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Contents

Table of Contents

Table of Contents

Table of Contents

Table of Contents

APPEALS, PRESERVE STATUS QUO.

PETITIONERS DID NOT TAKE STEPS TO PRESERVE THE STATUS QUO AND THE POWER PLANT BECAME OPERATIONAL AT THE OUTSET OF THE MOTION PRACTICE SEEKING TO VACATE CERTAIN PERMITS WHICH ALLOWED THE PLANT TO RESUME OPERATIONS, THE APPEAL WAS DEEMED MOOT AND THE PETITION WAS DISMISSED (FOURTH DEPT).

The Fourth Department determined that Sierra Club's petition seeking to vacate permits issued to allow respondents to operate a natural gas and biomass power plant, which was formerly coal-powered, was properly dismissed as moot. Petitioner's did not seek a temporary restraining order or other measures to preserve the status quo. The plant became operational while the motion seeking temporary injunctive relief was pending:

We agree with respondents that the appeal should be dismissed as moot … . Litigation over construction is rendered moot when the progress of the work constitutes a change in circumstances that would prevent the court from " rendering a decision that would effectively determine an actual controversy' " … . In addition to the progress of the construction, other factors relevant to evaluating claims of mootness are whether the party challenging the construction sought injunctive relief, whether the "work was undertaken without authority or in bad faith" …, and whether "substantially completed work" can be undone without undue hardship… . The primary factor in the mootness analysis is "a challenger's failure to seek preliminary injunctive relief or otherwise preserve the status quo to prevent construction from commencing or continuing during the pendency of the litigation"… . Generally, a petitioner seeking to halt a construction project must "move for injunctive relief at each stage of the proceeding" … .

The plant has been operating lawfully since March 2017. The failure to preserve the status quo is entirely the fault of petitioners, who waited until the last possible day to commence this proceeding, failed to request a TRO, failed to pursue an injunction with any urgency, waited until the last possible day to take an appeal, spent nine months perfecting the appeal, and failed to seek injunctive relief from this Court until approximately one year after the entry of the judgment, in a transparent attempt to avoid dismissal of this appeal. Matter of Sierra Club v New York State Dept. of Envtl. Conservation, 2019 NY Slip Op 01022, Fourth Dept 2-8-19

ATTORNEY'S FEES, CIVIL RIGHTS LAW.

PLAINTIFF'S ACTION WAS NOT FRIVOLOUS WITHIN THE MEANING OF 42 USC 1988, PREVAILING PARTY SHOULD NOT HAVE BEEN AWARDED ATTORNEY'S FEES (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined the award of attorney's fees to the prevailing party pursuant to 42 USC 1988 based upon the finding that plaintiff's action was frivolous should not have been granted. Plaintiff sued the county claiming that her employment was terminated in retaliation for her complaints about the special education provided to her son:

The court granted the motion on the basis of 42 USC § 1988, which authorizes the award of attorneys' fees to a prevailing defendant "upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation" … . Nonetheless, it remains " very rare [for] victorious defendants in civil rights cases [to] recover attorneys' fees' "… .

Here, in determining that plaintiff's claim against Whittemore [the county personnel director] was frivolous, the court relied on plaintiff's testimony during her deposition. During her deposition, however, plaintiff specifically stated that the factual basis for her claim against Whittemore was that he was the personnel director and his conduct caused injury to her because he allowed someone else to be placed in the position to which she sought to be reinstated. Contrary to the court's determination, any inability of plaintiff to provide further elaboration during her deposition, which was taken early in the litigation shortly after commencement of the action, did not establish that her claim against Whittemore was frivolous. Moreover, a claim may not "be deemed groundless where [, as here,] the plaintiff has made a sufficient evidentiary showing to forestall summary judgment and has presented sufficient evidence at trial to prevent the entry of judgment against him [or her] as a matter of law" … . Although the civil rights allegations against Whittemore may have been weak, we cannot deem plaintiff's claim "frivolous, unreasonable, or without foundation" … . Calhoun v County of Herkimer, 2019 NY Slip Op 01025, Fourth Dept 2-8-19

ATTORNEYS, PRIVILEGE.

MEMORANDUM PREPARED BY PLAINTIFF'S GENERAL COUNSEL PROTECTED FROM DISCLOSURE BY COMMON INTEREST PRIVILEGE (FIRST DEPT).

The First Department determined the common interest privilege applied to a memorandum by plaintiff's general counsel:

The motion court properly held that a legal memorandum prepared by plaintiff's General Counsel, and addressed to its Chief Executive Officer, which provided a summary and analysis of its pending litigation matters, including the litigation at issue, and subsequently shared with potential merger partners during the due diligence period pursuant to a common interest agreement, was privileged and protected from disclosure.

The common interest privilege is an exception to the traditional rule that the presence of a third-party at a communication between counsel and client is sufficient to deprive the communication of confidentiality. The common interest doctrine is a limited exception to waiver of the attorney-client privilege, and requires that: (1) the underlying material qualify for protection under the attorney-client privilege, (2) the parties to the disclosure have a common legal interest, and (3) the material must pertain to pending or reasonably anticipated litigation for it to be protected. The record, here, demonstrates that the common interest agreement was entered into in reasonable anticipation of litigation … . Kindred Healthcare, Inc. v SAI Global Compliance, Inc., 2019 NY Slip Op 01164, First Dept 2-14-19

BANKRUPTCY, SEVERANCE.

PLAINTIFF IN THIS SLIP AND FALL CASE ENTITLED TO SEVERANCE OF THE ACTION AGAINST THE PROPERTY OWNER, WHICH FILED FOR BANKRUPTCY, AND THE SNOW REMOVAL CONTRACTOR (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff in this slip and fall case was entitled to severance of the action against the property owner, Pathmark (supermarket), which filed for bankruptcy, from the action against the snow removal contractor, Peterman:

The supermarket defendants filed for chapter 11 bankruptcy relief, resulting in an automatic stay pursuant to 11 USC § 362(a). However, the automatic stay provisions of 11 USC § 362(a) did not extend to the nonbankrupt Peterman … . "Generally, the balance of the equities lies with plaintiff[ ] when severance is sought because the case against one defendant is stayed pursuant to 11 USC § 362(a), and that is particularly so in this personal injury action where a delay would be prejudicial to the plaintiff[ ]" … .

The supermarket defendants are subject to a $750,000 self-insured retention, which would make a lifting of the bankruptcy stay less likely. As the prejudice to the plaintiff in being required to await the conclusion of the bankruptcy proceeding before obtaining any remedy outweighs any potential inconvenience to Peterman, the Supreme Court improvidently exercised its discretion in denying the plaintiff's motion pursuant to CPLR 603 to sever the action insofar as asserted against the supermarket defendants from the action insofar as asserted against Peterman … . Vogric v Pathmark Stores, Inc., 2019 NY Slip Op 01447, Second Dept 2-27-19

COLLATERAL ESTOPPEL, ARBITRATION.

COLLATERAL ESTOPPEL CONTROLLED THIS ARBITRATION PROCEEDING TO DETERMINE HEALTH BENEFITS FOR RETIRED FIREFIGHTERS PURSUANT TO THE COLLECTIVE BARGAINING AGREEMENT (THIRD DEPT).

The Third Department, reversing Supreme Court, over a dissent, determined that collateral estoppel controlled this proceeding concerning firefighter health benefits as provided for in the collective bargaining agreement (CBA). The issue had been resolved in prior arbitration proceedings for firefighters who had retired before 2010. The instant proceeding was brought on behalf of firefighters who have or will retire after 2010:

Arbitration awards are entitled to collateral estoppel effect and will bar a party from relitigating a material issue or claim resolved in the arbitration proceeding after a full and fair opportunity to litigate … . It is undisputed that the arbitration award, rendered after a formal evidentiary hearing at which the parties were represented by counsel, afforded defendant a full and fair opportunity to litigate the issues therein. Accordingly, the only question is whether plaintiffs, as the parties seeking to invoke collateral estoppel, satisfied their burden of "show[ing] the identity of the issues" between those resolved in the arbitration awards and those in play here … . * * *

The 2010 and 2012 arbitration awards were never vacated — indeed, the 2012 award was confirmed — and are binding. Inasmuch as plaintiffs retired during the period that the reimbursement was provided to retirees under

CBAs containing section 27.1, the finding in those awards "that [defendant] is obligated to reimburse retired firefighters for these payments under the CBA is dispositive of the claims raised here" … . Holloway v City of Albany, 2019 NY Slip Op 00940, Third Dept 2-7-19

CONTINUOUS TREATMENT DOCTRINE.

QUESTIONS OF FACT WHETHER THE CONTINUOUS TREATMENT DOCTRINE TOLLED THE STATUTE OF LIMITATIONS IN THIS MEDICAL MALPRACTICE ACTION, REQUESTING MEDICAL RECORDS AND MEETING WITH AN ATTORNEY TO EXPLORE A MALPRACTICE ACTION DID NOT NECESSARILY INDICATE THE TERMINATION OF TREATMENT (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined the medical malpractice action should not have been dismissed as untimely. Plaintiff raised questions of fact supporting the application of the continuous-treatment toll of the statute of limitations. The court noted the fact plaintiff may have considered bringing a malpractice action did not signal the termination of treatment. Although the lawsuit named the surgeon, Kates, who did the hip replacement, the suit encompassed treatment by others at the clinic, treatment that was well-within the statute of limitations:

… [A]lthough plaintiff requested her medical records and consulted with attorneys in 2010, the mere consultation with an attorney to explore a potential malpractice claim does not, by itself, terminate a course of treatment … . Furthermore, on January 26, 2011, Kates ordered an ultrasound for plaintiff and, on July 27, 2011, plaintiff was seen in the clinic by another physician to evaluate the results of the ultrasound. That physician recommended to plaintiff that she see Kates to discuss those results, and plaintiff testified in her deposition that she was expecting to see Kates after the ultrasound to discuss whether corrective hip revision surgery was necessary. That testimony further indicates that plaintiff expected her doctor-patient relationship with Kates to continue … . Thus, even though plaintiff was somewhat disaffected with Kates, the record does not conclusively establish that either plaintiff or Kates regarded the gap in treatment or plaintiff's consultation with counsel as the end of their treatment relationship, and we therefore cannot conclude that the continuous treatment doctrine no longer applied as a matter of law after January 14, 2009 … . …

[A]lthough the court did not reach this issue, we … conclude that questions of fact exist regarding whether, for purposes of the continuous treatment doctrine, plaintiff's treatment by various other physicians in the clinic should be imputed to Kates … . Clifford v Kates, 2019 NY Slip Op 00744, Fourth Dept 2-1-19

CORPORATION LAW, SUCCESSOR LIABIITY, MERGER.

MOTION TO DISMISS THE NEGLIGENCE ACTION AGAINST DEFENDANT SECURITY COMPANY IN THIS THIRD PARTY ASSAULT CASE SHOULD NOT HAVE BEEN GRANTED, THE EVIDENCE SUBMITTED BY THE DEFENDANT DID NOT RULE OUT LIABILITY BASED UPON THE RELATIONSHIP BETWEEN THE DEFENDANT SECURITY COMPANY AND THE COMPANY PROVIDING SECURITY AT THE TIME OF THE ASSAULT (SECOND DEPT).

The Second Department determined defendant security company's motion to dismiss the complaint should not have been granted in this third party assault case. The complaint alleged the security company's negligence resulted in the murder of plaintiff's decedent at an assisted living facility. The defendant alleged it did not provide security there at the time of the murder. However, the documentary evidence submitted by defendant did not rule out the possibility the defendant company could be liable based upon its relationship with the company which was providing security at the time of the murder:

Generally, "a corporation which acquires the assets of another is not liable for the torts of its predecessor"… . However, such liability may arise if the successor corporation expressly or impliedly assumed the predecessor's tort liability, there was a consolidation or merger of seller and purchaser, the purchaser corporation was a mere continuation of the seller corporation, or the transaction was entered into fraudulently to escape such obligations… .

Moreover, "[w]here, as here, evidentiary material is submitted and considered on a motion pursuant to CPLR 3211(a)(7) . . . the motion should not be granted unless the movant can show that a material fact as claimed by the plaintiff is not a fact at all and unless it can be said that no significant dispute exists regarding it"… . " Accordingly, consideration of such evidentiary materials will almost never warrant dismissal under CPLR 3211(a)(7) unless the materials establish conclusively that [the plaintiff] has no [claim or] cause of action'"… .

Contrary to the Supreme Court's determination, the documentary and affidavit evidence submitted by USSA in support of its motion failed to conclusively establish that the plaintiff had no cause of action against it. More particularly, that evidence failed to demonstrate that the exceptions to the general rule of a successor corporation's nonliability where there was a de facto merger between the purchaser and the seller, or where the purchaser is a mere continuation of the seller, do not apply to this case … . Shea v Salvation Army, 2019 NY Slip Op 01441, Second Dept 2-27-19

DEBTOR-CREDITOR, BANKRUPTCY, RECOMMENCE ACTON.

DEBTOR'S LAWSUIT WAS DISMISSED BECAUSE IT WAS NOT LISTED AS AN ASSET IN THE BANKRUPTCY FILINGS, BANKRUPTCY TRUSTEE WAS ENTITLED TO RECOMMENCE THE SUIT PURSUANT TO CPLR 205 (a) WITHIN SIX MONTHS OF THE DISMISSAL (SECOND DEPT).

The Second Department determined the bankruptcy trustee could take advantage of CPLR 205 (a) to recommence a lawsuit within six months of the dismissal. The timely filed action was dismissed because the debtor did not list the suit as an asset in the bankruptcy filings:

… [D]ismissal of the 2013 action was not based upon a voluntary discontinuance, lack of personal jurisdiction, neglect to prosecute the action, or a final judgment on the merits (see CPLR 205[a]). … CPLR 205(a) is applicable even though the 2013 action was dismissed based on the debtor's incapacity to sue. The extension provisions of CPLR 205(a) are available to a plaintiff who seeks to recommence an action, notwithstanding that the prior action upon which the plaintiff relies was "invalid" in the sense that it contained a fatal defect … .

Although, as a general matter, only the plaintiff in the original action is entitled to the benefits of CPLR 205(a), the Court of Appeals has nevertheless recognized an exception to this general rule under certain circumstances where the plaintiff in the new action is seeking to enforce "the rights of the plaintiff in the original action" … . The Court of Appeals also has stated that the statute's " broad and liberal purpose is not to be frittered away by any narrow construction'" … . In this case, the plaintiff, the debtor's bankruptcy trustee, seeks to recommence a personal injury action as the debtor's successor-in-interest. As the debtor's successor-in-interest, the plaintiff has the capacity to commence this action to recover damages for the debtor's alleged personal injuries … . Consequently, the plaintiff is not seeking to enforce any rights separate and independent from those asserted by

the debtor in the prior action … . Goodman v Skanska USA Civ., Inc., 2019 NY Slip Op 01394, Second Dept 2-27-19

DEFAULT, DAMAGES.

ALTHOUGH THE MOTION TO SET ASIDE THE DEFAULT JUDGMENT IN THIS DOG BITE CASE SHOULD NOT HAVE BEEN GRANTED, A FULL EVIDENTIARY HEARING WAS REQUIRED TO DETERMINE THE APPROPRIATE DAMAGES AMOUNT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that the motion to vacate the default in this dog-bite case should not have been granted because it was untimely and unsubstantiated, but a full evidentiary hearing was required to determine the appropriate amount of damages:

… [A] court has the "inherent power to set aside excessive awards made upon default," despite the fact that there is no reasonable excuse for the default … . "An unwarranted and excessive award after inquest will not be sustained, as to do otherwise would be tantamount to granting the plaintiffs an "open season" at the expense of a defaulting defendant'"… . In light of the evidence in the record, including the plaintiff's testimony at the inquest, which was not supported by any expert testimony, and a police report of the incident which stated that the plaintiff suffered "minor injuries from an animal bite," there are significant questions as to whether the award of the principal sum of $500,000, consisting of $200,000 for past pain and suffering and $300,000 for future pain and suffering, was excessive. Thus, we agree with the Supreme Court's determination to stay enforcement of the default judgment and the settlement agreements based upon that judgment, and to direct further discovery. However, the court also should have stated in its order dated September 21, 2016, that the issues to be determined on the motion to stay enforcement of the default judgment are limited to the issue of damages. Loeffler v Glasgow, 2019 NY Slip Op 01401, Second Dept 2-27-19

EXPERT OPINION, DAMAGES.

EXPERT TESTIMONY PROPERLY PRECLUDED BECAUSE OF LATE NOTICE, NEW TRIAL REQUIRED BECAUSE JURY WAS NOT INSTRUCTED ON MITIGATION OF DAMAGES (FOURTH DEPT).

The Fourth Department determined defendants in this Labor Law 240 (1) action were properly precluded from offering expert testimony because of late notice. The Fourth Department further determined that the jury should have been instructed on mitigation of damages, requiring a new trial:

… [T]he court determined that there was a willful failure to disclose because, prior to jury selection, defendants' attorneys knew that they intended to present testimony from the psychiatric expert, but they did not disclose the expert until the day after jury selection began, which violated the court's directive that defendants disclose an expert as soon as they knew of said expert. Although the record establishes that plaintiff was aware of the possibility that defendants would call an expert psychiatrist, he was prejudiced by the tardiness of the disclosure both because it impaired his ability to discuss the relevant issues during jury selection and because it hamstrung his opportunity to retain an expert psychiatrist of his own. Thus, based on the evidence in the record supporting the court's determination that defendants had engaged in purposeful gamesmanship by withholding the information, and the resulting prejudice to plaintiff, we conclude that the court did not abuse its discretion in precluding the proposed expert testimony … .

We agree with defendants that the court erred in failing to instruct the jury on mitigation of damages insofar as it applied to past and future lost wages… . Here, plaintiff's physicians unanimously agreed that he was capable of working in a light duty or sedentary setting and, although he did obtain work shortly after being advised by a doctor to seek job training, there is a question, under the circumstances, of whether the part-time job that he took was a reasonable mitigation of his damages. Flowers v Harborcenter Dev., LLC, 2019 NY Slip Op 00749, Fourth Dept 2-1-19

FIDUCIARY DUTY.

BREACH OF FIDUCIARY DUTY CAUSE OF ACTION MUST BE PLED WITH PARTICULARITY (FOURTH DEPT).

The Fourth Department, in finding the breach of fiduciary duty cause of action was sufficiently pled, noted that the cause of action must be pled with particularity pursuant to CPLR 3016 (b). Cohen & Lombardo, P.C. v Connors, 2019 NY Slip Op 00755 [169 AD3d 1399], Fourth Dept 2-1-19

FORECLOSURE, JUDGES, SUA SPONTE.

JUDGE SHOULD NOT HAVE, SUA SPONTE, DISMISSED THE FORECLOSURE ACTION WHEN PLAINTIFF BANK ATTEMPTED TO BRING PREVIOUSLY FILED PAPERS INTO COMPLIANCE WITH SUBSEQUENT ADMINISTRATIVE ORDERS (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the judge should not have, sua sponte, dismissed the foreclosure action when plaintiff bank attempted to bring previously filed documents into compliance with subsequent administrative orders:

"A court's power to dismiss a complaint, sua sponte, is to be used sparingly and only when extraordinary circumstances exist to warrant dismissal"… . Here, the plaintiff's counsel attempted to comply, in good faith, with Administrative Orders 548/10 and 431/11 of the Chief Administrative Judge, which did not exist at the time of the commencement of the action, or at the time of the plaintiff's prior motion for an order of reference. Under such circumstances, dismissal was not warranted. Nothing in the Administrative Orders requires the dismissal of an action merely because the plaintiff's counsel discovers that there was some irregularity or defect in a prior submission, nor is the plaintiff effectively required to commence an entirely new action … . JP Morgan Chase Bank, N.A. v Laszlo, 2019 NY Slip Op 01205, Second Dept 2-20-19

FORECLOSURE, STATUTE OF LIMITATIONS.

STIPULATION OF DISCONTINUANCE OF THE PRIOR FORECLOSURE ACTION DID NOT DE-ACCELERATE THE DEBT, INSTANT FORECLOSURE ACTION IS THEREFORE TIME-BARRED (SECOND DEPT).

The Second Department determined the prior action for foreclosure accelerated the debt and the subsequent stipulation of discontinuance did not de-accelerate the debt. The instant foreclosure action was therefore time-barred:

… [D]efendant established that the six-year statute of limitations began to run on the entire debt on April 21, 2008, the date the plaintiff accelerated the mortgage debt by commencing the prior action … . Since the plaintiff did not commence this action until December 15, 2015, more than six years later, the defendant sustained his initial burden of demonstrating, prima facie, that this action was untimely … . The burden then shifted to the plaintiff to present admissible evidence establishing that the action was timely or to raise a question of fact as to whether the action was timely … .

The plaintiff failed to meet its burden. Contrary to its contention, the plaintiff failed to raise a question of fact as to whether it affirmatively revoked its election to accelerate the mortgage within the six-year limitations period. Its execution of the stipulation of discontinuance did not, by itself, constitute an affirmative act to revoke its election to accelerate, since the stipulation was silent on the issue of the election to accelerate, and did not otherwise indicate that the plaintiff would accept installment payments from the defendant … . **Bank of N.Y. Mellon v Craig, 2019 NY Slip Op 00846 [169 AD3d 627], Second Dept 2-6-19**

FORUM NON CONVENIENS.

MOTION TO DISMISS SUIT SEEKING RETURN OF A PAINTING ALLEGEDLY LOOTED BY THE NAZI-OCCUPIED FRENCH GOVERNMENT DURING WORLD WAR II PROPERLY DENIED (FIRST DEPT).

The First Department determined defendants' motion to dismiss on forum non conveniens grounds was properly denied. The suit seeks the return of a painting allegedly looted by the Nazi-occupied French government:

In weighing the relevant factors, the court correctly observed that plaintiff and several defendants maintained residences in New York … . Although defendants suggest that France is the more appropriate forum, they also argued below, and submitted expert affidavits in support of the position, that this action would be time-barred in that jurisdiction, an important factor to consider … . This Court observes that retaining this action would not be particularly burdensome; New York has previously entertained actions concerning Nazi looting of art during World War II … . That the originals of some documents are located abroad does not require dismissal, and it is noted that the key documents have already been translated for the court… . In light of the foregoing, defendants failed to meet their heavy burden of establishing that the action should be dismissed on forum non conveniens grounds … . Gowen v Helly Nahmad Gallery, Inc., 2019 NY Slip Op 01350, First Dept 2-26-19

FRAUD.

ALLEGATIONS OF COMPENSABLE DAMAGES INSUFFICIENT, MOTION TO DISMISS FRAUD COMPLAINT SHOULD HAVE BEEN GRANTED (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined the motion to dismiss fraud causes of action should have been granted because the allegation of compensable damages was deficient. "Plaintiff, a debt buying company, commenced this action alleging … [defendants] fraudulently induced it to purchase additional debt portfolios pursuant to its agreements with a third party by misrepresenting the terms of the financing arrangement secured by defendants to facilitate the purchase of such portfolios;"

"To allege a cause of action based on fraud, plaintiff must assert a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury' " … . " The true measure of damage is indemnity for the actual pecuniary loss sustained as the direct result of the wrong' or what is known as the out-of-pocket' rule" … . "Under this rule, the loss is computed by ascertaining the difference between the value of the bargain which . . . plaintiff was induced by fraud to make and the amount or value of the consideration exacted as the price of the bargain' " … .

Here, we conclude that, even as supplemented by the affidavit of plaintiff's president … , "plaintiff's pleading is fatally deficient because [it] did not assert compensable damages resulting from defendants' alleged fraud" … . With respect to the purchase of the subject portfolios, plaintiff received an interest therein worth more than the amount of its alleged investment … . Further, contrary to plaintiff's contention, the allegation that it lost the enhanced collections on the portfolios that defendants purportedly told it that it could receive under the terms of

the financing arrangement is a "quintessential lost opportunity, which is not a recoverable out-of-pocket loss"… . "Damages are to be calculated to compensate plaintiff[] for what [was] lost because of the fraud, not to compensate . . . for what . . . might have [been] gained . . . [T]here can be no recovery of profits which would have been realized in the absence of fraud" … . Southwestern Invs. Group, LLC v JH Portfolio Debt Equities, LLC, 2019 NY Slip Op 01035, Fourth Dept 2-8-19

INDEMNIFICATION.

COMMON LAW INDEMNIFICATION ONLY AVAILABLE TO A PARTY WHO IS VICARIOUSLY LIABLE, AS OPPOSED TO LIABLE FOR THE PARTY'S OWN NEGLIGENCE (FIRST DEPT).

The First Department noted that a party cannot obtain common-law indemnification unless it is vicariously liable:

The court properly granted the motions … for summary judgment dismissing the common-law indemnification and contribution claims against them. "[A] party cannot obtain common-law indemnification unless it has been held to be vicariously liable without proof of any negligence . . . on its own part" … , and the only claims ever asserted against defendant [in this case] sought to hold it liable for its own negligence rather than vicariously liable … . Ramirez v Almah, LLC, 2019 NY Slip Op 01153 [169 AD3d 508], First Dept 2-14-19

JURISDICTION.

COURT OF CLAIMS DID NOT HAVE SUBJECT MATTER JURISDICTION OVER A WORKERS' COMPENSATION ISSUE, REVIEW OF AN AGENCY DETERMINATION MUST BE BROUGHT AS AN ARTICLE 78 PROCEEDING (THIRD DEPT).

The Third Department determined the Court of Claims did not have subject matter jurisdiction over review of an agency determination, which must be brought as an Article 78 action:

At issue is whether the Court of Claims has subject matter jurisdiction over the action. While claimant seeks significant financial relief, the core of its claim challenges defendant's determination to classify the therapists as

employees for purposes of calculating the premium due under the workers' compensation policy. This is a threshold agency determination that the Court of Claims lacks subject matter jurisdiction to address … . … Such agency determinations are subject to review in the context of a CPLR article 78 proceeding commenced in Supreme Court, where a successful petitioner would be entitled to recover an overpayment as incidental relief (see CPLR 7806 …). As such, claimant's application should have been denied. Family & Educ. Consultants, LLC v New York State Ins. Fund, 2019 NY Slip Op 01273, Third Dept 2-21-19

MISCONDUCT BY PLAINTIFF WARRANTED DISMSSAL.

PLAINTIFF'S DEPLORABLE MISCONDUCT, INCLUDING ACCESSING DEFENDANT'S ATTORNEY-CLIENT COMMUNICATIONS, DELETING RELEVANT DOCUMENTS AND LYING UNDER OATH, IN DELAWARE COURT PROCEEDINGS REQUIRED DISMISSAL OF PLAINTIFF'S PERSONAL INJURY ACTION AGAINST THE SAME DEFENDANT IN NEW YORK (FIRST DEPT).

The First Department, reversing Supreme Court, determined that the plaintiff's personal injury action should have been dismissed because of plaintiff's misconduct in a Delaware court proceeding. The New York personal injury action alleged plaintiff was injured in an physical fight with the defendant which stemmed from the Delaware litigation. The Delaware court found that plaintiff had engaged in deplorable misconduct by accessing defendant's privileged attorney-client communications, deleting relevant documents and lying under oath:

Plaintiff's improper and willful access of defendant's privileged communications and spoliation of evidence supports dismissal of his claims in this action (CPLR 3103[c]; CPLR 3126[3]; Lipin v Bender , 84 NY2d 562 [1994] [dismissing the plaintiff's complaint because her improper taking of the defendant's attorney/client documents and work product caused prejudice to the defendant and irreparably tainted the litigation process]). Among the materials improperly accessed here was a privileged memorandum from defendant's counsel about his strategy concerning the incident underlying this action. Further, plaintiff's counsel referred to the contents of some of the privileged communications during motion practice in this litigation. Since "[p]laintiff's knowledge . . . can never be purged," and he would "carry [that knowledge] into any new attorney-client relationship," we find that dismissal of the complaint is "the only practicable remedy here" … . Shawe v Elting, 2019 NY Slip Op 01374, First Dept 2-26-19

REPLY PAPERS.

EVIDENCE SUBMITTED WITH REPLY PAPERS SHOULD HAVE BEEN CONSIDERED, NEGLIGENT MAINTENANCE CAUSE OF ACTION PROPERLY SURVIVED SUMMARY JUDGMENT IN THIS PLAYGROUND INJURY CASE (SECOND DEPT).

The Second Department determined Supreme Court should have considered evidence submitted by the defendant in its reply papers and further determined that the negligent maintenance cause of action properly survived summary judgment in this playground injury case. Infant plaintiff was injured when she fell from playground equipment during recess. The negligent supervision cause of action was dismissed. But there was evidence the area beneath the playground equipment was dangerous:

… [W]e disagree with the Supreme Court's decision to not consider the evidence submitted by the defendant in its reply papers. "The function of reply papers is to address arguments made in opposition to the position taken by the movant, not to introduce new arguments or new grounds for the requested relief" … . The evidence submitted by the defendant in its reply papers addressed arguments made by the plaintiff and the plaintiff's expert in opposition to its motion. Thus, the court should have considered the evidence. …

The defendant also established its prima facie entitlement to judgment as a matter of law dismissing so much of the complaint as alleged negligent maintenance of its premises by submitting evidence which demonstrated that it adequately maintained the playground, and that it did not create an unsafe or defective condition … . In opposition, however, the plaintiff raised a triable issue of fact by the submission of her expert's affidavit which opined, in part, that the ground cover beneath the apparatus from which the plaintiff fell was inherently dangerous as installed and/or maintained, because it did not meet standards established by the Consumer Product Safety Commission (see General Business Law § 399-dd). Boland v North Bellmore Union Free Sch. Dist., 2019 NY Slip Op 00849, Second Dept 2-6-19

SPOLIATION.

SANCTIONS FOR SPOLIATION OF VIDEOTAPE IN THIS SLIP AND FALL CASE SHOULD NOT HAVE BEEN IMPOSED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant store (Fairway) should not have been sanctioned (adverse inference jury instruction) for spoliation of evidence, i.e., videotape depicting areas outside the store. Plaintiff slipped and fell on ice in an area near the entrance to the store. The videotape from the camera which captured the fall was provided to plaintiff. The videotape from the other cameras depicting other areas outside the store was not preserved:

The plaintiff's January 3, 2013, letter specifically requested that Fairway preserve "any and all video footage depicting the location of my client's accident." Ten hours of video footage depicting the exact location of the accident before the fall occurred, including footage of the accident itself, were preserved by Fairway and subsequently disclosed to the plaintiff. The plaintiff did not initially request that video footage of other locations also be preserved, so Fairway was not on notice that such footage might be needed for future litigation … . In addition, the plaintiff has not established that the absence of such footage deprived her of the ability to prove her case … . Under these circumstances, the plaintiff did not establish that sanctions against Fairway were warranted … . Sarris v Fairway Group Plainview, LLC, 2019 NY Slip Op 00922, Second Dept 2-5-19

STATUTE OF LIMITATIONS, AMEND COMPLAINT.

THE MOTION TO AMEND THE COMPLAINT WAS MADE BEFORE THE STATUTE OF LIMITATIONS RAN, BUT THE SUPPLEMENTAL SUMMONS WAS NOT ATTACHED TO THE MOTION PAPERS, THEREFORE THE STATUTE OF LIMITATIONS WAS NOT TOLLED BY THE MOTION (FIRST DEPT).

The First Department determined the statute of limitations was not tolled by the motion to amend the complaint, which was made before the statute ran, because the supplemental summons was not attached to the motion papers:

Although plaintiffs sought leave to amend the complaint before the applicable statute of limitations had expired, their motion did not toll the statute, because they failed to annex the supplemental summons to their papers (*see*

Karagiannis v North Shore Long Is. Jewish Health Sys., Inc., 80 AD3d 569, 569 [2d Dept 2011]). **Bossung v Rebaco Realty Holding Co., N.V., 2019 NY Slip Op 01188 [169 AD3d 538], First Dept 2-19-19**

STATUTE OF LIMITATIONS, REAL PROPERTY TAX LAW.

EXTENSION OF TIME TO FILE A MOTION TO VACATE A TAX FORECLOSURE JUDGMENT SHOULD NOT HAVE BEEN GRANTED, CPLR 2004 DOES NOT APPLY TO TIME LIMITS SPECIFICALLY CALLED FOR IN THE REAL PROPERTY TAX LAW (RPTL) (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined respondents' motion to vacate a tax foreclosure judgment should not have been granted. The court noted that an extension of time pursuant to CPLR 2004 should not be granted where the Real Property Tax Law addresses the issue:

We further … with petitioner that the court erred in granting respondents' implicit request for an extension of time to bring the motion (see CPLR 2004). The Court of Appeals has emphasized that, " [a]s a general rule, there should be no resort to the provisions of the CPLR in instances where the [RPTL] expressly covers the point in issue' "… . We conclude that RPTL article 11 comprehensively addresses the situation where a default judgment of foreclosure is properly obtained and the defaulting property owner seeks to reopen the default and, therefore, such property owner "may not reach outside of the RPTL to [reopen] such a proceeding"… . More particularly, RPTL 1131 expressly covers the point in issue here inasmuch as it provides, in unambiguous and prohibitory language, that "[a] motion to reopen any such default may not be brought later than one month after entry of the judgment" … . To countenance resort to CPLR 2004 under these circumstances would undermine the statutory scheme established by the legislature and erode the finality of foreclosure proceedings even after a defaulting property owner has been afforded due process … . Matter of Foreclosure of Tax Liens By Proceeding In Rem Pursuant To Art. 11 of The Real Prop. Tax Law By The County of Wayne Relating To The 2015 Town & County Tax (Schenk), 2019 NY Slip Op 01029, Fourth Dept 2-8-19

STATUTE OF LIMITATIONS, RECOMMENCE ACTION.

THE SOLE REMEDY PROVISION OF THE CONTRACT IN THIS RESIDENTIAL MORTGAGE BACKED SECURITIES CASE, WHICH REQUIRED THAT THE DEFENDANT BE NOTIFIED AND GIVEN THE OPPORTUNITY TO REPURCHASE DEFECTIVE MORTGAGES, WAS NOT COMPLIED WITH PRIOR TO THE RUNNING OF THE STATUTE OF LIMITATIONS, PLAINTIFF'S TIMELY COMPLAINT WAS PROPERLY DISMISSED WITHOUT PREJUDICE, DESPITE THE FAILURE TO COMPLY WITH THE SOLE REMEDY PROVISION, ALLOWING PLAINTIFF TO REFILE THE COMPLAINT WITHIN SIX MONTHS PURSUANT TO CPLR 205 (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Rivera, determined that the trustee's breach of contract action in the residential-mortgage-backed-securities (RMBS) case was properly dismissed without prejudice, allowing plaintiff to refile pursuant to CPLR 205 (which allows a suit to be refiled within six months of a dismissal that is not on the merits). The contractual sole remedy provision, which requires that the defendant (DLJ) be notified and given the opportunity to repurchase any mortgages deemed defective, was not be complied with and the timely complaint was dismissed for that reason:

As a general rule, under CPLR 205 (a) a subsequent action may be filed within six months of a non-merits dismissal of the initial timely-filed matter. Here, we conclude that CPLR 205 (a) applies to an RMBS trustee's second action when its timely first action is dismissed for failure to comply with a contractual condition precedent. * * *

The difference between a procedural and substantive condition precedent is well-established. A condition precedent is substantive when it "describe[s] acts or events which must occur before a party is obliged to perform a promise made pursuant to an existing contract"… . In other words, the condition is "part of the cause of action and necessary to be alleged and proven, and without this no cause of action exist[s]" … , RMBS notice and sole remedy provisions are not substantive elements of the cause of action, but instead limitations on the remedy for a breach of the mortgage loan representations and warranties … . They serve as a precondition, "a procedural prerequisite to suit," not a separate undertaking by the trustee … . Since notice and sole remedy provisions "do[] not create a substantive condition precedent" … , they do not affect when the statute of limitations commences because the limitations clock begins to run when the contract is executed.

Nevertheless, DLJ argues that the Trustee had to fulfill the procedural condition precedent before the limitations period expired, and its failure to do so rendered the original action untimely, such that a new action cannot be commenced pursuant to CPLR 205 (a). DLJ's argument cannot be reconciled with our case law that a suit may be refiled pursuant to CPLR 205 (a) despite a plaintiff's failure to comply with a condition precedent prior to the expiration of the statute of limitations. U.S. Bank Natl. Assn. v DLJ Mtge. Capital, Inc., 2019 NY Slip Op 01169, CtApp 2-19-19

STATUTE OF LIMITATIONS, RELATION-BACK, RECOMMENCE ACTION, APPEALS.

TRUSTEE'S BREACH OF CONTRACT ACTION IN THIS RESIDENTIAL MORTGAGE BACKED SECURITIES CASE WAS TIME-BARRED, THE ACTION COULD NOT RELATE BACK PURSUANT TO CPLR 203 BECAUSE THE TIMELY ACTION BY ANOTHER PARTY WAS PRECLUDED BY THE CONTRACT, THE COURT OF APPEALS COULD NOT CONSIDER WHETHER THE ACTION WAS TIMELY PURSUANT TO CPLR 205, EVEN THOUGH THE ISSUE WAS ADDRESSED BY THE APPELLATE DIVISION, BECAUSE THE ISSUE WAS NOT FULLY ADDRESSED IN SUPREME COURT (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Rivera, determined that the trustee's breach of contract action in this residential-mortgage-backed-securities securities case was time-barred. A certificate holder had filed a timely action, but the relevant contract precluded the action by the certificate holder. Therefore the trustee's action could not be deemed to relate-back to it (CPLR 203). The Court of Appeals could not consider whether the trustee's action was timely under CPLR 205, despite the fact that the Appellate Division addressed the issue, because the issue was not fully addressed by the parties in Supreme Court and the Court of Appeals does not have interest of justice jurisdiction:

CPLR 203 (f) has no application here because the certificate holder's pre-existing action was not valid. The lower courts concluded that under the no action clause, the certificate holder could not bring the action on behalf of itself, any other certificate holder, or the Trustee. Those conclusions are not at issue in this Court. Thus, the certificate holder's action was subject to dismissal, and there is no valid pre-existing action to which a claim in a subsequent amended pleading may relate back. The Trustee's contention that it may use the relation-back doctrine of CPLR 203 (f) to cure the certificate holder's lack of a right to sue, and that it may therefore avoid

any problem with the identity of the plaintiff upon re-filing pursuant to CPLR 205 (a), is without merit. U.S. Bank Natl. Assn. v DLJ Mtge. Capital, Inc., 2019 NY Slip Op 01168, CtApp 2-19-19

STATUTE OF LIMITATIONS.

MOTION TO EXTEND TIME TO SERVE THE SUMMONS AND COMPLAINT PROPERLY GRANTED IN THE INTEREST OF JUSTICE, THE STATUTE OF LIMITATIONS HAD RUN AT THE TIME THE MOTION TO EXTEND WAS MADE (SECOND DEPT).

The Second Department determined plaintiff was entitled to an extension of time to serve the summons and complaint in the interest of justice, noting that the statute of limitations had expired when plaintiff made her motion to extend:

The interest of justice standard "requires a careful judicial analysis of the factual setting of the case and a balancing of the competing interests presented by the parties" … . "Unlike an extension request premised on good cause, a plaintiff [seeking an extension in the interest of justice] need not establish reasonably diligent efforts at service as a threshold matter" … . "However, the court may consider diligence, or lack thereof, along with any other relevant factor in making its determination, including expiration of the Statute of Limitations, the [potentially] meritorious nature of the cause of action, the length of delay in service, the promptness of a plaintiff's request for the extension of time, and prejudice to defendant" … .

We agree with the Supreme Court's determination granting, in the interest of justice, that branch of the plaintiff's motion which was pursuant to CPLR 306-b to extend the time to serve the summons and complaint upon the defendant. The statutory 120-day period for service of process commenced in November 2016… . In December 2016, the plaintiff attempted service on the defendant on multiple occasions. Moreover, she promptly moved, inter alia, for an extension of time to serve the summons and complaint after the defendant challenged the service on the ground that it was defective … . The statute of limitations had expired at the time the plaintiff made her motion, and there was no demonstrable prejudice to the defendant. Darko v Guerrino, 2019 NY Slip Op 01058, Second Dept 2-13-19

STATUTE OF LIMITATIONS.

THE STATUTE OF LIMITATIONS DID NOT TOLL WHILE DEFENDANT WAS OUT OF STATE BECAUSE THE DEFENDANT COULD HAVE BEEN SERVED OUT OF STATE, PLAINTIFFS' ACTION WAS TIME-BARRED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the statute of limitations did not toll while defendant was out of state and the action was therefore time-barred:

The plaintiffs' contention that the action was timely because they were entitled to the benefit of the tolling provision of CPLR 207 based on the defendant's alleged absence from the state did not raise a question of fact. Under that statute, as relevant here, when a defendant leaves the state after an action has accrued, and is continually absent from the state for at least four months, the time of the defendant's absence is not included in the time during which the action must be commenced. This tolling provision, however, does not apply "while jurisdiction over the person of the defendant can be obtained without personal delivery of the summons to the defendant within the state" (CPLR 207[3] …). In other words, the toll will not apply if there is a means by which the defendant may be served notwithstanding his or her absence from the state … . Here, even during his alleged absence from New York State, the defendant was subject to service of process (see CPLR 302[a][2]; 308[5]; 313 …). The plaintiffs did not submit evidence establishing that the defendant was attempting to evade service of process by, for example, living secretly in a foreign country, such that no means of service of process on him was available … . MP v Davidsohn, 2019 NY Slip Op 01069, Second Dept 2-13-19

STIPULATIONS.

IN COURT STIPULATION OF SETTLEMENT WAS BINDING DESPITE AGREEMENT TO FINALIZE IT IN WRITING (THIRD DEPT

The Third Department, reversing Supreme Court, determined that the in-court stipulation was binding, notwithstanding the agreement to memorialize it in writing:

The threshold question presented is whether the parties reached a binding settlement. A stipulation of settlement placed on the record by counsel in open court is binding, all the more so when, as here, the parties contemporaneously confirm their acceptance on the record (see CPLR 2104 …). "To be enforceable, an open

court stipulation must contain all of the material terms and evince a clear mutual accord between the parties" … . As a matter of policy, stipulations of settlement are encouraged to promote judicial economy and to "provide litigants with predictability and assurance that courts will honor their prior agreements" … . The nuance here concerns the additional component of a more specific writing to follow the open court settlement, as interjected by the court without objection by counsel. Following the October 19, 2017 appearance, plaintiffs forwarded a draft written settlement to defendant … . While acknowledging that it was prepared to finalize the settlement agreement, defendant raised concerns about the scope of the indemnification language and a provision requiring defendant "to make tax-related representations." The agreement was not signed and the subject motion ensued.

The parties acknowledge that they agreed to memorialize the record stipulation in a written agreement and, at the same time, agree that the record stipulation is binding. Although defendant has professed an intent to finalize the settlement once certain language issues as to the release and indemnification are resolved, it is significant that defendant does not contend that there are any necessary material terms not included in the oral stipulation… . As recounted above, it bears emphasis that the scope of both the required release and indemnification are in fact outlined in the oral stipulation. In our view, defendant's language concerns present an implementation issue that the parties expressly accounted for in the record stipulation by having Supreme Court retain jurisdiction. Given the above, we conclude that the record stipulation constitutes a binding settlement, notwithstanding the parties' dispute over finalizing the written agreement. It follows that the court erred in declining to "so order" the transcript, and, given defendant's default in payment, by denying plaintiffs' motion for judgment. Birches At Schoharie, L.P. v Schoharie Senior Gen. Partner LLC, 2019 NY Slip Op 01277, Third Dept 2-21-19

VERDICT, MOTION TO SET ASIDE.

PLAINTIFF SLIPPED AND FELL ON ICE INSIDE THE BUILDING SHE WAS WORKING IN, THE JURY COULD RATIONALLY CONCLUDE THE ICE WAS THE RESULT OF NEGLIGENCE ON THE PART OF SOMEONE INVOLVED IN THE CONSTRUCTION PROJECT, THE MOTION TO SET ASIDE THE VERDICT AS BASED ON LEGALLY INSUFFICIENT EVIDENCE IN THIS LABOR LAW 241 (6) ACTION WAS PROPERLY DENIED (SECOND DEPT).

The Second Department determined defendant's motion to set aside the verdict as based on legally insufficient evidence was properly denied in this Labor Law 241 (6) action. Plaintiff's job was removing asbestos from a building. After getting out of her asbestos suit in the decontamination room and walking in the interior of the

building she slipped and fell on ice. The Second Department held that the jury could have rationally concluded someone participating in the construction project was negligent:

We agree with the Supreme Court's determination denying that branch of the defendant's motion pursuant to CPLR 4404(a) which was to set aside the jury verdict as based on legally insufficient evidence and for judgment as a matter of law. There was a valid line of reasoning and permissible inferences which could have led a rational jury to conclude that the negligence of some party to, or participant in, the construction project caused the plaintiff's injuries … . The jury could have credited the plaintiff's trial testimony that she slipped on a large patch of ice on the floor of a building that did not have heating on a cold January day, and therefore, rationally conclude that "someone within the chain of the construction project was negligent in not exercising reasonable care, or acting within a reasonable time, to prevent or remediate the hazard, and that plaintiff's slipping, falling and subsequent injury proximately resulted from such negligence" … . Bocanegra v Chest Realty Corp., 2019 NY Slip Op 01048, Second Dept 2-13-19

VERDICT, MOTION TO SET ASIDE.

PLAINTIFF WAS INJURED WHEN HE FELL THROUGH A FLOOR OPENING IN A HOUSE UNDER CONSTRUCTION, DEFENDANT HAD PLACED CARDBOARD OVER THE OPENING, THE MOTION TO SET ASIDE THE DEFENSE VERDICT SHOULD HAVE BEEN GRANTED (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined plaintiff's motion to set aside the defense verdict in this personal injury case should have been granted. Defendant Keleher had placed cardboard over the floor opening to the basement in this house under construction. Plaintiff, whose presence was foreseeable, and who (allegedly) was aware of the opening in the floor, fell through and landed on his back on the basement floor:

Timothy Keleher admitted at trial that he covered the hole, which measured several feet in width and length, with a sheet of cardboard in an effort to preserve the heat in the basement, where he was working. It was undisputed at trial that covering such a hole with cardboard created an unsafe condition. The evidence at trial further established that plaintiff's presence at the property was foreseeable inasmuch as both Timothy Keleher and plaintiff testified that plaintiff stated that he would return to the property later that day. The fact that plaintiff may have returned later than was expected does not, in our view, render it unforeseeable that he would come back to the residence. Moreover, contrary to the Kelehers' contention, the fact that plaintiff was allegedly "aware

of the condition did not relieve [them] of [their] duty to maintain the [premises] in a reasonably safe condition" … . Rather, such awareness " bears only on the injured person's comparative fault' " … .

Inasmuch as plaintiff's presence was foreseeable, the risk of serious injury was great and the burden of avoiding the risk minimal, we conclude that a finding that the Kelehers were not negligent could not have been reached on any fair interpretation of the evidence. Pasceri v Keleher, 2019 NY Slip Op 00758, Fourth Dept 2-1-19

WRIT OF MANDAMUS, STANDING.

MENTAL HEALTH LEGAL SERVICES DOES NOT HAVE STANDING TO SEEK A WRIT OF MANDAMUS TO COMPEL A HOSPITAL TO COMPLY WITH THE MENTAL HYGIENE LAW PROCEDURE WHEN A PATIENT REQUESTS AN ADMISSION OR RETENTION HEARING (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge DiFiore, over a three-judge dissenting opinion, reversing the Appellate Division, determined Mental Hygiene Legal Services did not have standing to seek a writ of mandamus to compel a hospital to comply with Mental Hygiene Law 9.31 (b), which sets forth the procedure that must be followed after a patient requests an admission or retention hearing:

MHLS alleges that, in early 2016, it "began to notice problems with the medical charts offered into evidence by BPC [Bronx Psychiatric Center]" because "documents contained in the chart had been added or removed just prior to the hearing." MHLS filed this CPLR article 78 petition in the nature of mandamus, in its own name — and separate from any specific client or proceeding — seeking an order compelling BPC to provide copies of a patient's entire clinical chart when it provides notice of a request for an admission or retention hearing, arguing the clinical chart is part of the "record of the patient" under Mental Hygiene Law § 9.31. Matter of Mental Hygiene Legal Serv. v Daniels, 2019 NY Slip Op 01123, CtApp 2-14-19