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COURT OF APPEALS

CONSTITUTIONAL LAW, ELECTION LAW, MUNICIPAL LAW, EMPLOYMENT LAW.

DEPARTMENT OF AGRICULTURE'S RULE PROHIBITING DEPARTMENT INSPECTORS FROM RUNNING FOR PUBLIC OFFICE IS NOT AN UNCONSTITUTIONAL RESTRICTION OF FREE SPEECH.

The Court of Appeals, in a one-sentence memorandum, over a two-judge dissent, determined that the Department of Agriculture's regulation which prohibits employees responsible for inspecting agricultural facilities (like milk plants) from seeking public office (i.e., a county legislator) was not an unconstitutional restriction of free speech. ***Matter of Spence v. New York State Dept. of Agric. & Mkts.*, 2018 N.Y. Slip Op. 06071, CtApp 9-18-18**

FIRST DEPARTMENT

CONTRACT LAW.

PLAINTIFF, AS A THIRD PARTY BENEFICIARY OF THE AGREEMENT, HAD STANDING TO BRING THE BREACH OF CONTRACT ACTION, DESPITE THE BOILERPLATE EXCLUSION OF THIRD PARTY BENEFICIARIES.

The First Department, in a full-fledged opinion by Justice Singh too complex to fairly summarize here, reversing Supreme Court, determined that plaintiff was a third-party beneficiary to the contract, despite the boilerplate exclusion of third-party beneficiaries: "...[W]e reject defendant's contention that plaintiff does not have standing to sue for breach of the [agreement] because it is not a party to that agreement. Plaintiff is an intended third-party beneficiary of the [agreement], as that agreement explicitly refers to plaintiff and grants it enforceable rights. Accordingly, the [agreement's] boilerplate exclusion of third-party beneficiaries does not apply to plaintiff, and this action may not be properly dismissed for lack of standing ... ". ***MPEG LA, LLC v. Samsung Elecs. Co., Ltd.*, 2018 N.Y. Slip Op. 06147, First Dept 9-19-18**

INSURANCE LAW, SECURITIES.

A PENALTY OR DISGORGEMENT STEMMING FROM IMPROPER PROFIT-TAKING BY BEAR STEARNS IS NOT AN INSURABLE LOSS, EVEN IF THE BENEFITS OF THE PROFIT-TAKING WENT TO OTHERS AND NOT TO BEAR STEARNS.

The First Department, in a full-fledged opinion by Justice Andrias, determined that the requirement that Bear Stearns repay $160,000,000 constituted a penalty (disgorgement) for improper profit-taking, even where the benefits went to others and not Bear Stearns, and therefore was not a "loss" for which Bear Stearns' insurer was liable: "The law of the case is applicable to 'legal determinations that were necessarily resolved on the merits in a prior decision' ... . On the prior appeal, the Court of Appeals stated that 'the Insurers do not earnestly dispute that the claims fall within the policy's definition of Loss' ... , but did not rely on the policy language in denying defendants' motions. Instead it focused on the public policy issue. Furthermore, the doctrine does not apply where a motion for summary judgment follows a motion to dismiss that was not converted to a motion for summary judgment pursuant to CPLR 3212(c)... . Even if the Court of Appeals' prior determination is viewed as addressing the contractual issue, 'while the law of the case doctrine is intended to foster orderly convenience' . . ., it is not an absolute mandate which limits an appellate court's power to reconsider issues where there are extraordinary circumstances, such as subsequent evidence affecting the prior determination or a change of law' ... . Here, the United States Supreme Court's decision in [Kokesh v. Securities and Exchange Commission (_ US_, 137 S Ct 1635 [2017])], characterizing SEC disgorgement as a penalty, represents such a change of law. * * * ... Kokesh has now provided the missing precedent, establishing that disgorgement is a penalty, whether it is linked to the wrongdoer's gains or gains that went to others. In Kokesh, the Supreme Court, emphasizing that when a sanction 'can only be explained as . . . serving either retributive or deterrent purposes,' it is a 'punishment,' rejected the SEC's argument that disgorgement is remedial because it simply puts the defendant back in the position 'he would have occupied had he not broken the law.' " ***J.P. Morgan Sec., Inc. v. Vigilant Ins. Co.*, 2018 N.Y. Slip Op. 06146, First Dept 9-19-18**

PERSONAL INJURY, EVIDENCE.

QUESTION OF FACT WHETHER THE INADEQUATE HEIGHT OF A GUARDRAIL ALONG THE STAIRWELL WAS THE PROXIMATE CAUSE OF PLAINTIFF'S FALL, HEIGHT WAS BELOW THAT MANDATED BY THE NATIONAL FIRE PROTECTION ASSOCIATION.

The First Department determined defendant's motion for summary judgment in this slip and fall case was properly denied. The plaintiff presented evidence that the proximate cause of his stairway fall over the guardrail was the inadequate height of the guardrail: "… [P]laintiff raised an issue of fact by submitting an affidavit by an expert engineer who averred that the stairwell violated National Fire Protection Association (NFPA) No. 101. NFPA No. 101, which was listed in the 'Generally Accepted Standards Applicable to the State Building Construction Code' in effect at the time of the hotel's construction, advocated the construction of a 42-inch-high guardrail along the stairwell. The record shows that the existing guardrail was no more than 32 inches high. A violation of NFPA No. 101, which was 'applicable by reference in the [State] Building Construction Code - not incorporation - would constitute some evidence of negligence and may establish a standard of care' ... . Defendants failed to establish prima facie that they did not have constructive notice of a dangerous or defective condition. They argue that the stairwell complied with applicable building codes and that they never received any violations regarding the stairwell. However, their claimed compliance with applicable building codes is not dispositive of whether they breached their common-law duty of care ... . Moreover, the existence of a guardrail less than 42 inches high, although not in violation of a particular mandatory code, was obvious and had existed for a sufficient time for defendants to discover and remedy it. Contrary to defendants' argument, plaintiff's inability to identify the cause of his slip or trip on the stairs, which made him lose his balance and go over the rail, is not fatal to his claims, given the evidence supporting his contention that the proximate cause of his ... injuries was the lack of a 42-inch guardrail. In any event, there can be more than one proximate cause of an accident." ***Sussman v. MK LCP Rye LLC*, 2018 N.Y. Slip Op. 06143, First Dept 9-19-18**

SECOND DEPARTMENT

CIVIL PROCEDURE.

DEFENDANT COULD NOT BRING A SUMMARY JUDGMENT MOTION BEFORE ISSUE WAS JOINED BY SERVICE OF AN ANSWER.

The Second Department noted that a defendant who has not yet served an answer cannot move for summary judgment: "A motion for summary judgment may only be made after joinder of issue (see CPLR 3212[a]). Where, as here, it is conceded that the defendant had not served an answer before moving for summary judgment, issue was not joined and the defendant was precluded from obtaining summary judgment ... . The requirement that a motion for summary judgment may not be made before issue is joined (see CPLR 3212[a]) 'is strictly adhered to' ...". ***Cremosa Food Co., LLC v. Amella*, 2018 N.Y. Slip Op. 06077, Second Dept 9-19-18**

CIVIL PROCEDURE.

RELATION BACK DOCTRINE SHOULD HAVE BEEN APPLIED IN THE LABOR LAW §§ 200 AND 241(6) ACTION TO ALLOW PLAINTIFF TO ADD A PARTY AFTER THE STATUTE OF LIMITATIONS HAD RUN.

The Second Department, reversing Supreme Court, determined the relation-back doctrine should have been applied to allow plaintiff to add a party to the Labor Law §§ 200 and 241(6) complaint after the statute of limitations had run: "On October 15, 2007, the plaintiff, a construction worker, allegedly was injured while performing demolition work on the roof of a condominium building in Brooklyn. In December 2008, the plaintiff commenced this action against A.T.A. Construction Corp. (hereinafter A.T.A.), the general contractor for the construction project, and Park Slope Condominium (hereinafter Park Slope), the alleged owner of the subject building. The complaint asserted causes of action sounding in common-law negligence and violations of Labor Law §§ 200 and 241(6). In June 2014, after the expiration of the statute of limitations, the plaintiff cross-moved for leave to amend his complaint to add Flan Realty, LLC (hereinafter Flan), as a defendant in the action. * * * ...[T]he claims against Flan arise out of the same conduct, transaction, or occurrence as the claims asserted against Park Slope. In addition, the plaintiff demonstrated that, under the particular circumstances presented, Park Slope and Flan are united in interest inasmuch as the two entities, 'intentionally or not, often blurred the distinction between them' ... . Moreover, Flan had notice of this action within the applicable limitations period, inasmuch as the Flancraichs jointly operated both Park Slope and Flan, and Flan was designated in the condominium declaration to receive service of process on behalf of Park Slope ... .Finally, the plaintiff demonstrated that the initial failure to add Flan was not intentional, but was the result of an excusable mistake ...". ***Uddin v. A.T.A. Constr. Corp.*, 2018 N.Y. Slip Op. 06135, Second Dept 9-19-18**

CIVIL PROCEDURE, ATTORNEYS, TOXIC TORTS.

SUPREME COURT SHOULD NOT HAVE REFUSED TO VACATE A DISMISSAL AND ALLOW AMENDMENT PLAINTIFF'S BILL OF PARTICULARS, PLAINTIFF'S DELAY IN COMPLYING WITH A CONDITIONAL PRECLUSION ORDER WAS SHORT AND WAS ADEQUATELY EXCUSED BY LAW OFFICER FAILURE.

The Second Department, reversing Supreme Court, determined the delay in complying with a conditional discovery order did not justify Supreme Court's refusing to vacate the dismissal and allow the amendment of plaintiff's bill of particulars. The delay was short and the law office failure excuse was adequate: " 'To obtain relief from a conditional order of preclusion, the defaulting party must demonstrate a reasonable excuse for the failure to produce the requested items and the existence of a potentially meritorious claim or defense' ... . Under the circumstances of this case, the Supreme Court improvidently exercised its discretion in concluding that the law office failure of the plaintiff's former counsel was not a reasonable excuse for the plaintiff's short delay in complying with the directives of the conditional order ... . Moreover, the plaintiff demonstrated the existence of a potentially meritorious cause of action to recover lost wages ... . Further, the Supreme Court improvidently exercised its discretion in denying that branch of the plaintiff's motion which was for leave to amend her bill of particulars to allege that she had sustained property damage as a result of her alleged exposure to toxic mold and fungi at the defendants' premises. 'Generally, in the absence of prejudice or surprise to the opposing party, leave to amend a bill of particulars should be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit' ... . 'Where this standard is met, [t]he sufficiency or underlying merit of the proposed amendment is to be examined no further' ... . Here, the proposed amendment is not palpably insufficient or patently devoid of merit, and there is no evidence that it would prejudice or surprise the defendants, since the proposed amendment arose out of the same facts as those set forth in the complaint ...". ***Liese v. Hennessey*, 2018 N.Y. Slip Op. 06087, Second Dept 9-19-18**

CIVIL PROCEDURE, CONTRACT LAW, ATTORNEYS, AGENCY.

ATTORNEY HAD APPARENT AUTHORITY TO SIGN STIPULATION OF SETTLEMENT.

The Second Department determined that a stipulation of settlement was properly enforced because the attorney had the apparent authority to sign the stipulation on the client's behalf: " 'An agreement between parties or their attorneys relating to any matter in an action, other than one made between counsel in open court, is not binding upon a party unless it is in a writing subscribed by him [or her] or his [or her] attorney or reduced to the form of an order and entered' (CPLR 2104). A stipulation of settlement signed by an attorney may bind his or her client even if it exceeds the attorney's actual authority if the attorney had apparent authority to act on his or her client's behalf ... . Here, the plaintiff is bound by the stipulation of settlement signed by her former attorney, as the record supports the finding that even if the attorney lacked actual authority to enter into the stipulation of settlement on the plaintiff's behalf, he had apparent authority to do so (see CPLR 2104 ...)". ***Anghel v. Utica Mut. Ins. Co.*, 2018 N.Y. Slip Op. 06073, Second Dept 9-19-18**

CIVIL PROCEDURE, CONTRACT LAW, REAL PROPERTY LAW.

PLAINTIFF WAS GRANTED A PRELIMINARY INJUNCTION IN THIS ACTION FOR SPECIFIC PERFORMANCE OF A REAL ESTATE PURCHASE AGREEMENT, ALTHOUGH THE AMOUNT OF THE UNDERTAKING IS WITHIN THE COURT'S DISCRETION, THE COURT MUST REQUIRE PLAINTIFF TO GIVE AN UNDERTAKING.

The Second Department, reversing Supreme Court, noted that a party who has been granted a preliminary injunction must give an undertaking, although the amount is within the court's discretion: "The plaintiff commenced this action for specific performance of a contract for the sale of certain real property in Queens. The plaintiff moved for a preliminary injunction, inter alia, restraining the defendants from selling, transferring, or encumbering the subject property. In an order entered March 17, 2015, the Supreme Court granted the plaintiff's motion for a preliminary injunction. In the order appealed from, the court determined that an undertaking was not required. The defendants appeal. '[U]pon the granting of a preliminary injunction, a plaintiff shall give an undertaking in an amount to be fixed by the court' (...CPLR 6312[b]). Thus, '[w]hile fixing the amount of an undertaking when granting a motion for a preliminary injunction is a matter within the sound discretion of the court, CPLR 6312(b) clearly and unequivocally requires the party seeking an injunction to give an undertaking' ...". ***Chao-Yu C. Huang v. Shih*, 2018 N.Y. Slip Op. 06075, Second Dept 9-19-18**

CIVIL PROCEDURE, FORECLOSURE.

STATUTE OF LIMITATIONS DEFENSE WAS WAIVED BECAUSE IT WAS NOT RAISED IN AN ANSWER OR A PRE-ANSWER MOTION TO DISMISS IN THIS FORECLOSURE ACTION.

The Second Department, reversing Supreme Court, in this foreclosure action, noted that the statute limitations defense is waived if not raised in an answer or a pre-answer motion to dismiss: "In July 2014, the plaintiff commenced this mortgage foreclosure action against, among others, the defendant Anthony Palazzotto. Palazzotto defaulted in answering or appearing, and the plaintiff moved for leave to enter a default judgment and for an order of reference. Palazzotto opposed the motion, and cross-moved to dismiss the complaint insofar as asserted against him as time-barred ... . He argued that the debt was accelerated in 2008, when a prior action was commenced to foreclose the same mortgage. The Supreme Court de-

nied the plaintiff's motion, and granted Palazzotto's cross motion. ... The plaintiff demonstrated its entitlement to a default judgment and an order of reference by submitting proof of service of a copy of the summons and complaint, proof of the facts constituting the causes of action, including that the defendant defaulted on his payment obligations, and proof that neither he nor any of the other defendants had otherwise appeared or answered the complaint within the time allowed (see RPAPL 1321[1]; CPLR 3215[f]...). Palazzotto waived a statute of limitations defense by failing to raise it in an answer or in a timely pre-answer motion to dismiss (see CPLR 3211[a][5]...)". ***21st Mtge. Corp. v. Palazzotto*, 2018 N.Y. Slip Op. 06072, Second Dept 9-19-18**

CIVIL PROCEDURE, FORECLOSURE, ATTORNEYS.

CONCLUSORY AND UNSUBSTANTIATED ALLEGATION OF LAW OFFICE FAILURE DID NOT JUSTIFY VACATING THE DISMISSAL OF THE FORECLOSURE ACTION.

The Second Department, reversing Supreme Court, determined that the law-office-failure offered as an excuse for failure to comply with a conditional order in this foreclosure action was not sufficient to justify vacating the dismissal of the action: "To vacate the dismissal, HSBC was required to demonstrate a justifiable excuse for the noncompliance with the conditional order of dismissal and the existence of a potentially meritorious cause of action (see CPLR 3216...). Here, the proffered excuse of law office failure by prior counsel in failing to timely file a note of issue or move for entry of judgment was conclusory and wholly unsubstantiated (see CPLR 2005...). HSBC did not proffer an affidavit from anyone with personal knowledge of the purported law office failure and failed to provide any details regarding such failure. Therefore, the allegation of law office failure did not rise to the level of a reasonable excuse ...". ***Fremont Inv. & Loan v. Fausta*, 2018 N.Y. Slip Op. 06084, Second Dept 9-19-18**

CONTRACT LAW.

CONTRACT PROVISION ABOUT ALLOWED USES OF THE DIOCESE'S PROPERTY BY A CATHOLIC SCHOOL WAS AMBIGUOUS, DIOCESE'S SUMMARY JUDGMENT MOTION SEEKING DAMAGES FOR BREACH SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined a contract provision about the use of property by a Catholic school (CTK) was ambiguous about other allowed uses (daycare, charter school, etc.) and therefore the plaintiff's (the Diocese's) motion for summary judgment should not have been granted: "It cannot be said that the language of the 1976 Agreement requiring CTK to 'maintain and operate a Catholic high school in and upon the entire premises herein described and . . . use the same for no other purpose not customarily or usually associated with such use' 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,' particularly given the time that has passed and the changes in circumstances since the negotiation of the 1976 Agreement... . CTK came forward with evidence of other instances where unused or underused portions of Catholic schools were rented to charter schools, raising a triable issue of fact as to whether such a use is customarily and usually associated with the operation of a Catholic school under the budgetary and enrollment constraints currently facing schools within the Diocese." ***Roman Catholic Diocese of Brooklyn, N.Y. v. Christ the King Regional High Sch.*, 2018 N.Y. Slip Op. 06130, Second Dept 9-19-18**

CRIMINAL LAW, ATTORNEYS.

DEFENSE ATTORNEY TOOK A POSITION ADVERSE TO DEFENDANT STATING THERE WAS NO BASIS FOR DEFENDANT'S PRO SE MOTION TO WITHDRAW HIS PLEA, MATTER REMITTED FOR CONSIDERATION OF THE MOTION WITH NEW DEFENSE COUNSEL.

The Second Department remitted the matter for consideration of defendant's pro se motion to withdraw his guilty plea. His attorney told the judge there was no basis for the motion which adversely affected defendant's right to counsel: "...[T]he defendant pleaded guilty to tampering with physical evidence. Thereafter, he moved pro se to withdraw his plea of guilty. When the matter came on for sentencing, the defendant advised the County Court that he wanted to withdraw his plea. His attorney stated that there was no basis for the defendant to withdraw his plea, and the court proceeded to impose sentence. The defendant's right to counsel was adversely affected when his attorney took a position adverse to that of the defendant. The court should have appointed new counsel to represent the defendant with respect to the motion to withdraw his plea of guilty ...". ***People v. Falls*, 2018 N.Y. Slip Op. 06110, Second Dept 9-19-18**

CRIMINAL LAW, EVIDENCE.

STREET STOP NOT JUSTIFIED UNDER DE BOUR ANALYSIS, SEIZED FIREARM AND STATEMENT SHOULD HAVE BEEN SUPPRESSED.

The Second Department, with a concurring memorandum, determined that defendant's motion to suppress the evidence seized from his person and his statement should have been granted in this street stop case. The majority reversed under a De Bour analysis. The concurring memorandum, although agreeing with the De Bour analysis, would have reversed be-

cause the People did not demonstrate the legality of the police conduct at the suppression hearing: "This encounter began as a level two intrusion, with the officer, while seated in the vehicle, stating 'police' and asking the defendant to stop, then exiting his vehicle, walking onto the sidewalk, again stating 'police' and asking the defendant to stop. Thereafter, the officer's pursuit of the defendant, by getting 'closer to the defendant picking up with his pace,' constituted a level three intrusion under De Bour, requiring a reasonable suspicion that the defendant was involved in a felony or misdemeanor ... . However, the circumstances, such as that the defendant had a nondescript bulge in his right jacket pocket, was leaning to the right side, and walked away from the officer without complying with the officer's requests for him to stop, did not support a reasonable suspicion of particularized criminal action. After all, 'a bulging jacket pocket is hardly indicative of criminality. As [the Court of Appeals has] recognized, a pocket bulge, unlike a waistband bulge, could be caused by any number of innocuous objects' (*People v. Holmes*, 81 NY2d at 1058, quoting *People v. De Bour*, 40 NY2d at 221), and 'an individual has a right to be let alone' and refuse to respond to police inquiry' ... . Since this level three intrusion was not justified, it cannot be validated by the officer's subsequent observation of the firearm ... . Moreover, under the circumstances of this case, the defendant's subsequent statement to law enforcement officers must be suppressed as the product of the unlawful police conduct ...". ***People v. Jones*, 2018 N.Y. Slip Op. 06114, Second Dept 9-19-18**

CRIMINAL LAW, EVIDENCE, APPEALS, ATTORNEYS.

DETECTIVE'S TESTIMONY THAT COMPLAINANT PICKED DEFENDANT OUT OF A LINEUP WAS INADMISSIBLE BOLSTERING, ERROR REVIEWED IN THE INTEREST OF JUSTICE, CONVICTION REVERSED.

The Second Department, reversing defendant's conviction, determined the detective's testimony that the complainant picked the defendant out of a lineup constituted inadmissible bolstering. The issue was reviewed in the interest of justice (error not preserved): "The defendant has not preserved for appellate review his contention that the prosecutor improperly elicited testimony from a detective stating that he arrested the defendant after the defendant was identified in a lineup by the complainant. However, we nevertheless review this contention in the exercise of our interest of justice jurisdiction (see CPL 470.15[6][a]...). The detective's testimony implicitly bolstered the complainant's testimony by providing official confirmation of the complainant's identification of the defendant ... . A violation of the rule against bolstering may not be overlooked except where the evidence of identity is so strong that there is no serious issue upon that point ... . Here, the evidence that the defendant committed the crime was not so overwhelming as to render the error harmless. This error was compounded by improper comments made during the People's summation regarding the complainant's identification of the defendant as the robber." ***People v. Ramirez*, 2018 N.Y. Slip Op. 06120, Second Dept 9-19-18**

CRIMINAL LAW, IMMIGRATION LAW, EVIDENCE, CIVIL PROCEDURE.

SUPREME COURT LACKED TO POWER TO SUPPRESS DEFENDANT'S PRESENTENCE REPORT IN IMMIGRATION PROCEEDINGS.

The Second Department determined defendant juvenile offender could not move to suppress his presentence report in subsequent Department of Homeland Security proceedings: "The defendant, an immigrant from Bangladesh, was adjudicated a youthful offender. After completing his sentence, the defendant was detained by the United States Department of Homeland Security (hereinafter the DHS), which, in reliance on the defendant's presentence report, argued that the defendant should be denied a bond due to his youthful offender adjudication. Thereafter, the defendant moved before the Supreme Court in the subject criminal proceeding pursuant to CPLR 3103 for a protective order 'enjoining the [DHS's] use' of his presentence report, arguing that it is a confidential record under CPL 720.35(2), which the DHS had improperly obtained. In an order dated June 6, 2017, the Supreme Court denied the defendant's motion. The defendant appeals. CPLR 3103 'confers broad discretion upon a court to fashion appropriate remedies' to prevent the abuse of disclosure devices' ... . Pursuant to CPLR 3103(c), '[i]f any disclosure under this article has been improperly or irregularly obtained so that a substantial right of a party is prejudiced, the court, on motion, may make an appropriate order, including an order that the information be suppressed' … . Here, since the DHS did not obtain the presentence report in the course of any disclosure process under CPLR Article 31, there is no basis for the issuance of a protective order pursuant to CPLR 3103(c). Moreover, since '[c]ontrol over immigration and naturalization is entrusted exclusively to the Federal Government, and a State has no power to interfere' ... , the Supreme Court lacked the power to suppress the presentence report in immigration proceedings." ***People v. Saqline K.*, 2018 N.Y. Slip Op. 06115, Second Dept 9-19-18**

DEFAMATION, PRIVILEGE.

STATEMENTS ABOUT PROBLEMS WITH THE INSTALLATION OF GAS LINES MADE BY DEFENDANT WHO WAS HIRED TO FIND THE CAUSE OF THE GAS LEAKS PROTECTED BY QUALIFIED COMMON-INTEREST PRIVILEGE.

The Second Department, reversing Supreme Court, determined defendants' motion for summary judgment in this defamation and injurious falsehood action should have been granted. The allegedly defamatory statements were made by defendant Dimino who was hired to assess the reasons for gas leaks at a school. The defendant concluded the gas leaks were the result of improper installation of the gas lines by plaintiff. Plaintiff was thereafter prohibited from doing any fur-

ther school-related work for five years. The statements made about plaintiff's work were deemed protected by qualified common-interest privilege: "... [T]he defendants made a prima facie showing that the challenged statements were protected by the qualified common-interest privilege ... . The evidence in the record demonstrated that the letter, which does not reference the plaintiff by name, was written by Dimino at the request of the DOE [Department of Education], and that the defendants did not identify the plumbing company that installed the gas piping at the school. In opposition, the plaintiff failed to raise a triable issue of fact as to whether the challenged statements were motivated solely by malice ... . 'Mere conclusory allegations, or charges based upon surmise, conjecture, and suspicion are insufficient to defeat the claim of qualified privilege'... . Although the plaintiff disputes that its workmanship was poor and that it used lamp wick in the gas pipes at the school, the plaintiff failed to submit sufficient evidence to support its claims that the defendants made the statements for the purposes of justifying the cost of their repair work and eliminating the plaintiff as a competitor. For these same reasons, the defendants demonstrated their prima facie entitlement to judgment as a matter of law dismissing the cause of action alleging injurious falsehood. In opposition, the plaintiff failed to raise a triable issue of fact as to whether the defendants made false statements, maliciously and with the intent to harm it, or recklessly and without regard to their consequences ... . In addition, the defendants established, prima facie, that they did not tortiously interfere with the plaintiff's business relations. In opposition, the plaintiff failed to raise a triable issue of fact as to whether Dimino made the alleged defamatory statements in the letter for the sole purpose of harming the plaintiff or by using unlawful means ...". ***Franco Belli Plumbing & Heating & Sons, Inc. v. Dimino*, 2018 N.Y. Slip Op. 06083, Second Dept 9-19-18**

EDUCATION-SCHOOL LAW, ATTORNEYS.

STUDENT WAS NOT DEPRIVED OF HIS RIGHT TO HAVE AN ATTORNEY PRESENT AT A COLLEGE DISCIPLINARY HEARING BY THE COLLEGE'S REFUSAL TO ADJOURN THE MATTER FOR THREE HOURS SO THE ATTORNEY COULD ATTEND, STUDENT WAS PROPERLY FOUND RESPONSIBLE FOR THE DISCIPLINARY CHARGES AND WAS PROPERLY EXPELLED.

The Second Department, over a two-justice dissent, determined the student-petitioner's due process rights were not violated when the state college [SUNY Purchase] refused to adjourn a disciplinary hearing because petitioner's attorney could not be present. Petitioner was accused of having sex with another student without her consent. After the hearing the petitioner was found responsible and expelled. The dissent argued that the failure to grant the requested three-hour adjournment so petitioner's counsel could attend the hearing deprived petitioner of due process: "In disciplinary proceedings at public colleges, ' [d]ue process requires that the [accused students] be given the names of the witnesses against them, the opportunity to present a defense, and the results and finding of the hearing' ... Due process does not require colleges to provide accused students with legal representation at disciplinary hearings ... . Purchase's rules, the legality of which the petitioner does not challenge, allow for an attorney to be present and advise an accused student at a disciplinary hearing, but not to represent the student or interact with anyone at the hearing other than the accused student. Here, the petitioner had hired an attorney as of September 30, 2014. ... [t]he petitioner was notified on September 30, 2014, that the hearing would likely be scheduled for October 6 or 7, and was informed of the exact time of the hearing on October 2, 2014. He alleges that he did not request an adjournment until 'on or about' October 5, 2014, which was two days before the date of the hearing. Under these circumstances, contrary to the suggestion of our dissenting colleagues, the petitioner was not denied the opportunity to have an attorney present at the hearing ... .Purchase's determination that the petitioner committed the charged violations was supported by substantial evidence (see CPLR 7803[4]...). Contrary to the petitioner's contention, the penalty of expulsion was not so disproportionate to the offenses as to be shocking to one's sense of fairness, thus constituting an abuse of discretion as a matter of law (see CPLR 7803[3]...)." ***Matter of Bursch v. Purchase Coll. of the State Univ. of N.Y.*, 2018 N.Y. Slip Op. 06090, Second Dept 9-19-18**

FAMILY LAW, IMMIGRATION LAW.

MOTHER'S PETITION FOR GUARDIANSHIP RE: SEEKING SPECIAL IMMIGRANT JUVENILE STATUS FOR HER SON SHOULD NOT HAVE BEEN DISMISSED ON THE GROUND PATERNITY HAD NOT BEEN ESTABLISHED.

The Second Department, reversing Family Court, determined mother's guardianship petition should not have been dismissed simply because paternity had not been established. Mother was seeking special immigrant juvenile status (SIJS) for her child: "... [M]other filed a petition ... to be appointed the guardian of the subject child for the purpose of obtaining an order, inter alia, so as to enable the child to petition the United States Citizenship and Immigration Services for special immigrant juvenile status (hereinafter SIJS) ... . In an order dated April 9, 2018, the Family Court dismissed the petition, without a hearing, on the ground that it failed to state a cause of action because the putative father's paternity had not been established. ... We disagree with the Family Court's determination to dismiss the petition, in which the mother sought to be appointed guardian of her child. A natural parent may be appointed guardian of his or her child (see Family Ct Act § 661[a]...), and the mere fact that paternity has not been established for the putative father does not preclude the mother's guardianship petition ... . Accordingly, since the Family Court dismissed the guardianship petition without conducting a hearing or considering the child's best interests, the matter must be remitted to the Family Court ... for an expedited hearing

and a new determination thereafter of the guardianship petition ...". ***Matter of Olga L.G.M. (Santos T.F.),* 2018 N.Y. Slip Op. 06093, Second Dept 9-19-18**

FAMILY LAW, INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS.

NEW YORK DOES NOT RECOGNIZE A CAUSE OF ACTION FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS AGAINST A SPOUSE OR FORMER SPOUSE STEMMING FROM EVENTS DURING THE MARRIAGE.

The Second Department noted that, in New York, an intentional infliction of emotional distress cause of action cannot be brought against a spouse or former spouse regarding event occurring during marriage: "New York does not recognize a cause of action alleging the intentional infliction of emotional distress between spouses or former spouses based upon allegations of events that occurred during the marriage ... . In any event, the conduct complained of does not rise to the level of extreme and outrageous behavior required for a valid claim of intentional infliction of emotional distress ...". ***Chen v. Dehjung Deborah Wang*, 2018 N.Y. Slip Op. 06076, Second Dept 9-19-18**

FORECLOSURE.

DEFAULT NOTICE WAS NOT A CLEAR AND UNEQUIVOCAL ACCELERATION OF THE MORTGAGE, THE STATUTE OF LIMITATIONS FOR A FORECLOSURE ACTION DID NOT START RUNNING FROM THE DATE OF THE NOTICE.

The Second Department determined the language in a letter was not sufficient to trigger the acceleration of the debt, which, in turn, would have started the the running of the statute of limitations for a foreclosure action: "In June 2005, nonparty Cecilia Adebola executed a promissory note in the sum of $549,000 in favor of Fremont Investment & Loan [FBP] secured by a mortgage encumbering real property located in Brooklyn. After Adebola defaulted under the terms of the note and mortgage, the loan servicer sent her a notice of default dated July 3, 2006. The notice of default stated, in relevant part, that 'if the default is not cured on or before August 7, 2006, the mortgage payments will be accelerated with the full amount . . . becoming due and payable in full, and foreclosure proceedings will be initiated at that time.' * * * Here, it is clear from the record that FBP cannot establish that the notice of default letter was a clear and unequivocal acceleration of the mortgage ... . The notice of default 'was nothing more than a letter discussing acceleration as a possible future event, which does not constitute an exercise of the mortgage's optional acceleration clause' ...". ***Fbp 250, LLC v. Wells Fargo Bank, N.A.*, 2018 N.Y. Slip Op. 06082, Second Dept 9-19-18**

FORECLOSURE, UNIFORM COMMERCIAL CODE (UCC).

A CASH ACCOUNT AGREEMENT WHICH MEMORIALIZED A REVERSE MORTGAGE WAS NOT A NEGOTIABLE INSTRUMENT WITHIN THE MEANING OF THE UNIFORM COMMERCIAL CODE, THEREFORE THE HOLDER OF THE CASH ACCOUNT AGREEMENT DID NOT HAVE STANDING TO FORECLOSE

The Second Department, in a full-fledged opinion by Justice Chambers, reversing Supreme Court, determined that a Cash Account Agreement memorializing a reverse mortgage was not a negotiable instrument within the meaning of the Uniform Commercial Code and plaintiff, therefore, did not have standing to foreclose after the borrower's death: "... [T]o qualify as a negotiable instrument under the UCC, a document must '(a) be signed by the maker or drawer; and (b) contain an unconditional promise or order to pay a sum certain in money and no other promise, order, obligation or power given by the maker or drawer except as authorized by this Article; and (c) be payable on demand or at a definite time; and (d) be payable to order or to bearer' (UCC 3-104[1] ...). * * * ... [T]he Cash Account Agreement is signed by the borrower and contains an unconditional promise to pay. In addition to this ... the Cash Account Agreement also contains provisions that go well beyond what is permitted under the UCC. * * * On its face, the Cash Account Agreement does much more than memorialize the borrower's unconditional promise to pay a sum of money. It creates a banking relationship between the lender and the borrower, provides terms and conditions under which the borrower may, from time to time, obtain additional cash advances from the lender, and even contains an arbitration clause. Although the Cash Account Agreement appears to have been signed only by the borrower, section 17.2 specifically acknowledges that it imposes obligations on both the borrower and the lender. The specific language of several provisions of the Cash Account Agreement, read in context of the agreement as a whole, provides compelling evidence that the Cash Account Agreement is not, and was never intended to be, a negotiable instrument ... . Therefore, the plaintiff cannot establish its standing merely by showing that it possessed the original Cash Account Agreement, indorsed in blank, on the date this action was commenced, and the plaintiff's motion for summary judgment on the complaint should have been denied...". ***OneWest Bank, N.A. v. FMCDH Realty, Inc.*, 2018 N.Y. Slip Op. 06101, Second Dept 9-19-18**

INSURANCE LAW.

INSURER DID NOT DEMONSTRATE THE INSUREDS' LACK OF COOPERATION WITH THE INVESTIGATION INTO THE TRAFFIC ACCIDENT AND DID NOT MAKE A TIMELY DISCLAIMER, PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined plaintiff's motion for summary judgment against the defendant insurer should have been granted. Plaintiff was involved in an automobile accident with the insureds [Onwuzurulke

and Noel]. The defendant insurer disclaimed coverage on the basis of the insureds' alleged lack of cooperation with the investigation. The Second Department held that insurer did not demonstrate the lack of cooperation on the part of one of the insureds and did not make a timely disclaimer: " 'To effectively deny coverage based upon lack of cooperation, an insurance carrier must demonstrate (1) that it acted diligently in seeking to bring about the insured's cooperation, (2) that the efforts employed by the insurer were reasonably calculated to obtain the insured's cooperation, and (3) that the attitude of the insured, after his or her cooperation was sought, was one of willful and avowed obstruction' ... . '[M]ere efforts by the insurer and mere inaction on the part of the insured, without more, are insufficient to establish non-cooperation' ... . The defendant met these requirements with regard to Onwuzurulke. The defendant hired an investigator to locate Onwuzurulke, the investigator communicated with him, and Onwuzurulke refused to cooperate. However, with regard to Noel, the defendant failed to meet its 'heavy' burden of 'proving lack of cooperation'... . defendant repeatedly sent letters to an address where Noel did not reside. Further, the defendant's investigator searched for Noel under an incorrect name. In any event, the defendant's disclaimer of coverage with regard to both Noel and Onwuzurulke was untimely. Insurance Law § 3420(d)(2) provides that, when an insurer disclaims liability or denies coverage for bodily injury arising out of a motor vehicle accident occurring within the state, 'it shall give written notice as soon as is reasonably possible of such disclaimer of liability or denial of coverage to the insured and the injured person or any other claimant.' 'The timeliness of an insurer's disclaimer is measured from the point in time when the insurer first learns of the grounds for disclaimer of liability or denial of coverage' ... . '[T]he issue of whether a disclaimer was unreasonably delayed is generally a question of fact, requiring an assessment of all relevant circumstances'... . However, 'an insurer's explanation [for the delay in disclaiming] is insufficient as a matter of law where the basis for denying coverage was or should have been readily apparent before the onset of delay'...". ***Robinson v. Global Liberty Ins. Co. of N.Y.*, 2018 N.Y. Slip Op. 06128, Second Dept 9-19-18**

INSURANCE LAW, CONTRACT LAW.

CONSTRUCTION CONTRACT REQUIRING INSURANCE WILL NOT BE INTERPRETED TO REQUIRE ADDITIONAL INSURED COVERAGE ABSENT A SPECIFIC PROVISION.

The Second Department, reversing Supreme Court, determined that the causes of action alleging that parties should have been named as additional insureds in this Labor Law §§ 200 and 241(6) action should have been dismissed. Contracts which call for the procurement of insurance do not, without specific provisions, require parties to be named as additional insureds: " 'A provision in a construction contract cannot be interpreted as requiring the procurement of additional insured coverage unless such a requirement is expressly and specifically stated. In addition, contract language that merely requires the purchase of insurance will not be read as also requiring that a contracting party be named as an additional insured' ...". ***Uddin v. A.T.A. Constr. Corp.*, 2018 N.Y. Slip Op. 06136, Second Dept 9-19-18**

MUNICIPAL LAW, CIVIL PROCEDURE.

CITY WAS NOT ESTOPPED FROM ASSERTING THE STATUTE OF LIMITATIONS DEFENSE TO A CHALLENGE TO CITY WATER BILLS, ALTHOUGH AN INACCURATE BILL HAD BEEN ISSUED, THE ERROR WAS CORRECTED AND THE CITY DID NOT ACT IMPROPERLY.

The Second Department determined petitioner's challenge to the city water bills was properly deemed time-barred. Petitioner argued that the city should be estopped from taking advantage of the four-year statute because of a delay in correcting an inaccurate bill: "The petitioner's contention that DEP and the Water Board should be estopped from applying the four-year limitations period is without merit. ' The doctrine of estoppel will be applied against governmental agencies only in exceptional cases' ... , such as where there is fraud, misrepresentation, or other affirmative misconduct upon which the other party relies to its detriment … . 'Generally, the doctrine of estoppel is not available against a governmental agency to prevent it from discharging its statutory duties, even when the results are harsh' ... . Here, the Water Board was performing its statutory duties in, inter alia, establishing, charging, collecting, and enforcing payment for the use of the water and sewer systems (see Public Authorities Law § 1045-f[9]). Although an error had been made resulting in the petitioner being over-billed from June 2000 to April 2015, DEP corrected the error and credited the accounts of the 10 subject properties to the extent allowable under applicable law and the Water Board's rate schedule .... The petitioner failed to demonstrate any improper conduct on the part of DEP or the Water Board that would warrant the application of the doctrine of estoppel." ***Matter of Maimonides Med. Ctr. v. New York City Water Dept.*, 2018 N.Y. Slip Op. 06094, Second Dept 9-19-18**

PERSONAL INJURY.

PLAINTIFF, A TRAFFIC ENFORCEMENT OFFICER, WAS WALKING IN THE STREET WHEN DEFENDANT STRUCK HIM AFTER TAKING HIS EYES OFF THE ROAD, PLAINTIFF DID NOT HAVE TO DEMONSTRATE FREEDOM FROM COMPARATIVE FAULT, PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined that plaintiff's motion for summary judgment in the pedestrian-vehicle accident case should have been granted. Plaintiff, a New York City Police Department traffic enforcement agent, was walking in the road when he was struck by defendant's vehicle. Plaintiff's motion for summary judgment should have been granted because plaintiff did not have demonstrate freedom from comparative fault: "On April 3, 2018, the Court

of Appeals decided *Rodriguez v. City of New York* (31 NY3d 312, 324-325), and held that '[t]o be entitled to partial summary judgment a plaintiff does not bear the double burden of establishing a prima facie case of defendant's liability and the absence of his or her own comparative fault' … . Reviewing the record in the context of this recent decision, we conclude that the plaintiff established his prima facie entitlement to judgment as a matter of law on the issue of liability by the submission of deposition testimony which demonstrated that as the defendant driver was operating the vehicle, he took his eyes off the road and struck the plaintiff and a parked vehicle. The testimony further demonstrated that the defendant driver did not see the plaintiff prior to impact." ***Outar v.* Sumner, 2018 N.Y. Slip Op. 06103, Second Dept 9-19-18**

PERSONAL INJURY, EVIDENCE.

HEARSAY IN POLICE REPORT ABOUT THE PROXIMATE CAUSE OF THE TRAFFIC ACCIDENT WAS INADMISSIBLE, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined there was a question of fact about whether defendant's (RB Juice's] truck was a proximate cause of the vehicle accident which injured plaintiff. Although the police report indicated the truck was not a proximate cause, the officer did not witness the collision and therefore the officer's conclusions were inadmissible hearsay: "There can be more than one proximate cause of an accident ... , and '[g]enerally, it is for the trier of fact to determine the issue of proximate cause' ... . Here, RB Juice failed to establish, prima facie, that its truck was not a proximate cause of the accident. In support of the motion, RB Juice submitted the deposition testimony of the plaintiff, her husband, its employees, and the responding police officer, as well as a copy of the police accident report prepared by the responding police officer. The evidence submitted by RB Juice revealed the existence of triable issues of fact as what its box truck was doing at the time of the accident and how the accident occurred ... . With respect to the deposition testimony of the responding police officer, who did not witness the accident, about the section of the police accident report in which he identified 'passing or lane usage improper' by the plaintiff as a contributing factor to the happening of the accident, and attributed no contributing factors to the operation of the box truck, such testimony and the related section of the police accident report constituted inadmissible hearsay. Since the source of the information contained in this section of the police accident report was not identified, it could not be established whether the source of the information had a duty to make the statement or whether some other hearsay exception applied ... . Further, that information bore directly on the ultimate issue to be decided by the factfinder ...". ***Ardanuy v. RB Juice, LLC*, 2018 N.Y. Slip Op. 06074, Second Dept 9-19-18**

PERSONAL INJURY, EVIDENCE.

IN THIS SIDEWALK SLIP AND FALL CASE, DEFENDANT DID NOT ELIMINATE ISSUES OF FACT ABOUT WHETHER THE PLAINTIFF CAN PROVE THE CAUSE OF PLAINTIFF'S DECEDENT'S FALL, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined defendant in this sidewalk slip and fall case did not eliminate triable issues of fact about whether the plaintiff can demonstrate the cause of plaintiff's decedent's fall: " 'A plaintiff's inability to identify the cause of his or her fall is fatal to a cause of action to recover damages for personal injuries because a finding that the defendant's negligence, if any, proximately caused the plaintiff's injuries would be based on speculation' ... . 'Proximate cause may be established without direct evidence of causation by inference from the circumstances of the accident. However, mere speculation as to the cause of an accident, when there could have been many possible causes, is fatal to a cause of action' ... . Here, the defendant failed to establish, prima facie, that the cause of Estelle's fall was not identifiable. In support of its motion, the defendant submitted the deposition testimony of nonparty witness Laura Acito, who saw the plaintiff fall. While a vehicle was in front of Acito, and she was only able to see Estelle from the waist up, Acito was able to identify the exact spot where the accident occurred. Acito worked in a strip mall which was located next to the defendant's vacant lot, and she was familiar with the area where the accident occurred. Using photographs which she authenticated, Acito stated that the accident occurred in that portion of the sidewalk which was broken up and in a state of disrepair for years. Under the circumstances, the defendant failed to eliminate triable issues of fact as to whether Estelle fell due to the alleged defective condition of the sidewalk ... Since the defendant failed to meet its initial burden, the sufficiency of the plaintiff's opposition papers need not be reviewed ...". ***Eisenstein v. Block 5298, Inc.*, 2018 N.Y. Slip Op. 06080, Second Dept 9-19-18**

PERSONAL INJURY, MUNICIPAL LAW.

TOWN DID NOT OWE A DUTY TO PLAINTIFF WHO WAS STRUCK BY A CAR CROSSING A STREET AFTER ATTENDING A TOWN FIREWORKS DISPLAY.

The Second Department determined defendant town did not owe a duty to plaintiff who was struck by a car when crossing a county road after attending a town fireworks display: "On the evening of July 17, 2012, the infant plaintiffs attended a concert and fireworks show held by the Town of Oyster Bay in a Town park. The infant plaintiffs allegedly were injured when they were struck by a car while crossing Merrick Road in the Town, at a site where there was neither a crosswalk nor any traffic control devices. The infant plaintiffs and their father commenced this action to recover damages for the personal injuries sustained by the infant plaintiffs and for loss of services on behalf of their father, against, among others, the Town.

... 'In any negligence action, the threshold issue before the court is whether the defendant owed a legally recognized duty to the plaintiff' ... . 'The existence and scope of an alleged tortfeasor's duty is, in the first instance, a legal question for determination by the courts' ... Under the particular circumstances of this case, the Town established, prima facie, that it owed no duty to the infant plaintiffs once they left Town property and decided to cross Merrick Road, which is owned by the County ...". ***Janas v. Town of Oyster Bay*, 2018 N.Y. Slip Op. 06086, Second Dept 9-19-18**

PERSONAL INJURY, MUNICIPAL LAW, UTILITIES.

ABUTTING PROPERTY OWNERS AND CITY NOT LIABLE FOR A LAMP POST BASE IN THE SIDEWALK OVER WHICH PLAINTIFF ALLEGEDLY TRIPPED, THERE WAS, HOWEVER, A QUESTION OF FACT WHETHER CON ED INSTALLED THE BASE AND WAS THEREFORE LIABLE.

The Second Department determined the abutting property owners (Lomangino and Joro) and the city were entitled to summary judgment in this sidewalk slip and fall case. The raised concrete with bolts coming out of it, over which plaintiff allegedly tripped, was the base of a lamp post which was never replaced. The object was not part of the sidewalk, so the property owners were not required to maintain it. The city did not have written notice of the defect, so it was not liable. Con Ed, however, was not entitled to summary judgment because it submitted Lomangino's deposition in which he testified Con Ed had installed the object: "Lomangino and Joro established, prima facie, that the defect upon which the plaintiff tripped was not part of the sidewalk within the meaning of Administrative Code of the City of New York § 7-210... . Lomangino and Joro also established that Lomangino did not create the allegedly dangerous condition, that the condition was not the result of his negligent repair, and that Lomangino did not make any special use of the subject area ... . The plaintiff also contends that the Supreme Court erred in granting that branch of the City defendants' motion which was for summary judgment dismissing the complaint insofar as asserted against them because (1) the prior written notice law is inapplicable, and (2) there are triable issues of fact as to whether the City defendants created the defective condition by knocking down the former lamppost during snowplow operations in the winter of 1998. 'Administrative Code of the City of New York § 7-201(c) limits the City's duty of care over municipal streets and sidewalks by imposing liability only for those defects or hazardous conditions which its officials have been actually notified exist at a specified location'... . Contrary to the plaintiff's contention, the prior written notice rule includes 'any encumbrances' or 'attachments' to the sidewalk (Administrative Code § 7-201[c][2]), and thus encompasses the lamppost foundation at issue here ...". ***Madonia v. City of New York*, 2018 N.Y. Slip Op. 06088, Second Dept 9-19-18**

PERSONAL INJURY, UTILITIES.

PLAINTIFF DID NOT RAISE A QUESTION OF FACT ABOUT THE GAS COMPANY'S LIABILITY FOR A GAS EXPLOSION TRIGGERED BY A TREE UPROOTED DURING A HURRICANE, GAS COMPANY'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined the defendant gas company's (appellant's) motion for summary judgment in this negligence action should have been granted. During a hurricane a tree in plaintiff's neighbor's yard uprooted and disturbed a gas line, causing the neighbor's home to explode. Plaintiff allegedly was injured by debris from the explosion. The Second Department held that plaintiff had not raised a question of fact about whether the gas line was negligently maintained or whether the dangerous condition was created by the gas company: "... [T]he appellant established, prima facie, that it was not negligent in the installation of the subject gas service line ... . The appellant submitted evidence that the tree that uprooted was not present in 1936 when the gas service line was installed. This evidence included the deposition testimony of a former senior administrator for the appellant's predecessor, who testified that the presence of a tree would have rendered it impossible to install the line where it was placed in 1936. The appellant also submitted an affidavit of an arborist, who opined that the subject tree was a mature tree planted after the construction of the community was completed in 1938, based on the fact that nearly every other house on the subject block had alternating plantings of similar sized trees, thereby demonstrating that the trees were intentionally planted as part of the development of the community. ... Further, the appellant established, prima facie, that it was not negligent in maintaining the gas service line. The appellants' experts noted that the appellant complied with applicable regulations (see 49 CFR 192.723; 16 NYCRR 255.723) by performing a walking survey of the property on which the tree was located to detect leaks on July 28, 2010, within the three-year period prior to the explosion. The appellant submitted evidence demonstrating that no leaks were detected during that walking survey…". ***Deitrick v. Long Is. Power Auth.*, 2018 N.Y. Slip Op. 06079, Second Dept 9-19-18**

REAL PROPERTY LAW, CONTRACT LAW.

SELLER DID NOT DEMONSTRATE THE TIME OF THE ESSENCE LETTER GAVE BUYER SUFFICIENT TIME AND DID NOT DEMONSTRATE THE ABILITY TO CLOSE ON THAT DATE, SELLER'S MOTION FOR SUMMARY JUDGMENT IN THIS SPECIFIC PERFORMANCE ACTION PROPERLY DENIED.

The Second Department determined (1) seller did not demonstrate the time of the essence letter gave buyer sufficient time and (2) seller did not demonstrate the ability to close on that date. Therefore seller's motion for summary judgment in this

specific performance action was properly denied: "In order to make time of the essence, 'there must be a clear, distinct, and unequivocal notice to that effect giving the other party a reasonable time in which to act'... . 'What constitutes a reasonable time for performance depends upon the facts and circumstances of the particular case' ... . 'Included within a court's determination of reasonableness are the nature and object of the contract, the previous conduct of the parties, the presence or absence of good faith, the experience of the parties and the possibility of prejudice or hardship to either one, as well as the specific number of days provided for performance' ... . 'The determination of reasonableness must by its very nature be determined on a case-by-case basis' ... . '[T]he question of what constitutes a reasonable time is usually a question of fact' ... . Here, the seller failed to establish, prima facie, that the time of the essence letter provided the buyer with a reasonable time within which to close ... . Furthermore, the seller's submissions failed to eliminate triable issues of fact as to whether the property was the subject of ongoing administrative proceedings, in violation of the contract of sale, which could be completely resolved at the scheduled closing or within a reasonable time thereafter ... . Under these circumstances, the seller failed to sustain its burden of demonstrating that it was ready, willing, and able to convey title in accordance with the contract of sale ...". ***Rodrigues NBA, LLC v. Allied XV, LLC*, 2018 N.Y. Slip Op. 06129, Second Dept 9-19-18**

THIRD DEPARTMENT

DISCIPLINARY HEARINGS (INMATES).

PETITIONER, WHO WAS URINATING WHEN A FEMALE CORRECTION OFFICER PASSED HIS CELL, WAS NOT GUILTY OF LEWD CONDUCT.

The Third Department, annulling the determination, held that the petitioner did not engage in lewd conduct merely by urinating in his cell: "... [T]he Attorney General concedes, and we agree, that substantial evidence does not support that part of the determination finding petitioner guilty of engaging in lewd conduct... . The female correction officer testified that, while petitioner continued to urinate when she passed his cell, he made no gestures and did not expose his genitals to her ...". ***Matter of Burroughs v. Annucci*, 2018 N.Y. Slip Op. 06168, Third Dept 9-19-18**

ELECTION LAW.

PARTY OBJECTING TO CONGRESSIONAL CANDIDATE'S NOMINATING PETITION DID NOT PROPERLY NOTIFY THE CANDIDATE OF THE OBJECTIONS, STATE BOARD OF ELECTIONS SHOULD NOT HAVE INVALIDATED THE PETITION.

The Third Department, reversing the State Election Board, determined the nominating petition of a candidate for the US House of Representatives should not have been invalidated because the objecting party did not comply with the requirements for notifying the candidate of the objections: "9 NYCRR 6204.1 (b) provides that '[n]o specifications of objections to any petition will be considered by the [State B]oard unless the objector filing the specifications personally delivers or mails by registered or certified mail a duplicate copy of the specification[s] to each candidate for public office named in the petition . . . on or before the date of filing of [the] specifications with the [State B]oard' … . Suffice it to say, the elemental prerequisite of any service requirement is that a party is served with the correct documents ... . Plainly, this did not occur. Here, petitioner was not served with 'a duplicate copy' of the specifications of objections, but was instead served with specifications of objections related to another candidate. Moreover, even assuming, without deciding, that the service upon petitioner of an order to show cause and supporting papers seeking to invalidate the nominating petition — which contained the specifications of objections related to petitioner — could serve to remedy the original defect, such service was not effectuated 'on or before the date of filing of [the] specifications with the [State B]oard' (9 NYCRR 6204.1 [b]). Further, the fact that petitioner thereafter actually received the correct specifications is irrelevant, as 'notice received by means other than those authorized . . . cannot serve to bring [the objections] within the jurisdiction of the [State Board]'.... Inasmuch as 9 NYCRR 6204.1 (b) is 'mandatory and may not be disregarded,' we are constrained to conclude that '[Liscum's] failure to abide by the mandatory service provisions thereof deprived the [State] Board of jurisdiction to properly consider the objections and thereafter rule to invalidate the petition' ...". ***Matter of Neal v. Liscum*, 2018 N.Y. Slip Op. 06070, Third Dept 9-17-18**

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