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COURT OF APPEALS

ELECTION LAW.

FAILURE TO SPECIFY THE GENDER OF THE CANDIDATE REQUIRED DENIAL OF THE DESIGNATING PETITION.

The Court of Appeals, over a two-judge dissenting opinion, determined a designating petition was properly denied because the gender of the candidate was not specified: "Election Law § 6-132 directs, among other things, that the public office or party position sought be identified on the designating petition. Further, where, as here, a political party provides by rule for equal representation of the sexes on its state committee, 'the designating petitions . . . shall list candidates for such party positions separately by sexes' (Election Law § 2-102[4]). Thus, the courts below did not err in denying the petition to validate the designating petition due to the failure to specify whether the office sought was that of male or female member of the state committee ...". ***Matter of Mintz v. Board of Elections in the City of N.Y.*, 2018 N.Y. Slip Op. 05958, CtApp 8-29-28**

FIRST DEPARTMENT

CRIMINAL LAW, IMMIGRATION LAW, ATTORNEYS.

ALTHOUGH SUPREME COURT USED THE WRONG STANDARD OF PROOF, THE FINDING THAT DEFENDANT'S TESTIMONY AT THE HEARING ON HIS MOTION TO VACATE HIS CONVICTION WAS NOT CREDIBLE JUSTIFIED DENIAL OF THE MOTION, DEFENDANT, WHO HAS BEEN DEPORTED, ARGUED HE WOULD NOT HAVE PLED GUILTY BUT FOR HIS ATTORNEY'S ASSURANCE HE WOULD NOT BE SUBJECT TO DEPORTATION.

The First Department determined defendant's motion to vacate his conviction based upon ineffective assistance of counsel was properly denied. Seventeen years ago defendant pled guilty after being informed by his lawyer that he would not be subject to deportation. Although the First Department agreed that Supreme Court used the wrong standard of proof for analyzing ineffective assistance, the First Department held Supreme Court's finding that defendant's testimony at the hearing was not credible was a sufficient basis for denying the motion: "The motion court accepted defendant's 'uncontested assertion' in his affirmation that his attorney told him that his guilty plea would not result in negative immigration consequences such as deportation, and found that he had thus established the first of the two necessary prongs for ineffective assistance of counsel set forth in Strickland v. Washington (466 US 668, 688 [1984]), that is, that 'counsel's representation fell below an objective standard of reasonableness.' * * * ... [T]he second prong of the Strickland test [is] whether 'there [was] a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different' ... . Defendant's principal argument on appeal is that the hearing court applied the wrong evidentiary standard in applying the Strickland test. He maintains that the only relevant inquiry was whether there was a 'reasonable probability' that he would have proceeded to trial had he known that his guilty plea would result in deportation proceedings. ... This part of defendant's argument is meritorious ... . The court made a specific finding that defendant, the only witness, was not credible, a determination that is entitled to 'great deference' ... . His lack of credibility negates any conclusion that there was a reasonable probability that he would have proceeded to trial but for his attorney's misadvice." ***People v. Pinilla*, 2018 N.Y. Slip Op. 05960, First Dept 8-30-18**

INSURANCE LAW, TAX LAW, FRAUD, EMPLOYMENT LAW.

IN THIS QUI TAM (WHISTLEBLOWER) ACTION THE COMPLAINT SUFFICIENTLY ALLEGED DEFENDANT FILED FALSE TAX RETURNS RE: A CAPTIVE INSURANCE COMPANY AND TERMINATED THE WHISTLEBLOWER FOR RAISING HIS CONCERNS WITH HIS SUPERIORS.

The First Department, in a full-fledged opinion by Justice Manzanet-Daniels, determined a qui tam (whistleblower) action alleging defendant (Moody's) violated the New York False Claims Act (NYFCA) by filing false tax returns (on behalf of its captive insurance company) properly survived the motion to dismiss. The court further held that the relator's retaliation claim, alleging unlawful termination of employment for raising questions about Moody's tax filings, also properly survived the motion to dismiss. Captive insurance companies receive favorable tax treatment only if they meet certain criteria: "While the typical NYFCA claim involves the State paying out money on account of a false claim, a 'reverse false claim' occurs when someone uses a false record to conceal or avoid an obligation to pay the government ... . A defendant knowingly

makes a false claim under the NYFCA if the defendant had 'actual knowledge' of the falsity of the claim or acted 'in deliberate ignorance' or 'reckless disregard' of its truth or falsity (State Finance Law § 188[3][a]). The motion court correctly found that the complaint sufficiently alleges that Moody's 'tax treatment of MAC was aggressive, risky, and/or abusive due to its sham nature,' and that Moody's knowingly submitted false claims. * * * The complaint sufficiently alleges that defendants had knowledge of relator's protected activity and that they retaliated against him because of his protected activity. Relator alleges that he repeatedly complained about MAC's noncompliance with the tax laws to Moody's tax department as well as to his superiors ...". ***Anonymous v. Anonymous*, 2018 N.Y. Slip Op. 05963, First Dept 8-30-18**

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

HOMEOWNER EXEMPTION APPLIED TO THE CHURCH IN THIS LABOR LAW §§ 240(1), 241(6) AND 200 ACTION STEMMING FROM A FALL FROM A SCAFFOLD, FAILURE TO PLEAD THE EXEMPTION AS A DEFENSE DID NOT PRECLUDE RAISING IT IN A SUMMARY JUDGMENT MOTION, ARCHDIOCESE WAS NOT AN AGENT OF THE OWNER, NO LABOR LAW § 200 LIABILITY BECAUSE PLAINTIFF'S EMPLOYER SUPERVISED AND CONTROLLED THE MEANS AND MANNER OF WORK.

The First Department, modifying Supreme Court, determined defendant church demonstrated it was entitled to the homeowner exemption from liability in this Labor Law §§ 240(1) and 241(6) actions stemming from plaintiff's fall from a scaffold. The failure to plead the exemption as a defense did not preclude raising it in the summary judgment motion. The Archdiocese was not an agent of the owner because it did not have the authority to control or supervise plaintiff's work. And the Labor Law § 200 cause of action should have been dismissed because the accident involved the means and methods of work controlled solely by plaintiff's employer: "Defendant Catholic Church of Christ the King made a prima facie showing that the accident in which plaintiff was injured falls within the exemption to Labor Law § 240(1) and Labor Law § 241(6) for 'owners of one and two-family dwellings who contract for but do not direct or control the work' (Labor Law § 240[1]; Labor Law § 241). Plaintiff was repairing a detached garage associated with a church rectory used for both residential and church purposes ... . Moreover, the certificate of occupancy indicates that the rectory constituted a dwelling and a private garage ... . Defendant's failure to plead this affirmative defense in its answer does not mandate the denial of its motion, since plaintiff was not surprised by the defense, and fully opposed the motion (see CPLR 3018[b] ...). Plaintiff failed to raise issues of fact as to the applicability of the homeowner exemption. His assertion that the garage was exclusively restricted to use by teachers at an elementary school owned by the church is unsupported by the record." ***Bautista v. Archdiocese of N.Y.*, 2018 N.Y. Slip Op. 05959, First Dept 8-30-18**

PARTNERSHIP LAW, CONTRACT LAW.

COMPLAINT ALLEGING BREACH OF A JOINT VENTURE AGREEMENT SHOULD HAVE BEEN DISMISSED, TWO ESSENTIAL ELEMENTS OF A JOINT VENTURE, SHARING COSTS AND CONTROL, WERE ABSENT.

The First Department, reversing Supreme Court, determined the underlying breach of contract complaint should have been dismissed. Plaintiff alleged the contract created a joint venture. But the absence of an agreement to share costs and control precluded any finding that a joint venture had been formed by the contract: "In order to properly plead the existence of a joint venture agreement, a plaintiff must allege 'acts manifesting the intent of the parties to be associated as joint venturers, mutual contribution to the joint undertaking through a combination of property, financial resources, effort, skill or knowledge, a measure of joint proprietorship and control over the enterprise, and a provision for the sharing of profits and losses'... . 'An indispensable [element] of a contract of partnership or joint venture, both under common law and statutory law, is a mutual promise or undertaking of the parties to share in the profits of the business and submit to the burden of making good the losses' ... . Here, plaintiff fails to indicate the losses he would be jointly and severally liable for, and points to no provision in the alleged agreement for the sharing of any losses. Instead, there is nothing more than a conclusory allegation that any losses would be borne equally by the parties. To the contrary, the allegations in the complaint before us clearly state that any prospective losses were intended to be paid solely from defendant's share of the proceeds of the project. The failure to provide for the sharing of losses from the project is fatal to plaintiff's claim that a joint venture was created ... . Moreover, the complaint specifically alleged that management and control of the enterprise was to be completely vested in defendant, thus negating another element of a joint venture ...". ***Slabakis v. Schik*, 2018 N.Y. Slip Op. 05962, First Dept 8-30-18**

SECOND DEPARTMENT

ANIMAL LAW, CIVIL PROCEDURE.

OUT-OF-STATE AFFIDAVIT RAISED A QUESTION OF FACT WHETHER DEFENDANT WAS AWARE OF THE DOG'S VICIOUS PROPENSITIES IN THIS DOG BITE CASE, THE AFFIDAVIT WAS ADMISSIBLE DESPITE ABSENCE OF A CERTIFICATE OF CONFORMITY.

The Second Department, reversing Supreme Court, determined defendant's motion for summary judgment in this dog bite case should not have been granted. An affidavit from plaintiff's neighbor raised a question of fact whether defendant was

aware of the dog's vicious propensities. The Second Department further determined that the fact that the out-of-state affidavit was not accompanied by a certificate of conformity did not render it inadmissible: "...[I]n opposition to the motion, the plaintiff raised triable issues of fact as to whether the defendant's dog had vicious propensities, and whether the defendant knew or should have known of the dog's alleged vicious propensities ... . According to an affidavit of the plaintiff's neighbor Michael Walters, submitted in opposition to the motion, on two occasions prior to the incident, the defendant warned Walters to be careful near the dog because he bites. This affidavit was sufficient to raise a triable issue of fact as to whether the defendant had actual and/or constructive notice that the dog had vicious propensities ... . Contrary to the defendant's contention, Walters' affidavit was admissible, notwithstanding that it was subscribed and sworn to out of state and not accompanied by a certificate of conformity as required by CPLR 2309(c), as such a defect is not fatal, and no substantial right of the defendant was prejudiced by disregarding the defect ...". ***Lipinsky v. Yarusso*, 2018 N.Y. Slip Op. 05925, Second Dept 8-29-18**

APPEALS, CRIMINAL LAW, FAMILY LAW.

ADJOURNMENT IN CONTEMPLATION OF DISMISSAL WHICH HAS RESULTED IN DISMISSAL IS NOT APPEALABLE.

The Second Department determined no appeal lies from an adjournment in contemplation of dismissal (ACD) which has resulted in dismissal: " 'It is a fundamental principle of our jurisprudence that the power of a court to declare the law only arises out of, and is limited to, determining the rights of persons which are actually controverted in a particular case pending before the tribunal. This principle, which forbids courts to pass on academic, hypothetical, moot, or otherwise abstract questions, is founded both in constitutional separation-of-powers doctrine, and in methodological strictures which inhere in the decisional process of a common-law judiciary' ... . Thus, an appeal is academic 'unless an adjudication of the merits will result in immediate and practical consequences to the parties' ... . The application of these principles to the facts of this case establish that the appeal is academic. In the order appealed from, the Family Court adjourned the proceedings in contemplation of dismissal until July 18, 2017. Where a proceeding is adjourned in contemplation of dismissal, and the proceeding is not restored to the calendar and no applications by the petitioner or the child's attorney or motions by the court to restore the proceeding to the calendar are pending, 'the petition is, at the expiration of the adjournment period, deemed to have been dismissed by the court in furtherance of justice' (Family Ct Act 1039[f]). Thus, the petition has been dismissed, by operation of law and in the furtherance of justice... . Given that the appellants have received the exact relief they seek, any determination we might make in this matter would have no direct effect on the rights of the parties before us ...". ***Matter of Priciliyana C. (Jacklyn L.)*, 2018 N.Y. Slip Op. 05927, Second Dept 8-29-18**

CIVIL PROCEDURE, CORPORATION LAW.

ALTHOUGH DEFENDANT CORPORATION WAS NOT PERSONALLY SERVED WITH THE SUMMONS AND COMPLAINT, SUPREME COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO VACATE THE DEFAULT JUDGMENT, DEFENDANT DID NOT ADEQUATELY EXPLAIN ITS CLAIM THAT NOTICE BY MAIL WAS NOT RECEIVED.

The Second Department determined Supreme Court did not abuse its discretion in refusal to vacate a default judgment. Although the corporate defendant (Greenville) was not served personally, it failed to explain why it did not receive the summons and complaint: "CPLR 317 permits a defendant who has been served with a summons other than by personal delivery to defend the action upon a finding by the court that the defendant did not personally receive notice of the summons in time to defend and has a potentially meritorious defense ... . '[S]ervice on a corporation through delivery of process to the Secretary of State is not personal delivery' to the corporation' ... . 'The mere denial of receipt of the summons and complaint is not sufficient to establish lack of actual notice of the action in time to defend for the purpose of CPLR 317' ... . Whether to grant relief pursuant to CPLR 317 is discretionary ... , and relief may be denied 'where, for example, a defendant's failure to personally receive notice of the summons was a result of a deliberate attempt to avoid such notice' ... Here, Greenville did not contend that the address it kept on file with the Secretary of State was incorrect, and its shareholders effectively claimed ignorance as to why the summons and complaint were 'unclaimed,' without offering any details as to how Greenville ordinarily received mail at that address. Further, Greenville offered no explanation as to why it did not receive any of the other correspondence from the plaintiff, all of which were sent to the same address. Under these circumstances, Greenville's conclusory and unsubstantiated denial of service of the certified mailing card and other correspondence from the plaintiff was insufficient to establish that it did not have actual notice of the action in time to defend ...". ***Stevens v. Stepanski*, 2018 N.Y. Slip Op. 05954, Second Dept 8-29-18**

CIVIL PROCEDURE, EVIDENCE.

EMAILS SUBMITTED WITH REPLY PAPERS SHOULD NOT HAVE BEEN CONSIDERED, DEFENDANT'S CROSS MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined emails submitted in reply papers should not have been considered: "The purpose of a reply affidavit or affirmation is to respond to arguments made in opposition to the movant's

motion and not to introduce new arguments or grounds in support of the relief sought ... . There are exceptions to this rule, including when evidence is submitted in response to allegations made for the first time in opposition, or when the other party is given an opportunity to respond to the reply papers ... . Neither of those exceptions applies here. The time for the defendant to produce the letters allegedly from the plaintiff transferring his interest in the shares would have been in support of her cross motion, inter alia, for summary judgment declaring that she is the sole owner of the shares. There was no new allegation in the plaintiff's opposition to the cross motion that would have warranted the defendant's submission of the letters in reply. Further, the plaintiff was not given an opportunity to respond by way of surreply or oral argument. An unrecorded, in-chambers discussion of the cross motion cannot be deemed an opportunity to respond, especially in light of the plaintiff's claim on appeal that the letters are forgeries. Moreover, the defendant did not plead a demand for a declaratory judgment in a counterclaim ... . The defendant also did not assert a claim to sole ownership of the shares in her pleading." ***Gelaj v. Gelaj*, 2018 N.Y. Slip Op. 05917, Second Dept 8-29-18**

CIVIL PROCEDURE, EVIDENCE, LIEN LAW.

SUPREME COURT ABUSED ITS DISCRETION IN PRECLUDING PLAINTIFF FROM PRESENTING EVIDENCE OF ITEMS ALLEGEDLY SOLD OR DAMAGED BY DEFENDANTS (OWNERS-OPERATORS OF A STORAGE UNIT) AS A SANCTION FOR PLAINTIFF'S ALLEGED SPOLIATION OF ITEMS IN THE STORAGE UNIT.

In this Lien Law action, the Second Department determined Supreme Court improperly precluded the plaintiff from offering evidence of the value and condition of items allegedly sold or damaged by defendants, the owners/operators of a storage unit plaintiff had rented. Defendants allegedly mistakenly believed plaintiff had failed to pay the rental fees and held an auction. After plaintiff regained control of the unit, plaintiff disposed of most of the contents, despite defendants' requests to inspect the items: "Although the defendants demonstrated that the plaintiff disposed of the majority of the items remaining in the storage unit after he regained control and possession of the unit, the defendants failed to demonstrate that the plaintiff's conduct rose to the level of being intentional or willful ... . Under the circumstances of this case, the appropriate sanction is to preclude evidence of the items disposed by the plaintiff that were not available for inspection by the defendants ...". ***Heins v. Public Stor.*, 2018 N.Y. Slip Op. 05919, Second Dept 8-29-18**

CONTRACT LAW, FORECLOSURE.

"NOTWITHSTANDING" CLAUSE IN THE ADDENDUM TO THE NOTE CONTROLS, THE ADDENDUM REQUIRED THAT THE MONTHLY PAYMENTS ON THE NOTE START BEFORE THE DATE DESCRIBED IN THE NOTE ITSELF.

The Second Department determined the order and judgment of foreclosure was properly granted. The court explained that an addendum to the note, which included the phrase "notwithstanding anything to the contrary set forth in the Note," controlled. Based on the language of the addendum, appellants were required to make monthly payments during the construction period. Appellants had argued that, under the terms of the Note, no payments were required until the construction was complete: " '[A] written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms' ... . 'Where the terms of an agreement are unambiguous, interpretation is a question of law for the court' ... . 'A written contract will be read as a whole, and every part will be interpreted with reference to the whole; and if possible it will be so interpreted as to give effect to its general purpose' ... . It is important not to distort the meaning of a writing by placing 'excessive emphasis . . . upon particular words or phrases' ... . Here, pursuant to the note, Todd Amus agreed that he would 'pay interest beginning on the Permanent Loan Commencement Date,' i.e., January 1, 2010, and would 'make these payments every month until [he had] paid all the principal and interest and any other charges' he might owe under the note. However, Todd Amus also executed the note addendum, which was incorporated into and 'deemed to amend and supplement the Note,' and in which he agreed to its terms '[n]otwithstanding anything to the contrary set forth in the Note.' " ***IndyMac Venture, LLC v. Amus*, 2018 N.Y. Slip Op. 05920, Second Dept 8-29-18**

CRIMINAL LAW, CONSTITUTIONAL LAW, APPEALS.

CPL § 450.10(1), WHICH PURPORTS TO PROHIBIT AN 'EXCESSIVE SENTENCE' APPEAL AFTER A GUILTY PLEA, IS UNCONSTITUTIONAL, DEFENDANT'S WAIVER OF APPEAL, HOWEVER, WAS VALID.

The Second Department noted that Criminal Procedure Law § 450.10(1), which purports to prohibit an "excessive sentence" appeal after a guilty plea, is unconstitutional in that it limits the jurisdiction of the Appellate Division, in violation of the NYS Constitution. But the court went on to find that defendant's waiver of appeal was valid and precluded contesting his sentence: "CPL 450.10(1) provides a criminal defendant with the right to appeal a judgment 'unless the appeal is based solely upon the ground that a sentence was harsh or excessive when such sentence was predicated upon entry of a plea of guilty and the sentence imposed did not exceed that which was agreed to by the defendant as a condition of the plea.' As the People acknowledge, the Court of Appeals has held that this provision is unconstitutional because 'it imposes a limitation or condition on the jurisdiction of the Appellate Division of Supreme Court in contravention of NY Constitution, article VI, § 4(k)' ... . * * * Here, the record of the plea proceeding demonstrates that the defendant understood that the appeal waiver was separate and distinct from those rights automatically forfeited upon a plea of guilty and that the defendant was volun-

tarily relinquishing that right in consideration for the promised sentence ... . Furthermore, the record of the plea proceeding demonstrates that the defendant received an explanation of the nature of the right to appeal and the consequences of waiving that right ...". ***People v. Swen*, 2018 N.Y. Slip Op. 05949, Second Dept 8-29-18**

CRIMINAL LAW, EVIDENCE.

POLICE OFFICER RESPONDED APPROPRIATELY TO AN ESCALATING SITUATION AFTER A STREET STOP, MOTION TO SUPPRESS ABANDONED HANDGUN AND STATEMENTS SHOULD NOT HAVE BEEN GRANTED.

The Second Department determined defendant's motion to suppress a handgun and statements should not have been granted in this street stop case. The Second Department found that the officer who stopped the defendant properly responded to an escalating situation which culminated in the defendant's flight and abandonment of a backpack containing the handgun: "There is no dispute that upon receiving a radio transmission of an anonymous tip that a man of a specific description wearing a black backpack and possessing a gun was traveling on the B6 bus toward Canarsie, the responding police officer had a common-law right of inquiry upon encountering the defendant exiting that bus and matching the description ... . The responding officer testified at the suppression hearing that he approached the defendant and asked something to the effect of, 'Hey, what's up, man, you know, you got a second for the police?' The defendant's eyes widened, he appeared visibly nervous, and he started to back up. The defendant then thrust his right hand in his right pants pocket and refused to comply with the officer's command to remove it. These actions by the defendant escalated the encounter to justify the officer drawing his weapon, placing it across his own chest in a 'depressed position,' and attempting to forcibly remove the defendant's hand from his pocket as a self-protective measure ... . Further, the defendant's subsequent flight, coupled with all of the other indicia of criminality, justified the police pursuit ... and, ultimately, the recovery of a semi-automatic handgun from the defendant's backpack, which he abandoned in a nearby bodega ...". ***People v. King*, 2018 N.Y. Slip Op. 05941, Second Dept 8-29-18**

CRIMINAL LAW, EVIDENCE.

RESUMPTION OF QUESTIONING THE NEXT MORNING DID NOT REQUIRE REPEATING THE MIRANDA WARNINGS, EVIDENCE OF A PRIOR UNCHARGED CRIME WAS ADMISSIBLE TO COMPLETE THE NARRATIVE, DEFENDANT SHOULD HAVE BEEN ALLOWED TO INTERVIEW A PROSECUTION WITNESS WITHOUT A PROSECUTOR OR DETECTIVE PRESENT.

The Second Department determined the questioning of defendant, without repeating the Miranda warnings, was appropriate. Defendant had not unequivocally invoked his right to remain silent the night before and the questioning continued the next morning. The court noted that the admission of evidence of prior uncharged crime was not error because the evidence completed the narrative. The court further noted that defendant should have been allowed to interview a prosecution witness without the presence of a prosecutor or a detective. The error was deemed harmless however: "The defendant's morning statement was properly admitted at trial. Had the defendant unequivocally and unqualifiedly invoked her right to remain silent the previous evening, the request would have had to be scrupulously honored ... , and further interrogation would have had to cease... . Under such circumstances, further inquiry can be made, but only if a significant period of time has passed and the police reiterate the requisite warnings ... . However, since the defendant in this case had not unequivocally and unqualifiedly invoked her right to remain silent ... and remained in continuous custody in the interim, police and prosecutors were free to resume their questioning of the defendant within a reasonable time, and to do so without repeating the Miranda warnings ... . The further questioning at issue here was within a reasonable time under this Court's precedent ...". ***People v. Wisdom*, 2018 N.Y. Slip Op. 05950, Second Dept 8-29-18**

CRIMINAL LAW, EVIDENCE, APPEALS.

RECKLESS ENDANGERMENT AND RECKLESS ASSAULT CONVICTIONS AGAINST THE WEIGHT OF THE EVIDENCE.

The Second Department, over a dissent, reversed defendant's convictions for reckless endangerment and reckless assault. Defendant had picked up a gun that his friend (Morales) had brought to his house. In handling the gun it went off injuring his friend's leg. His friend was asleep when the gun fired. Defendant immediately said he was sorry, put the gun in a garbage can and accompanied his friend to the hospital. The Second Department determined the convictions were against the weight of the evidence because there was insufficient proof that defendant acted recklessly: "... [T]he People failed to prove beyond a reasonable doubt that the defendant was aware of and consciously disregarded a substantial risk that his conduct would cause physical injury to another person. The People did not introduce evidence that the defendant was familiar with weapons, or the particular gun. Indeed, the gun was brought to the defendant's home by Morales, and it is undisputed that the gun discharged as the defendant handled it out of curiosity. There was no evidence from which it could be inferred that the defendant knew the gun was loaded with live ammunition, or even knew how the particular gun operated. There was no evidence introduced that the defendant was aware of and consciously disregarded the risk that the gun might misfire ... . Indeed, Morales testified that the defendant appeared 'scared' when the gun discharged and that the defendant imme-

diately stated that he was 'sorry.' The defendant attempted to dispose of the gun and helped the victim get medical care. Contrary to the People's contention, there was no testimony that the defendant was pointing the gun at Morales when it discharged, and there was no evidence introduced establishing that the only way the pellets could have struck Morales's leg was by pointing the gun directly at Morales." ***People v. Marin*, 2018 N.Y. Slip Op. 05942, Second Dept 8-29-18**

DEFAMATION, CIVIL PROCEDURE, PRIVILEGE.

DEFAMATION PLEADING INSUFFICIENT, STATEMENT ENJOYED QUALIFIED PRIVILEGE, INTERNET POST WAS NONACTIONABLE OPINION.

The Second Department determined the defamation action, based upon a complaint made to the Society for the Prevention of Cruelty to Animals (SPCA) was properly dismissed. The complaint did not include the allegedly defamatory statement (a pleading failure) and the statement enjoyed qualified privilege. A remark posted on the Internet, which stated that defendant (Studer) had "seen and heard" horror stories about plaintiffs' treatment of animals, was nonactionable opinion: "... [W]ith respect to the plaintiffs' contention that Studer was liable for defamation based on the statements she made to the SPCA, since the amended complaint failed to set forth 'the particular words complained of,' that branch of Studer's motion which was for summary judgment dismissing so much of the defamation cause of action as was based on those statements should have been granted (CPLR 3016[a]...). In any event, the record supports the Supreme Court's determination that Studer demonstrated, prima facie, that the allegedly defamatory statements enjoyed a qualified privilege. Protection from defamation is afforded where the person making the statements does so fairly 'in the discharge of some public or private duty, legal or moral, or in the conduct of his [or her] own affairs, in a matter where his [or her] interest is concerned' ... Here, since the evidence establishes that Studer made the statements to the SPCA in a good faith effort to obtain the aid of a law enforcement agency in addressing a potentially unsafe environment which children in her community frequented, the statements are subject to a qualified privilege ... . We also agree with the Supreme Court's determination to reject the plaintiffs' contention that Studer was liable for defamation based on the Internet post. Studer established, prima facie, that this post constituted a nonactionable expression of opinion inasmuch as it consisted of imprecise, subjective characterizations which could not be objectively verified ...". ***New York Horse Rescue Corp. v. Suffolk County Socy. for the Prevention of Cruelty to Animals*, 2018 N.Y. Slip Op. 05934, Second Dept 8-29-18**

FORECLOSURE, CIVIL PROCEDURE, REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL), DEBTOR-CREDITOR.

LETTER DID NOT ACKNOWLEDGE THE DEBT AND THEREBY REVIVE A TIME-BARRED FORECLOSURE ACTION, MORTGAGE PROPERLY CANCELED AND DISCHARGED IN THIS RPAPL 1501 ACTION.

The Second Department determined plaintiff was entitled, pursuant to Real Property Actions and Proceedings Law (RPAPL) 1501 and the statute of limitations, to cancel and discharge a mortgage which defendant bank (Deutsche Bank) had accelerated more than six years before. Defendant bank argued that a letter sent by the original property owner, Aird (who had taken out the mortgage), pursuant to General Obligations Law § 17-101, acknowledged the debt and revived the time-barred claim. Supreme Court properly rejected that argument: " 'General Obligations Law § 17-101 effectively revives a time-barred claim when the debtor has signed a writing which validly acknowledges the debt' ... . To constitute a valid acknowledgment, a 'writing must be signed and recognize an existing debt and must contain nothing inconsistent with an intention on the part of the debtor to pay it' ... . Contrary to Deutsche Bank's contention, a letter written by Aird that accompanied his second short sale package submitted to Deutsche Bank's loan servicer did not constitute an unqualified acknowledgment of the debt or manifest a promise to repay the debt sufficient to reset the running of the statute of limitations ...". ***Karpa Realty Group, LLC v. Deutsche Bank Natl. Trust Co.*, 2018 N.Y. Slip Op. 05921, Second Dept 8-29-18.** Similar issues and result in ***Yadegar v. Deutsche Bank Natl. Trust Co*, 2018 N.Y. Slip Op. 05957, Second Dept 8-29-18**

MEDICAL MALPRACTICE, PERSONAL INJURY.

EXPERT AFFIDAVIT DID NOT DEMONSTRATE, PRIMA FACIE, THAT DEFENDANT DOCTORS DID NOT DEPART FROM GOOD AND ACCEPTED PRACTICE, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT IN THIS MEDICAL MALPRACTICE ACTION SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined the expert affidavit submitted by defendant emergency room defendants was insufficient to eliminate a question of fact whether the doctors departed from good and accepted medical practice. Plaintiff alleged his sports related injury was not correctly diagnosed in the emergency room: "The plaintiff ... submitted an affirmation from an expert, a physician certified in general surgery, who opined that the plaintiff had presented to the emergency room on October 2, 2013, with symptoms of compartment syndrome and that the moving defendants departed from the accepted standard of care by failing to perform adequate testing and diagnose the compartment syndrome, from which the plaintiff was suffering at that time. ... [T]he moving defendants failed to establish, prima facie, that the emergency room defendants did not depart from good and accepted standards of medical care, or that any such departure was not a proximate cause of the plaintiff's injuries. The moving defendants' expert merely recounted the

treatment rendered and opined in a conclusory manner that such treatment did not represent a departure from good and accepted medical practice ...". ***Kelly v. Rosca*, 2018 N.Y. Slip Op. 05922, Second Dept 8-29-18**

PERSONAL INJURY.

QUESTION OF FACT WHETHER LOCATION OF THE DOORWAY AND THE STAIRWAY PILLAR, WHICH WAS OPEN AND OBVIOUS, WAS AN INHERENTLY DANGEROUS CONDITION, DEFENDANT PROPERTY OWNER'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined the defendant property-owner's motion for summary judgment in this slip and fall case should not have been granted. Although the pillar of an exterior stairway (which allegedly caused plaintiff to trip) was open and obvious, there was a question of fact whether the location of the pillar and the exit door created an inherently dangerous condition: "The accident occurred after the injured plaintiff exited the building through a door located next to an opening between the door and the railing. The opening was at the top of the staircase and provided access to the steps descending from the landing. According to the injured plaintiff, the opening was less than two feet wide. When the door was completely open, it blocked the opening leading to the stairs. The injured plaintiff testified at her deposition that she was attempting to reach the opening to access the steps when her left foot hit the pillar of the railing, causing her to fall. * * * … [T]he defendant failed to establish, prima facie, that it maintained its premises in a reasonably safe condition. Thus, the Supreme Court should have denied the defendant's motion regardless of the sufficiency of the plaintiffs' opposition papers ... . Contrary to the defendant's contention, it cannot be said as a matter of law that the metal railing, which was open and obvious, was not inherently dangerous given its location within the accident site ... . The defendant also failed to establish, prima facie, that it did not have notice of the alleged dangerous condition ...". ***Dudnik v. 1055 Hylan Offs., LLC*, 2018 N.Y. Slip Op. 05914, Second Dept 8-29-18**

PERSONAL INJURY.

ABUTTING PROPERTY OWNER NOT LIABLE FOR HOLE IN BRICKWORK PUBLIC SIDEWALK IN THIS SLIP AND FALL CASE.

The Second Department determined the abutting property-owner's summary judgment motion in this sidewalk slip and fall case was properly granted. There was no statute or ordinance which imposed liability and the defendant demonstrated it did not create the defect and did not cause the defect by a special use. The defendant owned a cafe and had tables near, but not on, the sidewalk: "The plaintiff allegedly sustained injuries when she tripped and fell after stepping into a hole in the brickwork portion of a public sidewalk ... . [T]he Cafe demonstrated its prima facie entitlement to judgment as a matter of law by establishing that it did not create the alleged defect in the brickwork, did not cause the alleged defect to occur because of a special use, and did not violate a statute or ordinance that would impose liability for failing to maintain the sidewalk. Moreover, the Cafe demonstrated, prima facie, that the placement of outdoor tables and chairs on the cement portion of the public sidewalk abutting the storefront was not a proximate cause of the plaintiff's alleged injuries ...". ***Finocchiaro v. Town of Islip*, 2018 N.Y. Slip Op. 05915, Second Dept 8-29-18**

PERSONAL INJURY.

NO ONE WITNESSED FOUR-YEAR-OLD'S INJURY, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT PROPERLY GRANTED, PLAINTIFFS COULD NOT IDENTIFY THE CAUSE OF THE INJURY, INFANT PLAINTIFF SAID SHE WAS INJURED ON AN INFLATABLE SLIDE.

The Second Department determined defendant property-owner's motion for summary judgment in the inflatable-slide injury case was properly granted: "The plaintiff's daughter allegedly was injured as she slid down an inflatable slide at a facility owned and operated by the defendant Live, Play and Bounce Corp. (hereinafter the defendant). Although both of her parents were present when the accident allegedly occurred, neither witnessed it. The child, four years old at the time, came to her mother crying, and reporting that she fell and hurt her arm while on a slide. The plaintiff commenced this action to recover damages for personal injuries on behalf of her daughter. ... Based on the deposition testimony of the child's parents, the defendant established its prima facie entitlement to judgment as a matter of law dismissing the complaint by demonstrating that the plaintiff was unable to identify the cause of the child's accident ...". ***Harris v. Live, Play & Bounce Corp.*, 2018 N.Y. Slip Op. 05918, Second Dept 8-29-18**

PERSONAL INJURY, CONTRACT LAW.

PLAINTIFF DID NOT ALLEGE OR DEMONSTRATE IN THE OPPOSING PAPERS THAT ANY OF THE *ESPINAL* EXCEPTIONS APPLIED TO DEFENDANT SNOW-REMOVAL CONTRACTOR IN THIS SLIP AND FALL CASE, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined the snow-removal contractor's (Critics Choice's) motion for summary judgment in this slip and fall case should have been granted. Because plaintiff did not allege a violation of any of the *Espinal* factors, Critics Choice's demonstration that plaintiff was not a party to the snow removal contract was sufficient to warrant summary judgment. In opposition, plaintiff did not raise a question of fact about any of the *Espinal* exceptions:

" 'A limited contractual undertaking to provide snow removal services generally does not render the contractor liable in tort for the personal injuries of third parties'... . Nevertheless, '[a] contractor may be held liable for injuries to a third party where, in undertaking to render services, the contractor entirely displaces the duty of the property owner to maintain the premises in a safe condition, the injured party relies on the contractor's continued performance under the agreement, or the contractor negligently creates or exacerbates a dangerous condition'... . The Critics Choice defendants established their prima facie entitlement to judgment as a matter of law by demonstrating that the plaintiff was not a party to any snow removal contract ... , and thus, they owed no duty of care to the plaintiff ... . Since the plaintiff did not allege facts in his amended complaint or bill of particulars that would establish the possible applicability of any of the Espinal exceptions, the Critics Choice defendants, in establishing their prima facie entitlement to judgment as a matter of law, were not required to affirmatively demonstrate that these exceptions did not apply ... . The plaintiff's conclusory contention that the Critics Choice defendants launched a force or instrument of harm by creating or exacerbating the icy condition that allegedly caused him to fall was insufficient to raise a triable issue of fact ...". ***Laronga v. Atlas-Suffolk Corp.*, 2018 N.Y. Slip Op. 05924, Second Dept 8-29-18**

PERSONAL INJURY, EMPLOYMENT LAW.

NO QUESTION OF FACT RAISED ABOUT WHETHER FENCING CLUB WAS LIABLE FOR THE SEXUAL ASSAULT OF A FENCING STUDENT BY A FENCING COACH, CLUB'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined defendant fencing club's motion for summary judgment in this negligent hiring and supervision, negligent infliction of emotional distress action should have been granted. A fencing coach (Kfir) who worked for the club engaged in an unlawful sexual relationship with infant plaintiff, for which the coach went to prison. The Second Department held that the respondeat superior cause of action was not viable because the coach was not acting within the scope of his employment. The court further found that the defendant club demonstrated it did not have notice of the coach's criminal propensities and did not breach a duty owed plaintiffs: "... Fencers Club established its prima facie entitlement to judgment as a matter of law by demonstrating that it had no knowledge of any propensity by Kfir to commit sexual misconduct, either prior to or during his employment with Fencers Club . The coaches, parents, and students of the club were shocked when they learned of the criminal misconduct, which took place outside of Fencers Club's premises and in Kfir's apartment. Although it was later revealed that Kfir gave massages to the infant plaintiff and another fencing ... student in a workout room, and that he made sexually provocative comments toward the infant plaintiff during fencing lessons, these incidents were never reported to Fencers Club. Much of the communication between the infant plaintiff and Kfir took place by cell phone or text message, outside of Fencers Club's purview." ***KM v. Fencers Club, Inc.*, 2018 N.Y. Slip Op. 05923, Second Dept 8-29-18**

PERSONAL INJURY, EVIDENCE, EDUCATION-SCHOOL LAW.

MOTION TO STRIKE SCHOOL'S ANSWER FOR SPOLIATION OF EVIDENCE PROPERLY DENIED, SCHOOL'S MOTION FOR SUMMARY JUDGMENT IN THIS NEGLIGENT SUPERVISION ACTION PROPERLY GRANTED, PLAINTIFF WAS INJURED BY ANOTHER STUDENT.

The Second Department determined Supreme Court properly granted defendant board of education's motion for summary judgment in this student-on-student assault case. In addition, Supreme Court properly denied plaintiff's motion to strike the answer based upon spoliation of evidence (a video): "The complaint alleges that L.F., an infant, sustained injuries when he was picked up and dropped on his head by a fellow student at Mount Vernon High School. The plaintiff, suing individually and as the parent and natural guardian of L.F., commenced this action against the defendant, Mount Vernon Board of Education, to recover damages for personal injuries, alleging that it failed to provide adequate supervision. * * * ... [A] video recording which captured the incident from a distance could not be located after it had been viewed by the plaintiff, the police, and school administrators. According to the Principal of Mount Vernon High School, he did not know when the video disappeared but he asserted that its disappearance was accidental and a search had been conducted to locate it. Under these circumstances, where the defendant lost the video recording after having provided it for viewing to the plaintiff and others, the plaintiff would still be able to establish her case at trial despite the absence of the video. * * * The defendant submitted evidence that L.F. and the other student had no previous interaction and that the other student's prior disciplinary record did not include any violent act, thereby establishing that the defendant had no specific knowledge or notice of any prior conduct such that L.F.'s alleged assault ... could reasonably have been anticipated ...". ***Francis v. Mount Vernon Bd. of Educ.*, 2018 N.Y. Slip Op. 05916, Second Dept 8-29-18**

PERSONAL INJURY, MUNICIPAL LAW.

ALTHOUGH PLAINTIFF TURNED RIGHT INTO DEFENDANT DRIVER'S PATH AT AN INTERSECTION, DEFENDANT DRIVER DID NOT DEMONSTRATE FREEDOM FROM FAULT AND DEFENDANT TOWN DID NOT DEMONSTRATE FOLIAGE OBSTRUCTING A STOP SIGN DID NOT CONTRIBUTE TO THE ACCIDENT, DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined defendant driver and municipality's motions for summary judgment in this intersection accident case should not have been granted. Apparently plaintiff made a right turn at an intersection into the path of defendant driver, Ayers. According to Ayers, plaintiff did not stop at the stop sign before turning. Plaintiff alleged foliage obscured the stop sign: "The driver defendants failed to eliminate triable issues of fact as to whether Ayers contributed to the happening of the accident. In particular, Ayers testified at his deposition that he was traveling 40 miles per hour as he approached the intersection, and that although nothing obstructed his view of the intersection, he did not see the plaintiff's vehicle until he was one car length from the intersection. Further, Ayers could not say whether he took any evasive action to avoid the collision. Under the circumstances, it cannot be said as a matter of law that Ayers used reasonable care to avoid the accident ... . Contrary to the Town's contention, there is evidence in the record that the foliage which allegedly obscured the stop sign was located within the right-of-way of a Town road. ... The Town further failed to eliminate triable issues of fact as to whether any such obstruction of the stop sign was a proximate cause of the accident. 'Such proximate cause may be found only where it is shown that it was the very [obstruction] of the stop sign . . . which rendered the driver[ ] unaware of the need to stop before proceeding across the intersection'... . Where the driver 'had all the warning, all the notice of danger, that a stop sign would have afforded,' there is no basis for finding that the obstruction of a sign caused the driver 'to do anything other than [he or] she would have done had it been present' ... . The Town failed to demonstrate, prima facie, that despite the obstructed stop sign, the plaintiff, who was lost in an unfamiliar area, 'had all the warning, all the notice of danger, that a stop sign would have afforded'... . In particular, the Town presented no definitive evidence of either the plaintiff's knowledge of the need to stop at the intersection, or conditions necessitating that she bring her vehicle to a complete stop prior to entering the intersection. Viewing the record evidence in the light most favorable to the plaintiff, and resolving all reasonable inferences in her favor ... , the Town failed to eliminate issues of fact as to whether the obstruction of the stop sign contributed, to some degree, to the happening of the accident." ***Rivera v. Town of Wappinger*, 2018 N.Y. Slip Op. 05953, Second Dept 8-29-18**

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