB's contention that the plaintiff was the sole proximate cause of the accident because the scaffold from which he fell was one which he himself was constructing is without merit ...". ***Rapalo v. MJRB Kings Highway Realty, LLC*, 2018 N.Y. Slip Op. 05512, Second Dept 7-25-18**

MEDICAL MALPRACTICE, EMPLOYMENT LAW, NEGLIGENCE.

MEDICAL MALPRACTICE ACTION AGAINST HOSPITAL PROPERLY DISMISSED, THE DEFENDANT PHYSICIANS WERE PRIVATE INDEPENDENT PHYSICIANS, HOSPITAL PERSONNEL WERE NOT NEGLIGENT, AND THE HOSPITAL DEMONSTRATED IT HAD NO REASON TO SUSPECT THE PHYSICIANS WOULD ACT WITHOUT INFORMED CONSENT.

The Second Department determined the medical malpractice action against the hospital (Mount Sinai) was properly dismissed because the physicians involved were not employees of the hospital: "As a general matter, 'under the doctrine of respondeat superior, a hospital may be held vicariously liable for the negligence or malpractice of its employees acting within the scope of employment, but not for negligent treatment provided by an independent physician, as when the physician is retained by the patient'... . Where hospital staff, such as resident physicians and nurses, have participated in the treatment of the patient, the hospital may not be held vicariously liable for resulting injuries where the hospital employees merely carried out the private attending physician's orders ... . These rules shielding a hospital from liability do not apply when (1) 'the staff follows orders despite knowing that the doctor's orders are so clearly contraindicated by normal practice that ordinary prudence requires inquiry into the correctness of the orders'... ; (2) the hospital's employees have committed independent acts of negligence ... ; or (3) the words or conduct of the hospital give rise to the appearance and belief that the physician possesses the authority to act on behalf of the hospital ... . With respect to a cause of action predicated on lack of informed consent, 'where a private physician attends his or her patient at the facilities of a hospital, it is the duty of the physician, not the hospital, to obtain the patient's informed consent'... . It is only where the hospital knew or should have known that the private physician was acting or would act without the patient's informed consent that it may be held liable ... . Mount Sinai established, prima facie, that private attending physicians were responsible for the entirety of the injured plaintiff's care before, during, and after the surgical procedure, and that a resident physician employed by Mount Sinai acted under the supervision and control of the private attending physicians. Mount Sinai further established, prima facie, that the orders of the private attending physicians, which did not include post-operative antibiotics, were not contraindicated, and that none of Mount Sinai's employees committed any independent acts of negligence. Finally, Mount Sinai established, prima facie, that there was no reason for it to know or suspect that the private attending physicians were acting or would act without the injured plaintiff's informed consent ... ". ***Cynamon v. Mount Sinai Hosp.*, 2018 N.Y. Slip Op. 05448, Second Dept 7-25-18**

PERSONAL INJURY.

ACTION ALLEGING INJURY FROM A FALLING TREE ON DEFENDANT'S PROPERTY SHOULD HAVE BEEN DISMISSED, DEFENDANT DEMONSTRATED A LACK OF NOTICE OF THE CONDITION OF THE TREE,

The Second Department determined a lawsuit alleging injury from a falling tree on defendant's property should have been dismissed. Defendant property owner (Alice) demonstrated a lack of notice of the condition of the tree: " 'In cases involving

fallen trees, a property owner will only be held liable if [she or] he knew or should have known of the defective condition of the tree' ... . 'Constructive notice in such a case can be imputed if the record establishes that a reasonable inspection would have revealed the dangerous condition of the tree' ... . Here, Alice established her prima facie entitlement to judgment as a matter of law by submitting evidence that she lacked actual or constructive notice of the alleged defective condition of the tree ...". ***Pagan v. Jordan*, 2018 N.Y. Slip Op. 05477, Second Dept 7-25-18**

PERSONAL INJURY.

DEFENDANTS IN THIS SLIP AND FALL CASE DID NOT DEMONSTRATE WHEN THE AREA WAS LAST CLEANED OR INSPECTED, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court determined defendants did not demonstrate when the area where plaintiff slipped and fell had last been inspected or cleaned and did not demonstrate the handrail was not defective: "... [T]he defendants failed to establish, prima facie, that they did not have constructive notice of the alleged hazardous conditions. While the deposition testimony of the premises' porter and an affidavit of its superintendent, submitted by the defendants in support of their motion, demonstrated that the porter and the superintendent inspected and cleaned the premises on a regular basis, the defendants failed to present evidence of when the specific area where the plaintiff fell was last cleaned or inspected before the accident ...". ***Quinones v. Starret City, Inc.*, 2018 N.Y. Slip Op. 05510, Second Dept 7-25-18**

PERSONAL INJURY.

PLAINTIFF ENTITLED TO SUMMARY JUDGMENT IN THIS REAR-END COLLISION CASE.

The Second Department, reversing Supreme Court, determined that plaintiff's motion for summary judgment in this rear-end collision case should have been granted. The court noted that a plaintiff is not longer required to demonstrate the absence of comparative fault to be entitled to summary judgment. Plaintiff was in the first stopped car. The car behind plaintiff (CCAP/Rosenthal) was also stopped but was struck from behind by a third car (Auto Mall/Edri): "A plaintiff in a negligence action moving for summary judgment on the issue of liability must establish, prima facie, that the defendant breached a duty owed to the plaintiff and that the defendant's negligence was a proximate cause of the alleged injuries ... . A plaintiff is no longer required to show freedom from comparative fault in establishing his or her prima facie case … . A rear-end collision with a stopped or stopping vehicle establishes a prima facie case of negligence on the part of the operator of the rear vehicle, requiring that operator to come forward with evidence of a nonnegligent explanation for the collision in order to rebut the inference of negligence ... . The plaintiff's affidavit submitted in support of his motion established his prima facie entitlement to judgment as a matter of law. The plaintiff's affidavit demonstrated that he was stopped for between 5 and 10 seconds due to traffic related conditions before his vehicle was struck in the rear by the CCAP/Rosenthal vehicle. The plaintiff's affidavit also demonstrated that the vehicle operated by Edri struck the rear of the stopped vehicle owned by CCAP and operated by Rosenthal, which propelled that vehicle into the rear of the plaintiff's stopped vehicle. In opposition, Auto Mall and Edri failed to raise a triable issue of fact regarding a nonnegligent explanation for the rear-end collision. Furthermore, the contention of Auto Mall and Edri that the plaintiff's motion was premature pursuant to CPLR 3212(f) is unpersuasive. Auto Mall and Edri failed to demonstrate how discovery may lead to relevant evidence or that facts essential to opposing the motion were exclusively within the plaintiff's knowledge or control ...". ***Tsyganash v. Auto Mall Fleet Mgt., Inc.*, 2018 N.Y. Slip Op. 05517, Second Dept 7-25-18**

PERSONAL INJURY, VEHICLE AND TRAFFIC LAW.

REARMOST DRIVER RAISED A QUESTION OF FACT ABOUT WHETHER THE DRIVER IN FRONT STOPPED SUDDENLY AND DID NOT SIGNAL.

The Second Department, reversing Supreme Court, determined the rearmost driver (plaintiff) in this rear-end collision case raised a question of fact whether defendant stopped suddenly and did not signal: "A rear-end collision with a stopped or stopping vehicle establishes a prima facie case of negligence on the part of the operator of the rear vehicle, thereby requiring that operator to rebut the inference of negligence by providing a nonnegligent explanation for the collision ... . There can be more than one proximate cause of an accident ... , and a defendant moving for summary judgment in a negligence action has the burden of establishing, prima facie, that he or she was not at fault in the happening of the subject accident ... . '[N]ot every rear-end collision is the exclusive fault of the rearmost driver. The frontmost driver also has the duty not to stop suddenly or slow down without proper signaling so as to avoid a collision'... . Here, in support of her motion for summary judgment, the defendant submitted an affidavit in which she averred that she brought her vehicle to a gradual stop to make a left turn onto ... . She activated her left turning signal and had been stopped for at least 35 seconds, waiting for traffic to clear, when her vehicle was struck in the rear by the plaintiff's vehicle. ... In opposition, the plaintiff averred that the defendant made a sudden stop and failed to give proper signals, as required by Vehicle and Traffic Law § 1163. The plaintiff's affidavit was sufficient to raise a triable issue of fact as to whether the defendant negligently caused or contributed to the accident ...". ***Martinez v. Allen*, 2018 N.Y. Slip Op. 05462, Second Dept 7-25-18**

THIRD DEPARTMENT

INSURANCE LAW, CONTRACT LAW, NEGLIGENCE.

NO AGREEMENT TO INCREASE INSURANCE COVERAGE OF HOME DESTROYED BY FIRE AFTER RENOVATIONS, NO SPECIAL RELATIONSHIP BETWEEN THE INSURANCE BROKERS AND THE INSUREDS.

The Third Department determined defendant insurance brokers' motion for summary judgment in this breach of contract-negligence action by the insureds was properly granted. The Insureds alleged there was an agreement to increase the insurance coverage on the insureds' home which was destroyed by fire after renovations had been made and there was a special relationship between the brokers and the insureds. There evidence did not support either theory: " 'As a general principle, insurance brokers have a common-law duty to obtain requested coverage for their clients within a reasonable time or inform the client of the inability to do so; however, they have no continuing duty to advise, guide or direct a client to obtain additional coverage' ... . Thus, '[t]o set forth a case for negligence or breach of contract against an insurance broker, a plaintiff must establish that a specific request was made to the broker for the coverage that was not provided in the policy' ... . * * * Stressing that 'special relationships in the insurance brokerage context are the exception, not the norm' ... , the Court of Appeals has identified three 'exceptional situations' that may give rise to a special relationship: '(1) the agent receives compensation for consultation apart from payment of the premiums; (2) there was some interaction regarding a question of coverage, with the insured relying on the expertise of the agent; or (3) there is a course of dealing over an extended period of time which would have put objectively reasonable insurance agents on notice that their advice was being sought and specially relied on' ...". ***Hefty v. Paul Seymour Ins. Agency*, 2018 N.Y. Slip Op. 05547, Third Dept 7-26-18**

TAX LAW, MUNICIPAL LAW, REAL PROPERTY TAX LAW.

ALTHOUGH THE STATUTE STATES THAT EMPIRE ZONE REAL PROPERTY TAX CREDITS ARE AVAILABLE WHEN THE TAX PAYER MAKES DIRECT PAYMENTS TO THE TAXING AUTHORITY, PETITIONERS WERE ENTITLED TO THE TAX CREDITS EVEN THOUGH THE PAYMENTS WERE MADE FROM A MORTGAGE TAX ESCROW ACCOUNT.

The Third Department, reversing the Tax Appeals Tribunal, determined petitioners were entitled to Empire Zone real property tax credits even though the tax payment were mortgage by Wells Fargo from a mortgage tax escrow account. The Tax Law requires "direct payment" to the taxing authority: "... [A]lthough Tax Law § 15 (e) (3) contemplates a 'direct payment' of real property taxes from the lessee to the taxing authority, we find that, under the particular circumstances presented here, [the lessee's] use of a mortgage tax escrow account for the payment of real property taxes did not preclude petitioners from claiming the subject [Empire Zone] real property tax credits." ***Matter of Balbo v. New York State Tax Appeals Trib.*, 2018 N.Y. Slip Op. 05540, Third Dept 7-26-18**

FOURTH DEPARTMENT

CIVIL PROCEDURE, EMPLOYMENT LAW, LABOR LAW.

AN UNPLEADED AFFIRMATIVE DEFENSE MAY BE SUCCESSFULLY RAISED TO DEFEAT A MOTION FOR SUMMARY JUDGMENT.

The Fourth Department noted that an unpleaded affirmative defense may be successfully raised to defeat a motion for summary judgment: "Defendants allegedly embezzled over $100,000 from plaintiffs, their alleged former employers. Plaintiffs then commenced this action for fraud, conversion, and breach of fiduciary duty. Defendants both counterclaimed for, inter alia, slander per se and the violations of Labor Law §§ 162 (2), 191 (3), 195 (1) (a), and 195 (5). Defendant Carrie Massaro also counterclaimed for a violation of section 198 and for unpaid overtime under the Federal Fair Labor Standards Act (FLSA) ... . * * * ... [T]he affidavit of plaintiff .... raises triable issues of fact regarding their potential entitlement to the affirmative defense provided by [Labor Law] section 198 (1-b) (ii). Contrary to defendants' contention, '[a]n unpleaded affirmative defense may be invoked to defeat a motion for summary judgment' ... . Thus, although the court properly refused to dismiss the [Labor Law] section 195 (1) (a) counterclaims, the court erred in granting defendants summary judgment on those same counterclaims given plaintiffs' potential entitlement to the affirmative defense under [Labor Law] section 198 (1-b) (ii) ...". ***Salahuddin v. Craver*, 2018 N.Y. Slip Op. 05429, Fourth Dept 7-25-18**

CIVIL PROCEDURE, ENVIRONMENTAL LAW, CORPORATION LAW.

ALTHOUGH THE FOREIGN CORPORATION MIGHT BE LIABLE FOR CONTAMINATION OF PLAINTIFFS' PROPERTY, THE CORPORATION HAS NO PRESENT CONTACTS IN NEW YORK AND THEREFORE IS NOT SUBJECT TO THE COURT'S JURISDICTION.

The Fourth Department, reversing Supreme Court, determined that New York does not have jurisdiction over a foreign corporation which might be liable for contamination of plaintiffs' property, but which has no present contacts in New York: "It is undisputed that defendant, a foreign corporation with no present contacts in this State, is not subject to personal jurisdiction in New York under either CPLR 301 or 302 (a) (see Semenetz v. Sherling & Walden, Inc., 21 AD3d 1138, 1139-1140

[3d Dept 2005], affd on other grounds 7 NY3d 194 [2006]). Nevertheless, plaintiffs contend that personal jurisdiction exists over defendant because it ostensibly bears successor liability for a predecessor corporation that was itself subject to personal jurisdiction in New York. The Third Department, however, expressly rejected that jurisdictional theory in Semenetz (see id. at 1140). The 'successor liability rule[s],' wrote the Semenetz court, 'deal with the concept of tort liability, not jurisdiction. When and if [successor liability] is found applicable, the corporate successor would be subject to liability for the torts of its predecessor in any forum having in personam jurisdiction over the successor, but the [successor liability rules] do not and cannot confer such jurisdiction over the successor in the first instance' (id.)". ***BRG Corp. v. Chevron U.S.A., Inc.*, 2018 N.Y. Slip Op. 05425, Fourth Dept 7-25-18**

CIVIL PROCEDURE, INDIAN LAW.

SUPREME COURT PROPERLY REFUSED TO DISMISS A COMPLAINT CONCERNING CONTROL OF CERTAIN CAYUGA NATION PROPERTY ON SUBJECT MATTER JURISDICTION GROUNDS, TWO JUSTICE DISSENT.

The Fourth Department, over a two-justice dissent, determined that Supreme Court properly refused to dismiss the complaint on subject matter jurisdiction grounds. The complaint asserts one faction of the Cayuga Nation, defendants, are improperly in control of and trespassing on certain Nation property. Supreme Court granted to plaintiffs a preliminary injunction based upon a ruling by the Bureau of Indian Affairs (BIA). The dissenting justices argued that the New York courts do not have jurisdiction over tribal affairs and the complaint should have been dismissed on that ground: "Defendants contend that the court erred in denying their motion because the courts of New York have no power to determine who controls the Nation. Although we agree with defendants that we may not resolve the Nation's leadership dispute, we are not required to do so in this appeal. Rather, we accord due deference to the BIA's conclusion that the Nation, at least with respect to that issue, has resolved the dispute in favor of plaintiff. * * * We caution that we do not determine which party is the proper governing body of the Nation, nor does our determination prevent the Nation from resolving that dispute differently according to its law in the future. The Nation, as a sovereign body, retains full authority to reconcile its own internal governance disputes according to its laws. Until such action occurs, however, we accord deference to the BIA's determination that plaintiff is the proper body to enforce the Nation's rights, including its rights to control the property at issue in this action." ***Cayuga Nation v. Campbell*, 2018 N.Y. Slip Op. 05427, Fourth Dept 7-25-18**

CIVIL PROCEDURE, LANDLORD-TENANT, MUNICIPAL LAW, REAL PROPERTY LAW, CONVERSION.

CLASS ACTION COMPLAINT ON BEHALF OF TENANTS ALLEGING LANDLORDS' MISHANDLING OF SECURITY DEPOSITS SHOULD NOT HAVE BEEN DISMISSED.

The Fourth Department, reversing (modifying) Supreme Court, determined the complaint adequately pled a class action concerning defendants-landlords' alleged mishandling of security deposits, including allegations of conversion and co-mingling: " [P]laintiffs adequately alleged all of the prerequisites to class certification... . Plaintiffs alleged that the class of tenants consists of more than 200 members, thereby satisfying the numerosity requirement ... . Plaintiffs also alleged that the common issue is whether, by commingling the security deposits of their tenants, defendants acted unlawfully, and that the individual issues are the amount of the security deposit and defendants' entitlement to deductions therefrom... . Thus, we conclude that plaintiffs sufficiently alleged that the common issues predominate (see CPLR 901 [a] [2]). Regarding the typicality requirement, plaintiffs alleged that their claims arise from 'the same course of conduct and are based on the same theories as the other class members' ... . Plaintiffs also alleged that they can fairly and adequately protect the interests of the class inasmuch as they do not have conflicting interests with other class members... . Plaintiffs satisfied the superiority requirement by alleging that the damages likely suffered by each of the tenants range between $475 and $4,500, and 'the cost of prosecuting individual actions would deprive many of the putative class members of their day in court' ... . [T]he amended complaint adequately alleges a cause of action for conversion in violation of General Obligations Law § 7-103 ... . [T]he court erred in granting the motion with respect to the second cause of action, alleging that defendants violated Property Conservation Code of the City of Syracuse § 27-125, inasmuch as that section gives rise to a private cause of action ... . [T]he lease includes a clause requiring tenants to pay attorneys' fees if they breach the lease and, pursuant to Real Property Law § 234, the tenant has the 'same benefit [to attorneys' fees as] the lease imposes in favor of the landlord' ...". ***Rubman v. Osuchowski*, 2018 N.Y. Slip Op. 05416, Fourth Dept 7-25-18**

CRIMINAL LAW.

ERROR FOR JUDGE TO EFFECTIVELY IGNORE SPECIFIC QUESTIONS IN A JURY NOTE AND TO INSTRUCT THE JURY ON A LEGAL ISSUE THAT HAD NOT BEEN RAISED BEFORE AND COULD NOT, THEREFORE, HAVE BEEN ADDRESSED BY DEFENSE COUNSEL IN SUMMATION.

The Fourth Department, reversing defendant's conviction on two of three counts, determined the trial court abused its discretion when, in response to a jury note, it instructed the jury, for the first, that the intent to use a weapon may be presumed from possession of a weapon. The jury had asked specific questions concerning the issue of intent and the judge's "presumption" instruction did not address those questions. Rather, the instruction allowed the jury to avoid the questions by applying the presumption: "The Criminal Procedure Law allows the jury to ask the court to clarify an instruction '[a]t

any time during its deliberation' (CPL 310.30). Upon receiving such a request, the court must 'perform the delicate operation of fashioning a response which meaningfully answer[s] the jury's inquiry while at the same time working no prejudice to the defendant' ... . '[T]he court has significant discretion in determining the proper scope and nature of the response'... . In determining whether the court's response constituted an abuse of discretion, '[t]he factors to be evaluated are the form of the jury's question, which may have to be clarified before it can be answered, the particular issue of which inquiry is made, the [information] actually given and the presence or absence of prejudice to the defendant' ... . We conclude that the court failed in its duty to fashion a response that meaningfully answered the jury's question and to avoid prejudicing defendant. The jury notes demonstrate that the jury had thoughtful questions about intent and was carefully weighing the conflicting testimony of the witnesses to determine whether and when defendant in fact formed the intent to use the gun unlawfully against another. The court, however, instructed the jury that defendant's possession of the gun was presumptive evidence of intent to use it unlawfully, and that the jury may not need or want to consider additional evidence in light of that presumption. That answer was not responsive to either note. Moreover, the court's response prejudiced defendant by introducing new principles of law after summations, when defense counsel no longer had the opportunity to argue that, despite the presumption, the evidence established that defendant lacked the requisite intent ...". ***People v. Wood*, 2018 N.Y. Slip Op. 05422, Fourth Dept 7-25-18**

CRIMINAL LAW, EVIDENCE, ATTORNEYS.

DEFENSE COUNSEL WAS NOT INEFFECTIVE FOR FAILURE TO MOVE TO SUPPRESS THE RESULTS OF THE WARRANTLESS SEARCH OF A GARBAGE BAG AND CELL-SITE LOCATION RECORDS WHICH WERE JUSTIFIED BY EXIGENT CIRCUMSTANCES, AND DEFENSE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO OBJECT TO THE PROSECUTOR'S MISCHARACTERIZATION OF THE STRENGTH OF DNA EVIDENCE.

The Fourth Department determined the defendant was not deprived of effective assistance of counsel by (1) the failure to move to suppress evidence found in a garbage bag outside defendant's grandmother's house, (2) the failure to move to suppress cell site location information (CSLI), and (3) the failure to object to the prosecutor's mischaracterization of the DNA evidence as a match. Exigent circumstances justified the search of the garbage bag and the warrantless search of the cell-site records, and the prosecutorial misconduct was not flagrant and pervasive: "... [W]e conclude that, in light of the particular circumstances that led the police officers to the premises in search of a recently missing 17-year-old girl, that limited search (of the garbage bag) fell within the recognized emergency exception to the warrant requirement ... . The Supreme Court recognized that 'case-specific exceptions may support a warrantless search of an individual's cell-site records under certain circumstances' ... . 'One well-recognized exception applies when the exigencies of the situation make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable under the Fourth Amendment . . . Such exigencies include the need to . . . protect individuals who are threatened with imminent harm' ... . The testimony at trial established that defendant could not be excluded as the source of the DNA found on the victim's nail and that the chance of randomly selecting an unrelated individual as the source of the DNA was less than one in 114,000. Here, ... the sole mischaracterization of the DNA evidence 'did not rise to the flagrant and pervasive level of misconduct [that] would deprive defendant of due process,' ...". ***People v. Lively*, 2018 N.Y. Slip Op. 05413, Fourth Dept 7-25-18**

FAMILY LAW, CIVIL PROCEDURE.

PROPERTY ACQUIRED DURING A VERMONT CIVIL UNION, UNDER PRINCIPLES OF COMITY, IS SUBJECT TO EQUITABLE DISTRIBUTION.

The Fourth Department, reversing (modifying} Supreme Court, determined property acquired during a civil union entered into in Vermont was, under the principles of comity, subject to equitable distribution in a New York divorce action. The parties were married three years after entering the civil union: "... [W]e conclude that comity does require the recognition of property rights arising from a civil union in Vermont. One of the consequences of the parties' civil union in Vermont was that they would receive 'all the same benefits, protections, and responsibilities under law . . . as are granted to spouses in a civil marriage' (Vt Stat Ann, tit 15, § 1204 [a]), including rights with respect to 'divorce . . . and property division' (§ 1204 [d] ...). That rule is consistent with the public policy of New York, inasmuch as the laws of Vermont and New York both 'predicate[] [property rights] on the objective evidence of a formal legal relationship,' i.e., legal union between the parties... . In other words, under the laws of both Vermont and New York, property acquired during a legal union of two people—in Vermont a civil union or marriage, and in New York, a marriage—is subject to equitable distribution under the governing statutes of the state. The relevant New York and Vermont statutes both provide similar factors for the court to consider when determining the equitable distribution of the property (compare Domestic Relations Law § 236 [B] [5] [c], [d], with Vt Stat Ann, tit 15, § 751 [b]). Thus, we conclude that, under the principles of comity, the property acquired during the civil union and prior to the marriage is subject to equitable distribution, and such property will therefore be equitably distributed after trial, along with the property acquired during the marriage." ***O'Reilly-Morshead v. O'Reilly-Morshead*, 2018 N.Y. Slip Op. 05419, Fourth Dept 7-25-18**

FAMILY LAW, CONTRACT LAW.

DIVORCE SETTLEMENT AGREEMENT WHICH WAS SILENT ON THE DEFINITION OF MAINTENANCE WAS INTERPRETED IN ACCORDANCE WITH THE STATUTORY DEFINITION OF MAINTENANCE IN DOMESTIC RELATIONS LAW § 236.

The Fourth Department, in a full-fledged opinion by Justice NeMoyer, determined that a divorce settlement agreement which indicated a specific date (2020) when the husband's maintenance obligation ends did not extend the husband's maintenance obligation beyond the wife's remarriage in 2015. Because the agreement was silent on the meaning of "maintenance" the court turned to Domestic Relations Law § 236 which indicates that a maintenance obligation terminates upon remarriage: "A divorce settlement agreement is a contract, subject to standard principles of contract interpretation ... . The agreement at issue does not explicitly define the term 'maintenance,' and it is silent regarding the effect of the wife's remarriage upon the husband's maintenance obligation. Thus, the plain text of the agreement — which the Court of Appeals says is the best source of the parties' intent ... — is not conclusive of the question on appeal. 'Nevertheless, it is basic that, unless a contract provides otherwise, the law in force at the time the agreement is entered into becomes as much a part of the agreement as though it were expressed or referred to therein, for it is presumed that the parties had such law in contemplation when the contract was made and the contract will be construed in the light of such law' (Dolman v. United States Trust Co. of N.Y., 2 NY2d 110, 116 [1956] ...). The Dolman rule is of longstanding vintage, and the 'principle embraces alike those [laws in force at the time of a contract's execution] which affect its validity, construction, discharge, and enforcement' ... . By virtue of the Dolman rule, when parties enter into an agreement authorized by or related to a particular statutory scheme, the courts will presume — absent something to the contrary — that the terms of the agreement are to be interpreted consistently with the corresponding statutory scheme ... . The statutory scheme corresponding to the agreement in this case is Domestic Relations Law § 236, which authorizes divorce settlement agreements and directs that such agreements specify the 'amount and duration of maintenance,' if any ... . The term 'maintenance' is defined within this statutory scheme as 'payments provided for in a valid agreement between the parties or awarded by the court . . . , to be paid at fixed intervals for a definite or indefinite period of time' ... . Critically, the statutory definition includes the following caveat: any maintenance award 'shall terminate upon the death of either party or upon the payee's valid or invalid marriage' ...". ***Burns v. Burns*, 2018 N.Y. Slip Op. 05411, Fourth Dept 7-25-18**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

PLAINTIFF ENTITLED TO SUMMARY JUDGMENT ON THE LABOR LAW § 240(1) CAUSE OF ACTION, PLAINTIFF DEMONSTRATED THE FAILURE OF A TOE BOARD WAS AT LEAST A CONTRIBUTING CAUSE OF PLAINTIFF'S FALL FROM A ROOF, CONTRIBUTORY NEGLIGENCE IS NOT A BAR TO RECOVERY AS A MATTER OF LAW.

The Fourth Department, reversing (modifying) Supreme Court, determined plaintiff was entitled to summary judgment on his Labor Law § 240(1) cause of action. Plaintiff fell from a roof after a toe board became detached from the roof: " 'Plaintiff[s] met [their] initial burden by establishing that [plaintiff's] injury was proximately caused by the failure of a safety device to afford him proper protection from an elevation-related risk' ... . '[T]he question of whether [a] device provided proper protection within the meaning of Labor Law § 240 (1) is ordinarily a question of fact, except in those instances where the unrefuted evidence establishes that the device collapsed, slipped or otherwise failed to perform its [intended] function of supporting the worker and his or her materials' ... . Here, plaintiffs established that, on the morning of the accident, plaintiff had been instructed to work on a pitched roof on which 'toe boards,' i.e., two- by six-inch boards nailed directly to the roof approximately two to three feet up from the bottom edge of the roof, had already been installed, and defendants failed to submit non-speculative evidence to the contrary. There is no dispute that the toe boards detached from the roof while plaintiff was working, causing him to fall and sustain injuries. The failure of that safety device constituted a violation of Labor Law § 240 (1) as a matter of law ..., and that violation was, at minimum, ' a contributing cause of [plaintiff's] fall' ... . Thus, contrary to defendants' contentions, plaintiff's alleged failure to utilize other safety devices available on the job site, including his alleged failure to reinstall the toe boards with additional supporting roof jacks, raises no more than an issue of contributory negligence ...". ***Provens v. Ben-Fall Dev., LLC*, 2018 N.Y. Slip Op. 05426, Fourth Dept 7-25-18**

PERSONAL INJURY, EDUCATION-SCHOOL LAW.

EIGHT YEAR OLD STUDENT MISSED HIS BUS AND WAS ALLEGEDLY TOLD BY A SCHOOL EMPLOYEE TO WALK HOME, THE STUDENT WAS STRUCK BY A CAR ON HIS WAY HOME, THE NEGLIGENT SUPERVISION COMPLAINT AGAINST THE SCHOOL DISTRICT SHOULD NOT HAVE BEEN DISMISSED.

The Fourth Department, reversing Supreme Court, determined that an action brought by an eight year old student against the school district should not have been dismissed. It was alleged the student missed his bus and was told to walk home (two miles away). The student was hit by a car. The court noted that the school district is not off the hook simply because the injury did not occur on school property: " '[A]lthough a school district's duty of care toward a student generally ends when it relinquishes custody of the student, the duty continues when the student is released into a potentially hazardous situation, particularly when the hazard is partly of the school district's own making' ... . 'Thus, while a school has no duty to prevent injury to schoolchildren released in a safe and anticipated manner, the school breaches a duty when it releases a

child without further supervision into a foreseeably hazardous setting it had a hand in creating' ... . Contrary to defendants' contention and the court's holding, [precedent] does not limit a school's liability to injuries that occur near school grounds. Rather, a 'school district's duty of care requires continued exercise of control and supervision in the event that release of the child poses a foreseeable risk of harm,' irrespective of the physical distance between the school and the location of the reasonably foreseeable risk ... . Here, plaintiff raised a triable issue of fact concerning whether defendants, in violation of their own policies and procedures, released the child into a 'foreseeably hazardous setting' partly of their own making and thereby breached their duty of care ...". ***Deng v. Young*, 2018 N.Y. Slip Op. 05414, Second Dept 7-25-18**

PERSONAL INJURY, EVIDENCE, APPEALS, CIVIL PROCEDURE.

PLAINTIFF'S EXPERT WITNESS DISCLOSURE SHOULD NOT HAVE BEEN STRUCK AND THE EXPERT SHOULD NOT HAVE BEEN PRECLUDED FROM TESTIFYING ABOUT THE RELEVANT STANDARDS FOR USE OF SLIDES IN SWIMMING POOLS, PLAINTIFF ALLEGEDLY STRUCK HER HEAD ON THE BOTTOM OF THE POOL AFTER SLIDING HEAD FIRST, THE RULING ON THE MOTION IS APPEALABLE BECAUSE IT DEALS WITH THE MERITS AND AFFECTS A SUBSTANTIAL RIGHT.

The Fourth Department, reversing (modifying) Supreme Court, determined that defendants' motion in limine to strike plaintiff's expert witness disclosure and preclude the expert from testifying should not have been granted. The court noted that the evidentiary motion was appealable because it involved the merits of this swimming pool injury case and affected a substantial right. The disclosure indicated the expert would testify about New York State code provisions and ANSI/INSPI-4 standards for slides used in swimming pools. Plaintiff alleged she was injured when her head struck the bottom of the pool after sliding into the water head first: "... [T]he court erred in granting that part of the motion to strike the expert witness disclosure and to preclude the expert from testifying with respect to the 2010 Residential Code of New York State (Residential Code) and the ANSI/NSPI-4 standard for aboveground residential swimming pools, and we therefore modify the order accordingly. Section 1.2 of that standard provides that '[a]boveground/onground residential swimming pools are for swimming and wading only. No . . . slides or other equipment are to be added to an aboveground/onground pool that in any way indicates that an aboveground/onground pool may be used or intended for . . . sliding purposes,' and the ANSI/NSPI-4 standard is incorporated in the Residential Code that was in effect at the time of plaintiff's accident (see 2010 Residential Code of New York State §§ R102.6, G109.1). Inasmuch as the ANSI/NSPI-4 standard applies only to residential pools, and the Residential Code applies to family dwellings (see Residential Code § R101.2), we conclude that the Residential Code section adopting the ANSI/NSPI-4 standard applies to private homeowners. Thus, we further conclude that plaintiff's expert may properly rely on any violation of the ANSI/NSPI-4 standard as 'some evidence' of defendants' negligence ...". ***Redmond v. Redmond*, 2018 N.Y. Slip Op. 05417, Fourth Dept 7-25-18**

ZONING, ENVIRONMENTAL LAW.

TOWN DID NOT VIOLATE THE TOWN CODE OR THE STATE ENVIRONMENTAL QUALITY REVIEW ACT WHEN IT GRANTED A SPECIAL USE PERMIT AND VARIANCES FOR THE CONSTRUCTION OF A CELL TOWER.

The Fourth Department determined the zoning board of appeals (ZBA) did not violate any provisions of the town code or the State Environmental Quality Review Act when it issued a special use permit and variances allowing the construction of a cell tower (wireless telecommunications facility or WTF): " 'Where, as here, the zoning ordinance authorizes a use permit subject to administrative approval, the applicant need only show that the use is contemplated by the ordinance and that it complies with the conditions imposed to minimize anticipated impact on the surrounding area . . . The [zoning authority] is required to grant a special use permit unless it has reasonable grounds for denying the application' ... . Although the Planning Department initially concluded that aspects of the application would not be consistent with the Town's comprehensive plan, it recommended approval of the application upon certain conditions, which included employing stealth design to disguise the tower as an evergreen tree and reconfiguring the site plan to move the tower as far away as possible from adjacent residences. After holding a public hearing and formally considering the application, the ZBA approved the application subject to the recommended conditions and issued a written decision to that effect ... . Thus, we conclude that there is no merit to petitioners' contention that the special use permit ultimately granted by the ZBA was inconsistent with the Town's comprehensive plan. ... ... [W]e conclude that the requirements for area variances set forth in Town Law § 267-b (3) are inapplicable here inasmuch as the ZBA issued waivers pursuant to Town Law § 274-b (5). The record also establishes that Verizon demonstrated by clear and convincing evidence that the waivers would have 'no significant effect on the health, safety and welfare of the Town, its residents and other service providers' (ch 203, § 6-7-21)." ***Matter of Edwards v. Zoning Bd. of Appeals of Town of Amherst*, 2018 N.Y. Slip Op. 05430, Fourth Dept 7-25-18**

ZONING, ADMINISTRATIVE LAW, CIVIL PROCEDURE.

THE COURT REVERSED THE ZONING BOARD OF APPEALS BECAUSE THE BOARD FAILED TO FOLLOW THE PROCEDURE MANDATED BY THE TOWN CODE WHEN IT GRANTED AREA VARIANCES, THE COURT ALSO NOTED THAT A DECLARATORY JUDGMENT IS NOT AN AVAILABLE REMEDY FOR CHALLENGING AN ADMINISTRATIVE DETERMINATION.

The Fourth Department, modifying Supreme Court, determined the zoning board of appeals (ZBA) did not follow town code procedure when it refused to consider the review and comments submitted by the planning board in connection with area variances of lot-width requirements for a proposed subdivision. The court also noted that a declaratory judgment is not an available remedy for challenging an administrative determination: "The Town's Zoning Code (Code) provides that '[t]he [ZBA] shall refer applications for variance requests to the Planning Board for review and comments. The Planning Board shall forward comments within 30 days of the close of a public hearing of the [ZBA]' ... . Here, the Planning Board conducted a meeting on June 20, 2016, and voted to approve the relevant variances. On June 27, 2016, the ZBA held a public hearing and postponed its decision on the variance application until certain residents could comment at an upcoming July 18, 2016 Planning Board meeting. At the July 18, 2016 Planning Board meeting, various residents opposed the variances, and the Planning Board reversed its initial June 20, 2016 determination and voted not to approve the area variances. Thereafter, the ZBA determined that the Planning Board did not have the authority to reverse its prior determination and that the July 18, 2016 vote was null and void. The ZBA met on August 22, 2016 and voted to approve the area variances without considering the Planning Board's July 18, 2016 review and comments.'It is well established that [c]ourts may set aside a zoning board determination only where the record reveals that the board acted illegally or arbitrarily, or abused its discretion, or that it merely succumbed to generalized community pressure' ... . Here, inasmuch as no ZBA public hearing took place until June 27, 2016, the June 20, 2016 action on the variance application by the Planning Board was procedurally improper ... . The ZBA's refusal to consider the procedurally compliant July 18, 2016 review and comments submitted by the Planning Board therefore violated the procedure set forth in section 302 (G) of the Code. We thus conclude that the ZBA's grant of the area variances was 'made in violation of lawful procedure [and] was affected by an error of law' (CPLR 7803 [3])." ***Matter of Schulz v. Town of Hopewell Zoning Bd. of Appeals*, 2018 N.Y. Slip Op. 05418, Fourth Dept 7-25-18**

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